PUBLISH

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; HECTOR BALDERAS, in his official capacity as Attorney General of New Mexico,

Defendants - Appellees.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,

Amicus Curiae.

No. 20-2018

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:18-CV-01119-RB-LF)

(Filed Mar. 26, 2021)

Brian K. Kelsey (Reilly Stephens, with him on the briefs), Liberty Justice Center, Chicago, Illinois, for the Plaintiff - Appellant.

Eileen B. Goldsmith, Altshuler Berzon LLP, San Francisco, California (Scott A. Kronland, and Stefanie L. Wilson, Altshuler Berzon LLP, San Francisco, California; Shane C. Youtz, and Stephen Curtice, Youtz & Valdez, P.C., with her on the brief), Albuquerque, New Mexico, for the Defendant - Appellee AFSCME Council 18.

Lawrence M. Marcus (Alfred A. Park, with him on the brief), Park & Associates, L.L.C., Albuquerque, New Mexico, for the Defendants - Appellees Michelle Lujan Grisham and Hector Balderas.

Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia, filed an amicus brief in support of Defendants - Appellees.

Before **MATHESON, LUCERO, and McHUGH**, Circuit Judges.

MATHESON, Circuit Judge.

Brett Hendrickson worked for the New Mexico Human Services Department ("HSD") and was a dues-paying member of the American Federation of State County and Municipal Employees Council 18

("AFSCME" or "Union"). He resigned his membership in 2018 after the Supreme Court decided *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

In *Janus*, the Court said the First Amendment right against compelled speech protects non-members of public sector unions from having to pay "agency" or "fair share" fees—fees that compensate the union for collective bargaining but not for partisan activity. Mr. Hendrickson contends that, under *Janus*, the Union cannot (1) retain dues that had been deducted from his paycheck, or (2) serve as his exclusive bargaining representative. The district court dismissed these claims.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm these dismissals but remand for amendment of the judgment.

I. BACKGROUND

A. *Factual Background*[1]

Mr. Hendrickson signed membership agreements that permitted union dues to be deducted from his

[1] The facts come largely from the Union's statement of undisputed facts in support of its motion for summary judgment. The district court noted that "Mr. Hendrickson fail[ed] to respond to or specifically dispute the material facts" provided by the Union, despite local rules setting such a requirement. *See* App. at 51. But as "Mr. Hendrickson's material facts [in his motion for summary judgment] [we]re largely consistent with the Union's," the district court "accept[ed] as true the facts as presented in the Union's" motion for summary judgment. *See id.* at 51-52.

paycheck. After *Janus*, he terminated his membership. His dues deductions stopped shortly thereafter.

1. **Union Membership and Dues-Deduction Authorizations**

This timeline lists Mr. Hendrickson's actions regarding union membership and dues-deduction authorizations:

- 2001 - Began working for the HSD. HSD employees are part of the bargaining unit represented by the Union.
- 2004 - Signed an agreement to join the Union and authorized the deduction of union dues from his paycheck.
- 2006 - Took a position outside the bargaining unit. As a result, his union membership and dues payments ended.
- 2007 - Returned to the bargaining unit. He signed another membership agreement and dues-deduction authorization.
- 2017 - Signed a membership agreement and dues-deduction authorization for the third time.

2. **Dues-Deduction Authorization—2017**

The 2017 member agreement stated:

> Effective 4/7/17, 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.

Suppl. App. at 18-19, 50.[2]

The agreement also created an "opt-out window." It limited the time period during which Mr. Hendrickson could terminate his dues deductions:

> 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.

Id. at 19, 50.

3. **Membership and Dues-Deduction Termination—2018**

On June 27, 2018, the Supreme Court decided *Janus*. On August 9, Mr. Hendrickson emailed the State Personnel Office ("SPO"), asking, "Are we able to withdraw as full members now or do we have to wait for a certain amount of time?" *Id.* at 110; *see also id.* at 20.[3]

---

[2] The 2004 and 2007 agreements contained materially similar terms.

[3] Mr. Hendrickson began his message by stating: "I seemed to have lost your response regarding full union members." Suppl. App. at 110. The record does not contain any such earlier correspondence.

The SPO responded that "to cease payroll deductions for Membership dues, you must refer to the [collective bargaining agreement] regarding the request to cease payroll deductions." *Id.* at 110; *see also id.* at 20.[4]

On November 30, Mr. Hendrickson filed this suit. On December 6, the Union wrote to Mr. Hendrickson:

> 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.

Id. at 20-21, 58.

On December 8, the Union received a faxed letter from Mr. Hendrickson stating he would like to "opt out of being a member." *Id.* at 61; *see also id.* at 21.

4. **Refund—2019**

Despite this correspondence, dues continued to be deducted from Mr. Hendrickson's paycheck. On January 7, 2019, he emailed the SPO to request the

[4] The collective bargaining agreement here did not create a different opt-out window.

deductions be stopped, attaching the Union's December 6 letter. The SPO responded that because it had not received his request during the opt-out window in the first two weeks of December, it would not stop deductions. Mr. Hendrickson then sent a request to the HSD to cease dues deductions.

On January 9, the SPO notified the Union that it had no record of Mr. Hendrickson's requesting termination of his dues deductions during the opt-out window. The Union responded, "requesting that [the SPO] cease dues deductions for Hendrickson immediately." *Id.* at 68; *see also id.* at 22.

Mr. Hendrickson's deductions stopped starting "with the second pay period in January." *See id.* at 22. In February, the Union refunded Mr. Hendrickson the dues deducted from his paychecks following the closure of the 2018 cancellation window.[5]

B. **Procedural Background**

In addition to suing the Union, Mr. Hendrickson also named as defendants, in their official capacities, New Mexico Governor Michelle Lujan Grisham and New Mexico Attorney General Hector Balderas (the "New Mexico Defendants").

