APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

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THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-18172
Superior Court No. 3AN-19-09971 CI

[Filed May 26, 2023]

STATE OF ALASKA; GOVERNOR MICHAEL J. DUNLEAVY, in an official capacity; ATTORNEY GENERAL TREG R. TAYLOR, in an official capacity; DEPARTMENT OF ADMINISTRATION and COMMISSIONER PAULA VRANA, in an official capacity, Appellants,	)
v.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY	)

and MUNICIPAL EMPLOYEES)
LOCAL 52, AFL-CIO,)
Appellee.)
_____)

O P I N I O N

No. 7657 – May 26, 2023

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Gregory A. Miller, Judge.

Appearances: Jessica M. Alloway, Assistant Attorney General, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for Appellants. Molly C. Brown, Dillon & Findley, P.C., Anchorage, and Scott A. Kronland and Matthew J. Murray, Altshuler Berzon LLP, San Francisco, for Appellee.

Before: Winfree, Chief Justice, Maassen, Carney, and Henderson, Justices, and Eastaugh, Senior Justice.* [Borghesan, Justice, not participating.]

WINFREE, Chief Justice.

I. INTRODUCTION

Alaska State Employees Association (ASEA) is a public sector union representing thousands of State employees, including union members and nonmembers. Prior to 2019, and pursuant to a collective bargaining

* Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

agreement with ASEA, the State deducted union members' dues from their paychecks and deducted from nonmembers' paychecks a mandatory "agency fee" — a percentage of full union dues to support bargaining efforts on behalf of all employees — and transmitted the funds to ASEA.

In June 2018 the United States Supreme Court held in *Janus v. American Federation of State, County, & Municipal Employees, Council 31* (*Janus*) that charging union agency fees to nonmember public employees violated their First Amendment rights by "compelling them to subsidize private speech on matters of substantial public concern."[1] The State and ASEA modified their collective bargaining agreement to comply with *Janus*, and the State halted collecting agency fees from nonmembers.

In 2019, after a change in executive branch administrations following the November 2018 election, the State took the position that *Janus* also required the State to take steps to protect union member employees' First Amendment rights. The State contended that *Janus* required it to obtain union members' clear and affirmative consent to union dues deductions, or else they too — like nonmember employees — might be compelled to fund objectionable speech on issues of substantial public concern. The governor issued an administrative order directing the State to bypass ASEA and deal directly with individual union members to determine whether they wanted their dues deductions to continue and to immediately cease

[1] 138 S. Ct. 2448, 2460 (2018).

collecting dues upon request. Some union members expressed a desire to leave the union and requested to stop dues deductions; the State ceased collecting their union dues.

The State then sued ASEA, seeking declaratory judgment that *Janus* compelled the State's actions. ASEA responded and brought counterclaims and third-party claims, seeking to enjoin the State's actions and recover damages for breach of the collective bargaining agreement and violations of several statutes. The superior court ruled in favor of ASEA, entering declaratory judgment that the State's actions were wrongful, enjoining those actions, and awarding damages to ASEA.

The State appeals. We affirm the superior court's declaratory judgment in favor of ASEA because neither *Janus* nor the First Amendment required the State to alter the union member dues deduction practices set out in the collective bargaining agreement. And because the State's actions were not compelled by *Janus* or the First Amendment, we affirm the superior court's rulings that the State breached the collective bargaining agreement and violated relevant statutes. We further affirm the superior court's permanent injunction prohibiting the State from unilaterally implementing its wrongful actions.

II. CONSTITUTIONAL BACKDROP – *ABOOD* AND *JANUS*

In the late 1970s the United States Supreme Court decided *Abood v. Detroit Board of Education*.[2] In that case the Court held that public sector unions' collective bargaining agreements could require nonmember employees to pay a portion of what union members paid as union dues to support the unions' collective-bargaining activities on behalf of all employees, so long as those fees were used for "collective-bargaining, contract administration, and grievance-adjustment purposes."[3] But the Court concluded that such arrangements were unconstitutional if the agency fees were used "to contribute to political candidates and to express political views unrelated to [a union's] duties as exclusive bargaining representative."[4]

In 2018 the Supreme Court overruled *Abood* in *Janus*, declaring that *Abood* was poorly reasoned and that its constitutional dividing line was unworkable in practice.[5] The Court noted that during collective bargaining activities unions sometimes engage in speech on "sensitive political topics" such as "climate change, the Confederacy, sexual orientation and gender

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[2] 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. at 2460.

[3] *Id.* at 232.

[4] *Abood*, 431 U.S. at 234.

[5] *Janus*, 138 S. Ct. at 2460.

identity, [and] evolution."[6] The Court said that such speech "occupies the highest rung of the hierarchy of First Amendment values," and "merits 'special protection.' "[7] The Court identified compelled speech as the threat necessitating special First Amendment protections,[8] stating that it raises First Amendment concerns similar to those about "a law commanding 'involuntary affirmation' of objected-to beliefs."[9] The Court reasoned that requiring nonmember employees to pay agency fees could result in unions using those fees to fund collective bargaining speech advancing opinions with which nonmember employees disagreed.[10] Stating that such "compelled subsidization of private speech seriously impinges on First Amendment rights,"[11] the Court applied exacting scrutiny[12] to "public-sector agency-shop

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[6] *Id.* at 2476.

[7] *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

[8] *See id.* at 2464 ("When speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . .").

[9] *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)).

[10] *Id.* at 2463-65, 2467.

[11] *Id.* at 2464.

[12] *Id.* at 2464-65 (considering level of scrutiny to apply to compelled speech; declining to apply rational basis and strict scrutiny and holding that exacting scrutiny applies).

arrangements"[13] and held that charging mandatory agency fees to nonmembers "violate[s] the First Amendment" by "compelling them to subsidize private speech on matters of substantial public concern."[14] *Janus* thus made it unconstitutional to require mandatory union agency fees for nonmember employees.

III. FACTS AND PROCEEDINGS

A. Facts

1. Background labor practices

The State has approximately 15,000 employees represented by 11 public sector unions. Roughly 8,000 employees belong to a bargaining unit exclusively represented by ASEA, the largest public sector union in Alaska.[15] Union membership is not a condition of employment, but about 7,000 employees represented by ASEA chose to become union members.

ASEA engages in collective bargaining with the State on topics like wages, benefits, employee discipline, and employment terms. Every three years the State and ASEA execute a new collective bargaining agreement (CBA) that must be approved by

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[13] *Id.* at 2477-78.

[14] *Id.* at 2460, 2478.

[15] *See* AS 23.40.100 (authorizing bargaining units to democratically elect union as exclusive representative in collective bargaining).

the legislature.[16] CBAs may be modified during their three-year life spans.

The two CBAs relevant to this appeal were in effect from July 2016 to June 2019 and then from July 2019 to June 2022, respectively. Pursuant to statute, both CBAs required the State to deduct union dues from ASEA union members' paychecks, upon members' written authorizations provided by ASEA, and to transmit the money to ASEA.[17] And, also pursuant to statute, both CBAs required the State to "not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and [ASEA]."[18] The 2016–2019 CBA also required the State to deduct agency fees from nonmembers' paychecks and transmit the money to ASEA. ASEA and the State later modified

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[16] AS 23.40.215 (explaining that monetary terms of CBAs are "subject to legislative funding").

[17] *See* AS 23.40.220 ("Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits as certified by the [bargaining unit] and shall deliver it to the [bargaining unit].").

[18] *See* AS 23.40.080 ("Public employees may self-organize and form, join, or assist [a union] to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."); AS 23.40.110(a)(1)-(5) (prohibiting public employer from interfering with public employee's rights under AS 23.40.080; dominating union or interfering with union's formation, existence or administration; discriminating with regard to employment to encourage or discourage union membership; discharging an employee for exercising rights under AS 23.24.070-.260; and failing to bargain in good faith with union).

that CBA to comply with *Janus* and eliminated the required agency fees deductions from nonmembers' paychecks. The 2019–2022 CBA did not contain a requirement for agency fees deductions from nonmembers' paychecks.

An employee who voluntarily chooses to join ASEA signs a written union membership agreement and a written dues deduction authorization form authored by ASEA. Since 2017 the dues deduction form has included a one-year commitment automatically renewing if the member does not revoke the dues deduction authorization during an annual ten-day period.[19] In 2020 ASEA changed its procedures so that when a member submitted a resignation outside the revocation window, ASEA would hold the request until the resignation period and then ask the State to stop dues deductions.

ASEA's union dues authorization forms emphasized that employees do not have to pay union dues, and forms used since 2018 emphasized that joining the union is optional. For example, the version revised in September 2019, reads: "Yes, I choose to be a Union member . . . . I understand my membership supports

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[19] The form version used when this controversy arose read: "This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement . . . whichever occurs sooner, and for year to year thereafter unless I give [the State] and [ASEA] written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period."

the organization advocating for my interests . . . and paying union dues is not a condition of employment."

2. The State's interpretation and application of *Janus*

Soon after the Supreme Court's 2018 *Janus* decision, then-Attorney General Jahna Lindemuth (under Governor Bill Walker's administration) issued a memorandum to executive branch employees explaining that while *Janus* invalidated charging mandatory agency fees to nonmember employees, it had no effect on other aspects of Alaska labor law and did not allow the State to disregard existing union membership dues authorizations. But in August 2019, then-Attorney General Kevin G. Clarkson (under Governor Michael J. Dunleavy's administration) issued a legal opinion to Governor Dunleavy asserting that *Janus*'s holding necessitated much more than eliminating agency fees and instead "require[d] a significant change to the State's current practice in order to protect state employees' First Amendment rights."

Attorney General Clarkson wrote that, after *Janus*, "a public employer such as the State cannot deduct from an employee's wages 'any . . . payment to the union' unless it has 'clear and compelling evidence' that an employee has 'freely given' his or her consent to subsidize the union's speech." He asserted that before the State could constitutionally deduct union dues from public employees' paychecks, those employees needed to knowingly, intelligently, and voluntarily waive their First Amendment rights. He contended that, because unions design payroll deduction authorization forms

and control the environment in which employees are asked to authorize payroll deductions, the State would have "no way to ensure that its employees are being told exactly what their First Amendment rights are before being asked to waive them." He expressed concern that employees were being coerced to sign authorization forms when the process was "essentially a black box the State cannot peer inside of." He concluded that the only way to ensure that employees had knowingly, intelligently, and voluntarily waived their First Amendment rights when agreeing to join a union and pay dues would be for those employees to "provide that consent directly to the State" using State-authored dues authorization forms submitted through a State-created and managed online portal.

Attorney General Clarkson also asserted that *Janus* required the State to do even more to protect public employees' First Amendment rights. Drawing upon criminal law, he noted courts have held that waivers of *Miranda* rights can grow stale with the passage of time, "requiring the government to re-advise suspects of their rights."[20] Applying this logic to union dues payroll deduction authorizations, he concluded that union members must have regular opportunities to agree or disagree with continued payroll deductions

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[20] In *Miranda v. Arizona* the Supreme Court held that, under the Fourth Amendment, testimonial statements made during a custodial interrogation are not admissible in evidence unless the government adequately informed the interrogee of certain rights. 384 U.S. 436, 476 (1966). The Court's holding was designed to address the inherently coercive "pressures which work to undermine the individual's will to resist" divulging information in the context of a custodial interrogation. *Id.* at 467.

lest their initial waivers of First Amendment rights grow stale.

The parties in this case later stipulated that when Attorney General Clarkson wrote his opinion he was aware that other state attorney generals had interpreted *Janus* differently and that other courts had issued decisions contrary to the opinion. The parties also stipulated that Attorney General Clarkson did not consult with ASEA or offer it the opportunity to provide its views before releasing his opinion, but that State officials had consulted with certain Outside policy think tanks when the opinion was crafted.

On the same day Attorney General Clarkson gave his legal opinion to Governor Dunleavy, then-Department of Administration Commissioner Kelly Tshibaka emailed all State employees, including ASEA members, with links to the *Janus* decision, Attorney General Clarkson's legal opinion, and a Frequently Asked Questions (FAQ) document. Commissioner Tshibaka advised State employees that Attorney General Clarkson had concluded the State currently was not in compliance with *Janus*. The FAQ document informed employees that the State soon would be requiring union members to submit new dues consent forms before the State would deduct union dues from their paychecks. The parties in this case later stipulated that the State did not consult with ASEA or give ASEA advance notice before Commissioner Tshibaka sent the email. ASEA subsequently objected to these intended actions.

The next month the State sued ASEA, seeking declaratory judgment that the intended actions were

lawful and mandated by *Janus*.[21] The day after ASEA responded with its court filings, Governor Dunleavy issued Administrative Order 312 and a timeline for steps the State would take to comply with its new view of *Janus*. The Order required the State to develop a new union dues authorization form telling employees that by signing the document they were waiving their "First Amendment right not to pay union dues and fees," were "freely associating" themselves with the union's speech, and could "revoke [their] consent to future union dues or fees withdrawal at any time and for any reason." The Order also instructed State officials to develop an online portal for employees to submit the updated form directly to the State. The Order also stated: "Once the new procedures and forms are implemented . . . all dues and fees deductions made under prior procedures will be immediately discontinued, pre-existing employee authorizations will be deemed void, and any new dues deductions" must follow the new process. And the Order stated that union members could opt out of union dues payroll deductions "any time after this Order is implemented" by submitting an "opt-out form."

Governor Dunleavy's office published a press release about his Order and he held a press conference to discuss it the same day. Commissioner Tshibaka sent a copy of the press release to all State employees

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[21] *See Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005) (explaining that "declaratory judgments are rendered to clarify and settle legal relations, and to 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding' " (quoting *Jefferson v. Asplund*, 458 P.2d 995, 997-98 (Alaska 1969))).

in an email. The parties in this case later stipulated that the State did not notify ASEA of the Order before releasing it, but that the State had consulted with the same Outside policy think tanks it had consulted prior to releasing Attorney General Clarkson's legal opinion.

The State created a "Cease Union Dues Deduction" form and emailed it to twelve ASEA members who had contacted the State in response to Commissioner Tshibaka's emails. Some of them, union members who had paid dues to ASEA through payroll deductions and had signed dues authorization forms that included the one-year commitment and the ten-day revocation period, requested that the State stop deducting union dues from their paychecks. The State stopped collecting their dues and did not inform ASEA of its direct contact with the members or the cessation of dues deductions until after it stopped collecting the dues. The parties in this case later stipulated that, as a result of the State's actions, ASEA suffered about $186,000 in damages comprising staff time diverted to responding to the State's emails and the Order, lost dues, and lost memberships.

B. Proceedings

ASEA responded to the State's lawsuit by opposing the requested relief and filing a third-party complaint against Governor Dunleavy, Attorney General Clarkson, and Commissioner Tshibaka (collectively the State).[22] ASEA alleged that the State had violated the

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[22] Under Alaska Appellate Rule 517(b), when public officials who have been sued in their official capacity leave office, their successors are automatically substituted as parties to an appeal. This is reflected in the caption for this appeal.

CBA, resulting in a breach of contract; violated various provisions of Alaska's Public Employment Relations Act (PERA);[23] violated the separation of powers inherent in the Alaska Constitution (by infringing on legislative functions); and violated Alaska's Administrative Procedure Act (APA) by implementing regulatory procedures without a lawful rulemaking process.[24] Because the State already had begun unilaterally implementing elements of its new labor relations scheme, ASEA requested a temporary restraining order enjoining the State from taking any action to implement Attorney General Clarkson's legal opinion and Governor Dunleavy's Order.

Resolving ASEA's request for a temporary restraining order, the superior court ruled that "*Janus* does not support the State's position" and that the State "provide[d] no colorable explanation for why the existing dues authorization form's annual opt-out period is not sufficient." The court noted that "[m]ost contracts are not revocable at will" and saw no reason to treat a union member's agreement to pay annual dues any differently from other contracts, including employer-sponsored health insurance plans with defined opt-in and opt-out periods. The court granted a temporary restraining order directing the State to stop implementing Attorney General Clarkson's legal opinion and Governor Dunleavy's Order, and the next month the court converted it to a preliminary injunction pending resolution of the lawsuit. When

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[23] AS 23.40.070-.260.

[24] AS 44.62.010-.950.

later resolving the merits of the parties' competing claims based on the parties' extensive stipulation of facts, the court denied the State's request for declaratory judgment, permanently enjoined the State from implementing Attorney General Clarkson's legal opinion and Governor Dunleavy's Order, and awarded ASEA about $186,000 in damages.

The State appeals.

IV. STANDARD OF REVIEW

We review a grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party,[25] and we may affirm on any basis appearing in the record.[26] We use our independent judgment when reviewing constitutional questions[27] and interpreting statutes.[28]

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[25] *Peterson v. State, Dep't of Nat. Res.*, 236 P.3d 355, 361 (Alaska 2010).

[26] *Parson v. State, Dep't of Revenue, Alaska Hous. Fin. Corp.*, 189 P.3d 1032, 1036 (Alaska 2008).

[27] *Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020).

[28] *Jerrel v. State, Dep't of Nat. Res.*, 999 P.2d 138, 141 (Alaska 2000).

V. DISCUSSION

A. We Decline To Apply Issue Preclusion, And We Consider The Merits Of The State's Appeal.

ASEA invites us to hold that the State's argument about *Janus*'s reach is precluded by two federal court decisions, *Creed v. ASEA* and *Woods v. ASEA*, in which the Ninth Circuit Court of Appeals affirmed the District Court of Alaska's decisions that *Janus* does not extend a First Amendment right to avoid paying union dues.[29] Although ASEA's preclusion argument is not necessarily without merit, we decline to apply preclusion because of the State's third-party-defendant status and relatively limited participation in the federal cases.[30] The superior court evaluated the merits of the State's arguments, and we will do so as well.

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[29] *Creed v. Alaska State Emps. Ass'n/AFSCME Loc. 52*, 472 F. Supp. 3d 518, 530-31 (D. Alaska 2020), *aff'd*, No. 20-35743, 2021 WL 3674742 (9th Cir. Aug. 16, 2021), *cert. denied*, 142 S. Ct. 1110 (2022) (mem.); *Woods v. Alaska State Emps. Ass'n/AFSCME Loc. 52*, 496 F. Supp. 3d 1365, 1374-75 (D. Alaska 2020) (quoting *Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir. 2020)).

[30] *See McAlpine v. Pacarro*, 262 P.3d 622, 627 (Alaska 2011) (listing four elements of collateral estoppel and noting that "existence of those elements provides only the underlying basis for the trial court's exercise of discretion to apply or not apply collateral estoppel, and that 'this discretion must be tempered by principles of fairness in light of the circumstances of each particular case'" (quoting *Misyura v. Misyura*, 242 P.3d 1037, 1040 (Alaska 2010))). Issue preclusion may not be appropriate if the parties were not previously afforded an opportunity to "fully and fairly" litigate the issue. *Id.*; *Edna K. v. Jeb S.*, 467 P.3d 1046, 1051 (Alaska 2020).

B. *Janus* Did Not Compel The State's Unilateral Changes To Alaska's Labor Relations System.

The State seeks to give *Janus* broad effect, arguing that it "placed prohibitions on public employers generally, and they apply to [union] members and nonmembers alike." According to the State, *Janus* prohibits it from collecting union dues from its member-employees unless it has clear and compelling evidence that the union members waived their First Amendment rights. But the State's interpretation of *Janus* has three major flaws.

First, *Janus* expressly dealt only with charging union agency fees to nonmember public employees.[31] The labor practice challenged and ultimately prohibited by *Janus* was that of charging compulsory agency fees to nonmember public employees, *as a condition of employment*, to support union collective bargaining activities.[32] *Janus* did not address how union dues are collected from public employees who *voluntarily* join public sector unions and agree to pay union dues. In fact, in *Janus* the Supreme Court said: "States can keep their labor-relations systems exactly as they are — only they cannot force nonmembers to subsidize

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[31] *See Janus*, 138 S. Ct. 2448, 2460, 2478 (2018) (holding that agency-shop arrangements "violate[] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern" and that "public-sector agency-shop arrangements violate the First Amendment").

[32] *Id.* at 2460.

public-sector unions."[33] The State thus misunderstands when and to whom the *Janus* waiver requirement applies.

Second, the State's reading of *Janus* imagines compulsion when none exists. The State is correct that, under *Janus*, *nonmember* "state employees cannot be compelled to subsidize the speech of a union with which they disagree." But by the time the State began unilaterally changing union member dues deduction procedures, the compulsion that concerned the Supreme Court in *Janus*, charging union agency fees to nonmember public employees, already had been eliminated from the CBA. After the elimination of agency fees, no public employee had to choose between a job or unwillingly subsidizing union speech. We agree with the Fourth Circuit Court of Appeals that when "the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced."[34]

Third, the State conflates waiving First Amendment rights with exercising hem. Waiver is the "intentional relinquishment or abandonment of a known right."[35] It may be that a public employee waives First Amendment free speech rights by voluntarily joining a union and agreeing to pay dues; but, if so, that action

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[33] *Id*. at 2485 n.27.

[34] *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991).

[35] *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

itself is clear and compelling evidence that the employee has waived those rights.[36] Yet a public employee also exercises a First Amendment right of free association by voluntarily choosing to become a dues-paying union member.[37] The State's assertion that it needs additional clear and compelling evidence of waiver before it can lawfully deduct union dues from union employees' paychecks pretends to value one First Amendment right while actually impinging upon another.

The State's interpretation of *Janus* is incorrect. We join courts across the country that have rejected similar arguments[38] and hold that *Janus* did not compel the State's actions set in motion by Attorney

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[36] *See Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 586 (7th Cir. 2023) ("The voluntary signing of a union membership contract *is* clear and compelling evidence that an employee has waived her right not to join a union." (emphasis in original)).

[37] *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("Union membership is protected by the right of association under the First and Fourteenth Amendments.").

[38] *See, e.g.*, *Ramon Baro*, 57 F.4th at 586; *Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020); *Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps.*, 991 F.3d 724, 731 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (mem.); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (mem.); *Fischer v. Governor of New Jersey*, 842 F. App'x 741, 752-53, 753 n.18 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 426 (mem.); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 976 (8th Cir. 2022), *reh'g & reh'g en banc denied*, 2022 WL 3754006; *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Local 11*, No. 2:19-cv-3709, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020).

General Clarkson and Governor Dunleavy. *Janus* addressed the threat of compelled speech, and the Supreme Court held that requiring nonunion public employees to pay agency fees as a condition of employment violated the First Amendment because those employees could be forced to fund union speech repugnant to their own opinions and beliefs to keep their jobs.[39] But by November 2018 the State and ASEA had addressed that threat of compelled speech by eliminating mandatory agency fees from the CBA and ceasing charging agency fees to nonunion employees. Complying with *Janus* required nothing further.

C. Broader First Amendment Principles Do Not Justify The State's Unilateral Actions.

The State argues that even if *Janus*'s holding is not as far-reaching as the State contends, "[t]he First Amendment controls" and necessitated the State's actions. The State is mistaken.

The First Amendment "constrains governmental actors and protects private actors."[40] Unless the United States government or a state government[41]

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[39] *Janus*, 138 S. Ct. 2448, 2464, 2478 (2018).

[40] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019).

[41] The Fourteenth Amendment makes First Amendment protections applicable against the States. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

unreasonably curtails a private actor's right to speak or associate, no First Amendment violation occurs.[42] This is known as the "state action" requirement.[43] The question at the heart of the state action inquiry is whether the government is responsible for an alleged constitutional deprivation.[44] That "deprivation must be caused by the exercise of some right or privilege created by the State."[45] The government's "[m]ere approval of or acquiescence" to a private party's decision is not enough to hold the government responsible.[46] To determine whether state action has occurred, courts consider whether the government played a significant or coercive role in the activity[47] and whether there is a "symbiotic relationship" of mutual

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[42] *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928 ("The text and original meaning of [the First and Fourteenth Amendments], as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." (emphasis in original)).

