IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRETT HENDRICKSON, Plaintiff, v. AFSCME COUNCIL 18 *et al.*, Defendants.	)	Case No. 18-CV-1119 RB-LF

PLAINTIFF'S OPPOSITION TO
DEFENDANT AFSCME COUNCIL 18'S MOTION TO DISMISS COUNT II

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INTRODUCTION

Brett Hendrickson ("Hendrickson") brings this action to vindicate his right under the First Amendment not to be compelled to join, support, or associate with a public sector labor union because he does not agree with its political positions. Defendant AFSCME Council 18 ("AFSCME"), the union that serves as the exclusive representative of Hendrickson's bargaining unit, moved to dismiss Count II of the Amended Complaint. Motion to Dismiss at 7 (Doc. 17) ("MTD"). Count II challenges the union's status as Hendrickson's exclusive representative in negotiations with his employer, the New Mexico Human Services Department (the "Department"), which is overseen by Defendant Michelle Lujan Grisham in her official capacity as governor of New Mexico ("Governor Lujan Grisham"). Hendrickson opposes the Motion and submits this Memorandum in opposition to the Motion.

In its Motion, AFSCME misconstrues Hendrickson's Count II as asking the Court to overturn the "model used for collective bargaining for public employees of the federal government and about 40 other States." MTD at 12. Count II does no such thing. Hendrickson acknowledges that if Governor Lujan Grisham wants to bargain with only one union, AFSCME, she may do so. Put another way, Hendrickson does not challenge the portion of N.M. Stat. Ann. § 10-7E-15(A) that states that AFSCME may "negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit." *Id*. Instead, Hendrickson challenges the portion of the statute that says, in doing so, AFSCME "shall represent the interests of all public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization." *Id*. Hendrickson asks this Court only to recognize and acknowledge that, after the Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), neither the government nor the union can claim the union is representing non-members in its negotiations with the government. To do so would violate Hendrickson's First Amendment right to freedom of association.

In its Motion, AFSCME relies primarily upon a Supreme Court case decided decades before the *Janus* decision, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S.

271 (1984). *Knight* rejected a claim that individual public employees should be entitled to speak during negotiation sessions because of the state government's preference to negotiate with a union without dissenters present. Hendrickson acknowledges that *Knight* allows Governor Lujan Grisham to ignore his views and not negotiate with him for bargaining purposes. *Knight* is a private forum case, not a freedom of association case. It does not stand for what AFSCME would like it to—a blanket license to speak on behalf of employees irrespective of the wishes of the employees themselves.

Knight bases its reasoning upon the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which the Supreme Court overturned in *Janus*, explaining that "designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." 138 S. Ct. at 2460. AFSCME would now deny the substantial restriction that *Janus* recognized, on the basis of a case answering an unrelated question using overruled precedent. Hendrickson's claim finds support not only in *Janus* but also in the long line of jurisprudence affirming a right under the First Amendment not to be compelled into associations against one's will. The court should, therefore, find that Hendrickson has met Fed. R. Civ. P. 12(b)(6)'s minimal requirement that he "state a claim on which relief can be granted."[1]

FACTS

Hendrickson first began work for the New Mexico Human Services Department in 2001. First Amended Complaint ¶ 16 (Doc. 38). When his workplace unionized a few years later, he was required either to join the union and pay dues or to pay unconstitutional "fair share" fees. *Id.* After

[1] In its Motion to Dismiss, ASFCME also argues that any claim regarding the constitutionality of New Mexico's agency fee statute is not justiciable because the Supreme Court has already held such fees unconstitutional in *Janus*. MTD at 22-24. AFSCME's Motion to Dismiss Count II was filed prior to the filing of Hendrickson's First Amended Complaint. The First Amended Complaint ("FAC") clarifies that Hendrickson's claims on this topic relate to Count I, not Count II. FAC ¶ 60 (Doc. 21); therefore, Hendrickson does not respond in this Opposition to arguments to dismiss his claim that N.M. Stat. Ann. § 10-7E-9(G) is unconstitutional. However, Hendrickson does accept AFSCME's admission that the New Mexico statute is "indistinguishable" from the statute struck down by the Supreme Court, and is, therefore, unconstitutional. MTD at 22.

