



3. Plaintiff, Brett Hendrickson (“Hendrickson”), is an employee of the New Mexico Human Services Department (the “Department”). He was unconstitutionally coerced to join Defendant AFSCME Council 18 (the “Union”) and to pay union dues as a condition of his employment.

4. The Union violated Hendrickson’s First Amendment rights to free speech and freedom of association by refusing to allow him to withdraw his membership until an arbitrary two-week window of time and by continuing to charge him union dues based solely on a union card which could not have constituted “affirmative consent” because it was signed before the *Janus* decision.

5. Defendant Michelle Lujan Grisham, in her official capacity as governor of New Mexico (“Lujan Grisham”) violated Hendrickson’s First Amendment rights to free speech and freedom of association by continuing to withhold union dues from his paycheck, and, on information and belief, transmitted those funds to the Union, despite not having received freely given, affirmative consent from Hendrickson to do so.

6. Defendant Hector Balderas, in his official capacity as attorney general of New Mexico (“Balderas”), is violating Hendrickson’s First Amendment rights to free speech and freedom of association by continuing to defend a New Mexico law that requires public employees to revoke their payroll deduction authorization in accordance with union agreements. N.M. Stat. Ann. § 10-7E-17(C).

7. Balderas is violating Hendrickson’s First Amendment rights to free speech and freedom of association by continuing to defend a New Mexico law that allows unions to demand contract provisions providing for “fair share” fees from non-members. N.M. Stat. Ann. § 10-7E-9(G).

8. Balderas is violating Hendrickson's First Amendment rights to free speech and freedom of association by continuing to defend a New Mexico law that authorizes public employers to require employees to associate with labor unions and to require that those unions be the "exclusive representative" of all employees, whether they are union members or not. N.M. Stat. Ann. § 10-7E-15(A).

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

### **PARTIES**

10. Plaintiff, Brett Hendrickson, is a resident of Albuquerque, New Mexico and an employee of the Department, and until recently, was an involuntary member of the Union.

11. Defendant AFSCME Council 18 is headquartered in Albuquerque, New Mexico. It represents employees in New Mexico and Colorado, including employees of the Department.

12. Defendant Michelle Lujan Grisham is sued in her official capacity as governor of New Mexico, the official responsible for past and present actions of both the Department and the New Mexico State Personnel Office ("SPO"). Her address for service of process is Office of the Attorney General, Litigation Division, Galisteo Street, Santa Fe, NM 87504.

13. Defendant Hector Balderas is sued in his official capacity as the attorney general of New Mexico, the official responsible for defending New Mexico statutes. His address for service of process is Office of the Attorney General, Litigation Division, Galisteo Street, Santa Fe, NM 87504.

### **JURISDICTION AND VENUE**

14. This case raises claims under the First and Fourteenth Amendments of the U.S.

Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

15. Venue is appropriate under 28 U.S.C. § 1391(b) because Defendants are residents of this District and because a substantial portion of the events giving rise to the claims occurred in this District.

### **FACTS**

16. Plaintiff, Brett Hendrickson, has been an employee of the Department since 2001. When his workplace unionized circa 2003 or 2004, he was required either to join the Union or to pay an unconstitutional “fair share” agency fee.

17. After a one-year period serving in another part of the state government on a temporary basis, Hendrickson returned to the Department in October 2006 and has worked there since that time.

18. Union dues were not deducted from Hendrickson’s paycheck when he returned to the Department in October 2006 for approximately six months.

19. Because Hendrickson felt coerced to join the Union, he became concerned that the Union would demand that he pay back-dues for the previous six months in one lump sum. He requested, and the Union agreed not to collect back-dues on the condition that he be compelled to sign a union card to become a full member of the Union.

20. Hendrickson signed a Union membership card in or around June 2007. At the time of his signing, neither the Union nor the Department informed him that he had a right not to join the Union.

21. From 2007 to 2019, the Department deducted union dues in the approximate amount of thirty-four dollars (\$34) per month from Hendrickson's paycheck, and on information and belief, remitted those dues to the Union.

22. At the time Hendrickson was coerced into joining the Union, the unconstitutional agency fee charged by the Union to non-union member employees was more than 87% of full union dues.

23. On June 27, 2018, the U.S. Supreme Court decided *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448. The Court held that "[n]either 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." 138 S. Ct. at 2486.

24. Hendrickson could not have waived a right he did not know existed prior to the *Janus* decision. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

25. On August 9, 2018, Hendrickson sent an e-mail to SPO asking whether he could withdraw immediately as a union member or had to wait until a certain time window to withdraw.

26. On August 9, 2018, SPO responded to Hendrickson's e-mail by stating that the collective bargaining agreement with the Union controlled when he could exercise his First Amendment right to withdraw as a member of the Union.

27. Under New Mexico law, Lujan Grisham cedes authority over when she can end payroll deductions to the Union: "[t]he public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement ... ." N.M. Stat. Ann. § 10-7E-17(C).

