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 REPLY TO THE STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, Brett Hendrickson, submits this Reply to the Opposition of Defendants Governor Michelle Lujan Grisham and Attorney General Hector Balderas ("State Defendants") to Plaintiff's Motion for Summary Judgment (Dkt. 41) ("State Opposition"). Because Plaintiff has already addressed the arguments made in the State Opposition in his Motion for Summary Judgment (Dkt. 33) ("Plaintiff MSJ"), in his Opposition to the State Defendants' Motion to Dismiss (Dkt. 43) ("Plaintiff Opposition to MTD"), in his Opposition to AFSCME's Motion for Summary Judgment (Dkt. 42) ("Plaintiff Opposition to MSJ"), and in his Reply to Defendant AFSCME Council 18's Opposition to Plaintiff's Motion for Summary Judgment (filed simultaneously) ("Plaintiff Reply to AFSCME"), Plaintiff hereby incorporates those arguments and limits his reply to the points which require further elaboration.

ARGUMENT

I. Hendrickson's formatting error does not establish a dispute of material fact.

The State Defendants begin their Opposition by pointing out that Hendrickson's statement of material facts did not conform with the formatting requirements of the local rules. State Opposition at 1-2. Hendrickson's counsel concede their oversight in regards to the local rule.

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff included in his Motion for Summary Judgment a section of undisputed material facts. Plaintiff MSJ at 7-8. Further in compliance with the rule, Plaintiff supported each fact by "citing to particular parts of materials in the record" Fed. R. Civ. P. 56(c)(1)(A). Plaintiff failed, however, to number the facts for ease of reference by Defendants in determining whether to dispute a particular fact. D.N.M.LR-Civ

Rule 56.1(b) ("The facts must be numbered . . .").

Despite having a fair opportunity to consider the facts identified in the Plaintiff MSJ, the State Defendants did not identify one material fact in dispute. *See* State Opposition at 1-2. Defendant AFSCME had no trouble reading Plaintiff's Statement of Facts and, for its part, "does not dispute Plaintiff's material facts, which are consistent with AFSCME's Statement of Facts in Support of its Motion for Summary Judgment." Defendant AFSCME Council 18's Reponses to Plaintiff's Motion for Summary Judgement (Dkt. 39) ("AFSCME Opposition") at 1. Furthermore, the State Defendants already formally acknowledged in a joint statement to this Court 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 (Dkt. 27) at 2.

Therefore, Hendrickson asks this Court to excuse the formatting error and rule instead on the substance of his arguments. The Court has authority to do so by the terms of Fed. R. Civ. P. 56: "The court . . . may consider other materials in the record." *Id*. at (c)(3). Further in the interest of resolving this issue, Hendrickson attaches to this Reply a Reformatted Statement of Material Facts, identical to his initial Statement of Facts but formatted in individually numbered paragraphs, per the State Defendants' request.

II. Both Governor Lujan Grisham and Attorney General Balderas are proper Defendants to Plaintiff's First Amendment Claims.

Next, the State Defendants claim they are not proper defendants under *Ex Parte Young*, 209 U.S. 123 (1908). State Opposition at 2-3. Hendrickson has already refuted these arguments. *See* Plaintiff Opposition to MTD at 5-7.

Multiple Tenth Circuit opinions have held the governor and attorney general to be proper

parties when challenging executive branch policies and the constitutionality of state laws. *See, e.g., Kitchen v. Herbert*, 755 F.3d 1193, 1202 (10th Cir. 2014); *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 896 (10th Cir. 2017). As the circuit court explained in *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.

State Defendants now cite for their proposition the Fifth Circuit case of *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), State Opposition at 3-4, but that case is easily distinguishable from this one. In *Okpalobi*, the statute at issue had created a private right of action; therefore, the governor and the attorney general were not charged with enforcing the law under its own terms. *Id*. at 427. In this case, no such private right of action exists; state officials are charged with enforcing the laws. The governor, in particular, is not only charged with enforcing all state laws, as is the attorney general of New Mexico, but she is also the actual employer of Hendrickson. Plus, she is the only state official with authority over the actions of both the State Personnel Office and the Human Services Department, both of which contributed toward the unconstitutional act at issue. In short, Lujan Grisham is a proper defendant because she is Hendrickson's superior.

The State Defendants attempt to avoid culpability by arguing that New Mexico's Public Employee Labor Relations Board (PELRB) is the state entity that regulates labor relations in the state, and state law grants it some independence from the governor. State Opposition at 5. However, PELRB exists to adjudicate disputes on the application of New Mexico's labor law. It is not the proper venue nor party to defend the constitutionality of those laws. That is the

province and expertise of this Court.

If this Court deems the statute on exclusive representation to be unconstitutional, it will need to enforce its order with the governmental entity that entered into the collective bargaining agreement with the Union. That entity was not PERLB but the State of New Mexico, which follows direction from the governor and attorney general when deciding which unconstitutional laws not to enforce.

III. Hendrickson's claim regarding dues revocation is not moot, and the state policy on dues revocation is unconstitutional.

A. Count I is not moot.

The State Defendants argue that Plaintiff's claim in Count I of the Complaint regarding the dues revocation policy is moot. State Opposition at 6-8. However, Plaintiff has fully explained why the issue is ongoing. Plaintiff MSJ at 13-16; Plaintiff Opposition to MTD at 7-8; Plaintiff Reply to AFSCME at 7-9.