[43] *See, e.g.*, *id.* at 1926; *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020).

[44] *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

[45] *Lugar*, 457 U.S. at 937.

[46] *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

[47] *See Belgau*, 975 F.3d at 947.

benefit between the government and the private party.[48]

The State argues that it engaged in state action when "compelling subsidies to unions" by deducting dues from members' paychecks. This framing of state action is unpersuasive. The State's acquiescent role facilitating interaction and agreements between two private parties, the union member employee and the union, does not amount to state action. The dues deduction is authorized by a private agreement; it is not a right or privilege created by the State even though a statute requires the State to honor that private agreement.[49] And the State plays no significant or coercive role in the relationship between the union and its members.[50] State employees freely choose whether to join a union; membership is not a condition of employment. Only those employees who join ASEA

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[48] *Id.* at 948 (quoting *Sawyer v. Johansen*, 103 F.3d 140, 140 (9th Cir. 1996)).

[49] *See* AS 23.40.220 ("Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits as certified by the [bargaining unit] and shall deliver it to the [bargaining unit].").

[50] *See Belgau*, 975 F.3d at 947; *cf.* AS 23.40.110(a)(1)-(5) (prohibiting public employer from interfering with public employee's rights under AS 23.40.080; dominating union or interfering with union's formation, existence or administration; discriminating with regard to employment to encourage or discourage union membership; discharging an employee for exercising rights under AS 23.40.070-.260; and failing to bargain in good faith with union).

and sign forms authorizing the State to deduct their union dues from their paychecks will pay anything to ASEA. The State does not become responsible for its employees' decisions "by requiring completion of a form,"[51] or through the "additional paper shuffling"[52] it performs in its accountant-like role.[53] Rather the State permits the private choice of private actors.[54]

There also is no "symbiotic relationship" between the State and ASEA or a substantial degree of cooperation between them.[55] The State receives no benefit from transmitting collected union dues to ASEA. Rather than acting in concert, the State and ASEA oppose one another at the collective bargaining table every few years, and as this case demonstrates, they also oppose each other in court. Put simply, there

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[51] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999) (quoting *Blum*, 457 U.S. at 1007).

[52] *Id.* (internal quotation marks omitted).

[53] *See Belgau*, 975 F.3d at 948 (explaining that "ministerial processing of payroll deductions pursuant to [union agreement]" was not state action because "providing a 'machinery' for implementing the private agreement by performing an administrative task" does not establish state responsibility (quoting *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 54)).

[54] *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 55; *see also, e.g.*, *Hoekman v. Educ. Minn.*, 41 F.4th 969, 977 (8th Cir. 2022) ("The unions are private actors, and their conduct may be deemed state action only if that conduct is 'fairly attributable to the State.' " (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982))).

[55] *Belgau*, 975 F.3d at 948 (quoting *Sawyer v. Johansen*, 103 F.3d 140, 140 (9th Cir. 1996)).

is no state action giving rise to a First Amendment violation when a public employee joins a union and directs the State to collect the employee's union dues from paychecks and transmit them to the union.[56] The constitutional deprivation that the State claims it is seeking to prevent is illusory.

The State also contends that the CBA's provisions for collecting union dues from state employees are unenforceable because they violate the First Amendment. We disagree. The CBA's method for collecting union dues does not involve state action, and "[t]he First Amendment does not" give the State the right to "renege on [its] promise" to collect dues on behalf of public employees who opt to join the union.[57] The State and ASEA voluntarily entered into the CBA's contractual relationship. "When 'legal obligations . . . are self-imposed,' state law, not the First Amendment, normally governs."[58] The First Amendment does not "provide a right to 'disregard promises that would otherwise be enforced under state law.' "[59] The CBA

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[56] *Hoekman* 41 F.4th at 978 ("[I]t is the terms of the employee's union membership, not any state action, that create the employee's obligation to pay and the union's right to collect.").

[57] *Belgau*, 975 F.3d at 950.

[58] *Id.* (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (omission in original)); *see also Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 586-87 (7th Cir. 2023); *Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps.*, 991 F.3d 724, 731 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021) (mem.).

[59] *Belgau*, 975 F.3d at 950 (quoting *Cohen*, 501 U.S. at 671). As the Seventh Circuit aptly put it: "[T]he First Amendment protects our

and union members' dues collection authorizations do not violate the First Amendment, and the State is bound to its bargained-for promises in the CBA.

D. Because *Janus* Did Not Necessitate The State's Unilateral Actions, The State Violated The CBA.

The State conceded at oral argument before us that if we disagree with its interpretation of *Janus*, we should affirm the superior court's ruling that the State breached the CBA because the State has no justification for its unilateral actions contrary to the CBA other than its reading of *Janus*. Because we hold that *Janus* did not require the State to take the actions it did, we affirm the superior court's ruling that the State breached Sections 3.01[60] and 3.04[61] of the CBA and the implied covenant of good faith and fair

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right to speak. It does not create an independent right to void obligations when we are unhappy with what we have said." *Ramon Baro*, 57 F.4th at 587.

[60] Section 3.01 of the CBA prohibited the State from interfering between SEA and its members "in any manner."

[61] Section 3.04 of the CBA required the State to deduct dues from member's wages and forward those dues to ASEA.

dealing.[62] We accordingly affirm the award of compensatory damages to ASEA.

E. Because *Janus* Did Not Mandate The State's Unilateral Actions, The State Violated PERA.

PERA aims "to promote harmonious and cooperative relations between government and its employees."[63] In line with this goal, the Act protects public employees' rights to collectively bargain, imposes requirements on how the State interacts with organized labor, and prohibits the State from engaging in a number of unfair labor practices.[64] The superior court granted summary judgment in favor of ASEA on its claim that the State violated PERA, but did not specify which

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[62] The covenant of good faith and fair dealing is implied in all contracts in Alaska. *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 697 (Alaska 2014); *see also Jones v. Jones*, 505 P.3d 224, 233 n.31 (Alaska 2022) ("The covenant, which is included in every contract, concerns parties' duty not to act in a way 'which will injure the right of the other to receive the benefits of the agreement,' . . . and is intended to require the parties 'to do everything that the contract presupposes will be done in order to accomplish the purpose of the contract . . . .' " (first quoting *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979); then quoting *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 562 (9th Cir. 2016)).

[63] AS 23.40.070.

[64] AS 23.40.080 (providing that public employees may organize to bargain collectively); AS 23.40.110 (prohibiting public employer from interfering with organization under AS 23.40.080).

PERA provisions the State violated.[65] We therefore affirm the superior court's ruling as it applies to three particular sections of PERA, as explained below.

When the State stopped collecting dues on behalf of some union members, it ran afoul of AS 23.40.220, which states that "[u]pon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues . . . and shall deliver it to the . . . exclusive bargaining representative." No elaboration is necessary to see how the State deviated from the statute's command. *Janus* did not call for the State to cease honoring union members' dues authorization forms, to tell union members they could stop dues deductions at any time, or to stop forwarding union members' dues to ASEA. The State had no justification for reneging on this statutory duty. We hold, based on the parties' stipulated facts, that the State violated AS 23.40.220.

ASEA argues that the State interfered with its operations in violation of AS 23.40.110(a)(2), which provides that a public employer "may not . . . dominate or interfere with the formation, existence, or administration of" a union organization. The State counters that an anti-union animus is required to violate AS 23.40.110(a)(2) and there is no such evidence in the record. But neither the statute nor our previous

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[65] The temporary restraining order cites various PERA provisions but does not make clear which claims ASEA was most likely to prevail upon. The preliminary injunction similarly does not specify which sections of PERA the State may have violated.

holdings contain anything resembling an intent or scienter requirement for subsection .110(a)(2),[66] and it is difficult to imagine how a public employer could attempt to dominate a union or interfere with the formation, existence or administration of a union without having an anti-union animus. Moreover, as discussed below, there is evidence in the record of the State's anti-union animus underlying its unilateral changes to the labor relations framework. The State, a public employer, interfered with the administration of ASEA, a union organization, when it unilaterally told ASEA members they could stop deducting dues, and actually ceased collecting dues from some members, in violation of the members' dues authorization agreements with ASEA and the State's collective bargaining agreement with ASEA. We conclude, based on the parties's stipulated facts, that the State violated AS 23.40.110(a)(2).

Alaska Statute 23.40.110(a)(3) prohibits a public employer from "discriminat[ing] in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization." According to the National Labor Relations Board, under Section 8(a) of the National

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[66] The State argues that we previously held that any violation of AS 23.40.110(a) requires an anti-union motive, citing *Univ. of Alaska v. Alaska Cmty. Colls.' Fed'n of Tchrs., Loc. 2404*, 64 P.3d 823, 826 n.9 (Alaska 2003). But the relevant footnote merely summarized another case, *Alaska Cmty. Colls.' Fed'n of Tchrs., Loc. No. 2404 v. Univ. of Alaska,* 669 P.2d 1299 (Alaska 1983), when we held only that an anti-union motive was required under AS 23.40.110(a)(1) and (3); that case did not discuss subsection .110(a)(2). *Id*. at 1307-08.

Labor Relations Act (NLRA), the federal analog to PERA, when "an employer ceases to deduct and remit dues in derogation of an existing contract, it is in effect unilaterally changing the terms and conditions of employment of its employees."[67] The superior court found "merit" to ASEA's argument that "state control [of] the authorization forms for union dues seems likely to discourage union membership." The court described the language the State proposed for its new dues authorization forms warning employees that they were waiving their First Amendment rights as "not neutral" and capable of "directly violat[ing] PERA." The court stated: "[T]he State could describe union membership in a hostile way on authorization forms it drafts," and "[t]here is no guarantee . . . that the State's method and/or language would not discourage employees from joining unions." Based on this analysis, it appears that the court concluded, on the parties' stipulated facts, that the State acted with an anti-union motive and discriminated with regard to a term of employment in a manner discouraging union membership among state employees in violation of AS 23.40.110(a)(3).

The State nonetheless argues that there is no evidence in the record that it acted with an anti-union motive. But we see abundant evidence of anti-union animus: The State espoused its sweeping interpretation of *Janus* and began unilaterally changing dues deduction procedures only after a

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[67] *Shen-Mar Food Prods., Inc.*, 221 N.L.R.B. 1329, 1329 (1976); *see also Am. Needle & Novelty Co.*, 206 N.L.R.B. 534, 544-45 (1973) (affirming administrative law judge's finding that company's failure to remit dues violated §8(a)(5) of NLRA).

change in administration; the new administration consulted with Outside special interest groups but did not consult or negotiate with ASEA, with which it had a collective bargaining agreement; the State emailed all employees represented by ASEA to inform them (incorrectly) about their First Amendment rights and about union members' (fictitious) rights to immediately stop payroll dues deductions, again without first consulting ASEA; the State made changes only to union dues deduction procedures, not to other union-related employee payroll deductions; and the State actually stopped collecting dues from ASEA members outside their contractual revocation windows and did not inform ASEA.

There is evidence in the record, particularly in the parties' stipulated facts, supporting the superior court's conclusion that the State's actions were "not neutral" but rather were "hostile" to ASEA, and we therefore reject the State's argument to the contrary. We conclude that the State violated AS 23.40.110(a)(3) by interfering with the statutory and contractual dues deduction process in a way that singled out and discouraged union membership.

F. We Decline To Address The Parties' Arguments About Constitutional Separation Of Powers And The Administrative Procedure Act.

The superior court ruled in favor of ASEA on its claims that the State violated the constitutional separation of powers doctrine and the Alaska Administrative Procedure Act when it unilaterally made changes to the union dues authorization and

collection process. We decline to reach these issues because our other holdings provide an adequate basis for affirming all forms of relief granted to ASEA.

VI. CONCLUSION

We AFFIRM the superior court's rulings that neither the *Janus* decision nor the First Amendment required the State to unilaterally alter the union dues deduction practices in place under PERA and the CBA prior to August 27, 2019, to unilaterally take the steps set forth in Attorney General Clarkson's August 2019 legal opinion, and to unilaterally implement the steps set forth in Governor Dunleavy's Administrative Order 312. We AFFIRM the superior court's rulings that the State breached the CBA and violated provisions of PERA, as well as the superior court's damages award. And we AFFIRM the superior court's permanent injunction barring the State from implementing Attorney General Clarkson's legal opinion and Governor Dunleavy's Administrative Order or otherwise unilaterally changing the CBA's union dues deduction practices.

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971 CI

[Filed February 8, 2021]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO; Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO; Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; CLYDE "ED" SNIFFEN, in his official	)

capacity as Acting Attorney General of Alaska;)
KELLY TSHIBAKA, in her official capacity)
as Commissioner of the Alaska Department)
of Administration; and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

ORDER GRANTING ASEA'S MOTION FOR SUMMARY JUDGMENT AND DENYING STATE'S MOTION FOR SUMMARY JUDGMENT

Alaska State Employees Association / AFSCME Local 52's ("ASEA") and the State of Alaska have each filed motions for summary judgment. After considering the stipulated undisputed facts and the parties' arguments, ASEA's motion for summary judgment is GRANTED and the State's cross-motion for summary judgment is DENIED.

The Court incorporates by reference and reaffirms the analysis in the Court's prior orders granting a temporary restraining order and converting that TRO into a preliminary injunction. The Court further concludes that, for the reasons set forth in ASEA's motion and supporting memorandum, the stipulated undisputed facts establish that the State, including third-party defendants the Governor, the Attorney General, the Commissioner of the Alaska Department of Administration, and the Department of Administration, by unilaterally changing the union member dues deduction procedures in effect before August 27, 2019, implementing former Attorney General Clarkson's August 27, 2019 legal opinion and

Administrative Order 312, and directly dealing with General Government Unit bargaining members: (1) breached the collective bargaining agreement between ASEA and the State; (2) breached the implied covenant of good faith and fair dealing; (3) violated the separation of powers enshrined in the Alaska state constitution and violated the Public Employment Relations Act; and (4) violated the Administrative Procedures Act.

ASEA is entitled to a declaratory judgment that the First Amendment to the U.S. Constitution does not require the State to alter the union dues deduction practices in place prior to August 27, 2019, and does not require the steps set forth in Attorney General Clarkson's August 27, 2019 legal opinion or the steps mandated in Administrative Order 312. ASEA is also entitled to a declaratory judgment that the August 27, 2019 legal opinion is incorrect and that Administrative Order 312 is invalid and has no legal effect.

ASEA is also entitled to a permanent injunction prohibiting the State and third-party defendants from implementing Attorney General Clarkson's August 27, 2019 legal opinion or Administrative Order 312 or otherwise unilaterally changing the union dues deduction practices in place prior to August 27, 2019.

ASEA is also entitled to damages from the State in the stipulated amount of $186,020.64.

This Order resolves all claims as to all parties, and ASEA is directed to file a proposed final judgment.

IT IS SO ORDERED.

DATED: February 08, 2021

/s/ Gregory Miller
The Honorable Gregory Miller
Superior Court Judge

I certify that on 2/8/21 a copy of the following was mailed/ emailed to each of the following at their addresses of record.
M. Brown
J. Pickett
T. [illegible]
/s/ [illegible name]
Administrative Assistant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 23, 2020 a true and correct copy of the foregoing document was served by:

[ ] hand delivery
[ ] first class mail
[X] email

on the following attorneys of record:

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/s/ Lisa Kusmider
Lisa Kusmider

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971 CI

[Filed August 4, 2021]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; TREG R. TAYLOR, in his official	)

capacity as Attorney General of Alaska;)
AMANDA HOLLAND, in her official capacity)
as Acting Commissioner of the Alaska)
Department of Administration;)
and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

29 [~~PROPOSED~~] FINAL JUDGMENT

On February 8, 2021, this Court resolved all claims in this case in favor of the Alaska State Employees Association / AFSCME Local 52, AFL-CIO ("ASEA"). The Court subsequently extended the deadline to file a proposed Final Judgment until July 15, 2021, pursuant to the parties' joint motions. Third-Party Defendant Kelly Tshibaka, Commissioner of the Alaska Department of Administration, then left office and has been automatically replaced as a party by Acting Commissioner Amanda Holland pursuant to Alaska Rule of Civil Procedure 25(d). The Court now enters this Final Judgment.

IT IS ORDERED that judgment is entered in favor of ASEA and against the State of Alaska; Michael J. Dunleavy, in his official capacity as Governor of Alaska; Treg R. Taylor, in his official capacity as Attorney General of Alaska; Amanda Holland, in her official capacity as Acting Commissioner of the Alaska Department of Administration; and the State of Alaska, Department of Administration as follows:

1. It is hereby declared that the First Amendment to the United States Constitution does not require the

State of Alaska to alter the union dues deduction practices in place prior to August 27, 2019, and does not require the steps set forth in former Attorney General Kevin Clarkson's August 27, 2019 legal opinion or the steps mandated in Administrative Order 312. The August 27, 2019 legal opinion is incorrect and Administrative Order 312 is invalid and has no legal effect.

2. The State of Alaska, Governor Michael J. Dunleavy, Attorney General Treg R. Taylor, Acting Commissioner Amanda Holland, the State of Alaska, Department of Administration, each of their successors in office, all their officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, are permanently enjoined from implementing former Attorney General Kevin Clarkson's August 27, 2019 legal opinion and Administrative Order 312 or otherwise unilaterally changing the union dues deduction practices in place prior to August 27, 2019.

3. In addition, ASEA shall recover from and have judgment against the State of Alaska as follows:

a. Principal Amount:	$186,020.64
b. Prejudgment Interest (computed at the annual rate of 3.25% from September 16, 2019 until August 04, 2021 (date of final judgment). (688 days x $16.56/day)	$11,395.68

c. Sub-Total	$197,416.32
d. Attorney's Fees *(Motion Due per Rule 82 timelines) i. Date awarded: ii. Judge:	$_____
e. Costs (Cost Bill due per Rule 79 times) i. Date awarded: ii. Clerk:	$_____
f. **TOTAL JUDGMENT**	$197,416.32
g. Post-Judgment Interest Rate:	3.25%

DATED: August 04, 2021

/s/ Gregory Miller
The Honorable Gregory A. Miller
Superior Court Judge

I certify that on 8/4/21 a copy of the following was mailed/ emailed to each of the following at their addresses of record.
M. Brown
J. Pickett
T. [illegible]
/s/ [illegible name]
Administrative Assistant

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971CI

[Filed November 5, 2019]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 53, AFL-CIO, Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 53, AFL-CIO, Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official	)

capacity as Attorney General of Alaska;)
KELLY TSHIBAKA, in her official capacity)
as Commissioner of the Alaska Department)
of Administration; and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

PRELIMINARY INJUNCTION

On October 3, this court granted ASEA's September 25, 2019 motion for a temporary restraining order. At the State's request, this court gave the State until October 7 to file whatever additional briefing it desired as to whether the TRO should become a preliminary injunction. The State timely filed its additional briefing, more briefing from ASEA and the State followed, and time issue became ripe on October 25. But notwithstanding the State's request to have until October 7 to file its additional briefing, ultimately the State's briefing just attached and relied upon a copy of its October 1 TRO opposition brief. For the reasons stated in this court's October 3 Temporary Restraining Order, this court hereby **GRANTS** ASEA's motion for a preliminary injunction. All of the terms of this court's October 3 TRO now become this preliminary injunction order, and this injunction shall remain in force until further order of this court.[1]

[1] In that same October 7 filing the State moved to "consolidate" the preliminary injunction into a final judgment, and that issue is what dominated almost all of the parties' recent briefing. This court will address that motion in a separate order.

Two last points. The State writes at page 2 of its October 7 opposition that this court granted the TRO "in part." This implies that this court simultaneously "denied" part of the TRO ASEA was seeking. The State is mistaken. This court granted the TRO in full, and similarly is granting this preliminary injunction in full.

The last point is that it appears that two more courts have recently entered orders that essentially reject how AG Clarkson urges this court to interpret *Janus*. ASEA attached those decisions to its recent filings.[2]

DATED at Anchorage, Alaska this 05th day of November 2019.

/s/ Gregory Miller
Gregory Miller
Superior Court Judge

I certify that on November 5, 2019
a copy of the above was emailed to:
J. Pickett
M. Brown
T. Taylor
/s/ A. Stanley
Judicial Administrative Assistant – A. Stanley

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[2] *O'Callagham, et al. v. Regents of the University of California, et al.*, No. CV 19-2289 JVS (US District Court Central District of California, September 30, 2019), and *City of Rio Rancho v. AFSMCE, Council 18, Local 3277, et al.*, No. CV-2019-1398 (New Mexico District Court, Bernilillo County, October 28, 2019).

APPENDIX E

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971CI

[Filed November 5, 2019]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 53, AFL-CIO, Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 53, AFL-CIO, Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official	)

capacity as Attorney General of Alaska;)
KELLY TSHIBAKA, in her official capacity)
as Commissioner of the Alaska Department)
of Administration; and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

ORDER RE: STATE'S OCTOBER 7, 2019 MOTION FOR CONSOLIDATION OF PRELIMINARY INJUNCTION PROCEEDINGS AND FOR ENTRY OF FINAL JUDGMENT

On October 7, 2019, the State filed its opposition to ASEA's motion for a preliminary injunction. The State did not file any new briefing as to the preliminary injunction, and instead just attached and relied upon a copy of its October 1 TRO briefing. Given the State's lack of any new arguments, today this court issued a short order that granted the preliminary injunction for the same reasons this court granted the TRO. But within the State's short October 7 briefing, the State also moved to "consolidate" the preliminary injunction with a merits adjudication, and moved for entry of a final judgment. The State argues that no discovery is needed and that ASEA is not entitled to be heard on any of its other counterclaims. ASEA opposes. For the reasons stated below, this court **DENIES** the State's motion. The State, having chosen to file this lawsuit, cannot now unilaterally decide what counterclaims ASEA is entitled to pursue to final judgment.

The State cites to Alaska Rule of Civil Procedure 65(a)(2). That rule states in full as follows:

> 2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

The State also cites *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008). In *Haggblom*, Ms. Haggblom brought her dog to work, and the dog bit a co-worker. The City invoked a local ordinance to obtain an order to euthanize the dog. The City held an administrative hearing, at which Ms. Haggblom testified. The hearing officer granted the City's motion to euthanize the dog. Ms. Haggblom then filed a complaint in superior court, and sought a TRO and preliminary injunction to stop the euthanization. The court granted the TRO. The court thereafter held an evidentiary hearing on the preliminary injunction. Ms. Haggblom testified again, and she also presented a dog behavior expert. The trial court found in favor of the City, and on motion by the City also held that because all material evidence had been presented at the evidentiary hearing, a trial was not necessary and consolidation was appropriate, i.e., that the City was entitled to a judgment on the merits. Ms. Haggblom

then appealed to the Alaska Supreme Court. The Supreme Court stated that:

> [I]f it is clear that consolidation did not detrimentally affect the litigants, as, for example, when the parties in fact presented their entire cases and no evidence of significance would be forthcoming at trial, then the trial court's consolidation will not be considered to have been improper.
>
> . . . .
>
> Courts will uphold consolidation of proceedings when the preliminary injunction hearing was sufficiently thorough to remove any risk of prejudice. The sufficiency of the proceedings is determined on a case by case basis.[1]

In this instant case, ASEA argues that yes, this court held in its TRO that AG Clarkson was misinterpreting the U.S. Supreme Court's holding of *Janus* and that this court's order prevents the State from taking action based on the AG's misinterpretation of that holding. But ASEA argues that its five counterclaims go further than that, and that ASEA is entitled to a determination of all its claims. For instance, ASEA's counterclaims allege that the State violated state statutes (A.S. 23.40.070-.230) and the collective bargaining agreement. This court mentioned those counterclaims in its TRO, but expressly did not resolve those specific claims. ASEA also seeks discovery to determine at least the truthfulness of the State's

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[1] *Id.* at 999-1000 (citations and quotation marks omitted).

representations in its complaint and TRO opposition as to whether union members actually approached the State to "help" them with this dues issue. The State argues that having prevailed at the TRO stage, ASEA is not entitled to this or any other discovery. The State also argues that ASEA is just trying to run up attorney fees. ASEA in turn argues that it was the State that made these representations in its filings to this court, that the State will no doubt continue making these representations in any appeal briefing or oral arguments, and that if these representations are false, that the State's misrepresentations will prejudice ASEA. ASEA also argues that as to attorney fees, it was the State that filed this case, not ASEA.

