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 DEFENDANT AFSCME'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff, Brett Hendrickson, submits this Opposition to the Motion for Summary Judgment filed by Defendant AFSCME Council 18 ("AFSCME") (Dkt. 32) ("AFSCME MSJ"). Because Plaintiff has already addressed many of the arguments AFSCME makes in its motion as part of Plaintiff's own Motion for Summary Judgment (Dkt. 33) ("Plaintiff MSJ"), Plaintiff incorporates the previous briefs and here focuses on those additional issues which require elaboration, in order to minimize duplicative argumentation for the Court.

Hendrickson's First Amended Compliant (Dkt. 21) ("FAC") asserts two claims. Count I alleges that AFSCME's imposition of dues deductions on Hendrickson 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 AFSCME's status as Hendrickson's exclusive representative in bargaining negotiations represents a compelled association that, likewise, abridges his rights under the First Amendment. *See* FAC ¶¶ 8, 63. Hendrickson and AFSCME agree that there are no genuine issues of material fact as to either of these two counts and that it is appropriate for the Court to resolve this case as a matter of law. AFSCME MSJ at 1; Plaintiff MSJ at 9.

ARGUMENT

I. Hendrickson's claim that continuing to deduct union dues from his paycheck after he had withdrawn his affirmative consent violated his First Amendment rights under *Janus* is not moot but is a justiciable claim.

To Plaintiff's knowledge, this case presents the first case to reach the summary judgment stage on the merits of this claim of the dozens of similar cases filed across the country since the

ruling in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). AFSCME cannot avoid the jurisdiction of this Court by ending its unlawful conduct after being sued and asserting the claim is moot.

Hendrickson anticipated this argument and addressed it at length in his own motion. Plaintiff MSJ at 13-16. When a defendant attempts to evade judicial review of its actions by enforcing them against all parties except for those who file suit and then changing its actions after the filing of a lawsuit, the court retains jurisdiction to consider the merits: "[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)).

Recently, the Ninth Circuit, when faced with 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). While AFSCME restates the general concept that, when there's no ongoing injury, a case can become moot, its perfunctory analysis fails to addresses the well-established exception that the Ninth Circuit recognized applies to this case. ASFCME MSJ at 9. The only relevant citation, *Id.* at 10, is to a single conclusory sentence in a district court order, which undertakes no analysis of the relevant legal issues. *Bermudez v. SEIU, Local 5*, No. 18-cv-04312-VC, 2019 U.S. Dist. LEXIS 65182, at *2 (N.D. Cal. Apr. 16, 2019) (the relevant portion reads in its entirety: "[B]ecause the plaintiffs are no longer members of Local 521, they don't have standing to sue for an injunction to change the union's termination policies or to bar the collection of membership dues."). The conclusion of the Ninth Circuit is reasoned and plain. The single conclusory sentence in a district court order is neither.

II. When Hendrickson exercises his First Amendment right to withdraw his affirmative consent to pay union dues, AFSCME cannot rely on a contract that was based on a mutual mistake of what his rights were.

In addressing the merits of Count I of the First Amended Complaint, AFSCME mistakenly asserts that Hendrickson "voluntarily" entered into an agreement to pay union dues. ASFCME MSJ at 1. Quite the contrary, Hendrickson was mandated by a state law that has now been ruled unconstitutional to either pay union dues or pay their virtual equivalent in agency fees. This mandatory agreement, based on an unconstitutional choice, is not enforceable when Hendrickson asserts his First Amendment right to withdraw his affirmative consent to pay union dues. Plaintiff MSJ at 9-13.

A. The union membership agreement was based on a mutual mistake.

For over 100 years, the Supreme Court has recognized that a contract based upon a mutual mistake is voidable by one of the parties upon discovery of the mistake: "It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389, 38 S. Ct. 513, 514 (1918). Here, Hendrickson discovered the mistake that agency fees were constitutional when the Supreme Court ruled otherwise in *Janus*. He then requested to stop performance under the contract, but the assertion of his First Amendment right was denied. ASFCME MSJ at 5.