State Defendants cite to *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) (superseded on other grounds) for the proposition that a claim for declaratory relief does not cure mootness. State Opposition at 7. In *Cox,* an employee could not obtain declaratory relief on her claim of sexual harassment after her claim for monetary damages had been rejected. The court reasoned there was no ongoing interest in simply declaring that she had been mistreated on the basis of sex. *Id.* at 1347. The declaration sought in *Cox* was specific to the facts of plaintiff's case. In this case, however, Hendrickson has "show[n] the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest" of other employees. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974).

The State Defendants contend that Plaintiff's claim is "incapable of repetition," State Opposition at 8, because the State of New Mexico has changed its policies regarding non-member agency fees to conform with *Janus v. AFSCME*¸138 S.Ct. 2448 (2018). But Hendrickson is not claiming that he was or will be charged an agency fee. He was a union member, not an agency fee payer. His claim regards the policy applied to union members, which the State Defendants have not changed. Therefore, the state change in policy is irrelevant to his case.

State Defendants attempt to get around this irrelevance by stating that since there is no longer an agency fee in place, future hires will not be subject to the unconstitutional choice between dues and agency fees which Hendrickson faced. But future hires are not the relevant category of employee for analysis. Hendrickson is not challenging the agency fee policy but the revocation policy. There are countless similarly situated existing employees who remain subject to the unconstitutional revocation policy. These employees, like Hendrickson, signed union dues membership applications prior to *Janus* and have not signed new applications since *Janus*. Average state employees do not follow Supreme Court decisions and, like Hendrickson, they will likely learn of their right to pay nothing to the union in one of the fifty weeks a year in which the state is actively thwarting their efforts to end dues deductions. This Court should not allow the State of New Mexico to avoid judicial scrutiny because it allowed a two-week revocation period one time in 2018.

B. The New Mexico revocation policy violates the Constitution.

If not moot, the State Defendants deny that the union dues revocation policy is unconstitutional. State Opposition at 8-11. However, Hendrickson has explained why the policy

violates his constitutional rights. Plaintiff MSJ at 9-13; Plaintiff Opposition to MTD at 9. Plaintiff Reply to AFSCME at 2-7.

As Hendrickson has explained in other filings, *Fisk v. Inslee*, 759 Fed. Appx. 632 (9th Cir., unpublished opinion, Jan. 9, 2019) expressly does not address Plaintiff's arguments because the Plaintiffs in that case were deemed to have waived those arguments. *See* Plaintiff Opposition to MSJ at 11. Plaintiff acknowledges that a pair of district courts in the Ninth Circuit have come to mistaken conclusions on matters similar to those presented here. *See Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. 2019); *Smith v. Superior Court*, No. 18-cv-05472-VC, 2018 U.S. Dist. LEXIS 196089, at *2 (N.D. Cal. Nov. 16, 2018). But neither of those authorities is binding in this case, and Plaintiff invites this Court to address the matter with fresh eyes.

IV. Exclusive Representation violates Hendrickson's Rights of Speech and Association.

Finally, the State Defendants deny that that New Mexico's recognition of ASFCME as Hendrickson's exclusive representative violates his First Amendment rights to speech and association. State Opposition at 11-20. Hendrickson has already presented his affirmative case and addressed the State Defendants' argument. Plaintiff MSJ at 16-23; Plaintiff Opposition to MTD at 10-11; Plaintiff Reply to AFSCME at 11-12.

Defendants make much of the fact that when the Supreme Court said it would "assume" for purposes of discussion that labor peace was a compelling state interest, it did not include the magic words "without deciding." State Opposition at 11-12. But the context of the passage demonstrates that it is distinct from the State Defendants' counter examples. The State Defendants cite cases where the Supreme Court used the phrase "without deciding" because the Court was declining to address an unresolved issue that was tangential to the holding of the case.

Id. But *Janus* was not addressing an unresolved question; it was overturning an existing precedent, *Abood v. Detroit Board of Education*, 431 U.S. 20 (1977). *Abood* had held that agency fees could be justified by labor peace, and the Court in *Janus* was overturning that holding. *Janus*'s assumption was that *even if* labor peace is a compelling state interest, it is not an interest sufficient to overcome First Amendment rights without the sort of further factual showing that the State Defendants are unable to make in this case:

> We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood's* fears were unfounded…Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees.

Janus, 138 S. Ct. at 2465. If the State Defendants wish to stand on the premise that the Supreme Court declined to overturned *Abood*'s claimed state interest, they must take the bitter with the sweet, and acknowledge that *Janus* makes clear that an invocation of "labor peace" must come with a showing that the interest cannot be achieved "through means significantly less restrictive of associational freedoms."

The State Defendants also misapply *Janus'* discussion of the ways in which "designation as the exclusive representative confers many benefits." *Id.* at 2467. The "benefits" in question are benefits *to the union*. Plaintiff is perfectly willing to admit that exclusive representative status grants AFSCME many benefits. His contention is that those benefits should not be conferred at the expense of his First Amendment rights. And while the opinion in *Janus* discussed exclusive representative status with the understanding that it still existed because it was not at issue in the case, it did not do so with approval. Instead, *Janus* explicitly disapproved of exclusive representation: "Designating a union as the employees' exclusive representative substantially

restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460.

CONCLUSION

For the reasons stated both above and in Plaintiff's Motion for Summary Judgment, the Court should grant Plaintiff's motion and deny the State Defendants' Motion to Dismiss, finding that their enforcement of a revocation time period and exclusive representation violated Hendrickson's rights under the First Amendment.

Dated: August 1, 2019

Respectfully Submitted,

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I hereby certify that the foregoing pleading was electronically filed the 1st day of August, 2019, through the Court's CM/ECF filing system, which causes all parties of record to be served.

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