---

[5] The refund covered a total of $33.96 in dues deducted from his paycheck for the second December pay period and the first January pay period.

On March 15, 2019, Mr. Hendrickson filed a First Amended Complaint. He alleged two counts:

- "By refusing to allow [him] to withdraw from the Union and continuing to deduct his dues, Defendants violated his First Amendment rights to free speech and freedom of association" (Count 1); and
- "The state law forcing [him] to continue to associate with the Union without his affirmative consent violates [his] First Amendment rights to free speech and freedom of association and 42 U.S.C. § 1983" (Count 2).

Suppl. App. at 8, 11 (emphasis omitted).

On Count 1, Mr. Hendrickson sought a declaration stating that "the Union and [the Governor] 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." *Id.* at 10.

He also sought a declaration that the New Mexico statute authorizing deductions and allowing an opt-out window "constitutes an unconstitutional violation of his First Amendment rights to free speech and freedom of association." *See id*.[6] He further sought

---

[6] The statute at issue, then N.M. Stat. § 10-7E-17(C) (2003), stated in part:

> The public employer shall honor payroll deductions [of membership dues] 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.

"damages in the amount of all dues deducted and remitted to the Union since he became a member [in 2004]," *id.*, or in the alternative, "since the *Janus* ruling [in 2018]," *id.* at 11.[7]

On Count 2, Mr. Hendrickson sought a declaration that the New Mexico statute providing for exclusive representation "constitute[s] an unconstitutional violation of his First Amendment rights to free speech and freedom of association." *See id.* at 12.[8]

N.M. Stat. § 10-7E-17(C) (2003). Since Mr. Hendrickson filed suit, this provision has been updated and relocated. *See* N.M. Stat. § 10-7E-17(D). The updated version does not change our analysis.

[7] Mr. Hendrickson also sought a declaration that the New Mexico statute permitting fair share fees was unconstitutional. The district court found this request moot given "that the Union and SPO are no longer deducting fair share fees from nonunion employees." *See* App. at 55-56. Mr. Hendrickson's briefs before us do not contest this ruling.

[8] The statute at issue is N.M. Stat. § 10-7E-15(A). It states, in relevant part:

> A labor organization that has been certified by the board or local board as representing the public employees in the appropriate bargaining unit shall be the exclusive representative of all public employees in the appropriate bargaining unit. The exclusive representative shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit. The exclusive representative shall represent the interests of all public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization.

N.M. Stat. § 10-7E-15(A).

The Union and Mr. Hendrickson each filed motions for summary judgment. The New Mexico Defendants filed a motion to dismiss.

The district court granted the Union's motion for summary judgment and the New Mexico Defendants' motion to dismiss. It denied Mr. Hendrickson's motion for summary judgment. The court dismissed the suit in its entirety. Mr. Hendrickson appeals.

II. **DISCUSSION**

We affirm the district court's dismissal of Count 1 because Mr. Hendrickson's request for prospective relief is moot, and his request for retrospective damages relief fails on the merits. We affirm the district court's dismissal of Count 2 because the Eleventh Amendment bars his claim against the New Mexico Defendants, and the claim against the Union fails on the merits.

"We review de novo the district court's Rule 12(b)(6) dismissal." *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"We review a district court's grant of summary judgment de novo, applying the same standard as the district court." *Helm v. Kansas*, 656 F.3d 1277, 1284

(10th Cir. 2011). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In conducting the analysis, we view all facts and evidence in the light most favorable to the party opposing summary judgment." *Morris v. City of Colo. Springs*, 666 F.3d 654, 660 (10th Cir. 2012) (alterations and quotation omitted).

A. ***Count 1 – Union Dues***

Mr. Hendrickson objects to the deduction of union dues from his paycheck. We address below his requests for prospective and retrospective relief.

1. **Prospective Relief**

Mr. Hendrickson's request for prospective relief declaring that the opt-out window in the membership agreement violates the First Amendment is moot.

a. *Mootness*

"We have no subject-matter jurisdiction if a case is moot." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). Mootness is "standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Brown v. Buhman*, 822 F.3d 1151, 1164 (10th Cir. 2016) (quotation omitted).

An action becomes moot "[i]f an intervening circumstance deprives the plaintiff of a personal stake . . . at any point." *Id.* at 1165 (quotation omitted). An action is not moot if a plaintiff has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012) (quotation omitted). "The crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *Brown*, 822 F.3d at 1165-66 (quotation omitted).

A court must decide mootness as to "each form of relief sought." *See Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (quotation omitted). A request for declaratory relief is moot when it fails to "seek[ ] more than a retrospective opinion that [the plaintiff] was wrongly harmed by the defendant," *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011), and thus does not "settl[e] . . . some dispute which affects the behavior of the defendant toward the plaintiff," *Rio Grande Silvery Minnow*, 601 F.3d at 1110 (quotation omitted).

b. *Analysis*

When Mr. Hendrickson filed his initial complaint, he was a union member and dues were being deducted from his paycheck. Shortly thereafter, he resigned from the Union, and dues deductions stopped.[9] Thus, he no

[9] Mr. Hendrickson was a union member when he filed his initial complaint in November 2018, but not when he filed his amended complaint in March 2019. Because we look to the date of the plaintiff's original complaint when determining standing, *see S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152-53

longer has a personal stake in receiving a declaration addressing the constitutionality of the Union's opt-out window as applied to him. *See Brown*, 822 F.3d at 1165.