The State's arguments are not well founded. This court finds that neither Rule 65(a)(2), *Haggblom*, nor any other case supports preventing ASEA from pursuing judgment on all of its claims. In *Haggblom*, the court held an evidentiary hearing, heard from witnesses, and determined that there were no other issues. That has not happened here. The State is correct that as to the TRO briefing the parties presented only a pure question of law that did not require a evidentiary hearing, and that both parties' briefing on the TRO was quite thorough. But that TRO did not reach all of ASEA's counterclaims, nor whether the State's representations were truthful. The State has declared that it intends to pursue this matter on appeal. If so, ASEA, like any other party in any case, is entitled to have a final determination on all its claims. *Haggblom* held that consolidation is appropriate "if it is clear that consolidation did not detrimentally affect the litigants, as, for example, when the parties in fact

presented their entire cases and no evidence of significance would be forthcoming at trial." That is not the situation here.

Finally, the State, in its October 7 motion at page 6, does not just seek "consolidation," but moves for "final judgment in favor of the State and the Third-Party Defendants on the Union's counterclaims and claims raised in the Union's third-party complaint." The State offers no legal authority for this novel argument – that having lost at the TRO stage and offering no new arguments at the preliminary injunction stage -- that the preliminary injunction should now be denied, that final judgment should be entered in favor of *the State*, and that ASEA should not be permitted to pursue discovery or a determination on the merits of all five of its counterclaims.

For the above reasons, the State's October 7, 2019 "Motion for Consolidation of Preliminary Injunction Proceedings and For Entry of Final Judgment" is **DENIED.** The answers of all the defendants-in-counterclaim and third-party defendants to ASEA's counterclaims and third-party complaint are due November 18.

DATED at Anchorage, Alaska this 05th day of November 2019.

/s/ Gregory Miller
Gregory Miller
Superior Court Judge

I certify that on November 5, 2019
a copy of the above was emailed to:
J. Pickett
M. Brown
T. Taylor
/s/ A. Stanley
Judicial Administrative Assistant – A. Stanley

APPENDIX F

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No.: 3AN-19-09971CI

[Filed September 26, 2019]

STATE OF ALASKA, Plaintiff, v. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant.	)

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff State of Alaska, pursuant to AS 22.10.020(g) and Alaska R. Civ. Proc. 57(a), brings this action for declaratory relief against Defendant Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO. Plaintiff alleges as follows:

PARTIES

1. Plaintiff State of Alaska ("State") has approximately 15,000 employees. Approximately 8,000 of these employees are represented in collective bargaining negotiations by Defendant. The State has entered into a collective bargaining agreement ("CBA") with Defendant. The CBA governs the employment terms and conditions of these employees.

2. Defendant Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO ("Defendant" or "Union") is a public sector union based in Alaska. Defendant represents state and municipal employees in the General Government Unit and is the largest public union in Alaska.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this declaratory action pursuant to AS 22.10.020(a), (g).

4. Venue is proper in this Court pursuant to Civil Rule 3(c) and AS 22.10.030.

STATEMENT OF FACTS

A. The First Amendment to the U.S. Constitution and Public Sector Unions

5. The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech and association.

6. The First Amendment creates an "open marketplace" in which differing ideas about political, economic, and social issues can compete for public support free from government interference. It also protects the rights of individuals to associate with others in pursuit of a wide range of political, social, economic, educational, religious, and cultural ends. Free speech thus is critical to our democratic form of government and to the search for truth.

7. Freedom of speech protects more than the right to speak freely and to associate with others. It also protects the right *not* to speak and the right *not* to associate. As the Supreme Court has long recognized, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

8. Compelling a person to subsidize the speech of others raises similar First Amendment concerns. It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

9. These important First Amendment principles are always at stake whenever a state subsidizes public sector unions through employee paycheck deductions.

10. Such state actions receive heightened First Amendment scrutiny because the collective bargaining, political advocacy, and lobbying of public sector unions is directed at the government, and bargaining subjects (such as wages, pensions, and benefits) are important political issues. Public sector unions also engage in an array of other speech, including on issues related to state budgets, healthcare, education, climate change, sexual orientation, and child welfare.

11. "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences," the Supreme Court has held, "compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310-11 (2012). Compulsory-fee requirements, therefore, "cannot be tolerated unless [they] pass[] exacting First Amendment scrutiny." *Harris*, 573 U.S. at 647-48 (citation omitted).

B. The State's Collective Bargaining Agreement with Defendant

12. The Public Employment Relations Act ("PERA") authorizes public employees to "self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." AS 23.40.080.

13. Under PERA, public employers must "negotiate with and enter into written agreements with

employee organizations on matters of wages, hours, and other terms and conditions of employment." AS 23.40.070.

14. Defendant, as a public sector union, engages in collective bargaining with the State over the employment terms and conditions of the employees it represents.

15. Through its collective bargaining and lobbying efforts, Defendant has advocated on political issues concerning wages, pensions, and employee benefits.

16. In accordance with PERA, the State has negotiated a collective bargaining agreement with Defendant ("CBA"). The CBA governs the employment terms and conditions of approximately 8,000 state and municipal employees in the General Government Unit.

17. Section 3.04 of the CBA governs payroll deductions of state employees. It states: "Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number, the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership dues owed for that pay period. The Employer will forward the monies so deducted to the Union together with a list of bargaining unit members from whose wages such monies were deducted no later than the tenth (10th) day of the following calendar month."

18. Section 3.04 further states: "Bargaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the state. The amount of voluntary contribution shall be stated on the authorization form, together with the bargaining unit member's employee identification number."

19. Thus, it has been the State's practice to take money from an employee's paycheck and transfer it to Defendant when the State receives a payroll deduction authorization form from Defendant for that employee.

20. According to Defendant's payroll deduction authorization form, the employee is prohibited from withdrawing his financial support for the Union unless he gives "the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period."

21. In other words, if the employee does not provide this notification to both the Union and the State during this ten-day window, the employee must continue to subsidize the Union's speech for another year.

C. The Supreme Court's Opinion in *Janus v. AFSCME, Council 31*

22. On June 27, 2018, the U.S. Supreme Court issued its opinion in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

23. In *Janus*, an Illinois state employee (Mark Janus) challenged an Illinois law that required him to pay an "agency fee" to a union even though he was not a member of the union and strongly objected to the positions the union took in collective bargaining and related activities.

24. Janus argued that such a scheme violated his rights under the First Amendment, and the Supreme Court agreed.

25. According to the Court, it had long recognized that "a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences." These types of compulsory-fee provisions thus required heightened scrutiny under the First Amendment.

26. Applying heightened scrutiny, the Court concluded that neither of the rationales for the Illinois law—promoting "labor peace" and preventing "free riders"—could justify the serious burdens imposed on employees' free speech rights.

27. The Supreme Court thus concluded that the Illinois law was unconstitutional because it violated Janus' free speech rights by compelling him to subsidize private speech on matters of substantial public concern.

28. In finding this law unconstitutional, the Court made clear that its holding was not limited to the facts before it. *All* employees—not just non-members

like Mr. Janus—had a First Amendment right not to be forced to subsidize the speech of public unions.

29. Going forward, the Court warned, public employers may not deduct "an agency fee nor any other payment" unless "the employee affirmatively consents to pay."

30. The Court stressed that a waiver of First Amendment rights must be "freely given and shown by 'clear and compelling evidence,'" and such a waiver "cannot be presumed."

31. Thus, the Court explained, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met."

D. The State's Response to *Janus*

32. Before *Janus*, the State's collective bargaining agreement with Defendant (which has been superseded by the current CBA) required the State to deduct dues from employees who were members of the Union and deduct an agency fee (or "service fee") from employees who were not members of the Union.

33. In response to *Janus*, the State, under the administration of then-Governor Bill Walker, stopped deducting agency fees from non-members' paychecks. The State also reached agreement with a number of unions, including Defendant, modifying the terms of the collective bargaining agreements to account for *Janus*.

34. The State, however, took no additional steps to comply with *Janus*'s requirements. In particular, the State took no steps to ensure that the First Amendment rights of *all* employees (both members and non-members) were protected.

35. Shortly after taking office, Governor Michael J. Dunleavy requested a legal opinion from Attorney General Kevin G. Clarkson as to whether the State had fully complied with its obligations under *Janus*. The Governor sought this opinion to ensure that the State's employee payroll-deduction process complied with the First Amendment in light of *Janus*.

E. The Attorney General Opinion

36. On August 27, 2019, Attorney General Clarkson issued a legal opinion in which he concluded that "the State's payroll deduction process is constitutionally untenable under *Janus*."

37. Although the plaintiff in *Janus* was a non-member who was objecting to paying a union's agency fee, the Attorney General recognized that the "the principle of the Court's ruling . . . goes well beyond agency fees and non-members." The Court had held that the First Amendment prohibits public employers from forcing *any* employee to subsidize a union, whether through an agency fee or otherwise.

38. The Attorney General explained: "Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented)."

Thus, "the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's." In both cases, "the State can only deduct monies from an employee's wages if the employee provides affirmative consent."

39. That was why, as the Attorney General further explained, "the Court in *Janus* did not distinguish between members and non-members of a union when holding that 'unless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.'"

40. Following Supreme Court guidance governing the waiver of constitutional rights in other contexts, the Attorney General concluded that an employee's consent to have money deducted from his or her paycheck was constitutionally valid only if it met three requirements. The employee's consent must be (1) "free from coercion or improper inducement"; (2) "knowing, intelligent[, and] done with sufficient awareness of the relevant circumstances and likely consequences"; and (3) "reasonably contemporaneous."

41. In light of these constitutional requirements, the Attorney General identified three overarching problems with the State's payroll deduction process.

42. First, because unions design the form by which an employee authorizes the State to deduct his or her pay, the State cannot "guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech." Nor

could the State ensure that its employees knew the consequences of their decision to waive their First Amendment rights.

43. Second, because unions control the environment in which an employee is asked to authorize a payroll deduction, the State cannot ensure that an employee's authorization is "freely given." For example, some collective bargaining agreements require new employees to report to the union office within a certain period of time so that a union representative can ask the new employee to join the union and authorize the deduction of union dues and fees from his or her pay. Because this process is essentially a "black box," the State has no way of knowing whether the signed authorization form is "the product of a free and deliberate choice rather than coercion or improper inducement."

44. Third, because unions often add specific terms to an employee's payroll deduction requiring the payroll deduction to be irrevocable for up to twelve months, an employee is often "powerless to revoke the waiver of [his] right against compelled speech" if he disagrees with the union's speech or lobbying activities. This is especially problematic for new employees, who likely have no idea "what the union is going to say with his or her money or what platform or candidates a union might promote during that time." An employee, as a result, may be forced to "see [his] wages docked each pay period for the rest of the year to subsidize a message [he does] not support."

45. To remedy these First Amendment problems, the Attorney General recommended that the State

implement a new payroll deduction process to bring the State into compliance with the Supreme Court's *Janus* decision.

46. First, the Attorney General recommended that the State require employees to provide their consent directly to the State, instead of allowing unions to control the conditions in which the employee consents. The Attorney General recommended that the State implement and maintain an online system and draft new written consent forms.

47. Second, the Attorney General recommended that the State allow its employees to regularly have the opportunity to opt-in or opt-out of paying union dues. This process would ensure that each employee's consent is up to date and that no employee is forced to subsidize speech with which he disagrees.

F. Defendant threatens to sue the State.

48. Within hours of the release of the Attorney General's legal opinion, Defendant threatened to sue the State.

49. Defendant's Executive Director, Jake Metcalfe, told *Alaska Public Media* that the Attorney General's opinion was antagonistic and "legally incorrect." Metcalfe warned: "If [the Governor] follows through with an administrative order, then we're going to go to court and fight him from beginning to end on this." Metcalfe similarly told the *Anchorage Daily News* that if the State implements an annual opt-in program, "we will sue."

50. In an Alaska AFL-CIO press release, Metcalfe stated that the Attorney General's opinion was "an attack on all of us, and we'll challenge it in the courts at every step of the way to protect the Constitutional rights of Alaska's public employees in the workplace."

51. On its website, Defendant stated that the Attorney General's recommendations are "obviously illegal" and "ASEA won't let this happen. ASEA and all the other Alaska public employee unions are prepared to fight this unconstitutional power grab at every stage."

52. In an article entitled "Unions Pledge Legal Fight After State Announces Plans to Intervene in Union Membership Process," the *Midnight Sun* wrote: "Alaska's organized labor is pledging to take the Dunleavy administration to court if it implements what they say will be one of the harshest implementations of the U.S. Supreme Court ruling that found government employees can't be forced to pay union dues." According to the article, Defendant "will plan to fight the implementation of any changes through the courts."

53. Joelle Hall, operations manager for AFL-CIO, told the *Anchorage Daily News*: "I believe this would be the most aggressive and interventionalist interpretation of [*Janus*] in the country. Obviously, we will be taking action to prevent this from taking place."

G. Employees contact the State seeking an end to their paycheck deductions.

54. Following the release of the Attorney General's Opinion, many state employees contacted the

State to ask it to stop deducting money from their paychecks to give to Defendant.

55. According to one employee: "At the time when I started with the State in October, I was told the dues were not optional, and it was only yesterday that I learned that was not the case. I would like these deductions to cease immediately." The employee continued: "In the time since I started, I have also told two new employees that these dues were not optional, acting on the information I had been given by the union. If they would also like to opt out at this time, can I let them know to contact you?"

56. Another employee told the State: "After I was hired I received what I felt was a threatening letter from the Union saying that I had TEN DAYS, in caps and underlined, to contact the union office within the time specified or failure to do this may result in dues arrearage." The employee requested: "I want my payroll deductions to GGU to stop and want back the dues that were deducted without my permission from 2/10/19 to this date."

57. Another employee told the State that he had informed Defendant that he wanted to resign his membership in the Union and to no longer have dues deducted from his paycheck. The employee "requested to be provided with the timeframe for revocation of [his] signed and executed GGU Authorization for Payroll Deductions." The Union, however, never provided this information nor granted his request to resign from the Union.

58. On September 9, 2019, the Department of Administration emailed Mr. Metcalfe in order to provide him "courtesy notice that the following individuals have reached out to the State to cease their membership dues deductions effective immediately." The Department informed Mr. Metcalfe that it had processed these employees' requests and that the changes should be reflected on the next payroll.

59. The next day, Mr. Metcalfe responded to the Department. He stated that if the State stopped deducting dues from these employees it would be in violation of the CBA and Alaska law. Mr. Metcalfe stated: "If you do not immediately notify me that you have ceased and desisted the action described in your email, we will notify our attorney and initiate legal action."

60. The State continues to receive requests from employees who wish to no longer have their paychecks deducted to subsidize the Union's speech.

H. Administrative Order 312

61. On September 26, 2019, Governor Dunleavy released Administrative Order No. 312 in order to "establish a procedure that ensures that the State of Alaska honors the First Amendment free speech rights of each state employee to choose whether or not to pay union dues and fees." A copy of the Administrative Order is attached as Exhibit 1 to this First Amended Complaint.

62. The Order instructed the Department of Administration to work with the Department of Law to "implement new procedures and forms for affected

state employees to 'opt in' and 'opt out' of paying union dues and fees."

63. First, the Order directed the Department of Administration to create an "opt-in" dues authorization form that the State would require before deducting dues or fees from an employee's paycheck. This form must "clearly inform employees they are waiving their First Amendment right not to pay union dues or fees and thereby not to associate with the union's speech." The Order identified the minimum language that the form had to include to satisfy *Janus*.

64. Second, in order to "minimize the risk of undue pressure or coercion and to make the process simple and convenient for employees," the Order instructed the Department of Administration to develop a system for employees to submit the authorization forms directly to the State through electronic means.

65. The Order instructed the Department of Administration to process any "opt-in" forms or "opt-out" requests within thirty days of receipt, so that the requests would take effect at the beginning of the employee's next scheduled pay period.

66. Finally, the Order instructed the Department of Administration to give all affected unions 30 days' advance notice of the proposed changes and to give the unions the opportunity to engage in collective bargaining, to include "additions or modifications the union believes are compelled by the *Janus* decision or by Alaska law that are not otherwise in conflict with the First Amendment or the *Janus* decision."

CLAIM FOR RELIEF
(Declaratory Judgment)

67. Plaintiff realleges paragraphs 1 through 66 as if fully stated herein.

68. Alaska Statute 22.10.020(g) (the "Declaratory Judgment Act") grants to superior courts the power to issue declaratory judgments in cases of actual controversy.

69. It states in relevant part: "In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought."

70. Declaratory judgments are rendered "to clarify and settle legal relations, and to 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005).

71. The State has received numerous requests from state employees to stop deducting money from their paychecks to transfer to the Union.

72. The State has concluded that the First Amendment to the U.S. Constitution and the Supreme Court's decision in *Janus v. AFSCME, Council 31* require the State to honor these employees' requests and stop deducting funds from their paychecks to transfer to the Union.

73. The Union, however, has threatened to sue the State if the State honors these employees' requests.

74. The State also has concluded that the First Amendment to the U.S. Constitution and the Supreme Court's decision in *Janus v. AFSCME, Council 31* require the State to not deduct money from an employee's paycheck unless the State has clear and compelling evidence that the consent is (a) free from coercion or improper inducement, and (b) knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences.

75. The State also has determined that the mechanisms for collecting dues or fees from state employees in the State's collective bargaining agreement with the Union violate the First Amendment of the U.S. Constitution, as articulated in *Janus*

76. The Union, however, has threatened to sue the State if the State takes steps to ensure that the State does not deduct money from an employee's paycheck and transfer the money to the Union unless the State has clear and compelling evidence of the employee's consent.

77. Accordingly, an actual controversy has arisen and now exists between the State and the Union regarding: whether the First Amendment requires the State to stop deducting dues and/or fees from an employee's paycheck when the employee informs the State that he or she no longer wishes to subsidize the Union's speech; whether the First Amendment prohibits the State from deducting money from an

employee's paycheck to transfer to the Union if the State lacks clear and compelling evidence of the employee's consent; and whether the mechanisms for collecting dues or fees from state employees in the State's CBA with the Union violates the First Amendment.

78. To resolve this legal uncertainty, the State is entitled to a declaratory judgment that (1) the State, in accordance with the First Amendment, cannot deduct dues or fees from an employee to give to the Union unless the State has clear and compelling evidence that an employee has freely given his or her consent to subsidize the Union's speech; (2) that an employee's consent to subsidize a union's speech is not constitutionally valid unless the State has clear and compelling evidence that the consent is (a) free from coercion or improper inducement, and (b) knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences; (3) that the mechanisms for collecting dues or fees from state employees in the State's CBA with Defendant violate the First Amendment; and (4) that the State must timely stop deducting dues or fees from an employee's paycheck when the employee informs the State that he or she no longer wishes to subsidize the Union's speech.

WHEREFORE, Plaintiff respectfully requests that the Court:

(1) Declare that the State cannot deduct dues or fees from an employee to give to the Union unless the State has clear and compelling evidence that an

employee has freely given his or her consent to subsidize the Union's speech;

(2) Declare that an employee's consent to subsidize a union's speech is not constitutionally valid unless the State has clear and compelling evidence that the consent is (a) free from coercion or improper inducement, and (b) knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences;

(3) Declare that the mechanisms for collecting dues or fees from state employees in the State's collective bargaining agreement with Defendant violate the First Amendment of the U.S. Constitution, as articulated in *Janus*;

(4) Declare that the First Amendment of the U.S. Constitution, as articulated in *Janus*, requires that an employee's consent to deduction of dues or fees (a) be transmitted by the employee to the State to minimize the risk of coercion or improper inducement, and (b) contain an express acknowledgment that the employee is waiving his or her First Amendment right against compelled speech

(5) Declare that the State must timely stop deducting dues or fees from an employee's paycheck when the employee informs the State that he or she no longer wishes to subsidize the Union's speech;

(6) Award the State its costs and attorney's fees to be paid by the defendant pursuant to Alaska Civil Rules 79 and 82; and

(7) Provide such other and further relief as this Court deems just and equitable under the circumstances.

DATED: September 26, 2019

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: /s/ Tregarrick R. Taylor
Tregarrick R. Taylor
Deputy Attorney General
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APPENDIX G

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971CI

[Filed October 3, 2019]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 53, AFL-CIO, Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 53, AFL-CIO, Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official	)

capacity as Attorney General of Alaska;)
KELLY TSHIBAKA, in her official capacity)
as Commissioner of the Alaska Department)
of Administration; and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

The State of Alaska filed this lawsuit on September 16, 2019 against the Alaska State Employees Association (ASEA). The State alleges a single claim: a request by the State for declaratory judgment – i.e., that this court decide – whether Alaska Attorney General Kevin Clarkson is correctly interpreting a 2018 U.S. Supreme Court case, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[1] Briefly stated, in *Janus* a union of public-sector employees collected "agency fees" from public employees who were not union members, without first having them sign a consent form. "Agency fees" are fees charged to non-union employees to compensate the union for benefits these nonmembers receive from the union's collective bargaining efforts on behalf of union and non-union members (such as wage increases, paid personal days, or health insurance packages for all the employees). Union members pay full fees, whereas non-members may opt out and pay less than full dues if that employee does not wish to

[1] 138 S. Ct. 2448 (2018).

support other, non-collective bargaining union activities (such as political lobbying). Agency fees, prior to *Janus,* were used as a way for public employees' unions to maintain adequate funding despite the "free rider" problem (the idea that when a valuable service can be obtained either for free or at a cost, no rational actor will pay for it). This procedure had been approved by the Supreme Court 41 years prior in *Abood v. Detroit Board of Education.*[2] The 2018 *Janus* decision overruled the 1977 *Abood* decision. The Supreme Court expressly held in *Janus* that "this procedure violates the First Amendment and cannot continue." The Court further expressly stated that no fees may be deducted from a nonmember's wages, "nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay," and that "by agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." Rather, the Court held – again expressly stated—that "to be effective, the waiver must be freely and voluntarily given and shown by 'clear and compelling' evidence," and that "unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."[3] Just before this holding, at footnote 27, the Court expressly stated that "States can keep their labor-relations systems exactly as they are – only they cannot force nonmembers to subsidize public-sector unions."

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[2] 97 S.Ct. 1782 (1977).

[3] *Janus*, 138 S.Ct. at 2486.

That is the holding of *Janus*. It is a short and succinct holding, and is stated in the last paragraphs of the decision. This court has used the word "expressly" several times in the above paragraph to point out that that is what the Supreme Court actually said. The Court issued its *Janus* decision fifteen months ago, on June 27, 2018.

In this case now filed by the State in this Alaska superior court, all parties agree that almost immediately after *Janus* was issued in June 2018, ASEA changed its dues collection process to comply with *Janus*, and that the change included rewriting the form employees sign. The form now includes a signed statement from the employee that he/she agrees to join the union and to have those dues deducted from his/her paychecks. Membership is not a condition of employment, and employees must sign the form if they wish to join the union. If an employee does not join the union, he or she will not be charged any dues or fees. Members have ten days every year to opt out of the union and payment of dues. The employees affirmatively print, sign their names and date the forms. The form is a card that states "I hereby voluntarily authorize my Employer to deduct [union dues] from my pay ... My decision ... is voluntary and not a condition of my employment." This was ASEA's "Exhibit A" in this case, and this court is attaching a copy of that form to this decision.

