IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

BRETT HENDRICKSON,

Plaintiff,

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

AFSCME COUNCIL 18 *et al.*,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS
MICHELLE LUJAN GRISHAM AND HECTOR BALDERAS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Plaintiff, Brett Hendrickson, submits this opposition to the Motion to Dismiss (Dkt. 37) ("MTD") filed by Defendants 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 (collectively "State Defendants"). Because Plaintiff has already presented his affirmative case in a Motion for Summary Judgment (Dkt. 33) ("Plaintiff MSJ") and a secondary case in his Opposition to AFSCME's Motion for Summary Judgment ("AFSCME's MSJ"), both to be considered simultaneously with the State Defendants' motion, for judicial economy the related briefs are incorporated and in this brief he focuses on those aspects of the State Defendants' Motion that require further elaboration.

Hendrickson's First Amended Compliant (Dkt. 21) ("FAC") asserts two claims. Count I alleges that the imposition of dues deductions on Hendrickson by the State Defendants and AFSCME Council 18 ("AFSCME") after he requested they stop violated his First Amendment rights to Free Speech and Freedom of Association because these exactions were not supported by constitutionally sufficient affirmative consent. *See* FAC ¶¶ 2, 46. Count II alleges that, by recognizing AFSCME as Hendrickson's exclusive representative in bargaining negotiations, the State Defendants are compelling association and, likewise, abridging his rights under the First Amendment. See *FAC* ¶¶ 8, 63. The State Defendants, AFSCME, and Hendrickson agree that "there are no material facts in dispute, [and] that all the relevant questions are matters of law." Joint Status Report and Provisional Discovery Plan ("JSR") at 2 (Dkt. 27). Hendrickson set forth these facts in his Motion for Summary Judgment. Plaintiff MSJ at 7-8.

LEGAL STANDARD

To survive this Motion to Dismiss, Hendrickson need only state in his First Amended Complaint "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, 570 (2007)). He should prevail provided his First Amended Complaint demonstrates something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. The governor and attorney general are proper defendants under *Ex Parte Young*.

The State Defendants are the proper parties under *Ex Parte Young* because they are the officials responsible for carrying out and enforcing the withholding of union dues from state paychecks and recognizing unions as exclusive representatives of state employees. The State Defendants contend that they are not proper parties under *Ex Parte Young* because they do not handle these matters day-to-day and because there is a separate labor board in New Mexico, the Public Employee Labor Relations Board ("PERLB"), that regulates labor relations. MTD at 5-8. But the question in this case is not whether the PELRB is properly interpreting New Mexico labor law. Hendrickson presumes that it is. The question in this case is a federal constitutional one and, more specifically, the proper view and reach of the *Janus* decision. *Janus v. AFSCME,* 138 S. Ct. 2448. The question is whether the public official that oversees the departments of the state which are entering into contracts with ASFCME to withhold union dues (the governor) and the public official who is charged with defending the constitutionality of state laws (the attorney general) are proper parties in a suit that argues that the terms negotiated between the state and a

union and the statutes governing those negotiations are unconstitutional. Hendrickson asserts that they are proper parties.

In support of their argument, the State Defendants can muster from the Tenth Circuit only one unpublished case. *Bishop v. Okla.,* 333 Fed. Appx. 361 (10th Cir. Unpublished Opinion June 5, 2009). *Bishop* held that the Governor of Oklahoma was not the proper party in a same-sex marriage case because marriage licenses were given out by clerks of the district court. It may well be that a governor is not a proper party when the relevant actions must be taken by an entirely separate branch of government, but here the relevant conduct is that of executive branch departments, the New Mexico Human Services department and the State Personnel Office. The governor is the only public official who has responsibility for both executive departments. All employees of these two departments answer to her, and there is no other single person to whom they all answer.