A declaration regarding the opt-out window would not affect the defendants' behavior toward Mr. Hendrickson. *See id.* at 1165-66; *Rio Grande Silvery Minnow*, 601 F.3d at 1110. It would serve only to announce that the defendants had harmed him, *see Jordan*, 654 F.3d at 1025, but would have no real-world effect. We thus hold that Mr. Hendrickson's request for prospective relief on Count 1 is moot.[10]

(10th Cir. 2013), we consider Mr. Hendrickson's prospective relief request in his non-member capacity as an issue of mootness rather than standing.

[10] No exception to mootness, including those considered by the district court—conduct capable of repetition yet evading review, *FCC v. Wis. Right to Lift, Inc., 551* U.S. 449, 462 (2007); voluntary cessation, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005); and transitory claims, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009)—applies here. Insofar as Mr. Hendrickson generally suggests that a declaration would not be moot because "[t]here are countless similarly situated existing employees" a declaration would benefit, *see* Aplt. Reply Br. at 13, "our cases prevent us from applying the mootness exception based on a risk to others," *Marks v. Colo. Dep't of Corr.*, 976 F.3d 1087, 1095 (10th Cir. 2020). Because we resolve this issue on mootness grounds, we need not address whether Eleventh Amendment immunity bars this claim against the New Mexico Defendants. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ([A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." (quotation omitted)).

2. **Retrospective Relief**

Mr. Hendrickson's request for retrospective damages relief for his back dues fails on the merits under basic contract principles. This part of Count 1 was brought against the Union only.

a. *New Mexico law and basic contract principles*[11]

"It is well settled that the relationship existing between a trade union and its members is contractual and that the constitution . . . and regulations, if any, constitute a binding contract between the union and its members . . . , which the courts will enforce, if the contract is free from illegality or invalidity." *Adams v. Int'l Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers*, 262 F.2d 835, 838 (10th Cir. 1958). Under New Mexico contract law, "to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual assent." *Garcia v. Middle Rio Grande Conservancy Dist.*, 918 P.2d 7, 10 (N.M. 1996) (quotation omitted).

"A contract which contravenes a rule of law is unenforceable." *State v. Bankert*, 875 P.2d 370, 376 (N.M. 1994). But "the rights of the parties must necessarily be determined by the law as it was *when the contract was made*." *Town of Koshkonong v. Burton*, 104 U.S.

[11] The parties apply New Mexico law to the membership agreements.

668, 679 (1881) (emphasis added); *see also Memphis & L. R. R. Co. v. Berry*, 112 U.S. 609, 623 (1884) ("It is, of course, the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect."). This is so because "a contract incorporates the relevant law in force at the time of its creation." *Townsend v. State ex rel. State Highway Dep't*, 871 P.2d 958, 960 (N.M. 1994); *see Crow v. Capitol Bankers Life Ins. Co.*, 891 P.2d 1206, 1211 (N.M. 1995) ("Under traditional contract theory, state laws are incorporated into and form a part of every contract whether or not they are specifically mentioned in the instrument.").[12]

Thus, "a subsequent change in the law cannot retrospectively alter the parties' agreement." *Fla. E. Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1130

---

[12] *See also Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) ("Laws which subsist at the time and place of the making of a contract . . . form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." (quotation omitted)); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1866) ("It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."); *Dillard & Sons Constr., Inc. v. Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 915 (10th Cir. 1995) (collecting cases for the proposition that "Mt is well settled that the existing applicable law is a part of every contract, the same as if expressly referred to or incorporated in its terms" (quotation omitted)); 5 Corbin on Contracts § 24.26 (2020) ("Words and other symbols must always be interpreted in the light of the surrounding circumstances, and the existing statutes and rules of law are always among these circumstances.").

(7th Cir. 1994); *see also id.* ("Whereas the law in effect at the time of execution sheds light on the parties[']intent, subsequent changes in the law that are not anticipated in the contract generally have no bearing on the terms of their agreement"); 5 Corbin on Contracts § 24.26 (2020) ("[S]tatutes enacted subsequent to the making of a contract are not incorporated in the contract[,] and . . . when a statute is amended subsequent to formation of the contract, the amended version is not incorporated.").

As a result, "[c]hanges in decisional law, even constitutional law, do not relieve parties from their preexisting contractual obligations." *Fischer v. Governor of N.J.*, ___ F. App'x ___, 2021 WL 141609, at *7 (3d Cir. 2021) (unpublished); *see also Jones v. Ferguson Pontiac Buick GMC, Inc.*, 374 F. App'x 787, 788 (10th Cir. 2010) (unpublished) (holding that a "change in the law was not grounds for relief" from a settlement agreement (citing *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958))).[13] These basic principles doom Mr. Hendrickson's claim.[14]

---

[13] Although not precedential, we find the reasoning of the unpublished decisions cited in this opinion to be instructive. *See* 10th Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

[14] A "change of law" may "excuse . . . nonperformance of a contractual obligation" when, "[a]fter a contract is made, . . . a party's performance is made impracticable by" such a change of law, "the nonoccurrence of which was a basic assumption upon which the contract was made." *Cent. Kan. Credit Union v. Mut. Guar. Corp.*, 102 F.3d 1097, 1102 (10th Cir. 1996) (citing

b. *Analysis*

Mr. Hendrickson requested recovery of all dues paid since 2004, or at least since *Janus* was decided in June 2018. His arguments that *Janus* retroactively voids his membership agreements have no merit because he entered valid contracts when he joined the Union.[15]

i. Valid contracts

Mr. Hendrickson entered valid contracts with the Union in 2004, 2007, and 2017. They contained clear language and were the product of an offer, an acceptance, consideration, and mutual assent. *See Garcia*, 918 P.2d at 10.[16]

Restatement (Second) of Contracts §§ 261, 264 (Am. L. Inst. 1981)). But the doctrine of impracticability of performance is "inapposite" when the party seeking to invoke the doctrine is "under no . . . obligation to perform any act in the future." *See id.* at 1103. Thus, impracticability provides no relief when, for instance, a party "seeks . . . to reclaim funds it has already paid and from which it has derived a benefit," *see id.*, as Mr. Hendrickson does here.