Governor Walker's Attorney General, Jahna Lindemuth, issued a Memorandum opinion on September 7, 2018 stating that by modifying the dues authorization form and no longer charging agency fees,

ASEA was in "full compliance" with *Janus*. Governor Dunleavy was seated in January 2019. Eight months later, his Department of Administration negotiated a new collective bargaining agreement with ASEA. The term of that agreement is three years. It was the product of "negotiating teams" by both the State and ASEA. The new form was then and still is being used. The State and ASEA signed the agreement on August 8, 2019. Specifically, Commissioner of Administration Kelly Tshibaka signed it, as did ASEA Executive Director Jake Metcalfe. So did the Director of the State's Division of Personnel and Labor Relations, the President of ASEA/AFSCME Local 52, all six members of the State's bargaining team, and all seven members of ASEA's bargaining team. That was fourteen months after *Janus* was decided, and eleven months after AG Lindemuth's Opinion.

Then on August 27, 2019, current AG Kevin Clarkson issued his own Opinion Letter "Re: First Amendment rights and union due deductions and fees." He does not dispute the U.S. Supreme Court's *express* language quoted above. Rather, he writes that he has decided that *Janus* should be interpreted more broadly, i.e., applied beyond what the Supreme Court *expressly* held. He urges that under *Janus*, the State—not ASEA—"must" now manage the deduction of union dues from State employee's paychecks and "periodic[ally] inquir[e] into whether a public employee wishes to continue to waive—or reclaim—his or her First Amendment rights."[4] Under his interpretation,

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[4] Kevin G. Clarkson, Opinion Letter Re: First Amendment rights and union due deductions and fees, August 27, 2019, at 10.

the State "must" now take charge of this process of notifying union and non-union members of their rights to opt in or out, that this is a First Amendment right, that the State must draft the form, that the State's wording must be used, and that the State alone may determine how frequently an employee should be required to reaffirm his/her union membership. ASEA's forms do it once a year. AG Clarkson says that is not "reasonable." Arguably he could deem "reasonable" to mean that an employee must reaffirm his/her commitment to the union "before being paid," i.e., every two weeks. On September 16, the State sued ASEA, and asks the superior court to decide if AG Clarkson's interpretation of *Janus* is correct. The State also began contacting union members about these issues.

ASEA filed its answer nine days later, on September 25. ASEA also filed a third-party complaint against Governor Dunleavy, AG Clarkson, and Commissioner Tshibaka. ASEA seeks declaratory judgment in its favor and, while awaiting a final judgment, a temporary restraining order and preliminary injunction to "maintain the status quo." ASEA argues that AG Clarkson's August 27, 2019 opinion goes far beyond *Janus*, and that it violates both Alaska's Public Employee Relations Act (PERA, AS 23.40.070-.230) and the August 8, 2019 collective bargaining agreement signed by the State and ASEA. ASEA argues that AG Clarkson's opinion, and now the Governor's and the Commissioner's actions since August 27, are not supported by *any* court that has ruled on this issue, and that all Attorneys General from around the country, all arbitrators, and all labor boards that have considered this, have found that *Janus* is a

narrow opinion. In other words, that AG Clarkson's August 27 opinion finds no support in the law. Specifically, since *Janus* was decided, fifteen opinions from States' Attorneys General, nine federal court decisions, two administrative agency decisions, and two arbitration awards, have found that the holding of *Janus* is narrow and easily stated: "neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." ASEA attaches copies of many of these decisions as Exhibits A-V to the Declaration of Molly C. Brown submitted with its September 26, 2019 TRO application. ASEA further argues that not only have these authorities interpreted *Janus* as ASEA now seeks, but that *no* legal authority has interpreted *Janus* as AG Clarkson now seeks. And the State, in its very thorough October 2, 2019 brief filed in opposition to ASEA's TRO application, never mentions this legal framework, let alone disputes ASEA's exhibits or this part of ASEA's argument. Nor does the State's October 2 brief dispute that the express words in *Janus* do not say anything more than what this court quoted in the first paragraph of this decision. As discussed below, the facts of *Janus* were not the facts now presented by AG Clarkson (that the State, not the union, "must" control this process). The Supreme Court's analysis did not even reach this argument. And, the express holding did not order that States must (or even may) take over this process. ASEA further argues that the State is using the First Amendment argument discussed in *Janus* to now try to manage or

discourage union membership in a manner contrary to Alaska's Public Employee Relations Act.[5]

Both parties acknowledged at the September 27 scheduling hearing that the issue now before this court is purely legal, that no evidentiary hearing is needed, and that oral argument is waived unless this court has any questions not addressed in the briefs. The briefs by both parties are excellent and address all questions. This court agrees with the weight of authority on this matter: *Janus* does not support the State's position. As to whether a TRO should issue, the State has not been shy about its intentions: via its September 26 Press Release (a copy of which ASEA filed with this court), as well as orally at the September 27 hearing, that absent court order the State fully intends to continue its actions. ASEA said at the September 27 hearing that the State could have whatever time the State wanted to further brief this issue if the State would simply agree to stop trying to mandate this dues process. The State expressly declined that offer. The State then filed a 50 page, very thorough brief on October 2, which again makes clear that the State intends to forge ahead with its actions. This court finds that the State's actions are causing and will continue to cause irreparable harm to ASEA and, thus, this court hereby

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[5] AS 23.40.110, entitled "Unfair labor practices," states at sections (a)(1)-(3) that a public employer (here, the State), "may not (1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080; (2) dominate or interfere with the formation, existence, or administration of an organization; (3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization ..."

GRANTS ASEA's application for a temporary restraining order. The scope of the TRO is stated at the end of this decision.

II. STATUTORY FRAMEWORK

Alaska's Public Employment Relations Act ("PERA")[6] establishes a system of union representation for state employees. Under PERA, a majority of employees in a bargaining unit may, if they choose, select a union representative to negotiate and oversee a collective bargaining agreement for their unit.[7] The largest bargaining unit of Alaska State employees is the General Government Bargaining Unit, which is composed of approximately 8,000 State employees.[8] The General Government Bargaining Unit is represented by ASEA. PERA requires that public employers such as the State must deduct union dues from a public employee's pay when the employee has authorized those deductions in writing, and further states that the public employer shall deliver the dues to the union.[9]

To become a member of ASEA, a member of the General Government Bargaining Unit must voluntarily sign a written membership agreement authorizing the union to collect dues through payroll deductions in

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[6] AS 23.40.070-.230

[7] AS 23.40.080-.100.

[8] ASEA's Counterclaim and Third-Party Complaint, at 7.

[9] AS 23.40.220.

exchange for membership rights and benefits.[10] ASEA's current membership and dues authorization card explains that the dues authorization is valid "for a period of one year from the date of execution or until the termination of the collective bargaining agreement. . . and for year to year thereafter unless [the state employee] give[s] the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period."[11]

Under PERA, if public employees choose to be represented by a union, the public employer must "negotiate in good faith" with the union.[12] As part of this duty to bargain in good faith, PERA prohibits public employers from making unilateral changes to wages, hours, and other terms and conditions of employment.[13] After a tentative agreement is reached, the legislature reviews the terms of the agreement and implicitly ratifies the agreement by appropriating funds to cover the agreement's monetary terms. The resulting collective bargaining agreement (CBA) is binding on the public employer.[14] PERA explicitly prohibits the State and other public employers from

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[10] ASEA's Counterclaim and Third-Party Complaint, at 7.

[11] Declaration of Jake Metcalfe, Exhibit A.

[12] AS 23.40.250(1); *see also* AS 23.40.070, .110(a)(5).

[13] *Alaska Cmty. Colleges' Fed'n of Teachers, Local 2404 v. University of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983).

[14] AS 23.40.210.

"interfer[ing] with, restrain[ing], or coerc[ing] an employee in the exercise of the employee's rights guaranteed in [PERA]", and from "interfer[ing] with the formation, existence, or administration of a[] [labor] organization."[15]

ASEA and the State are parties to a CBA that governs the terms and conditions of employment for bargaining unit employees. The current CBA is effective from July 1, 2019 through June 30, 2022. The CBA was the product of extensive negotiations, and was signed by seventeen individuals representing both ASEA and the State of Alaska—including the Commissioner of the Department of Administration (and now Defendant-in-Counterclaim), Kelly Tshibaka. ASEA attached a copy of that agreement as Exhibit B to the Declaration of Jake Metcalfe filed with its September 26 brief. The agreement states in pertinent part that "bargaining unit members may authorize payroll deductions in writing on the form provided by the Union."[16] The CBA incorporates language from PERA, and further states that "[u]pon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member. .. the Employer shall" deduct union dues each pay period and forward those dues to ASEA.[17] Mirroring AS 23.40.110, the CBA also prohibits

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[15] AS 23.40.110(a)(1)-(3).

[16] ASEA CBA Art. 3.04.A.

[17] *Id.*

employer interference in the relationship between ASEA and its members.[18]

III. THE *JANUS* DECISION

The relationship between a public employer and public employees' unions is governed in large part by federal case law. In the recent *Janus* case, the Governor of Illinois brought an action seeking a declaration that an Illinois statute authorizing public-sector unions to assess "agency fees" from nonmember public employees, on whose behalf the union negotiated with the State of Illinois for pay and other benefits, violated the First Amendment. Mr. Janus was a public employee who joined the suit because he did not want to be a member of the union nor want the union negotiating on his behalf. The federal court dismissed the Governor due to the Governor having no standing to bring the suit. Mr. Janus was then the main plaintiff. On eventual appeal to the U.S. Supreme Court, that court held that charging agency fees violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of "substantial public concern."[19]

The *Janus* decision overturned the 1977 *Abood* case mentioned above, and a large part of the Court's decision discussed the principal of *stare decisis*. The *Janus* majority decision is 38 pages long. The facts were as set forth above. Put another way, the facts at issue were *not* whether the State of Illinois could

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[18] *Id.* at Art. 3.01.

[19] *Janus*, 138 S.Ct. at 2476.

control the union dues collection process. That was simply not a fact in the case. The Court's holding is set forth at the very end of that decision, and is quite succinct.[20]

Now at issue in this Alaska case is whether this court should interpret the Supreme Court's 2018 decision by its succinct holding (as argued by ASEA), or broadly (the State's position). ASEA supported its Motion for Temporary Restraining Order and Preliminary Injunction with two declarations: one from ASEA's counsel, Molly C. Brown, and the second from ASEA's Executive Director, Jake Metcalfe. Ms. Brown's Declaration attaches as Exhibits A-V 22 documents interpreting *Janus*—17 opinions from States' Attorneys General, one order from a state trial court, two administrative decisions, and two arbitration awards. ASEA also cites in its motion to nine federal court decisions. Each and every one of these authorities has found that the holding of *Janus* is narrow and easily stated: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."[21] That language comes directly from the *Janus* holding. This court notes that one of the Attorneys General's opinions was from the Illinois AG, i.e., the state from which *Janus* arose. Even that Attorney General acknowledges that *Janus* is a narrow

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[20] This court quoted the *Janus* holding above, at pages 2-3 of this decision.

[21] *Janus*, 138 S.Ct. at 2486.

decision that applies only to collecting agency fees from non-union members.

In each of the federal cases, at issue was whether the state or county employer was properly interpreting *Janus*, and whether *Janus* was applicable to the relationship between unions and their members. Every one of those decisions expressly rejected the idea that *Janus* goes farther than addressing agency fee arrangements.[22] Three state and local administrations have tried to extend the *Janus* opinion to require

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[22] *See*, *i.e., Anderson v. SEIU Local 503*, _ F.Supp.3d _, 2019 WL 4246688, at *3 (D.Or. Sept. 4, 2019); *Seager v. United Teachers Los Angeles*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019) (following the "growing consensus of authority on the issue" in rejecting "First Amendment claim[s] for return of dues paid pursuant to [plaintiff's] voluntary union membership agreement"); *Smith v. Superior Court, Cty. Of Contra Costa*, 2019 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018), *subsequent order*, *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019) ("*Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and non-members."); *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Janus* says nothing about people [who] join a Union, agree to pay dues, and then later change their mind about paying union dues."), *subsequent order*, 359 F.Supp.3d 1000, 1016 (W.D. Wash. 2019); *Babb v. Cal. Teachers Ass'n*, 378 F.Supp.3d 857, 877 (C.D. Cal. 2019) ("Plaintiffs voluntarily chose to pay membership dues in exchange for certain benefits, and '[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their membership does not mean their decision was therefore coerced.'); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019) ("[N]othing in *Janus*'s holding requires unions to cease deductions for individuals who have affirmatively chosen to become union members and accept the terms of a contract. . ."); *see also supra*, note 26.

existing union members to regularly "opt-in" to pay union dues or to stop making previously authorized union membership dues deductions. Courts and administrative agencies have rejected each of those arguments, and have entered temporary restraining orders and injunctions.[23] An order by a Montana court is most illustrative of the facts currently before this Alaska court. That case is *Montana Fed'n of Public Emps. V. Vigness,*[24] and the union was asking the court to issue a preliminary injunction. The County advanced the position that *Janus* "required" the county employees' union to mandate that its new members sign a waiver of rights before the County would withhold union dues from paychecks, and that the decision to require the affirmative waiver of rights was not subject to collective bargaining.[25] The court found

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[23] *See Montana Fed'n of Public Emps. V. Vigness*, No. DV 19-0217, Order Granting PI at 9-11 (Mont. D. Ct. Apr. 11, 2019) ("*Janus'* application is limited to nonmembers' payment of fees"); *In re Woodland Township Bd. Of Educ., and Chatsworth Educ. Ass'n*, No. CO-2019-047, 45 NJPER ¶ 24, 2018 WL 4501733 (N.J. Pub. Emp't Relati0ons Comm'n Aug. 31, 2018) *(Janus* "does not mandate members... to authorize 'dues deductions' after having done so previously"); *AFSCME, Local 3277 v. Rio Rancho*, PELRB No, 113-18, TRO and Pl ¶ 7 (N.M. Pub. Emps. Lab. Relations Bd. Aug. 21, 2018) ("The *Janus* Decision is narrowly written with its effects limited to payments by non-members of an 'agency fee' or 'fair share' fee; it has no application to the payment of dues by members of the union or the use of payroll deduction of those dues.").

[24] *Montana Fed'n of Public Emps. V. Vigness*, No. DV 19-0217, Order Granting PI at 9-11 (Mont. D. Ct. Apr. 11, 2019).

[25] *Id.* at 6.

that the County's arguments were contrary to the line of authority emerging *post-Janus,* and that "the County's interpretation of *Janus* to require potential new employees wishing to join the union to sign a waiver of rights appears to be an unreasonable expansion of the United States Supreme Court's holding."[26] The court issued a preliminary injunction in favor of the union and against the County.

IV. THE STATE'S POSITION

AG Clarkson's August 27, 2019 Opinion seeks to go even further than any of the above cases. AG Clarkson seeks to put the State in charge of—or at least be a main player in—the dues collection process. But more than that, AG Clarkson's interpretation is that the State gets to draft the notices, select the words in those notices, and establish the time periods for "re-upping." Indeed, AG Clarkson states that per *Janus*, the State "must" do this, "to protect state employees' rights." AG Clarkson takes the position that the State must "warn" union employees that by paying union dues they are "waiving" their First Amendment rights, and that they need not do so. In ASEA's September 25, 2019 36-page Answer and Third-Party Complaint, as well as in ASEA's 47 page brief of that same date, ASEA hit this issue squarely on the head, and included the Exhibits A-V mentioned above (copies of AG opinions from around the country, and copies of some of the court and administrative agency decisions), as well as those attached to the Declaration of Jake Metcalfe (the form given to employees, excerpts from the ASEA

[26] *Id.* at 9.

Collective Bargaining Agreement, the Attorney General's Opinion, and other documents). The State filed a 50 page brief on October 1. Perhaps not surprisingly, the State attached no contrary opinions to its brief. ASEA pointed this out in its October 2 reply. Nor does the State ever discuss *as a matter of law* what weight, if any, this court must or should give to the "first" AG opinion (AG Lindemuth's) versus the "more recent" AG opinion (AG Clarkson's)—i.e., contradictory Attorneys General opinions from the same state on exactly the same issue.

V. DISCUSSION

The State relies somewhat heavily on two other Supreme Court cases: *Knox v. Service Employees International Union*,[27] and *Miranda v. Arizona.*[28] From these, the State asserts that the State, post-*Janus,* must now manage the deduction of union dues from State employee's paychecks and "periodic[ally] inquir[e] into whether a public employee wishes to continue to waive—or reclaim—is or her First Amendment rights."[29] This court again starts with the express wording from *Janus.* The portion of *Janus* that the State relies on is as quoted above on pages 2-3 of this decision, and again here:

> For these reasons, States and public-sector unions may no longer extract agency fees from

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[27] 567 U.S. 298 (2012).

[28] 384 U.S. 436 (1966).

[29] Clarkson Opinion Letter, at 10.

> nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. No form of employee consent is required.
>
> This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.[30]

In the above language, the "this provision violates the First Amendment and cannot continue" the Supreme Court refers to is made crystal clear in the paragraph—and indeed in the sentence—right above this holding. Illinois was extracting fees with no form and no consent. The Court stated that "this procedure" cannot continue, and that "affirmative consents" were required. That the scope was narrow and did not encompass other parts of the state-labor relations

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[30] *Janus*, 138 S.Ct. at 2486, citations omitted.

systems is driven home on the prior page, at footnote 27: "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions."[31]

After *Janus*, the State and ASEA worked together to stop charging agency fees, and they drafted the authorization form requiring employees to consent to join the union and have dues deducted from their paychecks. Then again in the Dunleavy administration, the State and ASEA negotiated the current CBA, which at section 3.04 also requires employees' written consent to such dues. Now, before having union fees withdrawn, members do affirmatively sign authorization forms to have union dues withheld from their paychecks. Union members may withdraw their authorization during a ten-day window each year. A copy of this authorization form was provided to this court as Exhibit A to the Declaration of Jake Metcalfe, and is attached to this decision. This court reviewed the form. It is clearly written and easily understood. Contrary to the State's argument, this court finds that it is not confusing, ambiguous, or coercive.

As mentioned, much of the State's brief now seeks to extend two other Supreme Court cases, *Knox* and *Miranda*.

The Attorney General relies on *Knox* for his assertion that an employee must be able to opt in or out of paying union dues at will. *Knox* was decided six years before *Janus*. A public-sector union in California

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[31] *Id.* at 2485.

sent employees an annual notice that set annual dues and also a monthly dues cap. A nonmember had 30 days to opt-out of full payment of dues, but after opting-out would still have to pay an agency fee of about 56% of the full dues. One year, *after* the opt-out period ended, California public employees were sent a letter announcing a temporary 25% increase in dues and a temporary elimination of the monthly dues cap. The purpose of the special dues assessment was for the union to mount a political campaign. The Supreme Court held that opt-out arrangements for union dues are generally acceptable. However, the Court clarified that requiring union members to opt-out of paying unexpected fees which were not used for "ordinary union expenses" was constitutionally untenable.[32]

Knox is easily distinguishable from the present case. *Knox* concerned only "the First Amendment requirements applicable to a special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set."[33] It did not find yearly opt-out plans generally unacceptable. Like *Janus*, it goes no further.[34]

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[32] *Knox*, 567 U.S. at 314.

[33] *Id.* at 303.

[34] The State argues at pages 23-24 of their October 1 brief that "State employees... have a constitutional right to resign their membership in the Union at any time." In support of this assertion, the State cites to *Janus*, *Knox*, and two additional cases: *McCahon v. Pennsylvania Turnpike Com'n*, 491 F.Supp.2d 522 (M.D. Penn. 2007), and the unreported *Debont v. City of Poway*,

Similarly, the State's reliance on *Miranda* is misplaced. *Miranda* is, of course, the well-recognized 1966 case that established a suspect's right to an attorney and to not speak to police. It is a criminal case. It is not a union dues case. In *Miranda*, the Supreme Court held that "a waiver of Fifth Amendment rights" must be "knowing, voluntary, and reasonably contemporaneous." The State in this instant case points to several post-*Miranda* cases that decided an additional aspect of this privilege: that waivers may be withdrawn or grow stale. The State cites *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1964); *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007); and *Brady v. United States* 397 U.S. 742. But other than *Butts*, none of these cases contain any

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1998 WL 415844 (S.D. Cal. 1998). *Knox* and *Janus* do not so hold, and neither do *McCahon* and *Debont*. *McCahon* and *Debont* both concern agreements between a state and a public employee's union to restrain union members' ability to withdraw from the union for periods of three and eight years, respectively. In these cases, this restraint on withdrawal was not articulated in any authorization form signed by the union members, so they were not able to take it into account when joining the union. In both cases, the court found at the preliminary injunction stage that, under those facts, the plaintiffs' First Amendment right not to associate was likely being violated. The facts presented in the matter currently before this court are not analogous. ASEA members are informed when signing the dues authorization form that their membership will continue from year to year unless they choose to opt-out during an annual ten-day window. Furthermore, in *McCahon,* continued membership in the union was a condition of employment, which it is not in this case.

reference to the First Amendment right to free speech. And in *Butts*, the reference is at best tangential. Rather, most of these cases present questions of criminal law or the waiver of due process rights, and in each case the Court considered whether the coercive power of the state had been exercised in such a manner that a waiver of Fifth, Sixth, or Fourteenth Amendment rights could not have been knowing and voluntary. The Court does not, in any of those cases, extend its holding to encompass all constitutional rights. As the *Miranda* court said, "[t]he requirement of warnings and waiver of rights is fundamental *with respect to the Fifth Amendment privilege*."[35] These cases are not applicable or instructive in the context of union membership.

Not only is the State's new policy unsupported by applicable case law, but this court finds merit to ASEA's argument that the State's insistence that the State control the authorization forms for union dues seems likely to discourage union membership. The State's conduct—including the issuance of its September 26, 2019 administrative order—seems directly at odds with both PERA and the CBA the State signed, in that the State is "interfer[ing] with the formation, existence, or administration of a[] [labor] organization."[36] The State provides no colorable explanation for why the existing dues authorization form's annual opt-out period is not sufficient. Employer-sponsored health insurance plans, for

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[35] *Id. at* 476 (italics added).

[36] AS 23.40.110(a)(1)-(3).

example, typically have a once-a-year opt-in/opt-out period, and absent special circumstances such as marriage or divorce, that once-annual decision is binding. Political elections are once every four years. Most contracts are not revocable at will. The State does not explain why union membership should be any different.

The State proposes that public employers may only deduct union dues for union members who sign new authorization forms created by the State after the employees receive what is essentially a "warning" that they are "waiving" their First Amendment rights and that by paying dues they may be supporting causes with which they disagree. This language is not neutral, it is not the product of any discussion between the State and ASEA, and it bypasses the legislative process set up under Title 23 of the Alaska Statutes. Indeed, it may not just "bypass" the legislative process, but directly violate PERA. There is no guarantee under the State's proposed system that the State's method and/or language would not discourage employees from joining unions. Under the Attorney General's proposal, the State could arguably require union members to reaffirm their membership every two weeks before receiving each paycheck, or the State could describe union membership in a hostile way on authorization forms it drafts. The State says that it "must" take control to protect state employees' First Amendment rights. This court finds no support for the State's argument in *Janus* or in any other U.S. Supreme Court case, in no case from any other jurisdiction, not in PERA, and not in the collective bargaining agreement.