28. New Mexico law allows unions to demand contract provisions providing for “fair share” fees from non-members. N.M. Stat. Ann. § 10-7E-9(G).

29. New Mexico law requires a government employer to recognize a certified union as the exclusive bargaining representative of all public employees, union and non-union members alike. N.M. Stat. Ann. § 10-7E-15(A).

30. New Mexico law empowers the Union to speak on behalf of all public employees regarding issues of wages, hours, working conditions, and other aspects of the operation of government agencies. N.M. Stat. Ann. § 10-7E-17(A)(1).

31. *Janus* held that a waiver of one’s First Amendment rights “cannot be presumed;” instead, such waiver “must be freely given.” 138 S. Ct. at 2486.

32. Because the union membership agreement signed by Hendrickson in 2007 was prior to the Supreme Court’s decision in *Janus* on June 27, 2018, it was based on an unconstitutional choice and is invalid and unenforceable.

33. On November 30, 2018, Hendrickson filed the initial Complaint in this lawsuit against Defendants AFSCME Council 18 and the New Mexico Human Services Department.

34. On December 6, 2018, the Union sent Hendrickson a letter stating that, as a result of the filing of the lawsuit, it had processed his resignation from Union membership, cancelled his authorization for the deduction of Union dues from his paycheck, and was “notifying [his] employer to stop further membership dues deductions.”

35. On December 15 and December 31, 2018, Lujan Grisham continued to deduct Union dues from Hendrickson’s paycheck.

36. On January 3, 2019, without notifying Hendrickson and after the close of the two-week window to end union dues deductions per the Union’s collective bargaining agreement

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

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

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

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

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

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

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

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

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

**COUNT I**

**By refusing to allow Hendrickson to withdraw from the Union and continuing to deduct his dues, Defendants violated his First Amendment rights to free speech and freedom of association.**

45. The allegations in all proceeding paragraphs are incorporated here by reference.

46. Forcing a government employee to join a union or even to pay fees to a union violates that employee's First Amendment rights to free speech and freedom of association unless the employee "affirmatively consents" to waive the rights. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id.*

47. The rights of free speech and freedom of association in the First Amendment have been incorporated to and made enforceable against the States through the Fourteenth Amendment's guarantee of due process. *Id.* at 2463; *NAACP v. Alabama*, 357 U.S. 449 (1958).

48. 42 U.S.C. 1983 provides a cause of action for both damages and injunctive relief against any person who, under color of law of any state, subjects any person within the jurisdiction of the United States to a deprivation of any rights, privileges, or immunities secured by the Constitution.

49. 28 U.S.C. § 2201(a) allows a court of the United States, as a remedy, to declare the rights and other legal relations of interested parties.

50. Hendrickson did not affirmatively consent to remaining a member of the Union or to his dues being withheld by Lujan Grisham.

51. Lujan Grisham is a state actor, who through the actions of the Department and SPO, unconstitutionally deducted union dues from Hendrickson's paycheck under color of state law.



52. Balderas is a state actor, who is defending New Mexico laws that allowed for the unconstitutional deduction of dues from Hendrickson's paycheck under color of state law.

53. The Union acted in concert with Lujan Grisham to unconstitutionally collect union dues from Hendrickson's paycheck. In doing so, the Union acted under color of state law. The Union acted pursuant to a collective bargaining agreement negotiated with a state entity, followed the laws of the State of New Mexico in doing so, and utilized the state payroll system to exact its dues.

54. The Union and Lujan Grisham limited withdrawal from the Union to an arbitrary two-week period per year and insisted that Hendrickson could only exercise his First Amendment rights during that time.

55. The withholding of union dues from Hendrickson's paycheck by the Union and Lujan Grisham without his affirmative consent constituted a violation of Hendrickson's First Amendment rights to free speech and freedom of association not to be a member of or to financially support a union. *Janus*, 138 S. Ct. 2486.

56. Because Hendrickson was not given the option of paying nothing to the union as a non-member of the union, he could not have provided affirmative consent to join the Union. Hendrickson's consent to dues collection was not "freely given" because it was given based on an unconstitutional choice between union membership or payment to the union of agency fees without the benefit of union membership. *Janus*, 138 S. Ct. at 2486. If Hendrickson's choice had been between paying union dues or paying nothing, he would have chosen to pay nothing. Therefore, Hendrickson's consent, which was compelled by the false information and false dichotomy given to him, was not "freely given." *Id.*

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

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

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

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

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

62. In the alternative, Hendrickson is entitled under 42 U.S.C. § 1983 to damages in the amount of all dues deducted and remitted to the Union since the *Janus* ruling on June 27, 2018.

**COUNT II**

**The state law forcing Hendrickson to continue to associate  
with the Union without his affirmative consent violates  
Hendrickson's First Amendment rights to free speech and freedom  
of association and 42 U.S.C. § 1983.**

63. The allegations in all proceeding paragraphs are incorporated here by reference.

64. “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” *Janus*, 138 S. Ct. at 2463.

65. For this reason, the Supreme Court has repeatedly affirmed that “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.” *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943)).