[15] Mr. Hendrickson argues that *Janus* renders his membership agreements "voidable," "void[ ]," and "unenforceable." *See* Aplt. Br. at 12, 13, 17. In contract law, these terms have different meanings. *See* 1 Corbin on Contracts §§ 1.6, 1.7, 1.8 (2020). Mr. Hendrickson does not explain which term should apply here. Our decision is the same under any of these terms.

[16] Indeed, by entering these agreements, not only did Mr. Hendrickson "obtain rights and benefits that are not enjoyed by nonmembers, such as the right to vote on ratification of a [collective bargaining agreement]," Suppl. App. at 19, but he also availed himself of these benefits, *see id.* at 35-36, 46, 116.

Mr. Hendrickson does not allege the membership agreements contravened the law in effect when the contracts were created. *See Bankert*, 875 P.2d at 376. When he signed his agreements, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was the governing law. And in *Abood*, the Supreme Court upheld a requirement for public-sector non-union members to pay agency fees for non-partisan union activity. *See id.* at 211, 215, 232, 235-36. Mr. Hendrickson does not allege that his contracts with the Union violated *Abood* or any other law in force when he signed them.

In June 2018, *Janus* overruled *Abood*. The Supreme Court held that requiring non-members to pay agency fees to public-sector unions violated the First Amendment. *See* 138 S. Ct. at 2459-60. Doing so "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." 138 S. Ct. at 2460.

Janus thus changed the choices a public employee faces in deciding whether to join a union. Under *Abood*, the decision was between (1) joining a union and paying union dues or (2) not joining a union and paying agency fees. Under *Janus*, the decision is between (1) joining a union and paying union dues or (2) not joining a union and paying nothing. Had *Janus* been in force when Mr. Hendrickson signed his union contracts, he therefore would have faced a different calculus.

But *Janus* does not support his request for back dues. A change in law that alters the original considerations for entering an agreement does not allow

retroactive invalidation of that agreement. *See Town of Koshkonong*, 104 U.S. at 679; *Townsend*, 871 P.2d at 960; *Fla. E. Coast Ry. Co.*, 42 F.3d at 1130; *Jones*, 374 F. App'x at 788. Indeed, in *Fischer*, the Third Circuit considered this exact question—whether *Janus* "abrogat[ed] the commitments set forth in the [plaintiffs' union] agreements." *See Fischer*, 2021 WL 141609, at *7. The court noted that the "[p]laintiffs chose to enter into membership agreements with [the union] . . . in exchange for valuable consideration." *Id.* at *8. And "[b]y signing the agreements, [p]laintiffs assumed the risk that subsequent changes in the law could alter the cost-benefit balance of their bargain." *Id. Janus* thus did not permit the plaintiffs to renege on their contractual obligations. *See id.* We agree with this reasoning.

Mr. Hendrickson thrice signed agreements to become a union member and to have dues deducted from his paycheck. Each agreement was a valid, enforceable contract. A change in the law does not retroactively render the agreements void or voidable. *Janus* thus provides no basis for Mr. Hendrickson to recover the dues he previously paid.[17]

In reaching this conclusion, "[w]e join the swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues." *Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir.

[17] Because we find that Mr. Hendrickson's underlying claim for back dues against the Union fails, we do not additionally consider whether the Union meets the "state actor" element for this § 1983 claim. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

2020), *petition for cert. filed*, No. 20-1120 (U.S. Feb. 11, 2021); *see id.* at 951 n.5 (collecting cases); *see also Oliver v. Serv. Emps. Intl Union Local 668*, 830 F. App'x 76, 80 (3d Cir. 2020) (unpublished) ("By choosing to become a Union member, [the plaintiff] affirmatively consented to paying union dues," and thus "was not entitled to a refund based on *Janus*."); *Bennett v. Council 31 of the AFSCME, AFL-CIO*, No. 20-1621, ___ F.3d ___, 2021 WL 939194, at *4-6 (7th Cir. 2021).

ii. Mr. Hendrickson's arguments

Mr. Hendrickson's arguments are all variations on his contention that he can apply *Janus* retroactively to void his membership agreements. Each argument fails because *Janus* does not change that he entered valid contracts.

1) Affirmative consent

Mr. Hendrickson argues his agreements should now be invalid under *Janus* because he did not provide "affirmative consent . . . to deduct union dues." *See* Aplt. Br. at 10 (emphasis omitted). But he did provide affirmative consent by agreeing to the dues-authorization provision. And *Janus* concerned the consent of non-members, not union members like Mr. Hendrickson. His argument thus lacks a factual or legal basis.

The *Janus* Court concluded its opinion with the following direction regarding affirmative consent:

> 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.

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

This passage shows that *Janus* addressed only whether non-union members could be required to pay agency fees. *See Belgau*, 975 F.3d at 952. Applying its holding to members like Mr. Hendrickson "misconstrues *Janus*." *See id. Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id*.[18] Mr. Hendrickson, a union member, had signed agreements with the Union authorizing the deduction of dues. Unlike non-union members, who had not signed any agreement to pay agency fees, he

[18] Because *Janus* did not create such a new waiver requirement, Mr. Hendrickson's argument that "he could not have voluntarily, knowingly, or intelligently waived his right not to join or pay a union" before the Supreme Court decided *Janus* has no merit. *See* Aplt. Br. at 11.

affirmatively consented to pay dues. *Janus's* affirmative consent analysis provides no basis for Mr. Hendrickson to recover damages.