In far more analogous cases, the Tenth Circuit has issued published opinions in which it agreed there was subject matter jurisdiction over high ranking government officials for the enforcement of state policies. For instance, another same-sex marriage case, *Kitchen v. Herbert*, 755 F.3d 1193, 1202 (10th Cir. 2014), held that in Utah, where county clerks rather than court clerks issue marriage licenses, the governor and attorney general were the proper parties to defend state marriage laws. The Court should also consider *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 896 (10th Cir. 2017), where the court agreed that the district court had subject matter jurisdiction in a suit against the governor of Colorado to challenge Colorado's Amendment 64, which legalized recreational marijuana. In that case, the governor had no discretion whether or not to adhere to the state constitutional amendment, but he was, nonetheless, a proper party under *Ex Parte Young* because he was ultimately responsible for the policies implemented by the state.

Perhaps the clearest statement undermining the State Defendant's contention comes from *Petrella v. Brownback*, 697 F.3d 1285, 1293-94 (10th Cir. 2012):

> 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, 28 S. Ct. 441, 52 L. Ed. 714 (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.

Petrella made this observation in the context of a challenge to Kansas' school funding formula, where the plaintiffs claimed the legislature had failed to provide proper school funding in violation of the state constitution. *Id.* at 1289. The governor and attorney general were not the actors who determined school funding, but they were indisputably, in the Tenth Circuit's view, the proper defendants under *Ex Parte Young*. Moreover, in the Supreme Court case *Harris v. Quinn,* 573 U.S. 616, 626 (2014), the governor of Illinois was the proper party sued regarding Illinois' policy of deducting agency fees from home healthcare workers and remitting them to the union.

Each of the above cases is much more analogous to the present case than the State Defendants' unpublished opinion holding Oklahoma's governor was not responsible for the actions of Oklahoma's judiciary. And as the State Defendants' accurately explain in their motion, Plaintiff seeks only injunctive and declaratory relief against them. MTD at 5. This Court should, therefore, find that the governor and attorney general are proper parties under *Ex Parte Young.*

II. Hendrickson states a valid claim as to Count I of the First Amended Complaint.

A. Hendrickson's claims are not moot.

The State Defendants argue that Count I of Plaintiff's First Amended Complaint is moot.

MTD at 9-10. Hendrickson anticipated this argument and addressed mootness at length in his Motion for Summary Judgment. Plaintiff MSJ at 13-16. Furthermore, AFSCME raised the same issue in its Motion for Summary Judgment, and Hendrickson addressed the issue in his Opposition. Plaintiff's Opposition to AFSCME MSJ at 5-6. He here responds only to the arguments particular to the State Defendants.

The State Defendants argue that since Hendrickson has been allowed to leave the union, he lacks standing to challenge their membership revocation policy. But Defendants cannot avoid judicial scrutiny of their unconstitutional policies simply by making exceptions to them every time they are challenged. The Supreme Court has repeatedly explained that a "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). Because the policy whose constitutionality is in question presents an annual revocation period, the time window to resign membership will almost always come to pass before the case can properly be considered by a Court. It is for this reason that the Ninth Circuit, recently assessing the same argument regarding essentially the same underlying claim, held that the case was not moot because these "are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2 (9th Cir. Dec. 17, 2018). The State Defendants, in particular, cannot rely on AFSCME's withdrawal of Hendrickson from the union because they continue to enforce and assert the constitutionality of the state statute that allows dues revocation within a certain time window. N.M. Stat. Ann. § 10-7E-17(C). This Court should, therefore, find that Hendrickson presents a live controversy that has not been mooted by Defendants' actions after the filing of the lawsuit.

B. The limited revocation period is unconstitutional.

Next, the State Defendants assert that the time window to withdraw union membership is constitutional because it is pursuant to a contractual waiver of Hendrickson's rights. Hendrickson has already presented his affirmative case as to why the pre-*Janus* membership agreement does not represent a valid waiver. Plaintiff MSJ at 9-13. Furthermore, Hendrickson addressed the issue in Plaintiff's Opposition to AFSCME'S MSJ at 7-14. He here responds to the State Defendants' contentions.