66. Therefore, courts should scrutinize compelled associations strictly, because “mandatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” *Knox v. SEIU*, 567 U.S. 298, 310 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

67. In the context of public sector unions, the Supreme Court has likewise recognized that “[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual

employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer.” *Janus*, 138 S. Ct. at 2460.

68. New Mexico law grants the Union the right to speak on Hendrickson’s behalf on matters of serious public concern, including the salaries and benefits received by public employees and how public bodies should deal with financial challenges. N.M. Stat. Ann. § 10-7E-17(A)(1). These topics are inherently political. *Janus*, 138 S. Ct. 2473.

69. Under color of state law, Lujan Grisham has designated the Union as Hendrickson’s exclusive representative, even though he is no longer a member of the Union. N.M. Stat. Ann. § 10-7E-15(A).

70. Under color of state law, the Union has acted as Hendrickson’s exclusive representative in negotiating the terms and conditions of his employment.

71. This designation compels Hendrickson to associate with the Union against his will and, through its representation of him, to petition the government with a viewpoint in opposition to his own goals and priorities for the State of New Mexico.

72. The exclusive representation provision of N.M. Stat. Ann. § 10-7E-15(A) and all related provisions are, therefore, an unconstitutional abridgement of Hendrickson’s right under the First Amendment not to be compelled to associate with speakers and organizations without his consent.

73. Hendrickson is entitled to a declaration under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) that N.M. Stat. Ann. § 10-7E-15(A) and all related provisions constitute an unconstitutional violation of his First Amendment rights to free speech and freedom of association for requiring the Union to serve as his exclusive representative for bargaining purposes.

### PRAYER FOR RELIEF

Plaintiff Brett Hendrickson respectfully requests that this Court:

- a. Declare that limiting the ability of Hendrickson to resign his union membership to a window of time was unconstitutional because he did not provide affirmative consent;
- b. Declare that Hendrickson's signing of the union card cannot provide a basis for his affirmative consent to waive his First Amendment rights upheld in *Janus* because such authorization was based on the unconstitutional choice between paying the union as a member or paying the union as a non-member;
- c. Declare that the practice by Lujan Grisham of withholding union dues from Hendrickson's paycheck was unconstitutional because Hendrickson did not provide affirmative consent for her to do so;
- d. Enjoin Lujan Grisham from collecting union dues from public employees like Hendrickson who request to end their dues deduction prior to an opt-out period delineated in a collective bargaining agreement;
- e. Enjoin the Union from collecting union dues from public employees like Hendrickson who request to end their dues deduction prior to an opt-out period delineated in a collective bargaining agreement;
- f. Award damages against the Union for all union dues collected from Hendrickson since the commencement of his employment;
- g. In the alternative, award damages against the Union for all union dues collected from Hendrickson since the *Janus* decision on June 27, 2018;

h. Enjoin Balderas from enforcing N.M. Stat. Ann. § 10-7E-9(G) and any other provisions of New Mexico law that allow unions to receive “fair share” fees from non-members.

i. Enjoin Balderas from enforcing N.M. Stat. Ann. § 10-7E-17(C) and any other provisions of New Mexico law that require public employees to wait until a specified window of time to stop the deduction of union dues from their paychecks.

j. Declare that Hendrickson has a constitutional right not to be represented by the Union as his exclusive representative without his affirmative consent;

k. Enjoin the Union from acting as the exclusive representative of Hendrickson in bargaining negotiations with the Department;

l. Enjoin Lujan Grisham from recognizing the Union as the exclusive representative of Hendrickson in bargaining negotiations with the Department;

m. Enjoin Balderas from enforcing N.M. Stat. Ann. § 10-7E-15(A) and all other provisions of New Mexico law that provide for exclusive representation of employees who do not affirmatively consent to union membership;

n. Award Hendrickson his costs and attorneys’ fees under 42 U.S.C. § 1988;  
and

o. Award Hendrickson any further relief to which he may be entitled and such other relief as this Court may deem just and proper.

Dated: March 15, 2019

Respectfully Submitted,

/s/ Brian K. Kelsey  
Brian K. Kelsey  
Tennessee Bar No. 022874  
Jeffrey M. Schwab  
Illinois Bar No. 6290710  
Liberty Justice Center  
190 South LaSalle Street, Suite 1500  
Chicago, Illinois 60603  
Telephone (312) 263-7668  
Facsimile (312) 263-7702  
jschwab@libertyjusticecenter.org  
bkelsey@libertyjusticecenter.org

-and-

/s/ Patrick J. Rogers  
Patrick J. Rogers  
Patrick J. Rogers, LLC  
20 First Plaza  
Suite 725  
Albuquerque, NM 87102  
505-938-3335  
patrogers@patrogerslaw.com

*Attorneys for Brett Hendrickson*

I hereby certify that the foregoing pleading was electronically filed the 15<sup>th</sup> day of March, 2019, through the Court's CM/ECF filing system, which causes all parties of record to be served.

/s/ Patrick J. Rogers