2) Compulsion

Similarly, Mr. Hendrickson contends that in light of *Janus*, he was "compelled" to join the Union because he faced a "false dichotomy" of paying union dues or agency fees. *See* Suppl. App. at 9. This repackaged version of his "affirmative consent" argument fares no better. Mr. Hendrickson was not compelled. He was free to join the Union or not. *See* N.M. Stat. §§10-7E-19(B); 10-7E-20(B). "[R]egret[ting] [a] prior decision to join the Union . . . does not render [a] knowing and voluntary choice to join nonconsensual." *Oliver*, 830 F. App'x at 79. And his having "had the option of paying less as agency fees *pre-Janus*, or that *Janus* made that lesser amount zero by invalidating agency fees, does not establish coercion." *Belgau*, 975 F.3d at 950.

3) Mutual mistake

Mr. Hendrickson relatedly argues his membership agreements should be void because they were based on "mutual mistake." *See* Aplt. Br. at 12. He asserts that he "discovered the mistake that agency fees were constitutional when the Supreme Court ruled otherwise in *Janus," id.* at 13, and that his agreement should be voided as a result of this mutual mistake. This argument again relies on a retroactive application of *Janus*. But *Janus* does not support mutual mistake.

Under New Mexico law, a party can challenge a contract "on the basis of mistake" when "there is a mutual mistake; that is, where there has been a meeting of minds, an agreement actually entered into, but the contract . . . , in its written form, does not express what was really intended by the parties thereto." *See Morris v. Merch.*, 423 P.2d 606, 608 (N.M. 1967) (quotation omitted). A party can also contest a contract when "there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties." *See id.* (quotation omitted). But "Mt is not a proper function of the courts to relieve either party to a contract from its binding effect where it has been entered into without fraud or imposition and is not due to a mistake against which equity will afford relief." *In re Tocci*, 112 P.2d 515, 521 (N.M. 1941).

Mutual mistake thus does not apply when "subsequent events" show an agreement "to have been unwise or unfortunate." *See id.; see also State ex rel. State Highway & Transp. Dep 't v. Garley*, 806 P.2d 32, 36 (N.M. 1991) ("[T]he erroneous belief must relate to the facts as they exist at the time of the making of the contract." (quoting Restatement (Second) of Contracts § 151 (Am. L. Inst. 1979))); Restatement (Second) of Contracts § 151 (Am. L. Inst. 1981, Oct. 2020 update) ("The word 'mistake' is not used [in the Restatement], as it is sometimes used in common speech, to refer to an improvident act. . . .").

Mr. Hendrickson does not suggest the membership agreements failed to express his intent when he signed. *See Morris*, 423 P.2d at 608. Nor does he

suggest that the Union deceived him as to the Supreme Court's holding in *Abood*. *See In re Tocci*, 112 P.2d at 521. Rather, he argues that if had he known when he entered the contract that the Supreme Court was going to overrule *Abood* in *Janus*, his intent would have been different. But what he describes is buyer's remorse, not mutual mistake. *See id.* The doctrine of mutual mistake does not apply here.

4) Plea bargaining case law

In discussing mutual mistake, Mr. Hendrickson argues that *Janus* supports voiding his contract under plea bargaining case law. His reliance on *United States v. Bunner*, 134 F.3d 1000 (10th Cir. 1998), is misplaced.

Bunner addressed whether the obligations under a plea agreement should be dischargeable following a Supreme Court decision holding that the conduct underlying the defendant's offense was no longer a crime. *See* 134 F.3d at 1002-05. The opinion explained that "[s]ubsequent to entering the agreement, an intervening change in the law destroyed the factual basis supporting Defendant's conviction." *Id.* at 1005. This court applied the "doctrine of frustration of purpose," which allows a party to a contract to be "discharged from performing" when a "supervening event does not render performance impossible" but makes "one party's performance . . . virtually worthless to the other." *Id.* at 1004. We held that "the plea agreement no longer bound the parties." *Id.* at 1005.

Bunner does not help Mr. Hendrickson. There, after the change in law, the defendant could no longer be guilty, and thus the plea agreement had no purpose. By contrast, even after *Janus* changed the law, Mr. Hendrickson could still be a member of the Union, and his membership agreement continued to have a purpose. Again, *Janus* concerned non-member agency fees and has nothing to do with Mr. Hendrickson's agreeing to pay dues for his union membership.

Brady v. United States, 397 U.S. 742 (1970), is a more pertinent plea bargaining case. In *Brady*, the Supreme Court asked whether its recent decision changing the law to eliminate the death penalty from an offense also "invalidat[ed] . . . every plea of guilty entered [for that offense], at least when the fear of death is shown to have been a factor in the plea." *Id.* at 746. "Although [the defendant's] plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty," the Court found that the change in law did not invalidate the defendant's plea agreement. *See id.* at 758. "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended . . . the likely penalties attached to alternative courses of action." *Id.* at 757. "[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.*

Brady dealt with a change in law that altered a defendant's incentives to enter an agreement. If the

change had been known at the time of the plea, the deal may have been less attractive, which is the scenario we have here. Had Mr. Hendrickson known that *Janus* would overturn *Abood*, his decision to join the Union may have been less appealing because the alternative would not have required him to pay agency fees.

But *Brady* shows that even when a "later judicial decision[]" changes the "calculus" motivating an agreement, the agreement does not become void or voidable. *See id.* Indeed, we have stated that "Supreme Court precedent is quite explicit that as part of a plea agreement, criminal defendants may waive both rights in existence and those that result from unanticipated later judicial determinations." *United States v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005); *see also Bailey v. Cowley*, 914 F.2d 1438, 1441 (10th Cir. 1990) ("One of the risks a defendant assumes when he pleads guilty is that the consequences he seeks to avoid will not be later nullified by a change in the law."). The cases on plea bargaining thus fail to provide a basis for Mr. Hendrickson to recover damages.