VI. NECESSITY OF A TEMPORARY RESTRAINING ORDER

ASEA has moved for a temporary restraining order and a preliminary injunction. At this time, this court is only considering the issue of a temporary restraining order.[37]

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[37] Briefing for the preliminary injunction is due October 7, 2019. Second, both parties have discussed a "reverse *Boys Markets* injunction" in the briefs received thus far by the court. For the purposes of this TRO, the court need not and does not decide the issue of a reverse *Boys Markets* injunction. *Boys Markets* and reverse *Boys Markets* injunctions arose under unique conditions. The Norris-La Guardia Act of 1932 (29 U.S.C. §104), prohibited federal courts from granting injunctions in labor disputes. In 1947, however, the Labor-Management Relations Act (LMRA, 29 U.S.C. §185(a)), was enacted, giving federal courts jurisdiction over lawsuits alleging violations of collective bargaining agreements. In the 1960s, the U.S. Supreme Court decided a series of cases known as the Steelworkers trilogy. At issue was strengthening the requirement for arbitration under collective bargaining agreements. *Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), arose from the tension between the NLA, the LMRA, and the trend toward arbitration as the preferred mechanism for resolving labor disputes. The Court held that a federal court in LMRA §185(a) cases may issue limited injunctive relief to protect the effectiveness of arbitration agreements. The Court reasoned that, as the purpose of arbitration is to provide an expeditious mechanism for the settlement of labor disputes without resort to strikes, lockout, or self-help, that purpose is undercut where there is not an injunctive remedy available for the tactics that arbitration is designed to avoid. *Id.* at 248. Some courts have recognized "reverse *Boys Markets*" injunctions, which permit unions to obtain injunctions against employers to preserve the status quo pending arbitration of a labor dispute, if: (1) the underlying dispute is subject to mandatory arbitration; and (2) an injunction is necessary to prevent the arbitration process from becoming a "hollow formality" or "meaningless ritual." *See Verizon*

A party may obtain a TRO or preliminary injunction by meeting either the balance of hardships test or the probable success on the merits standard.[38] The balance of hardships standard is appropriate, among other circumstances, where "the injury which will result from the temporary restraining order . . . is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[39] This standard "requires balancing the harm the plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant.[40] A preliminary injunction is warranted under that standard when three factors are present: "(1) the plaintiff must be faced with irreparable harm; (2) the

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New England, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322, 651 F.3d 176, 184 (1st Cir. 2011); *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.*, 230 F.3d 569 (2d Cir.2000); *Niagara Hooker Emps. Union v. Occidental Chem. Corp.*, 935 F.2d 1370, 1377 (2d Cir.1991); *Lever Bros. Co. v. Int'l Chem. Workers Union*, 554 F.2d 115, 123 (4th Cir.1976). At the temporary restraining order stage, this court does not consider the propriety of a reverse *Boys Markets* injunction because the TRO will not interfere with any possible arbitration process. Nor is this court aware of either party having even filed an arbitration petition over this issue.

[38] *Alsworth v. Seybert*, 323 P.3d 47, 54-55 (Alaska 2014).

[39] *Id.*, *citing State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991) (citations omitted) (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified on other grounds*, 483 P.2d 198 (Alaska 1971); *Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554 (Alaska 1975)).

[40] *A.J. Indus.*, 470 P.2d at 540.

opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit."[41]

This court has discussed at some length the merits of this case. The State advances a position contrary to the express wording of *Janus*, contrary to the Memorandum opinion issued by his predecessor in office, contrary to all known opinions from other States' Attorneys General, and contrary to nine federal court decisions, two administrative agency decisions, and two arbitration awards. Thus, ASEA has demonstrated probable success on the merits.

ASEA's application for a TRO also satisfies the balance of hardships standard. The injury that would result to the State from a temporary restraining order is at best relatively slight compared to the injury ASEA will suffer if no temporary restraining order is granted. The State stated at the September 27, 2019 scheduling conference that the State would not be harmed were it to cease implementing its administrative order; rather, this affects the employees who request the State to stop collecting dues from their paychecks. As the *Janus* Supreme Court noted, the Illinois governor started a similar lawsuit against the union, and the trial court

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[41] *Alsworth*, 323 P.3d at n. 45, *citing State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1273 (Alaska 1992), and *Messerli v. Dep't of Natural Res.*, 768 P.2d 1112, 1122 (Alaska 1989)) (internal quotation marks omitted).

found that the governor lacked standing, and he was dismissed from the lawsuit.

This situation is also of the State's creation, ASEA has urged the State to not try to inject itself into this dues collection process, and the State has refused and said it will continue to refuse ASEA's request.

Conversely, ASEA stands to be genuinely injured in the absence of a TRO. The State stated that so far, eleven state employees have withdrawn their payment of monthly union dues, and no doubt the State will seek to have more state employees take this step. Any actions taken by the State to encourage individuals to stop paying union dues or to otherwise discourage union membership will cause ASEA irreparable injury. As ASEA notes at length in its counterclaim and TRO brief, this is a real injury that can't be undone and likely can't be fully compensated with money damages if the case goes to trial.

ASEA has met its burden of proving that it is entitled to a TRO, and this court hereby **GRANTS** that TRO. This court's decision today is limited solely to the temporary restraining order application. This decision does not tell any public employee who must, may, can, or can't join or leave ASEA. What this order does is preserve the status quo as this litigation proceeds.

VII. CONCLUSION

For the foregoing reasons, Defendant/ Counterclaimant and Third-Party Plaintiff ASEA's September 26, 2019 application for a temporary restraining order is **GRANTED.** The State of Alaska and third-party defendants Governor Michael

Dunleavy, Attorney General Kevin Clarkson, Department of Administration Commissioner Kelly Tshibaka, and the State of Alaska, Department of Administration, and their officers, employees, servants, agents, and all others acting on their behalf or in active concert or participation with them, are enjoined from taking any actions to implement the Attorney General's August 27, 2019 opinion letter or the State's September 26, 2019 Administrative Order No. 312, and from making any changes to the State employee dues deduction practices that were in place before the August 27, 2019 AG Opinion was issued. Given the nature of this TRO, ASEA is not required to post a bond or other security. This TRO is effective immediately.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 3rd day of October 2019.

/s/ Gregory Miller
Gregory Miller
Superior Court Judge

I certify that on Oct 3, 2019
a copy of the above was emailed to:
M. Brown
T. Taylor
W. Consovoy
M. Connolly
S. Kronland
S. Wilson
M. Murray

/s/ A. Stanley
Judicial Administrative Assistant

[*See next 2 pages for fold-out exhibit:*
Exhibit A to TRO]

ASEA/AFSCME Local 52, AFL-CIO

UNION MEMBERSHIP AND DUES DEDUCTION AUTHORIZATION

STATE OF ALASKA GENERAL GOVERNMENT UNIT (GGU) AUTHORIZATION FOR PAYROLL DEDUCTION

COMPLETE & RETURN TO ASEA/AFSCME LOCAL 52, 2601 DENALI ST, ANCHORAGE AK 99503, FAX (907) 277-5206 OR EMAIL ASEAHQ@AFSCMELOCAL52.ORG

Yes, I choose to be a Union member of ASEA/AFSCME Local 52.

I understand my membership supports the organization advocating for my interests as a bargaining unit member and as an individual. ASEA membership and paying union dues is not a condition of employment. By submitting this form, I choose to be a union member and to pay my dues by way of payroll deduction.

LAST NAME	FIRST NAME	MIDDLE	EMPLOYEE ID or LAST 4 SSN
MAILING ADDRESS	CITY		STATE & ZIP CODE
PHYSICAL ADDRESS	CITY		STATE & ZIP CODE
HOME/MESSAGE PHONE	MOBILE PHONE		WORK PHONE
HOME EMAIL ADDRESS (Home emails are held confidential at ASEA Headquarters for Union Business only)			WORK LOCATION (CITY / BLDG)
JOB TITLE	DEPARTMENT/DIVISION		DATE OF HIRE (MOST RECENT)

I hereby apply or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws. By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, (hereafter referred to as ASEA or the "Union"), to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, is voluntary and not a condition of my employment.

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. This card supersedes any prior dues authorization card I signed.

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses.

ASEA/AFSCME LOCAL 52 BUSINESS LEAVE BANK

I authorize the deduction of 7-1/2 hours of personal leave for deposit in the ASEA/AFSCME Local 52 Union Business Leave Bank*.

SIGNATURE OF GGU BARGAINING UNIT MEMBER DATE

*The ASEA Business leave bank is an asset of the membership and the Union. The leave bank is used to compensate members for time lost from their regular work schedule to conduct negotiations, ASEA trainings & conventions, arbitrations, and approved activities contributing to the mission and goals of ASEA/AFSCME Local 52.

GGU AUTHORIZATION FOR PAYROLL DEDUCTIONS

Entered _____

COMPLETE AND RETURN TO: ASEA/AFSCME Local 52, 2601 Denali Street, Anchorage, AK 99503
or Fax: (907) 277-5206 or Email: aseahq@afscmelocal52.org **PLEASE PRINT CLEARLY**

Most Recent Date of Hire	**Employee ID or** Last 4 of Social Security Number		Voter ID #
Department	Last Name	First	Middle
Division	Mailing Address		
Work Location	City	State	Zip + 4
Job Title	Physical Address		
Home Phone	City	State	Zip + 4
Work Phone	Home E-Mail Address (Home e-mail will be held confidential at ASEA Headquarters and will not be distributed to anyone.)		

I hereby apply for or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws. By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, (hereafter referred to as ASEA or the "Union"), to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours, other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues as certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, is voluntary and not a condition of my employment.

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. Employees must inform the Union of any promotion or transfer to a position outside the bargaining unit. This card supersedes any prior dues authorization card I signed.

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary businesse expenses.

ASEA BUSINESS LEAVE BANK

I authorize the deduction of 7-1/2 hours of personal leave for deposit in the ASEA/AFSCME Local 52 Union Business Leave Bank*

X _____

SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

Authorization for Payroll Deductions of my

Public Employees Organized to Promote Legislative Equality (PEOPLE) VOLUNTARY CONTRIBUTION

You may make a contribution of any amount or no contributions at all to PEOPLE. The Union will not favor or disadvantage anyone by the level or decision to contribute. In accordance with federal law, the PEOPLE Committee will accept contributions from only members of AFSCME and their families. Contributions to AFSCME PEOPLE are not deductible as a charitable contribution for federal income tax purposes.

I understand that this contribution may be used for political purposes. My contribution is voluntary. I understand that it is not required as a condition of membership or as a condition of continued employment, and that I may revoke this authorization at any time by giving 30 days written notice.

I AUTHORIZE THE STATE OF ALASKA TO DEDUCT THE FOLLOWING VOLUNTARY CONTRIBUTION FROM MY PAYCHECK EACH PAY PERIOD, TO BE PAID TO ASEA/AFSCME LOCAL 52 POLITICAL ACTION COMMITTEE.

Minimum Contribution ☐ **$2.00** (Does not qualify for AFSCME MVP Rewards)

AFSCME PEOPLE MVP Rewards Program ($5.00 minimum contribution to qualify for the AFSCME MVP Rewards)

☐ **$5.00** ☐ **$10.00** ☐ **$ _____** **(Any amount up to $20.00)**

X _____

SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

DMR-COMB REC20-S

(FORM REVISED (6.3.18 sd) If you have questions about this form please contact ASEA at 800-478-2732 Effective 6.3.2018

APPENDIX H

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971 CI

[Filed September 23, 2020]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; CLYDE "ED" SNIFFEN, in his official	)

capacity as Acting Attorney General of Alaska;)
KELLY TSHIBAKA, in her official capacity)
as Commissioner of the Alaska Department)
of Administration; and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

STIPULATION OF FACTS

The parties hereby stipulate and agree that the following facts are true for the purposes of the parties' cross motions for summary judgment and/or summary adjudication. The parties further agree that they will not rely on or introduce additional evidence in support of or in opposition to motions for summary judgment and/or summary adjudication. This Stipulation of Facts applies only for the purpose of the motions for summary judgment and/or summary adjudication in this case. The parties agree that they are not precluded from presenting additional facts or evidence in subsequent motions or proceedings if any part of the case is not fully resolved by motions for summary judgment and/or summary adjudication.

Background

1. The State of Alaska ("State") is a public employer and has approximately 15,000 employees.

2. Michael J. Dunleavy is the Governor of Alaska. He became Governor of Alaska on December 3, 2018.

3. Clyde E. Sniffen is the Acting Attorney General of Alaska. Kevin G. Clarkson is the former

Attorney General of Alaska. He was Attorney General from December 5, 2018 to August 25, 2020.

4. Kelly Tshibaka is the Commissioner of the Alaska Department of Administration. She became Commissioner on January 31, 2019. She is responsible for, among other things, the State's Department of Personnel and Labor Relations and the implementation of the State's collective bargaining agreements with exclusive bargaining representatives covering State of Alaska employees.

5. The State of Alaska, Department of Administration provides centralized administrative services to state agencies in matters of, among other things, finance, personnel administration, labor relations, payroll for state employees, and retirement and benefits programs.

6. There are eleven public-sector unions in the State of Alaska. These unions represent bargaining units of State of Alaska employees. The State has entered into collective bargaining agreements with each of these unions.

7. The Alaska State Employees Association/ American Federation of State, County and Municipal Employees Local 52, AFL-CIO ("ASEA") is the exclusive bargaining representative of a bargaining unit of approximately 8,000 State of Alaska employees. That bargaining unit is called the "General Government Bargaining Unit" or "GGU." The GGU is the largest bargaining unit of State of Alaska employees.

8. ASEA is a union based in Alaska. It is a non-profit corporation.

9. ASEA is governed by its Articles of Incorporation, Constitution, and Policies and Procedures, which are attached hereto as Exhibits A, B, and C, respectively.

10. ASEA is the democratically chosen representative of state employees in the GGU and is the largest union representing public-sector workers in Alaska.

11. Under state law, employees of the State of Alaska in the GGU are not required to become union members as a condition of employment. They can choose to join or not join ASEA.

12. Approximately 7,000 of the employees in the General Government Bargaining Unit are members of ASEA. State employees become members of ASEA by signing a membership and dues deduction authorization form.

13. ASEA's primary source of revenue is dues from ASEA members. ASEA collects those dues through member-authorized payroll deductions processed by the State.

14. ASEA provides representational services to all employees within the GGU, regardless of membership. These services include, but are not limited to: negotiating collective bargaining agreements with the State regarding the wages, benefits, and terms and conditions of employment for bargaining unit employees; advocating, through those negotiations, for

better wages, benefits, and terms and conditions of employment for GGU employees; enforcing the rights of all GGU employees under the collective bargaining agreements through grievances and arbitration; and providing all GGU employees the option of a union representative to be present at disciplinary meetings with their employer.

15. In Alaska, collective bargaining agreements covering State of Alaska employees are subject to legislative approval and appropriation. AS 23.40.215. ASEA encourages the state legislature to adopt laws important to the union. For example, ASEA has encouraged the state legislature to fund its collective bargaining agreements, to provide a better pension for state employees, to pass or not pass a proposed budget, and not to privatize certain government facilities and services.

16. ASEA has expressed positions on issues related to the State's budget; healthcare and education for GGU employees; non-discrimination on the basis of race, gender or sexual orientation; and labor relations.

17. ASEA has been publicly critical of many of Governor Dunleavy's policies and positions since he took office in December 2018. For example, in February 2019, Governor Dunleavy released a proposed state budget with cuts to various state government programs, and ASEA actively opposed those budget cuts. The state budget that the legislature eventually passed in the summer of 2019 included fewer cuts than in Governor Dunleavy's February 2019 proposal. ASEA also separately filed a lawsuit in April 2019 against Governor Dunleavy's plan to privatize Alaska's state

psychiatric care facilities. In response, the state administration modified its privatization plan.

Prior Collective Bargaining Agreements

18. ASEA and the State have engaged in collective bargaining since approximately 1989 and have negotiated and executed numerous collective bargaining agreements ("CBAs") in the ensuing decades. These CBAs are contracts between ASEA and the State of Alaska that cover some of the employment terms and conditions of GGU bargaining unit employees.

19. Excerpts of the first CBA between the State and ASEA, entered into on May 16, 1990 ("1990 CBA"), and certain other previous CBAs between the State and ASEA, which were effective from July 1, 2000 through June 30, 2004 ("2000 CBA"), from July 1, 2004 through June 30, 2007 ("2004 CBA"), from July 1, 2007 through June 30, 2010 ("2007 CBA"), from July 1, 2010 through June 30, 2013 ("2010 CBA"), from July 1, 2013 through June 30, 2016 ("2013 CBA"), and from July 1, 2016 through June 30, 2019, ("2016 CBA"), are attached as Exhibits D, E, F, G, H, I, and J, respectively.

***Janus* and Agency Fees**

20. Prior to June 27, 2018, the 2016 CBA required the State to deduct an "agency fee" from employees in the GGU bargaining unit who were not members of ASEA and to remit that fee to ASEA. At all times, the chargeable portion of agency fees was less than full union member dues.

21. At the time, agency fees or "service fee[s]" were authorized under state law (AS 23.40.110(b)(2)) and the U.S. Supreme Court precedent in *Abood v. Detroit Board of Education*, 431 U.S. 2019 (1977). Agency fees covered the share of the cost of collective bargaining representation that ASEA provided to nonmember bargaining unit employees, as described above in paragraph 14.

22. The Supreme Court issued its decision in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, on June 27, 2018, overruling *Abood*.

23. After *Janus*, ASEA and the State agreed to modify the 2016 CBA to comply with *Janus* by removing the provisions regarding agency fees. The letter memorializing this agreement is attached as Exhibit K.

24. In response to *Janus*, and pursuant to the agreement of ASEA and the State (which was then under the administration of Governor Bill Walker), the State immediately stopped collecting and ASEA stopped receiving agency fees from nonmembers.

25. The State did not undertake a notice and comment rulemaking pursuant to AS 44.62.180-.290, or any other formal public comment or rulemaking process, before it stopped deducting agency fees from nonmembers' paychecks.

26. On September 7, 2018, then-Attorney General Jahna Lindemuth sent a legal memorandum on the *Janus* decision to Heidi Drygas, then-Commissioner of the Department of Labor & Workforce Development, and Leslie Ridle, then-Commissioner of

the Department of Administration, titled "Guidance to Executive Branch departments regarding the rights and duties of public employees and public employers following the Supreme Court's decision in *Janus v. AFSCME Council 31*," which is attached as Exhibit L.

The Current CBA

27. The current collective bargaining agreement between the State and ASEA ("current CBA") is effective from July 1, 2019 through June 30, 2022. The current CBA is a contract between ASEA and the State. The current CBA is attached as Exhibit M.

28. Representatives of the State of Alaska and ASEA engaged in negotiations leading to the current CBA during the fall of 2018. The parties agreed to make certain changes to the CBA in response to *Janus*. Neither party proposed any change to Article 3.04 of the CBA, which addresses dues deductions for ASEA members.

29. Representatives of the State of Alaska and ASEA tentatively agreed to the current CBA in November 2018. ASEA members ratified the agreement and ASEA representatives signed the current CBA on December 10, 2018. In 2019, the state legislature approved a state operating budget that included full funding for the current CBA. Following legislative approval of the state operating budget, Department of Administration Commissioner Kelly Tshibaka, the representative of the State of Alaska, signed the current CBA on August 8, 2019.

30. The State created a "Summary of Changes in the ASEA 2019-2022 Collective Bargaining

Agreement," which is published on the State's website. A copy of this document is attached as Exhibit N.

31. When State Department of Administration officials negotiated the CBA, the Department of Administration had received the ASEA membership and dues deduction authorization form attached as Exhibit O, and so the State was aware of the contents of that form.

32. When Commissioner Tshibaka signed the CBA, the Department of Administration had received the ASEA membership and dues deduction authorization form attached as Exhibit O, and so the State was aware of the contents of that form. When Commissioner Tshibaka signed the CBA, Commissioner Tshibaka and then-Attorney General Clarkson were familiar with the *Janus* opinion. Governor Dunleavy had general knowledge of the *Janus* decision at this time.

ASEA Membership Dues

33. The following paragraphs 34 to 59 describe current practices, in light of the Court's October 3, 2019 temporary restraining order. Except where specifically noted, these same practices have been in effect for many years before the parties signed the current CBA (at least since July 1, 2016, the beginning of the prior CBA) and before then-Attorney General Clarkson issued his legal opinion on *Janus* on August 27, 2019. That legal opinion is attached as Exhibit P.

34. When the State hires a new employee in the GGU bargaining unit, the State, pursuant to Section 3.02 of the parties' CBA, provides the new hire

with an orientation packet that includes a letter asking the employee to contact ASEA to schedule a new employee orientation.

35. ASEA hosts orientation sessions for newly hired employees within the GGU bargaining unit. The orientation sessions are held either in person or, for employees in more rural areas, by telephone. Since April 2020, orientation sessions have been held via Zoom due to the public health situation. During the orientation sessions, the ASEA business agent or organizer provides an overview of the Union, its services, and the benefits of union membership, and encourages the employee to join the Union. The business agent or organizer does not say that union membership is mandatory or a condition of employment. ASEA also provides a packet to new employees containing informational materials about the rights and benefits of union membership.

36. The State does not monitor or participate in these orientation sessions.

37. State employees in the GGU bargaining unit may become members of ASEA by signing a written membership and dues deduction authorization form. Copies of ASEA's current membership and dues deduction authorization form and previous versions of ASEA's membership and dues deduction authorization forms are attached as Exhibits Q (in use from approximately September 18, 2019 to the present), R (in use from approximately October 19, 2004 to early 2018), S (in use from approximately July 24, 2017 to approximately July 8, 2018), and O (in use from approximately July 8, 2018 to approximately

September 18, 2019). There are GGU employees whose dues are currently being deducted pursuant to each of these forms in Exhibits Q, R, S, and O.

38. The forms in Exhibits Q, S, and O contain an annual commitment and an annual revocation period: "This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period."

39. When an employee signs a dues deduction form, an employee will not need to sign another union membership and dues deduction authorization form unless the employee resigns from membership and then later wishes to rejoin the union, or leaves the bargaining unit and then later returns and wishes to rejoin the Union.

40. There are GGU employees who joined the Union and authorized dues deductions before *Janus* was issued on June 27, 2018. There are also GGU employees who joined the Union and authorized dues deductions after *Janus* was issued.

41. The State took no part in drafting or designing the membership/dues deduction forms attached as Exhibits O, Q, R, and S. State representatives are aware of the contents of ASEA's

membership/dues deduction forms because ASEA forwards copies of every signed form to the State.

42. When an employee agrees to dues deduction by signing a membership/dues deduction form, ASEA considers that person to be a member of ASEA. ASEA provides members with rights and benefits not available to nonmembers. Members-only rights include, for example, the right to run for union office, serve as union stewards, vote in union officer elections, represent the Union in negotiations with the State by serving on the contract negotiating committee, and otherwise participate in internal union affairs. Members-only benefits include, for example, access to discounts on products and services like credit cards, rental cars, local dental clinic procedures, the AFSCME free college benefit, no-cost life insurance, and ASEA chapter scholarship programs.

43. Prior to July 2017, ASEA's membership and dues deduction authorization form (Exhibit R) did not include a one-year dues deduction commitment.

44. ASEA's current membership and dues deduction authorization form (Exhibit Q) includes a one-year dues deduction commitment, which renews from year to year if it is not revoked as described below.

45. ASEA relies on the one-year dues commitment to make long-term financial investments (e.g., hiring staff, purchasing equipment, renting office space, etc.) for the benefit of GGU employees, and to budget its resources according to its expected income for the following year.