serving in another part of state government for a year, Hendrickson returned to the Department in 2006 and has been employed there since then. FAC ¶ 17. When Hendrickson first returned to the Department in 2006, union dues were not deducted from his paycheck. FAC ¶ 18. He worried that AFSCME would demand that he pay back-dues in one lump sum and felt coerced to join the union. FAC ¶ 19. AFSCME offered not to pursue Hendrickson for the prior months' union dues if he would sign a union application, so he joined the union in June 2007. FAC ¶ 20. At the time Hendrickson signed the union application, neither AFSCME nor the Department informed him of his First Amendment right not to join a union. *Id.*

After the Supreme Court issued its decision in *Janus* on June 27, 2018, Hendrickson learned of his right not to join or financially support a union. On August 9, 2018, he sent an e-mail to the State Personnel Office ("SPO") expressing his desire to withdraw from union membership, asking whether he could do so immediately or whether he had to wait. FAC ¶ 25. SPO replied that he had to wait until an annual two-week window because the Collective Bargaining Agreement between the Department and ASFCME controlled when he could exercise his First Amendment rights not to be a member of the union. FAC ¶ 26. On November 30, Hendrickson filed this lawsuit to protect those rights. FAC ¶ 33.

In an effort to avoid the jurisdiction of this Court, on December 6, 2018, AFSCME sent Hendrickson a letter stating that, as a result of the lawsuit, the union had processed his membership resignation and would notify the State of New Mexico to cease his union dues deductions. FAC ¶ 35. However, AFSCME failed to notify the state. FAC ¶ 36. New Mexico continued to deduct union dues from Hendrickson's paychecks on December 15 and 31. FAC ¶ 35. Finally, on January 3, 2019, after allowing the two week opt-out window to pass, AFSCME sent a letter to SPO requesting that it end Hendrickson's dues deductions. FAC ¶ 36. Initially, the State of New Mexico refused to do so because the opt-out window had passed. FAC ¶ 38. On January 29, AFSCME sent Hendrickson a letter acknowledging its error and stating that he would be reimbursed his union dues paid after December 31. FAC ¶ 41. On February 28, 2019, SPO reversed course and returned

to Hendrickson an amount equivalent to dues deductions from two paychecks. FAC ¶ 44. The remaining funds unconstitutionally collected from Hendrickson remain outstanding. FAC ¶ 61.

Despite the fact that AFSCME acknowledges Hendrickson is no longer a member of the union, it continues to claim to represent his interests when it negotiates with the Department. MTD at 19-22. This claim violates Hendrickson's First Amendment right not to associate with the union that was recognized in *Janus*.

I. Standard of Review

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.

II. *Knight* is a private-forum case and does not address Hendrickson's compelled association claim.

AFSCME's primary submission is that *Knight* controls as to Count II of the First Amendment Complaint. MTD at 8. But *Knight* is addressed to a different question, and more recent cases more directly on point support Hendrickson's claim not to be compelled to associate with AFSCME.

A. *Knight* does not control.

The *Knight* case holds that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, "The question presented . . . is whether this restriction on

participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id*. at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.

The court explained the issue it was addressing well: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. Confronted with this claim, the court held that "[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Hendrickson does not claim that his employer—or anyone else—should be compelled to listen to his views. Instead, he asserts a right against the compelled association forced on him by exclusive representation.

AFSCME's invocation of *Knight* makes two important missteps. First, it asserts that the "the Supreme Court summarily affirmed the lower court's rejection of the Knight plaintiffs' 'attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment.'" MTD at 15 (quoting *Knight,* 465 U.S. at 278-79). But AFSCME does not clarify what was summarily affirmed. What was summarily affirmed was a rejection of the argument that collective bargaining violates the non-delegation doctrine, not that it violates a right of association, as the relevant portion of the lower court opinion makes clear. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n.*, 571 F. Supp. 1, 4 (D. Minn. 1982). That the non-delegation doctrine is at issue is proven when the Supreme Court cites to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co*., 298 U.S. 238 (1936), neither of which address a right

to freedom of association. *Knight*, 465 U.S. at 279. The plaintiffs in *Knight* viewed the granting of negotiating rights to the union as a delegation of legislative power to a private organization, and the district court rejected the claim, explaining simply that the claim "is clearly foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 (1977)." *Knight,* 571 F. Supp. at 4. The statutory arrangement did not violate the non-delegation doctrine "merely because the employee association is a private organization." *Id.* at 5. In its own *Knight* decision, the Supreme Court was not affirming a claim of exclusive representation equivalent to Count II of Hendrickson's First Amended Complaint.