5) Opt-out window

Finally, Mr. Hendrickson suggests that *Janus* should retroactively invalidate the membership opt-out window because limiting his ability to terminate his dues payments to two weeks a year violates the First Amendment right of association. We reject this argument based on Supreme Court precedent.

In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Supreme Court held that when "[t]he parties themselves . . . determine[d] the scope of their legal obligations, and any restrictions that" the parties placed on their constitutional rights were "self-imposed," then "requir[ing] those making promises to keep them" does not offend the First Amendment. *See id.* at 671. As another court put it, "the First Amendment does not preclude the enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law." *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019) (unpublished) (quoting *Cohen*, 501 U.S. at 668-71). *Janus* therefore does not provide a basis for Mr. Hendrickson to challenge the opt-out window to recover back dues.

* * * *

We hold Mr. Hendrickson's claim against the Union for retrospective relief on Count 1 fails on the merits because his dues were deducted under valid contractual agreements. His claim for prospective relief is moot. We therefore affirm the district court's decision on Count 1.

B. *Count 2—Exclusive Representation*

Mr. Hendrickson objects to the Union's serving as his exclusive representative. This claim fails against (1) the New Mexico Defendants because they have Eleventh Amendment immunity and (2) the Union on the merits.

1. **New Mexico Defendants**

The New Mexico Defendants are not proper parties under *Ex parte Young*, 209 U.S. 123 (1908), and thus have Eleventh Amendment immunity.

a. *Eleventh Amendment and* Ex parte Young

The Eleventh Amendment constitutionalizes the doctrine of state sovereign immunity. It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Under this provision, states enjoy sovereign immunity from suit. *See Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). This immunity extends to suits brought by citizens against their own state. *See Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890); *Amisub (PSL), Inc. v. State of Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 792 (10th Cir. 1989). It also extends to "suit[s] against a state official in his or her official capacity" because such suits are "no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

Eleventh Amendment immunity "is not absolute." *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). Under the *Ex parte Young* exception, a plaintiff may sue individual state officers acting in their official capacities if the complaint alleges an

ongoing violation of federal law and the plaintiff seeks only prospective relief. *See Ex parte Young*, 209 U.S. 159-60; *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

To satisfy this exception, the named state official "must have some connection with the enforcement" of the challenged statute. *Ex parte Young*, 209 U.S. at 157. Otherwise, the suit is "merely making [the official] a party as a representative of the state" and therefore impermissibly "attempting to make the state a party." *Id.*

"The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact." *Id. Ex parte Young* does not require that the state official "have a 'special connection' to the unconstitutional act or conduct." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007). But it does require that the state official "have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Id.* (quoting *Ex parte Young*, 209 U.S. at 157); *see also* 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3524.3 (3d ed., Oct. 2020 update) ("[T]he duty must be more than a mere general duty to enforce the law.").

b. *Analysis*

Mr. Hendrickson sued the Governor and Attorney General of New Mexico in their official capacities. But these officeholders do not enforce the

exclusive representation statute. Rather, members of the Public Employee Labor Relations Board ("PELRB") do. The Governor and Attorney General therefore do not fall within the *Ex parte Young* exception and thus have Eleventh Amendment immunity to this suit.

i. PEBA and PELRB

The Public Employee Bargaining Act ("PEBA") provides for a union to serve as the exclusive representative for the employees in a bargaining unit. *See* N.M. Stat. § 10-7E-14. The PELRB "has the power to enforce provisions of the [PEBA]." *See id.* § 10-7E-9(F).[19] For example, the PELRB "shall promulgate rules . . . for . . . the selection, certification and decertification of exclusive representatives." *Id.* § 10-7E-9(A), (A)(2).

The PELRB "consists of three members appointed by the governor." *See* N.M. Stat. § 10-7E-8(A). "The governor shall appoint one member recommended by organized labor representatives actively involved in representing public employees, one member recommended by public employers actively involved in collective bargaining and one member jointly recommended by the other two appointees." *Id.*

The New Mexico Supreme Court has held the governor cannot remove these PELRB members at

[19] If necessary, the PELRB may request that a court enforce its orders. *See* N.M. Stat. § 10-7E-23(A).

will. *See AFSCME v. Martinez*, 257 P.3d 952, 953 (N.M. 2011). The court observed that "[b]ecause the PELRB is empowered to make decisions that may adversely affect the executive branch, the PELRB must remain free from the executive's control . . . or coercive influence." *Id.* at 956.

ii. Application of *Ex parte Young*

The PEBA empowers the PELRB—not the Governor or the Attorney General—to enforce New Mexico's exclusive representation law. *See* N.M. Stat. § 10-7E-9. Moreover, the New Mexico Supreme Court has insulated the PELRB from other executive branch officials. *See Martinez*, 257 P.3d at 956. Thus, PELRB members enforce the statute for the purposes of *Ex parte Young*. The Governor and Attorney General do not, and they therefore have Eleventh Amendment immunity to Mr. Hendrickson's exclusive representation claim.