46. When an employee signs an ASEA membership/dues deduction authorization form and provides that signed form to ASEA, that employee becomes an ASEA member, ASEA informs the State that the employee has authorized dues deductions, and ASEA sends the State a copy of the employee's dues deduction form. The State then deducts dues in accordance with that form. The State does not typically receive dues deduction authorization forms directly from bargaining unit employees.

47. The dues deduction form is the only document or information the State requires to start dues deduction.

48. If an employee does not sign an ASEA membership/dues deduction authorization form, the employee does not become an ASEA member, ASEA does not inform the State that dues should be deducted, and the State does not deduct dues from that employee's pay.

49. A GGU bargaining unit employee who was incorrectly told by the State or ASEA that union membership was mandatory could bring an unfair labor practice charge against the party responsible for that misinformation.

50. There are no pending or recently concluded unfair labor practice charges asserted against ASEA or the State alleging that any representative of ASEA or the State told a GGU bargaining unit employee that union membership was mandatory.

51. Prior to then-Attorney General Clarkson's August 27, 2019 legal opinion, ASEA members

sometimes would contact the State and ask the State to resign their membership or stop their dues deduction. When this happened, the general practice of the Alaska Department of Administration was to direct those bargaining unit employees to contact ASEA. The State would not stop the employee's dues deduction.

52. If a union member contacts ASEA to resign membership, ASEA informs the individual of the members-only rights and benefits that they will no longer have access to after resigning membership. If the individual still wishes to resign, ASEA processes the requested membership resignation and the employee is no longer considered a union member as of the date of the request.

53. If the member also requests to cease union dues deductions, then ASEA reviews the dues deduction authorization form that the member signed. If the member's dues deduction authorization does not contain an annual commitment agreement (see Exhibit R), ASEA processes the request and informs the Department of Administration, Payroll Services to cease the employee's dues deductions effective the following pay period.

54. If the member's dues deduction authorization form contains an annual commitment (see Exhibits Q, S, O), and the member's request to cease union dues deductions occurs within the annual revocation period for cancelling deductions stated in the employee's membership and dues deduction authorization form, ASEA staff informs the Department of Administration, Payroll Services to cease the employee's dues deductions effective the following pay period.

55. If the member's dues deduction authorization form contains an annual commitment (see Exhibits Q, S, O), and the member's request falls outside of the revocation period stated in the employee's membership and dues deduction authorization form, ASEA informs the employee that the request was made outside of the revocation period set in the employee's membership and dues deduction authorization form, informs the employee of when his or her revocation period will begin, and provides the employee a copy of the employee's signed membership and dues deduction authorization. ASEA staff does not inform the Department of Administration, Payroll Services to cease the employee's dues deductions.

56. As of July 2020, if ASEA receives a request to revoke dues deduction authorization outside the annual revocation period from a member whose membership and dues deduction form contains an annual commitment, ASEA holds the employee's request and informs the State to cease dues deductions on the first day of the member's revocation period.

57. When asked, ASEA staff, including ASEA's secretaries, business agents, and the executive director, provide information to GGU employees about the process for resigning membership, the process for revoking their union dues deduction authorization, and the date (if applicable) of the employee's annual revocation period. ASEA's website provides contact information for ASEA's staff and stewards. ASEA's website does not provide instructions for resigning membership or ending dues deduction.

58. If an employee's dues deduction form contains an annual commitment, the annual revocation period is determined based on the date the employee signed the dues deduction authorization form and it is set by the terms of that form.

59. Prior to former Attorney General Clarkson's August 27, 2019 legal opinion, the general practice of the Alaska Department of Administration was to cease GGU bargaining unit employees' dues deductions only upon request or direction from ASEA.

60. Between June 28, 2018 and August 27, 2019, when former Attorney General Clarkson issued his legal opinion, there were union members who asked ASEA to end their membership and/or stop dues deductions outside of the revocation period in the employee's membership and dues deduction authorization form. ASEA processed those requests according to the procedures described in paragraphs 52 to 55, above.

The Former Attorney General's Legal Opinion and the Administrative Order

61. Former Attorney General Clarkson issued a legal opinion on August 27, 2019, concerning the State's collection of dues for public-sector unions and the Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018) (see Exhibit P). The legal opinion was published on the State's website on August 27, 2019.

62. When he issued his legal opinion, former Attorney General Clarkson was aware of the legal opinion that his predecessor Attorney General Jahna

Lindemuth had issued on September 7, 2018, and former Attorney General Clarkson was aware that other state Attorneys General and state and federal courts had issued decisions regarding *Janus* that adopted reasoning that was not consistent with the reasoning in former Attorney General Clarkson's legal opinion. Attorney General Clarkson and officials in the Attorney General's Office also had reviewed and were aware of the legal authorities cited in Attorney General Clarkson's Opinion.

63. The State and former Attorney General Clarkson did not consult with ASEA or offer ASEA the opportunity to provide legal briefing or other input before the Attorney General released the August 27, 2019 legal opinion.

64. Before former Attorney General Clarkson released the August 27, 2019 legal opinion, State officials in the Attorney General's office spoke with F. Vincent Vernuccio, Kristina Rasmussen, and Morgan Shields from the Mackinac Center for Public Policy, Bethany Marcum from the Alaska Policy Forum, and Brian Sanderson from the Three Oak Group, regarding the Attorney General's *Janus* opinion.

65. On August 27, 2019, Commissioner Tshibaka sent an email to all State employees, including all GGU bargaining unit employees. The email and its attachments are attached as Exhibit T. The email also included a hyperlink to a copy of the *Janus* opinion. The State and Commissioner Tshibaka did not consult with ASEA about the content of the email before Commissioner Tshibaka sent this email and did not

give ASEA advance notice that Commissioner Tshibaka would send the email.

66. The State did not undertake notice and comment rulemaking prior to Commissioner Tshibaka's August 27, 2019 email and attachments to all State employees.

67. The Commissioner has sent other emails to all State employees. Examples of these emails are attached as Exhibits U, V, and W.

68. ASEA objected to the former Attorney General's legal opinion and to the State's emails to GGU bargaining unit members regarding the legal opinion. The State filed this lawsuit against ASEA on September 16, 2019. ASEA filed counterclaims and a third-party complaint along with a motion for a temporary restraining order and preliminary injunction on September 25, 2019.

69. On September 26, 2019, Governor Dunleavy issued Administrative Order No. 312. Administrative Order No. 312 was posted on the State's website on September 26, 2019. A copy of Administrative Order No. 312 is attached as Exhibit X.

70. The State created the document attached as Exhibit Y to provide a timeline on the implementation of Administrative Order No. 312. This timeline was posted on the State's website.

71. When Governor Dunleavy issued Administrative Order No. 312, then-Attorney General Clarkson and other State employees were aware of the legal opinion that then-Attorney General Jahna

Lindemuth had issued on September 7, 2018. Attorney General Clarkson was aware of ASEA's filings in this lawsuit, and Governor Dunleavy and Commissioner Tshibaka were aware of ASEA's lawsuit.

72. The State did not undertake a notice and comment rulemaking pursuant to AS 44.62.180-.290, or any other formal public comment or rulemaking process, before the Governor issued Administrative Order No. 312.

73. The State and Governor Dunleavy did not consult with ASEA or offer ASEA the opportunity to provide legal briefing or other input before the Governor issued Administrative Order No. 312.

74. Before Governor Dunleavy released Administrative Order No. 312, officials in the Governor's office spoke with F. Vincent Vernuccio, Kristina Rasmussen, and Morgan Shields from the Mackinac Center for Public Policy, Diana Rickert from the Liberty Justice Center, and Bethany Marcum from the Alaska Policy Forum, regarding the Attorney General's *Janus* opinion.

75. On September 26, 2019, Commissioner Tshibaka emailed all State employees, including all GGU bargaining unit employees. The email and attachments are attached as Exhibit Z. The State and Commissioner Tshibaka did not consult with ASEA about the content of the email before sending this email and did not give ASEA advance notice that Commissioner Tshibaka would send the email.

76. On September 26, 2019, Governor Dunleavy issued a press release entitled "Governor Dunleavy

brings Alaska into compliance with United States Supreme Court's Janus Ruling." Since September 26, 2019, a webpage containing similar information has been posted online on a State of Alaska webpage. A copy of the press release and the documents to which it linked is attached as Exhibit AA.

77. On September 26, 2019, the Governor, then-Attorney General Clarkson, and the Commissioner held a press conference regarding the Administrative Order. Video of that press conference is available at https://vimeo.com/362675319. A transcription of that press conference is attached as Exhibit BB.

78. On September 27, 2019, a representative of the Department of Administration sent identical letters along with a copy of the Administrative Order to all eleven public sector unions. Attached as Exhibit CC is a copy of the letter and the attachments sent to ASEA.

79. Governor Dunleavy authored an op-ed titled "Governor of Alaska: My state will be the first to comply with SCOTUS' new union ruling," published in USA Today on November 23, 2019. A copy of this op-ed is attached as Exhibit DD.

80. State employees in the GGU bargaining unit may authorize payroll deductions for purposes other than union dues, including to make charitable contributions to non-profit organizations through the State of Alaska SHARE Campaign, to pay health insurance premiums, and to make contributions to retirement accounts. The State has made no changes to the process for processing payroll deductions for these other purposes. A copy of the Alaska SHARE payroll

deduction pledge form is attached as Exhibit EE. A state employee may make charitable contributions by submitting the form online at www.AlaskaSHARE.org. The employee can stop deducting charitable contributions by emailing the request to the State's Division of Finance or the State's Employee Call Center.

The State's Dues Deductions Stoppages

81. After former Attorney General Clarkson's August 27, 2019 legal opinion was issued, the Department of Administration created a document entitled "Cease Union Dues Deduction." A copy of this document is attached as Exhibit FF.

82. The Department of Administration did not consult with ASEA about the content of the "Cease Union Dues Deduction" document or allow ASEA to provide input on the document before releasing the document.

83. The State emailed the "Cease Union Dues Deduction" form (see Exhibit FF) to at least twelve GGU bargaining unit employees.

84. Between August 27, 2019 and October 3, 2019, in response to Commissioner Tshibaka's emails to all state employees, 12 state employees in the GGU bargaining unit emailed the State to stop their dues deduction.

85. The State provided these 12 state employees with the State's "Cease Union Dues Deduction" form (see Exhibit FF), which each of the employees filled out and submitted.

86. Of these 12 employees, nine employees were paying dues to ASEA at the time of their requests. Of those nine employees paying dues to ASEA at the time of their requests, seven had signed ASEA membership and dues deduction authorization forms that contained annual dues commitments with a revocation period (i.e., Exhibits Q, S, or O). These seven employees' requests to revoke dues deduction authorization were outside of each of their revocation periods on their forms. The other two employees who were paying union dues at the time of their requests had signed ASEA membership and dues deduction forms without an annual dues commitment or revocation period (i.e., Exhibit R).

87. In keeping with the former Attorney General's opinion, the State responded by email to each of these employees that it was stopping deduction of dues from their paychecks. Of these nine employees, the State ceased dues deduction for seven of them as of the last pay period in August. The State did not contact ASEA regarding these employees prior to processing the cessation of their dues, nor direct those employees to contact ASEA regarding their desire to cease dues. After processing the cessation of dues, the State provided notice to ASEA that it had ceased these employees' dues deductions and that the State's actions would be reflected on the next payroll.

88. For the remaining two employees, the State also received a request from ASEA to cease dues deduction for that employee because the dues deduction authorization cards that those two

employees had signed did not include an annual dues deduction commitment.

89. For the other three GGU employees who communicated with the State about dues deductions during this time period, the State took no action because these employees were not having union dues deducted from their paychecks at the time of their requests.

90. In October 2019, in compliance with this Court's Temporary Restraining Order in this lawsuit, the State reinstated dues deduction for the seven GGU employees whose dues it had stopped.

91. As a result of the State's dues deduction stoppages for these seven GGU employees, ASEA did not receive $299.01 in dues.

Other Alleged Damages

92. After August 27, 2019, ASEA staff diverted time away from their normal bargaining unit organizing, representation, and support duties, in order to respond to and counteract the effects of the State's emails to GGU employees about the former Attorney General's legal opinion and the Administrative Order. To avoid the expenses associated with further discovery and litigation, the parties agree that the total costs to ASEA as a result of the State's communications was $93,565.47.

93. As a result of the State's emails to GGU employees about the former Attorney General's legal opinion and the Administrative Order, ASEA experienced a loss of membership and accompanying

membership dues. To avoid the expenses associated with further discovery and litigation, the parties agree that the total loss of membership dues to ASEA as a result of the State's communications was $92,156.16.

94. Other than the damages described in paragraphs 91-93, ASEA does not claim that it is entitled to any additional damages.

95. The exhibits attached to these stipulated facts are incorporated by reference to these stipulated facts. The parties further stipulate to the authenticity of all documents attached as exhibits hereto.

DATED: Sept. 23, 2020

So stipulated,

CLYDE "ED" SNIFFEN
ACTING ATTORNEY GENERAL

By: /s/ Jeffrey G. Pickett

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Counsel for Plaintiff State of Alaska and the Third-Party Defendants

DATED: Sept. 23, 2020

DILLON & FINDLEY, P.C.

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Stefanie Wilson (*Pro Hac Vice*)
ALTSHULER BERZON, LLP

Attorneys for Defendant and Third-Party Plaintiff Alaska State Employees Association/ AFSCME Local 52, AFL-CIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 24, 2020 a true and correct copy of the foregoing document was served by:

[ ] hand delivery
[ ] first class mail
[X] email

on the following attorneys of record:

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Lisa Kusmider

APPENDIX I

EXCERPT

EXHIBIT M

COLLECTIVE BARGAINING AGREEMENT
between the
ALASKA STATE EMPLOYEES ASSOCIATION,
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
LOCAL 52, AFL-CIO

and the
STATE OF ALASKA

covering the

GENERAL GOVERNMENT BARGAINING UNIT

July 1, 2019 through June 30, 2022

* * *

3.04 Payroll Deductions.

A. Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number, the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership dues owed for that pay period. The Employer will forward the monies so deducted to the Union together with a list of bargaining unit members from whose wages such monies were deducted no later than the tenth (10^{th}) day of the following calendar month. The Employer shall deduct from a bargaining unit member's wages only that amount of money that the Union has certified in writing is the amount of semi-monthly dues.

If, for any payroll period in which the Employer is obligated to make deductions pursuant to this section, the wages owed a bargaining unit member after mandatory deductions are less than the authorized dues to be deducted pursuant to this Article, the Employer shall make no deduction from wages owed the bargaining unit member for that payroll period. Payment of dues for that pay period shall be made by the bargaining unit member directly to the Union.

B. 1. The Union Executive Director shall notify the Director of the Division of Personnel and Labor Relations in writing of any increase or decrease in authorized dues at least thirty (30) calendar

days prior to the effective date of a flat dollar rate change.

2. The Union Executive Director shall notify the Director of the Division of Personnel and Labor Relations in writing of any increase or decrease in authorized dues at least sixty (60) calendar days prior to the effective date of a percentage or other alternative rate change.

C. Bargaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the state. The amount of voluntary contribution shall be stated on the authorization form, together with the bargaining unit member's employee identification number.

* * *

APPENDIX J

[*See next page for fold-out exhibit:*
Exhibit O ASEA Membership and Dues Authorization
(July 2018)]

GGU AUTHORIZATION FOR PAYROLL DEDUCTIONS

Entered _____

COMPLETE AND RETURN TO: ASEA/AFSCME Local 52, 2601 Denali Street, Anchorage, AK 99503
or Fax: (907) 277-5206 or Email: aseahq@afscmelocal52.org **PLEASE PRINT CLEARLY**

Most Recent Date of Hire	**Employee ID or** Last 4 of Social Security Number — Voter ID #
Department	Last Name — First — Middle
Division	Mailing Address
Work Location	City — State — Zip + 4
Job Title	Physical Address
Cell Phone* — Home Phone	City — State — Zip + 4
Work Phone	Home E-Mail Address* *(Home email and cell phone information will be kept confidential by ASEA and AFSCME, will be used for official ASEA Union purposes only. By providing my cell phone number I understand that the Union and its affiliates may use automated call technology and/or send text messages on a periodic basis. The Union will not charge for text alerts. Carrier rates may apply.)

I hereby apply for or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws. By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, (hereafter referred to as ASEA or the "Union"), to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours, other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues as certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, is voluntary and not a condition of my employment.

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. Employees must inform the Union of any promotion or transfer to a position outside the bargaining unit. This card supersedes any prior dues authorization card I signed.

(Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses.)

SIGNATURE REQUIRED

ASEA BUSINESS LEAVE BANK

I authorize the deduction of 7-1/2 hours of personal leave for deposit in the ASEA/AFSCME Local 52 Union Business Leave Bank*

X _____

SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

Authorization for Payroll Deductions of my

Public Employees Organized to Promote Legislative Equality (PEOPLE) VOLUNTARY CONTRIBUTION

You may make a contribution of any amount or no contributions at all to PEOPLE. The Union will not favor or disadvantage anyone by the level or decision to contribute. In accordance with federal law, the PEOPLE Committee will accept contributions from only members of AFSCME and their families. Contributions to AFSCME PEOPLE are not deductible as a charitable contribution for federal income tax purposes.

I understand that this contribution may be used for political purposes. My contribution is voluntary. I understand that it is not required as a condition of membership or as a condition of continued employment, and that I may revoke this authorization at any time by giving 30 days written notice.

I AUTHORIZE THE STATE OF ALASKA TO DEDUCT THE FOLLOWING VOLUNTARY CONTRIBUTION FROM MY PAYCHECK EACH PAY PERIOD, TO BE PAID TO ASEA/AFSCME LOCAL 52 POLITICAL ACTION COMMITTEE.

Minimum Contribution ☐ **$2.00** (Does not qualify for AFSCME MVP Rewards)

AFSCME PEOPLE MVP Rewards Program ($5.00 minimum contribution to qualify for the AFSCME MVP Rewards)

☐ **$5.00** ☐ **$10.00** ☐ **$ _____** **(Any amount up to $20.00)**

X SIGN HERE

SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

APPENDIX K

EXHIBIT P

[SEAL] **THE STATE of ALASKA**

GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
OFFICE OF THE ATTORNEY GENERAL
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
Main: (907) 269-5100
Fax: (907) 269-5110

August 27, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: First Amendment rights and union due deductions and fees

Dear Governor Dunleavy:

You have asked for a legal opinion on proposed changes to the State's current process for deducting union-related dues and fees from employee paychecks in light of the United States Supreme Court's decision in *Janus v. American Federation of State, County, and*

Municipal Employees, Council 31.[1] As explained further below, I have concluded that *Janus* requires a significant change to the State's current practice in order to protect state employees' First Amendment rights.

I. The U.S. Supreme Court's decisions in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* significantly limits the manner by which the State can deduct union dues and fees from its employees' wages.

Alaska's Public Employee Relations Act (PERA) assigns public employers the task of deducting from their employees' wages any union dues, fees, or other benefits and transmitting these funds to the union, if the employee provides written authorization to do so.[2] The Act does not provide any details on how an employee's authorization must be procured or provide any safeguards to ensure that the employee's authorization for the employer to withhold those funds is freely executed with full awareness of the employee's rights.[3] But the U.S. Supreme Court's recent decision

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[1] 138 S. Ct. 2448 (2018).

[2] AS 23.40.220.

[3] The full text of AS 23.40.220 provides: "Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative."

in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* places important limitations on a public employer's ability to deduct union dues and fees from employee wages under AS 23.40.220.

In *Janus*, the U.S. Supreme Court held that the First Amendment prohibits public employers from forcing their employees to subsidize a union.[4] The *Janus* decision thus invalidated a provision of PERA, AS 23.40.110(b)(2), which previously authorized public employers to enter into agreements with unions that require every employee in a bargaining unit—whether a member of the union or not—to pay an "agency fee" to the union as a condition of employment. This agency fee, that even non-members were required to pay, was calculated by the union to compensate it for the cost of union activities ostensibly taken on the employees' behalves. But *Janus* ruled that requiring public employees to pay an agency fee to a union violates employees' First Amendment right against compelled speech, thereby invalidating laws like AS 23.40.110(b)(2).[5] The Court further warned that going forward, public employers may not deduct "an agency fee *nor any other payment to the union*" from an employee's wages "unless the employee affirmatively consents to pay."[6]

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[4] 138 S. Ct. at 2460.

[5] *Id.* at 2486.

[6] *Id.* (emphasis added).

In response to the *Janus* decision, the State, under the administration of then-Governor Bill Walker, began discussions with state employee unions to address the effects of the decision. For example, the State immediately ceased deducting agency fees from non-member's paychecks and executed letters of agreement with a number of unions modifying the terms of the collective bargaining agreements to account for *Janus*. But the letters of agreement left largely unchanged collective bargaining agreement provisions regarding employees' consent for automatic payroll deduction of union dues, fees, or other benefits. Generally speaking, these provisions leave to the unions the power to elicit employees to authorize the State to deduct union dues and fees from their paychecks and transmit those monies to the unions.

The State's payroll deduction process is constitutionally untenable under *Janus*, and the prior administration's preliminary steps did not go far enough to implement the Court's mandate. The Court announced in *Janus* that a public employer such as the State cannot deduct from an employee's wages "any . . . payment to the union" unless it has "clear and compelling evidence" that an employee has "freely given" his or her consent to subsidize the union's speech.[7] By ceding to the unions themselves the process of eliciting public employee's consent to payroll deductions of union dues and fees, and unquestioningly accepting union-procured consent forms, the State has no way of ascertaining—let alone by "clear and compelling evidence"—that those consents are

[7] *Id.* at 2486.

knowing, intelligent, and voluntary. The State has thus put itself at risk of unwittingly burdening the First Amendment rights of its own employees.

A course correction is required. To protect the First Amendment rights of its employees, the State must revamp its payroll deduction process for union dues and fees to ensure that it does not deduct funds from an employee's paycheck unless it has "clear and compelling evidence" of the employee's consent.

II. The *Janus* decision prohibits a public employer from deducting union dues or fees from a public employee's wages unless the employer has "clear and compelling evidence" that the employee has freely waived his or her First Amendment rights against compelled speech.

The Court's decision in *Janus* recognizes that forcing individuals to subsidize the speech of any other private speaker, including a union, burdens those individuals' First Amendment rights. The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all."[8] "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command" and burdens the rights secured by the First Amendment.[9] Indeed, when the government compels speech (as opposed to merely limiting speech) it inflicts unique

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[8] *Id.* at 2463 (internal quotation marks omitted).

[9] *Id.*

damage: it coerces individuals "into betraying their convictions."[10]

"Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."[11] Thus "a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences."[12] The Court acknowledged that an employee's financial support of a union will effectively subsidize union speech not just on budgetary issues, but on a range of significant and often controversial matters in collective bargaining and related activities that can include healthcare, education, climate change, sexual orientation, and child welfare.[13]

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[10] *Id.* at 2464.

[11] *Id.* (emphasis in original).

[12] *Id.* (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310-11 (2012)).

[13] *Id.* at 2475 ("[U]nions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few."); *id.* at 2476 ("Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound value and concern to the public." (internal footnotes and quotation marks omitted)).

With these principles in mind, *Janus* considered an Illinois law requiring even public employees who declined to join the union that represented their bargaining unit to pay the union an "agency fee"—a sum of money, deducted from the employee's paycheck, to compensate the union for the costs of collective bargaining.[14] Because "the compelled subsidization of private speech seriously impinges on First Amendment rights," the Supreme Court applied "exacting scrutiny" to its review of the law.[15] Under exacting scrutiny, "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive' of First Amendment freedoms."[16] The Court concluded that neither of the justifications proffered in support of the agency fee requirement—promoting "labor peace" and making non-members pay for the fruits of the union's efforts on their behalf to avoid "the risk of free riders"—satisfied this standard.[17] The Court therefore struck down Illinois' agency fee statute, holding that "States and public-sector unions may no longer extract agency fees from nonconsenting employees."[18]

The effect of *Janus* was, in part, to invalidate Alaska's agency-fee provision, AS 23.40.110(b)(2). That

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[14] *Id.* at 2464.