New Mexico law comports with this long history of voiding contracts for mutual mistake:

> The Supreme Court of New Mexico has also suggested that, under certain circumstances, a party might be able to "avoid" or "rescind" a contract "'[w]here a mistake of both parties at the time a contract was made as to a basic assumption

> on which the contract was made has a material effect on the agreed exchange of performances.'"

City of Raton v. Ark. River Power Auth., 611 F. Supp. 2d 1190, 1198 (D.N.M. 2008) (citing *State ex rel. State Highway and Transp. Dept. v. Garley*, 111 N.M. 383, 385, 806 P.2d 32, 34 (1991)) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 152 (1979)).

The 10th Circuit Court of Appeals recognizes that a change in law caused by a U.S. Supreme Court decision constitutes a material effect on the agreed exchange of performances when one of the choices for performance is found to be unconstitutional. *United States v. Bunner*, 134 F.3d 1000, 1002 (10th Cir. 1998). This analogy to the Hendrickson case comes from criminal law. In *Bunner*, the prosecution chose to offer a plea deal to the criminal defendant: he could plead guilty to one crime or take his chances at trial of being found guilty of three other crimes. He chose to enter an agreement pleading guilty to the one crime. Later, as in Hendrickson's case, it was found that this was an unconstitutional choice that had been presented to him, and his agreement was voided. *Id.* at 1005. After the agreement had been entered into, the U.S. Supreme Court ruled that the crime to which he had pleaded guilty was unconstitutional. The prosecution, like Hendrickson, was not stuck with its choice after one of the options was later found unconstitutional. No, the 10th Circuit ruled that the intervening Supreme Court decision so materially changed the nature of the agreement between the parties that performance of the contract was no longer required, and all options were back on the table. The Court allowed the prosecution to choose an option that was constitutional and enter into a new agreement with the defendant, in which he pled guilty to another crime. Similarly, the Supreme Court has now given Hendrickson the constitutional option to pay nothing to the Union, and that is the option he tried to exercise and which he requests this Court to recognize. Moreover, it is not just an option, it is his constitutional right.

B. AFSCME's arguments do not establish that Hendrickson's agreement was valid.

AFSCME begins by saying that Hendrickson's assertion that he did not provide affirmative consent to union membership is "flatly contradicted" by the undisputed facts in this case because Hendrickson signed a membership agreement. ASFCME MSJ at 11. ASFCME misunderstands or misstates the import of "affirmative consent." It is not simply affirmative consent to membership by signing a membership card. *Janus* requires that ASFCME show Hendrickson affirmatively consented to *waive his First Amendment rights*. *Janus,* 138 S. Ct. at 2486. ASFCME presumes 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). ASFCME cannot show by clear and compelling evidence that Hendrickson affirmatively consented to waive his *Janus* rights.

ASFCME then cites various cases, but these citations amount to little more than a contention that a union authorization is a type of contract that can create binding obligations. AFSCME MSJ at 11. Hendrickson does not dispute this and has never disputed it. What Hendrickson disputes is whether his particular contract was formed without mutual mistakes.

The union agreements that Hendrickson entered into were executed without Hendrickson's knowledge of his rights. Since there was no such knowledge, there could not have been a knowing waiver of those rights. AFSCME states accurately in its motion that his agreements were executed prior to the Supreme Court issuing its ruling in *Janus*. See AFSCME MSJ at 3. Because the right not to pay fees or dues to a union had not been announced by the Supreme Court, Hendrickson could not have known that he was waiving that constitutional right;

therefore, he could not have "freely given" his "affirmative consent" as required by the *Janus* decision. 138 S. Ct. at 2486. AFSCME fails to recognize this flaw in the formation of the contracts on which it relies. Any such waiver must be freely given in a manner that is voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co*., 405 U.S. 174, 185-86 (1972). Because they were not freely entered into, the agreements cannot bind Hendrickson.