Our decision in *Chamber of Commerce of the United States of America v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), supports this conclusion. There, we considered whether the attorney general of Oklahoma had Eleventh Amendment immunity to a suit challenging a statute "regulat[ing] illegal immigration and verification of employment eligibility." *See id.* at 750, 759-60. We concluded that he did not insofar as "[a]n injunction would prevent him from filing lawsuits or defending against suits on the basis of" violations of one part of the statute. *See id.* at 758, 760. But the plaintiffs had "not shown us that the Attorney General

ha[d] a particular duty to enforce" another part of the statute. *Id.* at 760. Their claims based on this latter part, therefore, "f[ell] outside the scope of the *Ex parte Young* exception," and "[t]he Attorney General [wa]s thus entitled to immunity as to that challenge." *Id.*; *see also Day v. Sebelius*, 376 F. Supp. 2d 1022, 1025, 1031 (D. Kan. 2005) (finding that the Kansas governor's "general enforcement power . . . [wa]s not sufficient to establish the connection to [a challenged] statute required to meet the *Ex parte Young* exception to Eleventh Amendment immunity"), *aff'd sub nom. Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

Similarly, in *Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013), we considered whether a motor vehicle clerk, who allegedly had responsibility for interpreting the policies of the Oklahoma Department of Public Safety, had immunity to a suit that challenged a statute regulating license-plate images. *See id.* at 1143, 1146. Because the clerk did not "have a particular duty to enforce the challenged statute," she was not a "proper state official[ ] for suit under *Ex parte Young*." *See id.* at 1146 & n.8.

Here, as in *Edmondson* and *Cressman*, neither the Governor nor the Attorney General has a particular duty to enforce the challenged statute. Rather, their connection to the exclusive representation statute stems from their general enforcement power. But this does not suffice for *Ex parte Young.* They therefore are not proper parties, and they have Eleventh Amendment immunity.

Bishop v. Oklahoma, 333 F. App'x 361 (10th Cir. 2009) (unpublished), which the parties discuss at length, also supports immunity. There, we considered whether "the Governor and Attorney General of the State of Oklahoma . . . [we]re sufficiently connected to the enforcement of the Oklahoma Constitution's marriage provisions" to permit suit. *Id.* at 362.[20] We concluded that the "officials' generalized duty to enforce state law, alone, [wa]s insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce." *Id.* at 365. Because the judiciary was responsible for administration of marriage licenses, the "claims [we]re simply not connected to the duties of the Attorney General or the Governor." *See id.* Likewise, here, the PELRB bears responsibility for the provision at issue, and Mr. Hendrickson's claims thus are not connected to the New Mexico Defendants.

Mr. Hendrickson relies on *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), and *Petrella v. Brownback*,

---

[20] We ultimately resolved *Bishop* as a matter of standing rather than Eleventh Amendment immunity because "the unique procedural stance of th[e] appeal ha[d] deprived th[e] Court of a full briefing of the [*Ex parte Young*] issues." *See Bishop*, 333 F. App'x at 363-64. But as we noted in *Cressman,* "there is a common thread between Article III standing analysis and *Ex parte Young* analysis." *Cressman*, 719 F.3d at 1146 n.8; *see also Bishop*, 333 F. App'x at 364 n.5 (observing that "[t]he 'necessary connection' language in [*Ex parte*] *Young*" is the "common denominator" of both a standing inquiry and "whether our jurisdiction over the defendants is proper under the doctrine of *Ex parte Young*" (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004))).

697 F.3d 1285 (10th Cir. 2012),[21] but they do not support the contrary conclusion. In *Kitchen*, we held the governor and attorney general of Utah were proper parties to a suit challenging Utah's laws banning same-sex marriage because in Utah, unlike in Oklahoma, "marriage licenses are issued not by court clerks but by county clerks." *See* 755 F.3d at 1199-202, 1204. The defendants' "actual exercise of supervisory power and their authority to compel compliance from county clerks and other officials provide[d] the requisite nexus" between the defendants and the provision at issue. *See id.* at 1204. Here though, this inquiry fails to show the requisite nexus between the New Mexico Defendants and the PELRB members.

Similarly, in *Petrella* we determined the governor and attorney general of Kansas to be proper parties to a suit challenging the constitutionality of Kansas's school-funding laws. *See* 697 F.3d at 1289, 1293-94. We found it cannot "be disputed that the Governor and Attorney General of [a] state . . . have responsibility for the enforcement of the laws of the state," they had general law enforcement powers, and there was no indication the statutory provisions at issue fell outside the scope of these general enforcement powers. *See id.* at 1289-91, 1294. But here, the statutory scheme vests enforcement power in the PELRB, a body independent

[21] Mr. Hendrickson also points to *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017), and *Harris v. Quinn*, 573 U.S. 616 (2014). *Safe Streets* did not discuss the *Ex parte Young* requirement at issue here. *See id.* at 896, 901-02, 906 n.19, 912. And *Harris* did not discuss *Ex parte Young* at all.

of the Governor and the Attorney General. We thus do not find Mr. Hendrickson's arguments availing.

* * * *

We hold that Mr. Hendrickson's claim against the New Mexico Defendants on Count 2 must be dismissed because they are not proper parties to this suit under *Ex parte Young* and thus have Eleventh Amendment immunity.

2. **Union**

The Supreme Court's treatment of exclusive bargaining representation—including in *Janus* itself—forecloses Mr. Hendrickson's exclusive representation claim against the Union.[22]

a. *Additional legal background*

The Supreme Court has discussed exclusive representation at length in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and in *Janus*.

---

[22] Our affirmance of the district court's dismissal of the New Mexico Defendants based on Eleventh Amendment immunity leaves only the Union as a defendant on the exclusive representation claim. As with Count 1, *see supra* n.17, because we find that Mr. Hendrickson's underlying claim regarding exclusive representation fails, we do not additionally consider whether the Union meets the "state actor" element for this § 1983 claim. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

i. *Knight*

In *Knight*, the Supreme Court considered the constitutionality of exclusive representation. *See* 465 U.S. at 273. State law provided for bargaining units to select an exclusive representative based on majority vote. *See id.* at 273-74. Several college faculty who were not members of the union designated as the exclusive representative objected. *See id.* at 278. They claimed that limiting participation in meetings to the exclusive representative violated their First Amendment rights of speech and association. *See id.* at 288.