[15] *Id.* at 2464, 2477.

[16] *Id.* at 2465 (quoting *Knox*, 567 U.S at 310).

[17] *Id.* at 2465-69 (internal quotation omitted).

[18] *Id.* at 2486.

provision authorized the State to enter into agreements with the state-employee unions and require *all* employees in a bargaining unit—even non-union members—to pay an agency fee as a condition of employment with the State. The collective bargaining agreement provisions that implemented the agency-fee requirement were invalidated too.

The principle of the Court's ruling, however, goes well beyond agency fees and non-members. The Court stated that "[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay."[19] Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented). Thus the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's. In either case, the State can only deduct monies from an employee's wages if the employee provides affirmative consent. Thus, the Court in *Janus* did not distinguish between members and non-members of a union when holding that "[u]nless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met."[20]

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[19] *Id.* (emphasis added).

[20] *Id.* (emphasis added).

Accordingly, before a public employer may lawfully deduct union dues or fees from any employee's paycheck, the employee must waive his or her First Amendment rights against compelled speech.[21] And because a waiver of First Amendment rights will not be presumed, the employer must have "clear and compelling evidence" that waiver of this right was "freely given" by the employee.[22]

Janus therefore significantly limits the State's power under AS 23.40.220 to make any union-related deduction from its employees' paychecks. The statute provides that "[u]pon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits" certified by the union representing that bargaining unit and shall transmit those funds to the union. But in the wake of *Janus*, the State needs "clear and compelling evidence" that this written authorization was "freely given." Without such consent, the State is unwittingly burdening its employees' First Amendment rights by deducting union dues from any number of employees who have not "clearly and affirmatively" consented.[23] The standard announced in *Janus* for ascertaining that consent mandates changes to the way the State processes payroll deductions.

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[21] *Id.*

[22] *Id.* (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-82 (1999)).

[23] *Id.* at 2486.

III. The State's existing system for payroll deductions of union dues and fees does not ensure "clear and compelling evidence" that every employee has "freely given" consent to the State to withhold those funds.

Alaska Statute 23.40.220 requires the State, as a public employer, to deduct union dues, fees, and other benefits from an employee's paycheck and transmit those funds to the union "[u]pon written authorization of the employee." The statute does not describe in any detail the process for executing this authorization, and up until now the State has largely deferred and defaulted to a union-sponsored system of obtaining employee consent.

But the *Janus* decision requires the State to have "clear and compelling evidence" that the authorization to deduct dues and fees—which represents a waiver of the employee's rights against compelled speech—is "freely given."[24] And because the system of payroll deductions for union dues and fees is a state law-created, State-facilitated process—a process that has the potential to violate employees' First Amendment rights—the process must survive exacting constitutional scrutiny.[25] The State must therefore strive for a payroll deduction system that creates the least possible risk of deducting union dues or fees from

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[24] *Id.*

[25] *Id.* at 2465.

an employee who does not truly consent to subsidizing the union's speech.

A. For an employee's consent to be valid, it must be reasonably contemporaneous, free from coercion, and be accompanied by a clear explanation of the rights an employee is waiving.

In articulating the "clear and compelling evidence" standard, the Court in *Janus* cited to a long line of decisions fleshing out what is required for a valid waiver of constitutional rights.[26] These decisions dictate the contours of a system of payroll deductions for union dues and fees that can pass constitutional muster.

At the outset, it must be recognized that a waiver of the First Amendment right against compelled speech "cannot be presumed."[27] To the contrary, courts "indulge every reasonable presumption against waiver of fundamental constitutional rights."[28]

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[26] *Id.* at 2486 (citing *Knox*, 567 U.S. at 312-13; *College Sav. Bank*, 527 U.S. at 682; *Curtis Publ'g Co.*, 388 U.S. at 145; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[27] *Janus*, 138 S. Ct. at 2486 (citing *Zerbst*, 304 U.S. at 464); *accord Knox*, 567 U.S. at 312 ("Courts 'do not presume acquiescence in the loss of fundamental rights.'") (quoting *College Sav. Bank*, 527 U.S. at 682).

[28] *Zerbst*, 304 U.S. at 464.

For a waiver of a constitutional right to be valid, it must first be voluntary.[29] A waiver of constitutional rights is voluntary if "it was the product of a free and deliberate choice rather than coercion or improper inducement."[30] In the context of payroll deductions for union-related dues and fees, an employee's waiver is voluntary if the employee is free from coercion or improper inducement in deciding whether to authorize the deduction.

A valid waiver of First Amendment rights must also be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."[31] An individual's waiver is knowing and intelligent when the individual has "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[32] In the context of a payroll deduction for union dues and fees, a knowing and intelligent waiver requires the employee be aware of the nature of the right—to elect to retain one's First Amendment rights, or to financially support a union and thereby affiliate with and promote a union's speech and platform. In other words, the employee must be aware that there is a choice presented, and that consenting to having the

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[29] *See Janus*, 138 S. Ct. at 2486 ("the waiver must be freely given"); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[30] *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

[31] *Brady v. United States*, 397 U.S. 742, 748 (1970).

[32] *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

employee's wages reduced to pay union dues is not a condition of state employment. The employee would also have to be aware of the consequences of waiving that right—*i.e.* that the union could use his money to fund union speech on a broad swath of politically significant issues, from state fiscal issues to civil rights and environmental issues, including speech with which the employee disagrees.

It is not enough that some individuals *might* be generally aware of the scope of their First Amendment rights and the kinds of speech a union might undertake with the use of their wages. The U.S. Supreme Court has declined to find a waiver of First Amendment rights based on extra-record information about the "special legal knowledge" of particular individuals.[33] Because the First Amendment is "the matrix, the indispensable condition, of nearly every other form of freedom," a purported waiver of that right is not effective "in circumstances which fall short of being clear and compelling."[34] And without actual evidence that a waiver of First Amendment rights was knowing and voluntary, a purported waiver cannot be credited.

To be truly voluntary, an individual's consent to waive their rights must also be reasonably contemporaneous. This is because circumstances change over time, and waivers of constitutional rights may eventually grow stale. Courts have thus recognized that timeliness is an important

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[33] *Curtis Publ'g Co.*, 388 U.S. at 144.

[34] *Id.* at 145.

consideration in determining whether a waiver of fundamental rights is valid. For example, in *Knox v Service Employees International Union, Local 1000*, the U.S. Supreme Court ruled that a public employee union could not levy a special assessment for election-related speech without giving non-members a new opportunity to opt out of subsidizing that effort.[35] While acknowledging that nonmembers were given a choice once per year about whether to subsidize the union's political speech, the Court reasoned that nonmembers "cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent."[36] And because "the factors influencing a nonmember's choice may change" with the passage of time and changes in the content of the union's speech, the First Amendment requires that nonmembers be given an opportunity to opt out of subsidizing this speech.[37]

The Supreme Court also recognized that the invocation or waiver of a constitutional right has temporal limits in *Maryland v. Shatzer*.[38] In that case a suspect invoked his right to have an attorney present

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[35] 567 U.S. at 314-17.

[36] *Id.* at 315.

[37] *Id.* at 315-16 ("There were undoubtedly nonmembers who, for one reason or another, chose not to opt out . . . when the standard *Hudson* notice was sent but who took strong exception to the [union's] political objectives and did not want to subsidize those efforts").

[38] 559 U.S. 98 (2010).

during an investigatory interview.[39] The government honored that right and terminated the interview. The government later reinitiated the investigation, but this time, the suspect waived his *Miranda* rights and consented to a polygraph test, after which he made several inculpatory statements.[40] Upon being charged with the crime he confessed to, the defendant then sought to exclude the statements, arguing that his original invocation of the right to counsel should have prevented investigators from later approaching him. The Court rejected his defense and the implicit assumption that the invocation of a constitutional right might exist in perpetuity despite any change in circumstances. Writing for the Court, Justice Scalia determined that a fourteen-day break in custody was sufficient for the defendant's prior invocation of his right to counsel to have expired.[41] If the invocation of a constitutional right can expire with time, so can the waiver of a constitutional right.

Indeed, courts have recognized that a waiver of one's *Miranda* rights may expire with the passage of time. In *Miranda v. Arizona*, the Supreme Court imposed a set of prophylactic rules designed to protect an individual's Fifth Amendment right against self-incrimination.[42] Decisions applying *Miranda* recognize that the passage of time can be an important factor in

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[39] *Id.* at 100-01.

[40] *Id.* at 101-02.

[41] *Id.* at 110.

[42] 384 U.S. 436, 467-72 (1966).

evaluating whether an initial waiver of those rights has become stale, requiring the government to re-advise suspects of their rights.[43]

This makes sense because as the Supreme Court recognized in *Knox*, the circumstances that lead an individual to waive a fundamental right may change, as may an individual's beliefs or opinions, and cause

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[43] *See, e.g., United States v. Garcia-Haro*, 2000 WL 1471750, *2 (9th Cir. 2000) (unpublished) (holding that "[r]epeat *Miranda* warnings are not required . . . unless an 'appreciable time' elapses between interrogations" (quoting *United States v. Nordling*, 804 F.2d 1466, 1471 (9th Cir. 1986))); *Nordling*, 804 F.2d at 1471 (inquiring into totality of circumstances and concluding additional *Miranda* warnings not required where "[n]o appreciable time" elapsed between interrogations); *State v. Ransom*, 207 P.3d 208, 217 (Kan. 2009) (explaining that whether waiver of *Miranda* rights has expired requires considering totality of circumstances, including the passage of time); *Commonwealth v. Dixon*, 380 A.2d 765, 767-68 (Pa. 1977) (concluding police were required to re-advise individual of his rights because enough time had passed and circumstances had changed since suspect's waiver) (citation omitted); *State v. DuPont*, 659 So. 2d 405, 407-08 (Fla. Dist. Ct. App. 1995) (determining renewed warning required where polygraph exam conducted more than 12 hours after suspect first read *Miranda*); *United States v. Jones*, 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001) (concluding where circumstances changed over time, warnings became "stale" and suspect entitled to receive new warnings and reconsider earlier decision to waive *Miranda* rights); *cf. Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau, Alaska*, 356 F. Supp. 3d 831, 849 (D. Alaska 2018) (noting that constitutional rights may only be waived if clear and convincing evidence establishes that waiver was "voluntary, knowing, and intelligent" and finding no evidence that, despite allegations of waiver, plaintiffs in that case "voluntarily waived *for all time in the future* any possible constitutional or legal challenge" to city's assessment of fees (emphasis added)).

the individual to rethink that waiver.[44] Because the right to be free from compelled speech is a "fixed star in our constitutional constellation,"[45] *Janus*'s requirement of clear and compelling evidence of a waiver thus demands some periodic inquiry into whether a public employee wishes to continue to waive—or reclaim—his or her First Amendment rights.

B. The State's current payroll deduction system fails to satisfy constitutional standards.

The State's current system for employee payroll deductions cannot ensure that these constitutional standards are met. Through its collective bargaining agreements, the State has effectively ceded to the unions widespread power to elicit employees' consent to payroll deductions of dues and fees. After *Janus*, this arrangement is no longer tenable. The union-directed process utilized to date fails to yield "clear and compelling evidence" that state employees have "freely given" their consent to deducting union dues and fees from their wages. And yet without that consent, the State is constitutionally barred from making those deductions.

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[44] *See Knox*, 567 U.S. at 315 (noting that a non-union member's choice to support a union's political activities, through electing to pay dues or a special assessment, may change "as a result of unexpected developments" in the union's political advocacy).

[45] *Janus*, 138 S. Ct. at 2463 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

First, having ceded the power to collect payroll deduction authorizations to the unions themselves, the State has no way to ensure that its employees are being told exactly what their First Amendment rights are before being asked to waive them. The current system allows the unions to design the form by which an employee gives written authorization for payroll deductions. But there is no guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech. The same is true for information about the consequences of the employee's decision to waive his or her First Amendment rights. And there is no guarantee that the employee will be told what kinds of speech a particular union will engage in—what positions the union will take—with the benefit of his or her wages. Without that knowledge, a waiver of the employee's rights against compelled speech can hardly be considered knowing and intelligent.

Second, because the unions control the environment in which the employee is asked to authorize a payroll deduction, there is no guarantee that an employee's authorization is "freely given." For example, some collective bargaining agreements require new employees to report to the union office within a certain period of time, where a union representative presents the new hire with the payroll deduction form. The State thus has no awareness of what information is (or is not) conveyed to an employee at the critical moment the employee is confronted with the decision whether to waive his or her First Amendment rights. Because this process is essentially a black box the State cannot

peer inside ofto see what occurs at a venue the State is not invited to, the State has no way of knowing whether the signed form is "the product of a free and deliberate choice rather than coercion or improper inducement."[46] And without knowing that, the State lacks "clear and compelling evidence" that the employee's consent to have union dues and fees deducted from his or her paycheck was "freely given."[47]

The importance of assuring that an employee gives knowing consent, and the risk of obtaining uninformed waivers under the current state payroll deduction system, is all the more apparent when unions add specific terms to an employee's payroll deduction authorization, like making the payroll deduction irrevocable for up to twelve months. A new employee might not have any idea what the union is going to say with his or her money or what platform or candidates a union might promote during that time. But if he or she becomes unhappy with the union's message, they are powerless to revoke the waiver of their right against compelled speech, forced instead to see their wages docked each pay period for the rest of the year to subsidize a message they do not support. A system that permits unions to set the terms by which a public employee waives his or her First Amendment rights and to control the environment in which that waiver is elicited does not satisfy the standards announced in *Janus*. Instead it induces the State to unknowingly burden the First Amendment rights of untold numbers

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[46] *Comer*, 480 F.3d at 965.

[47] *Janus*, 138 S. Ct. at 2486.

of its own employees. This situation is untenable and must be rectified.

IV. The State must implement a new process for ensuring that an employee's consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary.

A system of payroll deductions for union dues and fees that comports with the standards articulated in *Janus* must have certain essential features informed by the preceding analysis. In order to implement *Janus*'s requirements, the Governor may determine to exercise his executive authority under Article III, Sections 1 and 24 of the Alaska Constitution and issue an administrative order to establish a procedure to ensure the State honors the First Amendment rights of its employees.

This procedure will implement the constitutional directives set forth in the *Janus* decision. To ensure that the State does not deduct union dues or fees from an employee without "clear and compelling evidence" that the employee freely consents to the deduction, the State must require that the employee provide that consent directly to the State. Rather than permitting the union to control the conditions in which the employee provides consent to a payroll deduction from their state-paid wages, the State may implement and maintain an online system and new written consent forms through which employees wishing to authorize payroll deductions for union dues and fees may provide consent. This process allows the State to ensure that all waivers are knowing, intelligent, and voluntary.

And to ensure that an employee's consent is up-to-date, as required for it to be a valid waiver of the employee's First Amendment rights, the State should require that an employee regularly has the opportunity to (1) opt-in to the dues check-off system and provide their consent to waive their First Amendment rights by providing funds to support union speech; and (2) opt-out of the dues check-off system where the employee determines, for example, that he or she no longer supports the speech being promoted or shares the views of the speaker. When such a procedure is implemented, employees would be asked to "opt-in" to payroll deductions for union dues or fees. Were it otherwise, the risk of error—in this case, unwitting violation of an employee's First Amendment right—would be shifted onto the State, at the expense of the individual employee. Indeed, the Supreme Court already acknowledged in *Knox v. Service Employees International Union, Local 1000* that there are real risks inherent to any opt-out system and that "the difference between opt-out and opt-in schemes is important."[48]

In order to secure clear and compelling evidence of a knowing waiver, the State should also provide for a regular "opt-in" period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages. By

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[48] *Knox*, 567 U.S. at 312 (recognizing that in the context of agency shop dues, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree").

Administrative Order the Governor may identify a period of one year as the appropriate amount of time for an employee's waiver of his or her First Amendment rights to remain in effect. Requiring consent to be renewed on an annual basis would ensure that consents do not become stale (due to intervening events, including developments in the union's speech that may cause employees to reassess their desire to subsidize that speech) and promotes administrative and employee convenience by integrating the payroll deduction process with other benefits-elections employees are asked to make at the end of every calendar year.

Sincerely,

Kevin G. Clarkson
Attorney General

APPENDIX L

[*See next page for fold-out exhibit:*
Exhibit Q ASEA Membership and Dues Authorization
(September 2019)]

ASEA/AFSCME Local 52, AFL-CIO

UNION MEMBERSHIP AND DUES DEDUCTION AUTHORIZATION

STATE OF ALASKA GENERAL GOVERNMENT UNIT (GGU) AUTHORIZATION FOR PAYROLL DEDUCTION

COMPLETE & RETURN TO ASEA/AFSCME LOCAL 52, 2601 DENALI ST, ANCHORAGE AK 99503, FAX (907) 277-5206 OR EMAIL ASEAHQ@AFSCMELOCAL52.ORG

Yes, I choose to be a Union member of ASEA/AFSCME Local 52.

I understand my membership supports the organization advocating for my interests as a bargaining unit member and as an individual. ASEA membership and paying union dues is not a condition of employment. By submitting this form, I choose to be a union member and to pay my dues by way of payroll deduction.

LAST NAME	FIRST NAME	MIDDLE	EMPLOYEE ID or LAST 4 SSN
MAILING ADDRESS	CITY		STATE & ZIP CODE
PHYSICAL ADDRESS	CITY		STATE & ZIP CODE
HOME/MESSAGE PHONE	MOBILE PHONE		WORK PHONE
HOME EMAIL ADDRESS (Home emails are held confidential at ASEA Headquarters for Union Business only)			WORK LOCATION (CITY / BLDG)
JOB TITLE	DEPARTMENT/DIVISION		DATE OF HIRE (MOST RECENT)

I hereby apply or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws. By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, (hereafter referred to as ASEA or the "Union"), to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, is voluntary and not a condition of my employment.

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. This card supersedes any prior dues authorization card I signed.

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses.

ASEA/AFSCME LOCAL 52 BUSINESS LEAVE BANK

I authorize the deduction of 7-1/2 hours of personal leave for deposit in the ASEA/AFSCME Local 52 Union Business Leave Bank*.

SIGNATURE OF GGU BARGAINING UNIT MEMBER DATE

*The ASEA Business leave bank is an asset of the membership and the Union. The leave bank is used to compensate members for time lost from their regular work schedule to conduct negotiations, ASEA trainings & conventions, arbitrations, and approved activities contributing to the mission and goals of ASEA/AFSCME Local 52.

Questions? Contact ASEA (800)478-2732

REVISED 9.18.19

APPENDIX M

[*See next page for fold-out exhibit:*
Exhibit R ASEA Membership and Dues or Fees Authorization (October 2004)]

GGU AUTHORIZATION FOR PAYROLL DEDUCTIONS

Entered _____

COMPLETE AND RETURN TO: ASEA/AFSCME Local 52, 2601 Denali Street, Anchorage, AK 99503
or Fax: (907) 277-5206 or Email: aseahq@afscmelocal52.org **PLEASE PRINT CLEARLY**

Most Recent Date of Hire	**Employee ID or** Last 4 of Social Security Number		Voter ID #
Department	Last Name	First	Middle
Division	Mailing Address		
Work Location	City	State	Zip + 4
Job Title	Physical Address		
Home Phone	City	State	Zip + 4
Work Phone	Home E-Mail Address (Home e-mail will be held confidential at ASEA Headquarters and will not be distributed to anyone.)		

SIGNATURE REQUIRED →

I AUTHORIZE MY EMPLOYER TO DEDUCT FROM MY PAYCHECK EACH PAY PERIOD, UNION DUES OR FEES IN ACCORDANCE WITH THE TERMS OF THE ASEA/AFSCME LOCAL 52—STATE OF ALASKA COLLECTIVE BARGAINING AGREEMENT.

(Select One) ☐ **UNION DUES, with full membership rights, including the right to vote and/or hold office.**

☐ **AGENCY FEES,** (I understand I will not have full rights to participate in the Union, including the right to vote or hold office.)

ASEA BUSINESS LEAVE BANK

I acknowledge, as a condition of employment that 7-1/2 hours of personal leave will be deducted and contributed to ASEA/AFSCME Local 52's Union Leave Bank.

X SIGN HERE

SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

Authorization for Payroll Deductions of my Public Employees Organized to Promote Legislative Equality (PEOPLE) VOLUNTARY CONTRIBUTION

You may make a contribution of any amount or no contributions at all to PEOPLE. The Union will not favor or disadvantage anyone by the level or decision to contribute. In accordance with federal law, the PEOPLE Committee will accept contributions from only members of AFSCME and their families. Contributions to AFSCME PEOPLE are not deductible as a charitable contribution for federal income tax purposes.

I understand that this contribution may be used for political purposes. My contribution is voluntary. I understand that it is not required as a condition of membership or as a condition of continued employment, and that I may revoke this authorization at any time by giving 30 days written notice.

I AUTHORIZE THE STATE OF ALASKA TO DEDUCT THE FOLLOWING VOLUNTARY CONTRIBUTION FROM MY PAYCHECK EACH PAY PERIOD, TO BE PAID TO ASEA/AFSCME LOCAL 52 POLITICAL ACTION COMMITTEE.

Minimum Contribution ☐ **$2.00** (Does not qualify for AFSCME MVP Rewards)

AFSCME PEOPLE MVP Rewards Program ($5.00 minimum contribution to qualify for the AFSCME MVP Rewards)

☐ **$5.00** ☐ **$10.00** ☐ **$ _____** **(Any amount up to $20.00)**

X SIGN HERE

SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

UNION RELEASE FOR CONTINUED EMPLOYMENT

OFFICE USE ONLY **OFFICE USE ONLY**

The Bargaining Unit Member named above has fulfilled their dues/fees enrollment obligation under the Collective Bargaining Agreement and is released for the continued state employment beyond their 31st day.

OFFICE USE ONLY

AUTHORIZED UNION REPRESENTATIVE _____ DATE _____

(FORM REVISED 1.17.18 sd) If you have questions about this form please contact ASEA at 800-478-2732 www.afscmelocal52.org Effective 10/19/04

APPENDIX N

[*See next 2 pages for fold-out exhibit:*
Exhibit S ASEA Membership and Dues Authorization (2017)]

Protecting pay, working conditions, worker rights and member benefits for you is our number one priority. Our power depends on the participation of union members like you standing up for our rights as valuable public service employees. Getting active in our union democracy is one of the most critical rights you have as a member. Let us know how you would like to get involved in our union.

- ☐ Getting co-workers more involved in workplace actions, event and current issues
- ☐ Building power with other members
- ☐ Participate in Social Media videos and publications
- ☐ Attending worksite meetings and trainings

Yes, I choose to be a union member. I understand that as a member I will make our union stronger to protect our jobs and the services we provide to the community.

ASEA/AFSCME LOCAL 52, AFL-CIO
UNION MEMBERSHIP CARD/PAYROLL DEDUCTION AUTHORIZATION

Name _____ **Job Title** _____

Home Address _____ **Date of hire** _____ **Employee ID #** _____

City, State, ZIP _____ **Dept./Div.** _____

Home Phone _____ **Work Location** _____

Birth Year _____ **Sex:** ☐Male ☐Female **Work Phone** _____

Home Email _____ **Cell*** _____

**Home email and cell phone information will be held confidential with ASEA & AFSCME and will be used for official ASEA Union purposes only. By providing my cell phone number, I understand that the Union and its affiliations may use automated calling technologies and/or text message me on my cell phone on a periodic basis. The Union will not charge for text message alerts; carrier message and data rates may apply to such texts.*

I hereby apply for or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws. By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, (hereafter referred to as ASEA or the "Union") to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to the ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, is voluntary and not a condition of my employment.