AFSCME's second misreading of *Knight* severely elevates and misinterprets dicta in the decision. The central issue of the *Knight* decision is whether plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Hendrickson's claim that the government cannot compel him to associate with the union by making the union bargain on his behalf.

In arguing that these two distinct claims are the same, AFSCME points only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [plaintiffs'] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please." *Knight*, 465 U.S. at 288. Yet AFSCME's own quotations from that portion of the opinion reinforce that the court is still addressing the question of being heard. *See* MTD at 17. The court explains that the government's right to "choose its advisors" is upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight,* 465 U.S. at 288. The court raises the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This again is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Hendrickson now raises: whether someone else can speak in his name, with his imprimatur granted to them by the government. Hendrickson does not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify AFSCME's voice. He does not demand that the government schedule meetings with him, engage in negotiation, or any of the other demands made in *Knight*. He demands only that AFSCME not do so in his name.

B. *Janus* presents a new opportunity to consider the question.

As the Supreme Court has recently recognized, "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. This understanding of the "substantial restriction" that exclusive representation places on Hendrickson's rights cannot be squared with AFSCME's interpretation of the dicta in *Knight*.

Of the eight citations AFSCME puts forward for its interpretation of the *Knight* case, only two involve a Court of Appeals opinion written after *Janus*. MTD at 18; *see Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Mentele v. Inslee*, No. 16-35939, 2019 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019).[2] 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 8th 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 8th 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.*

[2] AFSCME mistakenly names the *Mentele* case by its second plaintiff, Miller.

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.

2019 U.S. App. LEXIS 5613, at *12. 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.

Mentele should be distinguished on this point. 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 *3. Washington only considers the plaintiffs in *Mentele* to be "'public employees' for purposes of the State's collective bargaining legislation." *Id.* at *3-4. 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.* at *4. 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 Supreme Court distinguished between "full-fledged public employees" like Hendrickson and partial state employees in *Harris v. Quinn*, 573 U.S. 616, 639 (2014). In fact, the plaintiffs in *Harris* were almost identical in nature to the plaintiffs in *Mentele*; they were personal assistants hired solely by families to provide homecare services for Medicaid recipients. The Supreme Court in *Harris* limited its holding to partial state employees because of the differences between such employees and full-fledged public employees. *Id*. at 647. Likewise, the *Mentele*

holding should be limited to partial state employees and not extended to full-fledged public employees like Hendrickson.

The remaining circuit decisions cited by AFSCME 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,* and therefore *Knight,* remained good law. *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017).

AFSCME'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 AFSCME would like. The opinion ASCMFE attaches as Exhibit 1 to their Motion 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 this memorandum addressed above. *Thompson v. Marietta Education Ass'n*, No. 2:18-cv-00628-MHW-CMV, ECF Dkt. 52 at *7 (S.D. Ohio Jan. 14, 2019). *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 this 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). This Court is under no such encumbrance from the 10th Circuit Court of Appeals and should take the opportunity to address this issue in light of *Janus*.

AFSCME makes much of the fact that *Janus* did not "hold" exclusive representation unconstitutional, quoting *Bierman* to the effect that "*Janus* 'never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue.'" MTD at 10 (quoting *Bierman,* 900 F. 3d. at 574). Therefore, in the view of AFSCME, "both *Knight* and *Janus* require rejection of plaintiffs' claim." MTD at 19. To the contrary, if the *Janus* court had relied on *Knight* for its reasoning and had rejected an exclusive representation claim, it would have mentioned *Knight* explicitly. The *Janus* court did not mention *Knight* only because the issue of exclusive representation had not been disputed by the plaintiff. 138 S. Ct. 2478.

Instead, the *Janus* court eroded the foundations of *Knight*, which was "relying chiefly on [*Abood*]." *Knight*, 465 U.S. at 278. In *Janus* the Supreme Court "cataloged *Abood*'s many weaknesses." *Janus*, 138 S. Ct. at 2484. The court rejected both the rationales that *Knight* had borrowed from *Abood* to support its claim that unions may serve as the exclusive representative of a dissenting member: "labor peace" and "free riders." *Janus*, 138 S. Ct. at 2486. The court determined that both governmental interests were not compelling enough to override the First Amendment rights to free speech and freedom of association. *Id*. Its foundations now swept from underneath it, *Knight* should be regarded as the impotent decision that it is.