The Court found that, although exclusive representation might "amplif[y] [the representative's] voice," this did not mean the challengers' right to speak had been infringed. *See id.* at 288-89. Similarly, the Court found that although individuals may "feel some pressure to join the exclusive representative," such pressure did not impair their freedom of association. *See id.* at 289-90; *see also id.* at 290 ("[T]he pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom.").

Thus, "restriction of participation . . . to the faculty's exclusive representative" did not infringe "speech and associational rights." *See id.* at 288. "The state has in no way restrained [the faculty's] freedom to speak on any education-related issue or their freedom to associate *or not to associate* with whom they

please, including the exclusive representative." *Id.* (emphasis added). The Court therefore held that "restriction on participation . . . of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views" does not "violate[ ] the[ir] constitutional rights." *Id.* at 273.

ii. *Janus*

Janus explained that the union in that case was an exclusive representative. *See Janus*, 138 S. Ct. at 2460. And the Court indicated its ruling on agency fees would not prevent such exclusive representation: "[I]t is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees." *Id.* at 2467. The Court acknowledged that "[i]t is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees." *Id.* at 2478. It further said, "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27.

b. *Analysis*

Mr. Hendrickson argues exclusive representation requires him to "allow the Union to speak on his behalf," and this "compelled association" violates his First Amendment rights. *See* Aplt. Br. at 45. He contends that "as a condition of his employment, [he] must

allow the Union to speak" for him regarding "the sort of policy decisions that *Janus* recognized are necessarily matters of public concern," including his salary. *See id.* Although Mr. Hendrickson acknowledges that he "retains the right to speak for himself," he contends this "does not resolve the fact that the Union organizes and negotiates as his representative in his employment relations." *Id.* at 46. He concludes that "[l]egally compelling [him] to associate with the Union demeans his First Amendment rights." *Id.* But *Knight* and *Janus* foreclose his claim.

Knight found exclusive representation constitutionally permissible. Exclusive representation does not violate a nonmember's "freedom to speak" or "freedom to associate," and it also does not violate one's freedom "not to associate." *See* 465 U.S. at 288. *Knight* thus belies Mr. Hendrickson's claim that exclusive representation imposes compulsion in violation of the First Amendment.

Janus reinforces this reading. As noted, the *Janus* Court stated that "[i]t is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees." *Janus*, 138 S. Ct. at 2478. And exclusive representatives have a "duty of providing fair representation for nonmembers." *See id.* at 2467-68. Even though exclusive representatives speak on behalf of nonmembers, the Court stated that, with the exception of agency fees, "[s]tates can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27.

Finally, 101 Circuits that have addressed this issue subsequent to the *Janus* decision have concluded that exclusive representation remains constitutional." *Oliver v. Serv. Emps. Intl Union Local 668*, 830 F. App'x 76, 80 n.4 (3d Cir. 2020) (unpublished); *see also Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 445 (2020); *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016) (unpublished); *Akers v. Md. State Educ. Ass'n*, No. 19-1524, ___ F.3d ___, 2021 WL 852086, at *5 n.3 (4th Cir. 2021); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813-14 (6th Cir. 2020), *petition for cert. filed*, No. 20-1019 (U.S. Jan. 22, 2021); *Ocol v. Chi. Tchrs. Union*, 982 F.3d 529, 532-33 (7th Cir. 2020); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Mentele v. Inslee*, 916 F.3d 783, 786-90 (9th Cir. 2019), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019).

III. **CONCLUSION**

We affirm the district court's decisions to grant the Union's motion for summary judgment and the New Mexico Defendants' motion to dismiss. We remand to the district court with instructions to amend its judgment to reflect that (1) the dismissal of Mr. Hendrickson's request for prospective relief on Count 1 as moot and (2) the dismissal of Count 2 against the New Mexico Defendants based on Eleventh Amendment sovereign immunity, are both "without prejudice." *See N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1167 (10th Cir. 2019); *Williams*

v. Utah Dep't of Corr., 928 F.3d 1209, 1214 (10th Cir. 2019).[23]

[23] Also pending before us is a motion from the Union to take judicial notice of (1) portions of the practice manual for the PELRB, and (2) a decision and order from the PELRB. No party opposes the motion. We may take judicial notice of these documents. *See* Fed. R. Evid. 201(b), (b)(2); *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1258 (10th Cir. 2020); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009). We grant the motion, though we have not relied on these documents in reaching our decision.

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; HECTOR BALDERAS, in his official capacity as Attorney General of New Mexico, Defendants - Appellees. --- NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., Amicus Curiae.	No. 20-2018 (D.C. No. 1:18-CV-01119-RB-LF)

JUDGMENT

(Filed Mar. 26, 2021)

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed and remanded. The case is remanded to the United States District Court for the District of New Mexico for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

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

(Filed Jan. 22, 2020)

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 11[1] (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

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

> 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 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

---

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

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 nonmembers 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 non-union 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 NM*, 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]

[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

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 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

---

authorization only in response to the lawsuit, but in response to his resignation.

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. CW 13-628 RBGBW, 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

[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.

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.*)

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 non-union 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 non-union 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]

---

[5] Mr. Hendrickson cites: (1) *Romer v. Evans*, 517 U.S. 620, 635 (1996), where the Supreme Court found that a purported

(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.

---

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.

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. 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.)

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

[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%2Orevd%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).

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. Wagnon*, 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." § 107E-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 *1st 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**.

/s/ Robert C. Brack
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

(Filed Jan. 22, 2020)

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**.

/s/ Robert C. Brack
ROBERT C. BRACK
SENIOR U.S.
DISTRICT JUDGE