AFSCME goes on to argue that two-week revocation windows serve certain union purposes. While Hendrickson is willing to concede, for the purposes of this motion, that AFSCME uses union dues to budget annually, the practice does not entitle the union to violate his constitutional rights for fifty weeks a year. Under the prior agency fee regime, the Supreme Court allowed that "[g]iving employees only one opportunity per year to make this choice [whether to join the union or to pay agency fees] is tolerable if employees are able at the time in question to make an informed choice." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315 (2012). Hendrickson does not claim that a one-year waiting period in and of itself is always unreasonable. Rather, Hendrickson submits to this Court that in the present context there was no such "informed choice."

ASFCME closes this portion of the argument by asserting that Hendrickson's position would "undermine foundational principles of labor law," citing references to union contracts with private employers that are covered by the National Labor Relations Act and not *Janus*. AFSCME MSJ at 13. Hendrickson nowhere argues that unions and employees cannot contract with each other. To the extent this argument would "eradicate" agreements signed by public employees around the country, *Id.*, that is the logical and natural consequence of recognizing, implementing, and honoring the significant change due to the *Janus* decision. AFSCME claims Hendrickson's arguments amount to a First Amendment right to void contractual obligations.

Hendrickson doesn't assert that it is impossible to contract away First Amendment rights, only that the proffered contract here is insufficient to do so.

AFSCME's primary citation on this point is *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). In *Cohen*, a newspaper agreed not to reveal a source, and having made that agreement, could not rely on the First Amendment to protect its publication of the information it had agreed not to reveal. *Cohen* amounts to a statement that one can waive a constitutional right, which Hendrickson acknowledges is consistent with *Janus*. But the First Amendment rights of newspapers were long established when *Cohen* was decided in 1991. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971). There 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. In this case, however, an intervening Supreme Court decision has clarified that Hendrickson signed his authorizations subject to an unconstitutional choice between paying dues to the union or paying agency fees to the union. Because this choice is now known to have been unconstitutional, there could not have been the knowing waiver that *Janus* requires.

ASFCME then quotes extensively from *Fisk v. Inslee*, claiming that both the district court and the Ninth Circuit endorsed ASFCME's argument regarding the contract. ASFCME MSJ at 14. But *Fisk* did *not* properly present the arguments that Hendrickson now submits to the court regarding the invalidity of the pre-*Janus* agreement, and therefore, the Ninth Circuit expressly *did not consider them*. The Court found that the argument had not been made below, so it held that "this claim is not properly before us and so we need not address the adequacy of [the employees'] putative waivers." *Fisk v. Inslee*, 759 F. App'x 632, 634 (9th Cir. 2019).

ASFCME's remaining string cite is no more helpful to its cause. AFSCME MSJ at 15. *Babb* addresses a different and somewhat confusing argument that union members should be

refunded a portion of their dues equal to agency fees because "such fees were subsumed within their membership dues." *Babb v. Cal. Teachers Ass'n*, No. 8:18-cv-00994-JLS-DFM, 2019 U.S. Dist. LEXIS 79812, at *34 (C.D. Cal. May 8, 2019). The court does not address the sufficiency of a waiver; its discussion is about the availability of damages. *Bermudez* contains nothing but a conclusory sentence addressed above. *See supra,* Section I. *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019) is helpful to AFSCME regarding the question of returning pre-*Janus* dues, but the dicta cited in the district court opinion is addressed simply to damages and says nothing about the right to revoke an authorization outside a proscribed time window. The only opinions AFSCME is able to point to that fairly support its view are district court orders denying motions for preliminary injunctions on the ground that the plaintiffs had not met their burden at that early state of the litigation. *See Cooley v. Cal. Statewide Law Enf't Ass'n*, No. 2:18-cv-02961-JAM-AC, 2019 U.S. Dist. LEXIS 12545, at *9 (E.D. Cal. Jan. 25, 2019); *Smith v. Superior Court*, No. 18-cv-05472-VC, 2018 U.S. Dist. LEXIS 196089, at *2 (N.D. Cal. Nov. 16, 2018); *Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *14 (W.D. Wash. Oct. 11, 2018).