Hendrickson does not seek a "broad expansion" of the holding in *Janus*. MTD at 11. Rather, he simply asks that *Janus* be enforced by its terms. *Janus* doesn't say that union deductions are permissible every time an employee has signed a membership card. Instead, *Janus* requires Defendants to show that Hendrickson affirmatively consented to waive his First Amendment rights. *Janus*, 138 S. Ct. at 2486. Defendants presume that any union authorization suffices, but *Janus* holds that such a "waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by clear and compelling evidence." *Id*. (citations and quotation marks omitted). Hendrickson never knowingly signed such a waiver; therefore, the agreements that Defendants invoke cannot serve as affirmative consent to waive his First Amendment rights.

The State Defendants invoke *Cohen v. Cowles Media Co*., 501 U.S 663, 672 (1991). But in *Cohen* the newspaper contracted away its right to publicize with full knowledge of its First Amendment rights. There was no intervening change in law that recognized a right that the newspaper could not have previously asserted. Hendrickson does not deny that one can make a knowing waiver of First Amendment rights. He simply denies that any such knowing waiver was made by him.

III. Hendrickson states a valid claim as to Count II of the First Amended Complaint.

Finally, the State Defendants contend that Count II does not state a valid claim. Plaintiff has already presented his affirmative case as to why exclusive representation is unconstitutional under *Janus*. Plaintiff MSJ at 16-23. Furthermore, Hendrickson addressed the issue in Plaintiff's Opposition to AFSCME'S MSJ at 16-19. Here, he responds to the additional points made by the State Defendants.

The State Defendants begin their argument on this point with a misstatement: they assert *Janus* found that labor peace was a compelling state interest. MTD at 13. What the State Defendants are describing is the holding of *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), which *Janus* overturned. In overturning *Abood*, the *Janus* Court said, "We assume that 'labor peace,' in this sense of the term, is a compelling state interest," *Janus*, 138 S. Ct. at 2465 (2018). *Janus* was assuming *without deciding* that labor peace was a compelling interest. The Court did so because, even when it granted that initial assumption to *Abood*, the decision still warranted overturning.

It is true that *Janus* recognized that "exclusive representation confers many benefits [on a union]." *Id.* at 2467. But *Janus* made this observation in the context of arguing that the "free rider" rationale was not sufficient to compel an association. Oddly, AFSCME and the State Defendants are now demanding that Hendrickson remain a free rider by paying nothing to the union but still requiring it to represent him. Exclusive representative status accrues power to the union to speak with Hendrickson's voice. As the Supreme Court explained, "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. The First Amendment should not require such compelled association: "[M]andatory 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. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

The State Defendants contend that *Janus*' discussion of this abridgment of rights "clearly anticipated the continuation of exclusivity provisions after the *Janus* decision." MTD at 14. *Janus*, however, simply acknowledged the current status in a question that was before it. The Motion to Dismiss then cites *Burson v. Freeman*, 504 U.S. 191, 1990-200 (1992) for the proposition that "exclusive representatives is necessary to serve the compelling state interest of maintaining labor peace, which allows it to survive First Amendment scrutiny." MTD at 14. But the citations to *Janus* do not state, establish, or reasonably imply that exclusive representation is necessary to labor peace. Instead, they stand for the proposition that exclusive representation is *beneficial to the union*. Hendrickson does not deny that exclusive representation benefits the union; he asserts that this benefit should not be granted at the expense of his Freedom of Association. Because forced union representation does not further a compelling state interest that can justify this abridgment, Hendrickson has stated a claim on which relief can be granted, and the motion to dismiss Claim II should be denied.

CONCLUSION

For the reasons stated above, in the Plaintiff's Motion for Summary Judgment, and in his Opposition to AFSCME's Motion for Summary Judgment, the Motion to Dismiss should be denied.

Dated: June 27, 2019

Respectfully Submitted,

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I hereby certify that the foregoing pleading was electronically filed the 27th day of June, 2019, through the Court's CM/ECF filing system, which causes all parties of record to be served.

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