III. In the alternative, *Knight* should be overruled to the extent it holds that exclusive representation does not violate Hendrickson's right of association.

As stated above, Hendrickson argues that *Knight* does not answer the freedom of association claim asserted in his First Amended Complaint. 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. *Knight* asserted that exclusive representation "in no way restrained [plaintiff's]…freedom to associate," *Knight*, 465 U.S. at 288. However, *Janus* stated that exclusive representation "substantially restricts the rights of individual employees," *Janus*, 138 S. Ct. at 2460. *Knight* was, therefore, in error on this point and should be overruled to bring greater clarity to the doctrine.

IV. Hendrickson states a cognizable claim of compelled association under the First Amendment that should be heard on the merits.

As the Supreme Court has recently recognized, "Designating 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). Because forced union representation does not further a compelling state interest, Hendrickson has stated a claim on which relief could be granted and should be allowed to proceed to the merits.

A. There is no state interest that can sustain this compelled association.

Unions and state governments have proffered various claimed interests for compelling the association of employees. One interest often proffered is "labor peace," meaning the "avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union" because "inter-union rivalries would foster dissension within the work force, and the employer could face 'conflicting demands from different unions.'" *Janus*, 138 S. Ct. at 2465. Other interests typically asserted in support of exclusive representation status amount to much the same claim: that it is in the state's interest to have a "comprehensive system" that bundles all employees into a single bargaining representative with which the state can negotiate. *See, e.g.,* Brief for Respondents Lisa Madigan and Michael Hoffman at 4, *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (No. 16-1466).

This justification does not apply to Hendrickson because he does not seek to introduce a competing union into the bargaining mix but only to ensure that AFSCME does not speak on his

behalf. Furthermore, in *Janus* the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest but rejected it as a justification for agency fees. The interest should, likewise, be rejected as a justification for exclusive representation. The Supreme Court recognized that "it is now clear" that the fear of "pandemonium" if the union couldn't charge agency fees was "unfounded." *Janus*, 138 S. Ct. at 2465. To the extent individual bargaining is claimed to raise the same concerns of pandemonium, this too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id*. It may be that the state finds it convenient to negotiate with a single agent, but that, in and of itself, is not enough to overcome First Amendment rights. The rights to speech and association cannot be limited by appeal to administrative convenience. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (in free speech cases, a "small administrative convenience" is not a compelling interest); *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could "no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party").

While it may be quicker or more efficient for the state to negotiate only with the union, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). Even if the state could claim that it saves monetary resources by negotiating only with the union, the preservation of government resources is not an interest that can justify First Amendment violations. In other contexts where the state's burden was only rational basis review, the Supreme Court has rejected such justifications. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting the "interest in conserving public resources" in a case applying only heightened rational basis review); see also *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("a concern for the

preservation of resources standing alone can hardly justify the classification used in allocating those resources"). Such claimed interests are not enough to leave Hendrickson "shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

B. Exclusive representation forces Hendrickson to associate with the views of the union.

Under N.M. Stat. Ann. § 10-7E-17(A)(1), as a condition of his employment, Hendrickson must allow the union to speak on his behalf on "wages [and] hours," matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. This compelled association raises serious First Amendment concerns. *Janus*, 138 S. Ct. at 2464 (whenever "a State . . . compels [individuals] to voice ideas with which they disagree, it undermines" First Amendment values). New Mexico law goes further, granting the union prerogatives to speak on Hendrickson's behalf on all manner of contentious matters. For example, the union is entitled to speak on Hendrickson's behalf regarding the grievance procedure Hendrickson would have to go through to settle disputes with his employer. N.M. Stat. Ann. § 10-7E-17(F). It may even take a position directly contrary to Hendrickson's best interest in negotiating his salary or other terms of his employment. N.M. Stat. Ann. § 10-7E-17(A)(1). These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467.

Unions in other states agree with Hendrickson on this point. In Illinois, the International Union of Operating Engineers, Local 150, AFL-CIO brought a lawsuit against the State of Illinois precisely because they did not want to speak as the exclusive representative of non-union members: "[P]laintiffs assert that they, and therefore their membership, will be compelled to speak on behalf of non-members, infringing on their First Amendment rights." *Sweeney v. Madigan*, No. 18-cv-1362, 2019 U.S. Dist. LEXIS 19389, at *6 (N.D. Ill. Feb. 6, 2019).