C. *Janus* establishes that a knowing waiver of First Amendment rights is required.

ASFCME then asserts that *Janus* was addressed to agency fee payers and did not hold expressly what Hendrickson now contends. However, *Janus* did expressly hold that there are explicit requirements a union must meet before abridging an employee's First Amendment rights. Ensuring AFSCME adheres to these requirements forms a valid basis for Hendrickson's claim. *See* Plaintiff MSJ at 9-13.

AFSCME introduces two new authorities in this section of its motion. The first is a Montana state court opinion that AFSCME attaches as Exhibit 1 to the motion (Dkt 32-1). *Yellowstone County* addressed a new union authorization form that a county wished to require for employees *hired after Janus*. The Court there granted a preliminary injunction to preserve the status quo because a separate Unfair Labor Practice charge was ongoing in another venue. The court made no ruling on the merits of the practice or on the enforceability of pre-*Janus* agreements. *Yellowstone County* at 11. The other authority, attached as Exhibit 2 (Dkt. 32-2) is simply a Temporary Restraining Order entered by the New Mexico Public Employee Labor Relations Board preserving the status quo while it considers a case. Neither of these cases nor the ones discussed in Section B, infra, represent persuasive authority that can overcome what the Supreme Court said in *Janus*: the burden is on AFSCME to prove by clear and convincing evidence that Hendrickson knowingly waived his First Amendment right. *Janus*, 138 S. Ct. at 2486.

Finally, Hendrickson notes that AFSCME continues to assert a position that is contrary to the direct holding of *Janus*: AFSCME claims unions can continue to extract dues from non-union members. On one hand, AFSCME admits that the collection of fees from non-members is foreclosed by *Janus*. AFSCME MSJ at 4. On the other hand, however, AFSCME's own description of its membership practices explains that it allowed Hendrickson to "resign his membership at any time but…dues would continue to be deducted from his paycheck." AFSCME MSJ at 5. For the purposes of this motion, Hendrickson accepts this factual description of how AFSCME treated him, but he vigorously objects to any conclusion of law that this action is still allowed under *Janus*. The *Janus* Court clearly ended the idea that unions can bifurcate the obligation to pay the union from membership in the union. *Janus,* 138 S.Ct. at 2460. If the *Janus*

decision stands for anything at all, surely it stands for the proposition that nonmembers of the union cannot be forced to make payments to the union. *Id*.

III. AFSCME is enforcing its agreement under color of state law.

AFSCME's final argument on Count I asserts that actions taken by state officers pursuant to a state statute do not constitute state action. ASFCME MSJ at 17. When the state government uses the state payroll system to deduct dues from state-issued paychecks of state employees, that is the very definition of state action required for a suit brought under 42 U.S.C. § 1983. Moreover, the time window limitations that AFSCME is enforcing are asserted pursuant to a state statute, N.M. Stat. Ann. § 10-7E-17(C), that expressly grants ASFCME this special privilege. In fact, the Supreme Court has gone much further to impart state action to unions in cases of unconstitutional dues deductions. This Court need look no further than the *Janus* decision itself, in which the union's deduction of agency fees constituted state action. An even more extreme example is the case of *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982), which held that a private debt collector's actions constituted state action under § 1983. In that case, the Court also struck down an unconstitutional state statute because the private parties "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 934. In the present case, ASFCME also has invoked the aid of state officials to take advantage of a state labor statutory scheme to withdraw its dues. State actors carrying out these state statutes constitutes state action under § 1983, and the question of whether such action is constitutional is properly before this Court.

ASFCME defends this assertion by arguing that "the State did not require Plaintiff to join the Union." Plaintiff MSJ at 8. That is not the relevant question. The relevant question is whether

the state required Hendrickson to *remain* a member of the union after *Janus*, and the answer is that New Mexico did. State officials followed and continue to enforce N.M. Stat. Ann. § 10-7E-17(C), which establishes the permissibility of the two-week revocation provision.

AFSCME next contends it cannot be treated as a state actor because that would require that "there is a substantial degree of cooperative action between state and private officials" with "overt and significant state participation in the deprivation of a plaintiff's constitutional rights." *Schaffer v. Salt Lake City Corp.,* 814 F.3d 1151, 1157 (10th Cir. 2016). But there is a substantial degree of cooperation between the state and the union and significant state participation in the deprivation of Hendrickson's constitutional rights. The state and the union sat down together and negotiated the contractual terms by which they would take members' dues, and the state carried out the union's instructions, just as it had regarding agency fee payers in *Janus*, where the Supreme Court never questioned the matter of state action. Adopting ASFCME's position on state action would require this Court to overturn a host of Supreme Court decisions on the subject. In *Knox* union exactions were held to be a First Amendment violation with requisite state action. 567 U.S. 315. Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounted to state action. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). ASFCME's argument would even mean that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), which *Janus* overturned, was likewise a mistake, because there could be no First Amendment question presented to the Court if the union exaction had not constituted state action. Hendrickson humbly submits that the Court should find that decades of Supreme Court cases applying First Amendment standards to public sector unions were not in error.

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

Finally, ASFCME contends that Count II, that challenges ASFCME's status as Hendrickson's exclusive representative, should be rejected. AFSCME primary relies here on *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), claiming that it forecloses Count II. Hendrickson has already presented his affirmative argument, as well as outlined the reasons *Knight* does not control, in his own motion. *See* Plaintiff MSJ 16-23. Therefore, he uses this opportunity to respond to AFSCME's arguments not yet addressed.

Of the eleven citations ASFCME puts forward for its interpretation of the exclusive representation argument, only two involve a Court of Appeals opinion written after *Janus*. ASFCME MSJ at 20; *see Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Mentele v. Inslee*, 916 F.3d 783, 786-90 (9th Cir. 2019). The remaining cases either predate *Janus* or are district court decisions, and few provide more than a cursory analysis of the question at issue.

The reasoning in *Bierman* is not persuasive because the Eighth Circuit Court of Appeals was addressing the same Minnesota statute that had been upheld in *Knight*. Understandably, the court felt bound by the *Knight* holding, despite differences in the claims being made by plaintiffs in the two cases. *Bierman*, 900 F. 3d. at 574. Had it considered the different reasoning of the two cases, as this Court is doing, the Eighth Circuit should have reached a different result. Instead, the court in *Bierman* repeated the holding of *Knight* in a few perfunctory paragraphs and did not consider or make mention of any potential reasons why *Knight* should be distinguished. *Id*.

As to the other post-*Janus* circuit court case, *Mentele* recognizes that the question presented in *Knight* can be distinguished from the current question of whether a union can act as exclusive representative of non-members:

> We acknowledge that *Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct from [the] contention that employees' associational rights are implicated when a state recognizes an exclusive bargaining representative with which non-union employees disagree.

916 F.3d. at 788. Nonetheless, the 9th Circuit in *Mentele* goes on to state that *Knight* continues to apply to "partial" state employees with limited representation by the union. This Court should also recognize that the question in *Knight* is distinct from the question that Hendrickson raises, but it should follow this reasoning to the natural conclusion that *Knight* should be distinguished.

Mentele can also be distinguished because the plaintiffs in *Mentele* are not government workers but private employees contracted to perform government services. Under the childcare system of the State of Washington, "families choose independent childcare providers and pay them on a scale commensurate with the families' income levels. The State covers the remaining cost." *Id.* at 785. Washington only considers the plaintiffs in *Mentele* to be '"public employees' for purposes of the State's collective bargaining legislation." *Id*. As such, the exclusive representation provided these employees by their union is limited: "[T]hey are considered 'partial' state employees, rather than full-fledged state employees, and Washington law limits the scope of their collective bargaining agent's representation." *Id*. The exclusive representative cannot organize a strike, negotiate over retirement benefits, or even govern the hiring or firing of employees because they are private employees hired by the families in need of their services. *Id*. The harm of being forced to associate with such an exclusive representative is, thus, minimal.