Legally compelling Hendrickson to associate with AFSCME demeans his First Amendment rights. Indeed, "[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) (internal quotation marks omitted)). New Mexico's laws do command Hendrickson's involuntary affirmation of objected-to beliefs. The fact that he retains the right to speak for himself does not resolve the fact that AFSCME organizes and negotiates as his representative in his employment relations.

C. AFSCME's contention that exclusive representation does not compel association does not survive examination.

Finally, AFSCME asserts that their representation does not abridge Hendrickson's rights because it says he is not required to "do or say anything" and because "reasonable people" would not attribute AFSCME's actions to Hendrickson. MTD at 20.

In the first instance, AFSCME is right that Hendrickson "does not allege that he is required to personally do or say anything to join or endorse AFSCME." MTD at 20. This is in fact precisely his objection: he has no agency in the matter, his autonomy having been assigned to AFSCME as his agent despite his objections, and he cannot withdraw that endorsement under New Mexico law.

AFSCME asserts that in this case AFSCME's speech is not "attributed to plaintiff" on the premise that "reasonable people would not believe that all bargaining unit workers necessarily agree with the exclusive representative or its positions." MTD at 20. For this proposition, AFSCME relies on *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006), in which law schools could be pressured to "'associate' with military recruiters in the sense that they interact[ed] with them." Hendrickson does not claim a right to never interact with a representative of AFSCME. Indeed, he

expects he will cross paths with them in his employment from time to time and expects the interactions to be cordial. The problem is that the union negotiates on Hendrickson's behalf without his consent. No law student or faculty member was required to follow the military's "Don't Ask, Don't Tell" policy, which was the basis of the law school's objection. AFSCME also incorrectly cites *FAIR* by analogy, because even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *FAIR*, 547 U.S. at 65 (citing *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). But Hendrickson does not object to AFSCME's speech; he objects to AFSCME representing him in his employment relations, so *FAIR* is inapposite.

Another analogy offered by AFSCME for the proposition that compelled association is constitutional has been specifically addressed by the Supreme Court in light of *Janus*. AFSCME cites a concurrence in *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) for the proposition that individuals can be compelled to associate with the views of a state bar association. MTD at 21. However, the Supreme Court recently addressed this very issue when it vacated an 8th Circuit decision upholding forced membership in the bar and remanded it for further consideration in light of *Janus*. *See Fleck v. Wetch*, 139 S. Ct. 590 (2018).

The premise that Hendrickson is not burdened by compelled association because he can speak his own mind is not consistent with other Supreme Court rulings on the issue. An individual's ability to publicly speak in disagreement with a group is not an excuse for continuing to compel association with the group. In New Hampshire, for example, motorists could not be compelled to associate with the state motto by bearing it on their license plates even though they were given the outlet to publicly speak against it. *Wooley v. Maynard*, 430 U.S. 705 (1977). The Boy Scouts could not be compelled to associate with members who engaged in activism with which the Boy Scouts disagreed even when they were given the outlet to express such disagreement publicly. *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000). Florida newspapers could not be compelled to print editorials from the state even when they were given

the freedom to print their disagreement with such editorials. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974). Each of these instances of compelled association or speech was held unconstitutional. Hendrickson's ability to express a message different from that of AFSCME does not make it constitutional for New Mexico to forcibly associate Hendrickson with AFSCME and its views.

AFSCME finally argues that the union is not Hendrickson's agent since any "democratic" system sometimes requires dissenters to be bound by the majority. MTD at 21. But AFSCME does not administer a democratic system as regards to Hendrickson. He has no vote for the union's leadership, for whether to accept or reject a contract, or for whether or not to strike. This "democratic" system is reserved for union members. *Janus* rectified the deficits in this "democracy" by eliminating the union's system of taxation without representation. Hendrickson asks the Court only to clarify that he is not being represented.

CONCLUSION

For the forgoing reasons, AFSCME's Motion to Dismiss Count II of the First Amended Complaint should be denied.

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Respectfully Submitted,

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I hereby certify that the foregoing pleading was electronically filed the 5th day of April, 2019, through the Court's CM/ECF filing system, which causes all parties of record to be served.

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