The remaining circuit decisions cited by ASFCME predate *Janus*, and their reasoning cannot survive it. The First Circuit upheld exclusive representation by explaining that "the starting point for purposes of this case is [*Abood*]" before going on to address *Abood's* extension in *Knight*. *D'Agostino v. Baker*, 812 F.3d 240, 242 (1st Cir. 2016). The Second Circuit's

approached was even more perfunctory than others, citing *Abood* and then *D'Agostino* in a brief unpublished opinion that considered none of the arguments Hendrickson presents here. *Jarvis v. Cuomo*, 660 F. App''x 72, 74 (2d Cir. 2016). The Seventh Circuit likewise followed *D'Agostino* in holding, correctly at the time, but now incorrectly, that *Abood* remained good law. *Hill v. SEIU,* 850 F.3d 861, 864 (7th Cir. 2017).

ASFCME's remaining citations are district court opinions at various, often preliminary, stages of litigation and cannot control the outcome here. Nor do they stand for as much as ASFCME would like. *Thompson* actually explains that "the holding [of *Knight*] is not directly dispositive of the claim" that exclusive representation is corrective association, before going on to over-broadly read the dicta from *Knight* that Hendrickson addressed in his motion. *Thompson v. Marietta Education Ass'n* No. 2:18-cv-00628-MHW-CMV, ECF Dkt. 52 at *7 (S.D. Ohio Jan. 14, 2019); *See* Plaintiff MSJ at 22. *Uradnik* represents nothing more than a district court properly following circuit precedent, since the "Eighth Circuit specifically found that *Knight* foreclosed a similar compelled association argument" in *Bierman*¸ discussed above. *Uradnik v. Inter Faculty Org.*, No. 18-1895 (PAM/LIB), 2018 U.S. Dist. LEXIS 165951, at *10 (D. Minn. Sep. 27, 2018). *Reisman* is likewise a district court case following binding (but erroneous) circuit precedent, in that instance the *D'Agostino* case from the First Circuit. *Reisman v. Associated Faculties of the Univ. of Me.*, No. 1:18-cv-00307-JDL, 2018 U.S. Dist. LEXIS 203843, at *11 (D. Me. Dec. 3, 2018). The opinions in *Grossman* and *Babb* are likewise simply district court opinions compelled by the Ninth Circuit's error in *Mentele*. *Grossman v. Haw. Gov't Emps. Ass'n/AFSCME Local 152*, --- F.Supp.3d ---, 2019 WL 2195206, at *2-3 (D. Haw. May 21, 2019); *Babb,* 2019 U.S. Dist. LEXIS 79812, at *60. In both *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1009 (D. Alaska 2019) and *Akers v. Md. State Educ. Ass'n*, Civil Action No. RDB-18-1797, 2019 U.S.

Dist. LEXIS 65910, at *18 (D. Md. Apr. 18, 2019), the plaintiffs simply conceded the exclusive representation argument, so the court did not address it, except for a distinct anti-trust theory presented in both cases that is not analogous to the arguments Hendrickson presents here.

This Court, however, is not bound by an erroneous precedent that governs some other circuits. *Knight* deserves a close and proper reading. *Janus* cannot be so easily dismissed or ignored, and *Knight* must be viewed in the light of *Janus* and in the light of the different claim being asserted by Hendrickson.[1] ASFCME's status as Hendrickson's exclusive representative is an abridgement of his First Amendment rights of Free Speech and Freedom of Association.

CONCLUSION

For the reasons stated both above and in Plaintiff's own Motion for Summary Judgment, the Court should deny ASFCME's Motion for Summary Judgment, and instead grant Plaintiff's motion, finding that ASFCME's enforcement of a withdrawal window of time and its status as exclusive representative violated Hendrickson's rights under the First Amendment.

Dated: June 27, 2019

Respectfully Submitted,

/s/ Brian K. Kelsey

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[1] In the alternative, if this Court determines that *Knight* does control, Hendrickson asserts and preserves his right to argue on appeal that *Knight* should be overruled.

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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.

/s/ Brian K. Kelsey