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter, unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. Employees must inform the Union of any promotion or transfer to a position outside of the bargaining unit. This card supersedes any prior dues authorization card I signed.

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses.

GGU2017

✖ _____ _____

REQUIRED: SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

Protecting pay, working conditions, worker rights and member benefits for you is our number one priority. Our power depends on the participation of union members like you standing up for our rights as valuable public service employees. Getting active in our union democracy is one of the most critical rights you have as a member. Let us know how you would like to get involved in our union.

- ☐ Getting co-workers more involved in workplace actions, event and current issues
- ☐ Building power with other members
- ☐ Participate in Social Media videos and publications
- ☐ Attending worksite meetings and trainings

Yes, I choose to be a union member. I understand that as a member I will make our union stronger to protect our jobs and the services we provide to the community.

ASEA/AFSCME LOCAL 52, AFL-CIO
UNION MEMBERSHIP CARD/PAYROLL DEDUCTION AUTHORIZATION

Name _____ **Job Title** _____

Home Address _____ **Date of hire** _____ **Employee ID #** _____

City, State, ZIP _____ **Dept./Div.** _____

Home Phone _____ **Work Location** _____

Birth Year _____ **Sex:** ☐Male ☐Female **Work Phone** _____

Home Email _____ **Cell*** _____

**Home email and cell phone information will be held confidential with ASEA & AFSCME and will be used for official ASEA Union purposes only. By providing my cell phone number, I understand that the Union and its affiliations may use automated calling technologies and/or text message me on my cell phone on a periodic basis. The Union will not charge for text message alerts; carrier message and data rates may apply to such texts.*

I hereby apply for or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws. By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, (hereafter referred to as ASEA or the "Union") to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment with my Employer.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to the ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, is voluntary and not a condition of my employment.

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter, unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. Employees must inform the Union of any promotion or transfer to a position outside of the bargaining unit. This card supersedes any prior dues authorization card I signed.

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses.

GGU2017

✖ _____ _____

REQUIRED: SIGNATURE OF BARGAINING UNIT MEMBER **DATE**

☑ YES, I will support candidates that fight for us!

For public employees, the people we elect determine the quality of our lives and our livelihood.
Our wages, benefits, working conditions, health and safety, and even whether we have jobs at all, are in the hands of officials who influence our future. Unless, that is, we hold them accountable. Our activism in politics is incredibly important. Through the ASEA Political Action Committee (PAC) and P.E.O.P.L.E.* we help elect candidates who stand for what matters to ASEA members. Your contribution will remain in Alaska and be used only for candidates and issues in Alaska. Contributions will not be used on Federal issues.

*ASEA members who participate in the ASEA/AFSCME Local 52 PAC will automatically be participants of the P.E.O.P.L.E. Program. P.E.O.P.L.E. is a national political action program by AFSCME.
You may make a contribution of any amount or no contributions at all to PEOPLE. The union will not favor or disadvantage anyone by the level or decision to contribute. In accordance with federal law, the PEOPLE Committee will accept contributions from only members of AFSCME and their families. Contributions to AFSCME PEOPLE are not deductible as a charitable contribution for federal income tax purpose.

AUTHORIZATION FOR PAYROLL DEDUCTION FOR THE ASEA/AFSCME Local 52
POLITICAL ACTION COMMITTEE
VOLUNTARY CONTRIBUTION

I authorize the State of Alaska to deduct the following voluntary contribution from my paycheck each period, to be paid to ASEA/AFSCME Local 52 POLITICAL ACTION COMMITTEE.

AFSCME PEOPLE MVP Rewards Program - $5.00 Minimum per payroll contribution to qualify for AFSCME MVP Rewards

Minimum Contribution ☐ $2.00 *(Does not qualify for AFSCME MVP Rewards)*

☐ $5.00 **☐ $10.00** **☐ _____ any amount up to $20.00**

- I understand that this contribution may be used for political purposes.
- I understand my contribution is voluntary.
- I understand my participation is not required as a condition of union membership or of continued employment and that I may revoke this authorization at any time by giving 30 days written notice to the Union.

PRINT First & Last Name	Employee ID number	Signature	Date

☑ YES, I will support candidates that fight for us!

For public employees, the people we elect determine the quality of our lives and our livelihood.
Our wages, benefits, working conditions, health and safety, and even whether we have jobs at all, are in the hands of officials who influence our future. Unless, that is, we hold them accountable. Our activism in politics is incredibly important. Through the ASEA Political Action Committee (PAC) and P.E.O.P.L.E.* we help elect candidates who stand for what matters to ASEA members. Your contribution will remain in Alaska and be used only for candidates and issues in Alaska. Contributions will not be used on Federal issues.

*ASEA members who participate in the ASEA/AFSCME Local 52 PAC will automatically be participants of the P.E.O.P.L.E. Program. P.E.O.P.L.E. is a national political action program by AFSCME.
You may make a contribution of any amount or no contributions at all to PEOPLE. The union will not favor or disadvantage anyone by the level or decision to contribute. In accordance with federal law, the PEOPLE Committee will accept contributions from only members of AFSCME and their families. Contributions to AFSCME PEOPLE are not deductible as a charitable contribution for federal income tax purpose.

AUTHORIZATION FOR PAYROLL DEDUCTION FOR THE ASEA/AFSCME Local 52
POLITICAL ACTION COMMITTEE
VOLUNTARY CONTRIBUTION

I authorize the State of Alaska to deduct the following voluntary contribution from my paycheck each period, to be paid to ASEA/AFSCME Local 52 POLITICAL ACTION COMMITTEE.

AFSCME PEOPLE MVP Rewards Program - $5.00 Minimum per payroll contribution to qualify for AFSCME MVP Rewards

Minimum Contribution ☐ $2.00 *(Does not qualify for AFSCME MVP Rewards)*

☐ $5.00 **☐ $10.00** **☐ _____ any amount up to $20.00**

- I understand that this contribution may be used for political purposes.
- I understand my contribution is voluntary.
- I understand my participation is not required as a condition of union membership or of continued employment and that I may revoke this authorization at any time by giving 30 days written notice to the Union.

PRINT First & Last Name	Employee ID number	Signature	Date

APPENDIX O

EXHIBIT X

STATE CAPITOL
P.O. Box 110001
Juneau, AK 99811-0001
907-465-3500

550 West Seventh Avenue,
Suite 1700
Anchorage, AK 99501
907-269-7450

[SEAL]

Governor Michael J. Dunleavy
STATE OF ALASKA

ADMINISTRATIVE ORDER NO. 312

I, Michael J. Dunleavy, Governor of the State of Alaska, under the authority of Article III, Sections l and 24, of the Constitution of the State of Alaska, issue this order to establish a procedure that ensures that the State of Alaska honors the First Amendment free speech rights of state employees to choose whether or not to pay union dues and fees through payroll deduction.

BACKGROUND

On June 16, 2018, the United States Supreme Court in *Janus v. AFSCME Council 31*, 585 U.S. __ , 138 S. Ct. 2448 (2018), found that forcing public employees to pay agency fees to unions "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." (*Janus* decision). The Court held that "[s]tates and

public-sector unions may no longer extract agency fees from nonconsenting employees." The Court further held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect a payment, unless the employee affirmatively consents to pay." A waiver of an employee's First Amendment rights "cannot be presumed" and in order to be effective, "must be freely given and shown by 'clear and compelling' evidence." Following the *Janus* decision, the Alaska Department of Administration immediately stopped the deduction of union fees from the wages of those employees who were not members of a union.

On August 27, 2019, the Attorney General of the State of Alaska issued an Opinion outlining the State's duties and responsibilities in light of the *Janus* decision and the protections the decision affords all state employees. *See 2019 Op. Alaska Att'y Gen. (August 27) (Opinion).* The Opinion explained that under *Janus*, the State of Alaska may no longer automatically deduct union dues and fees from an employee's wages unless the employee affirmatively consents to waive his or her First Amendment rights. The Opinion also made clear that the State's previous steps to implement the *Janus* decision did not go far enough. Specifically, the State did not implement a procedure to ensure that it had "clear and compelling" evidence that an employee freely consented to waive his or her First Amendment rights by authorizing the automatic deduction of union dues and fees from the employee's paycheck.

PURPOSE

This Order implements certain recommendations outlined in the Opinion, protects the First Amendment free speech rights of affected state employees, and ensures that future deductions of dues and fees from state employee paychecks meet the requirements laid out by the United States Supreme Court in the *Janus* decision. This Order will ensure that an employee clearly and affirmatively consents before the State deducts union dues or fees from employee paychecks, and that the consent is "freely given" and reflected by "clear and compelling" evidence.

ORDER

Under the authority of Article III, Sections 1 and 24, Constitution of the State of Alaska, I, Michael J. Dunleavy, Governor of the State of Alaska, order the following:

1. Effective immediately, the Department of Administration will work with the Department of Law to implement new procedures and forms for affected state employees to "opt-in" and "opt-out" of paying union dues and fees. These procedures and forms will ensure that waivers of First Amendment rights are freely given. The "opt-in" dues authorization form must clearly inform employees that they are waiving their First Amendment right not to pay union dues or fees and thereby not to associate with the union's speech. To minimize the risk of undue pressure or coercion and to make the

process simple and convenient for employees, I direct that the State collect these forms electronically, but include a process for submission of paper forms for those employees with little or no computer or Internet access.

Consistent with the Opinion, in order to comply with the U.S. Supreme Court's mandate, the "opt-in" dues authorization form must, at a minimum, contain the following language, which may be augmented through the collective bargaining process:

Union Dues/Fees Authorization Form

I understand that I have a constitutional right to refrain from paying union dues and fees. I hereby freely and without any coercion whatsoever affix my signature to this form. By signing this form, I authorize my employer, the State of Alaska, to automatically deduct from my paycheck each pay period the regular monthly dues or fees as established by my union's constitution or bylaws and the Collective Bargaining Agreement between the State of Alaska and my union. I also understand that I am waiving my First Amendment right not to pay union dues and fees, and am freely associating myself with my union's speech activities.

I understand that I am not required to sign this form in order to obtain or maintain my job with the State of Alaska.

I further understand that I may revoke my consent to future union dues or fees withdrawal at any time and for any reason and that my request to revoke my consent will be processed not later than 30 days after receipt by the Department of Administration and will become effective at the beginning of the next regularly scheduled pay period following the processing period.

2. Effective as soon as administratively feasible, the Department of Administration will develop a system for employees to electronically submit the required forms to the State. The State will also promptly develop a multi-factor authentication process that is easy to understand and administer, and which presents two levels of authorization to verify an employee's identity and intent.

3. After the forms and processes described above are completed, the State shall provide notice to all affected unions at least 30 days before implementation. The State will offer to meet with each union to discuss any additions or modifications the unions believe are compelled by the *Janus* decision or by Alaska law that are not otherwise in conflict

with the First Amendment or the *Janus* decision.

4. The State will continue to authorize and process the deduction of union dues from the wages of current employees until the State is able to develop and implement the process identified in this Order. Once the new procedures and forms are implemented as described above, all dues and fees deductions made under prior procedures will be immediately discontinued, pre-existing employee authorizations will be deemed void, and any new dues deductions will follow the process implemented by this Order.

5. State employees can "opt-in" to pay union dues and fees at any time after this Order is implemented by submitting the appropriate form to the Department of Administration. An "opt-in" form will be processed not later than 30 days after receipt by the Department of Administration and will become effective at the beginning of the next regularly scheduled pay period following the processing period. The "opt-in" form will contain the waiver language as outlined above. State employees can also stop having union dues and fees deducted at any time after this Order is implemented by submitting an "opt-out" form to the Department of Administration. Any "opt-out" or withdrawal of dues deduction forms will be processed not later than 30 days after receipt by the

Department of Administration and will become effective at the beginning of the next regularly scheduled pay period following the processing period.

6. The Department of Administration will work and engage with the unions, through the collective bargaining process, with guidance and assistance from the Department of Law, to address any remaining issues described in the Opinion, including developing appropriate contract language for other procedures and forms and determining the frequency of "opt-in" authorizations for state employees.

RESPONSIBILITY FOR IMPLEMENTATION

The Department of Administration, with guidance from the Department of Law, is responsible for the implementation of this Order. The Department of Administration will work with the other departments as needed in order to comply with this Order. Department leadership and staff are expected to provide their complete cooperation in effecting this Order. Further, the Department of Administration will provide quarterly progress reports to the Office of the Governor that detail the steps taken to implement this Order. The frequency of those progress reports may be changed to be required more or less frequently, upon direction from the Governor.

DURATION

This Order takes effect immediately and remains in effect until it is modified or rescinded.

DATED at CITY, Alaska, this 26 day of September, 2019.

/s/ Michael J. Dunleavy
Michael J. Dunleavy Governor

APPENDIX P

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-19-09971 CI

[Filed March 4, 2020]

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, vs. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant/Counterclaimant.	)
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Third-Party Plaintiff, vs. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official	)

capacity as Attorney General of Alaska;)
KELLY TSHIBAKA, in her official capacity)
as Commissioner of the Alaska Department)
of Administration; and STATE OF ALASKA,)
DEPARTMENT OF ADMINISTRATION,)
Third-Party Defendants.)
_____)

ASEA'S SECOND AMENDED COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

Defendant/counterclaimant/third-party plaintiff Alaska State Employees Association/AFSCME Local 52, AFL-CIO ("ASEA") asserts the following counterclaims against plaintiff/counterclaim defendant State of Alaska (the "State"), and hereby files a third-party complaint against third-party defendants Alaska Governor Michael J. Dunleavy, Alaska Attorney General Kevin G. Clarkson, Alaska Department of Administration Commissioner Kelly Tshibaka, and the State of Alaska, Department of Administration, alleging as follows:

INTRODUCTION

1. ASEA seeks judicial relief to invalidate, and prevent the State and third-party defendants from implementing, unilateral changes to the State's longstanding practices for deducting union membership dues for thousands of State employees who voluntarily authorized those payroll deductions to support their unions. ASEA also seeks damages and other relief for the State's violations of ASEA's collective bargaining agreement with the State.

2. On August 27, 2019, the third-party defendants announced that they will implement a new policy by making radical changes to the State's union member dues deduction practices. The third-party defendants' implementation of these changes exceeds their authority under the Alaska Constitution, conflicts with statutes adopted by the Alaska Legislature, and violates legally binding contracts between the State and labor unions that represent State employees. The third-party defendants' implementation of their new policy will interfere with the relationship between unions and their members, deprive unions of resources needed to fund their operations, and undermine the ability of unions to effectively represent their members and bargaining units.

3. The State and third-party defendants claim that they must implement their new union dues deduction policy to comply with a U.S Supreme Court decision that issued almost 15 months before they announced their new policy and that did not involve the deduction of union membership dues for employees who voluntarily joined unions and authorized the deductions. The State and third-party defendants' claim of necessity is meritless. The Attorney General's office already concluded, correctly, that the Supreme Court decision does *not* require any changes to the State's policies or practices for deducting union membership dues. The third-party defendants' new policy is an illegal effort to use the authority of the State to retaliate against labor unions that have criticized the Governor's actions.

PARTIES

4. Counterclaimant and third-party plaintiff ASEA is a labor organization that serves as the democratically chosen collective bargaining representative of a General Government Bargaining Unit consisting of approximately 8,000 State employees.

5. Counterclaim defendant STATE OF ALASKA is a public employer.

6. Third-party defendant MICHAEL J. DUNLEAVY is the Governor of Alaska. He is sued in his official capacity.

7. Third-party defendant KEVIN G. CLARKSON is the Attorney General of Alaska. He is sued in his official capacity.

8. Third-party defendant KELLY TSHIBAKA is the Commissioner of the State of Alaska Department of Administration. She is sued in her official capacity.

9. Third-party defendant STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION is the agency responsible for administering payroll for State of Alaska employees. Through its agents, the State has entered into a collective bargaining agreement with ASEA. The agency is bound, under this agreement, to honor voluntary union dues deduction requests submitted by employees.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this state law dispute against the State of Alaska, an executive branch department, and executive branch officers.[1]

11. Venue is proper in this Judicial District.[2]

BACKGROUND

Alaska's Public Employment Relations Act

12. Alaska's Public Employment Relations Act ("PERA"),[3] establishes a democratic system of union representation for State employees. Under PERA, a majority of employees in a bargaining unit may, if they choose, select a union representative to negotiate and administer a collective bargaining agreement to cover their unit.[4] If the employees choose to be represented by a union, the public employer must "negotiate in good faith" with the union "with respect to wages, hours, and other terms and conditions of employment."[5] The Legislature reviews "[t]he complete monetary and nonmonetary terms of a tentative agreement" reached as the result of such negotiations, and implicitly ratifies such an agreement by appropriating funds to

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[1] AS 09.05.010, 09.05.015, 22.10.020.

[2] AS 22.10.030; Alaska R. of Civ. P. 3(c), 4(d)(7), (8).

[3] AS 23.40.070-.230.

[4] AS 23.40.080-.100.

[5] AS 23.40.250(1); *see* AS 23.40.070, .110(a)(5).

cover the agreement's monetary terms.[6] The resulting written collective bargaining agreement is binding on the State employer.[7]

13. PERA requires that public employers must deduct union dues from a public employee's pay when the employee has authorized those deductions in writing:

> Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative.[8]

14. PERA also requires that public employers must bargain in good faith with certified employee representatives about the terms of member dues deductions. "PERA specifically requires public employers to 'negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment.' AS 23.40.070(2). Such matters are

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[6] AS 23.40.215(a)-(b).

[7] AS 23.40.210.

[8] AS 23.40.220.

'mandatory subjects of bargaining.'"[9] As part of that duty to bargain in good faith, PERA prohibits public employers from making unilateral changes to mandatory subjects of bargaining.[10] Deduction of dues for union member employees is a mandatory subject of bargaining.[11] PERA thus prohibits public employers from changing how they process union member dues deductions without first bargaining in good faith with the union.

15. PERA further prohibits public employers from "interfer[ing] with, restrain[ing], or coerc[ing] an employee in the exercise of the employee's rights guaranteed in [PERA]," from "discriminat[ing] in regard to ... a term or condition of employment to . . . discourage membership in a[] [labor] organization," and from "interfer[ing] with the formation, existence, or administration of a[] [labor] organization."[12] "Implicit in Alaska's public union statutory rights is the right of the union and its members to function free of harassment and undue interference from the State."[13]

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[9] *Alaska Pub. Employees Ass'n v. State*, 831 P.2d 1245, 1248 (Alaska 1992) (quoting *Alaska Cmty. Colleges' Fed'n of Teachers, Local 2404 v. University of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983) ("*Fed'n of Teachers*")).

[10] *Fed'n of Teachers*, 669 P.2d at 1305.

[11] *See In Re Wkyc-TV, Inc.*, 359 NLRB 286, 288 (2012).

[12] AS 23.40.110(a)(1), (2), (3).

[13] *Peterson v. State*, 280 P.3d 559, 565 (Alaska 2012).

ASEA and its Members

16. ASEA is the democratically chosen collective bargaining representative of the General Government Bargaining Unit, which consists of approximately 8,000 State of Alaska employees. The General Government Bargaining Unit is the largest bargaining unit of Alaska State employees.

17. State employees in union-represented bargaining units are not required to become union members as a condition of public employment. They are free to choose to join or to not join the union.

18. Approximately 7,000 of the employees in the General Government Bargaining Unit have chosen to become members of ASEA.

19. ASEA's members have voluntarily signed written membership agreements authorizing the Union to collect dues through payroll deductions in exchange for union membership and access to members-only rights and benefits.

20. ASEA's current membership/dues authorization agreement states, above the line for the employee's signature:

> I hereby *voluntarily authorize* and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues as certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of

> payroll deduction, as opposed to other means of payment, *is voluntary and not a condition of my employment*.[14]

21. ASEA's current membership and dues authorization card provides that the dues authorization is valid "for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period."[15]

22. Many union members throughout the country execute similar membership agreements that require the payment of membership dues through payroll deduction for a one-year period, even if the employee resigns membership in the interim. Such agreements provide financial stability to labor organizations and prevent employees from becoming members solely to take advantage of a particular membership right or benefit, such as to vote in a union election, only to immediately stop paying dues. Some of ASEA's members have signed such membership agreements.

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[14] ASEA Membership Card (emphases added).

[15] *Id.*

ASEA's Collective Bargaining Agreement with the State

23. ASEA and the State are parties to a collective bargaining agreement ("CBA") that governs the terms and conditions of employment for bargaining unit employees. The CBA is effective July 1, 2019 to June 30, 2022.

24. The CBA is a binding contract between ASEA and the State.

25. The CBA explicitly provides that, "[u]pon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member ... the Employer shall" deduct union dues each pay period and forward those dues to the Union.[16]

26. The CBA specifically provides that "[b]argaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the state."[17]

27. The CBA also provides that "[t]he Employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union."[18]

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[16] ASEA CBA Art. 3.04.A.

[17] *Id.*

[18] *Id* at 3.01.

The *Janus* Decision and Nonmember Agency Fees

28. Prior to June 27, 2018, Alaska state law and U.S. Supreme Court precedent, in a case called *Abood v. Detroit Board of Education*,[19] permitted public employers to require non-union-members to pay fair-share fees (also known as agency fees) to their union representatives.[20] Under *Abood*, fair-share fees could be collected to cover the nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political or ideological activities.[21]

29. In *Janus v. AFSCME, Council 31*,[22] issued on June 27, 2018, the Supreme Court held that *Abood* "is now overruled" and that, under *Janus*, the collection of mandatory fair-share fees from nonmember public employees "violates the First Amendment and cannot continue."[23] The Court in *Janus* explained, however, that its holding was limited to the collection of fair-share fees from nonmembers: "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions."[24]

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[19] 431 U.S. 209 (1977).

[20] *See* AS 23.40.110(b)(2).

[21] 431 U.S. at 235-36.

[22] 138 S.Ct. 2448 (2018).

[23] *Id.* at 2486.

[24] *Id.* at 2485 n.27.

30. After *Janus*, the State and ASEA immediately stopped collecting fair-share fees.[25]

Alaska's Attorney General Recognizes that *Janus* Does Not Affect Public Employers' Obligation to Deduct Authorized Union Dues

31. After *Janus* was decided, Alaska's Attorney General Jahna Lindemuth issued a legal memorandum explaining that *Janus* invalidated agency fee requirements but otherwise "[a]ll other provisions of the State's PERA law remain in effect. In fact, the Supreme Court in *Janus* pointed out that its decision did not require the invalidation of state labor relations laws such as PERA."[26]

32. Attorney General Lindemuth specifically recognized that *Janus* did not authorize public employers to make unilateral changes to existing collective bargaining agreements and that *Janus* does not affect the validity of existing dues deduction authorizations:

> Does the *Janus* decision provide that a public employer may not continue to honor existing union membership dues authorizations?
>
> No. The *Janus* decision addressed the issue of payment of union dues by non-union members. It does not require existing union members to

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[25] *Cf Crockett v. NEA-Alaska*, 361 F. Supp. 3d 996, 1003 (D. Alaska 2019) ("[I]t is undisputed that the collection of fair-share fees ceased immediately after *Janus* ....").

[26] Alaska AG Memorandum at 2, Sept. 7, 2018.

> take any action; existing membership cards and payroll deduction authorizations by union members should continue to be honored.[27]

33. The Attorneys General or Departments of Labor of at least 13 other states and the District of Columbia issued similar opinions, all agreeing with Attorney General Lindemuth that *Janus* does not affect dues deductions for union members who have previously authorized those deductions. *See*:

a. California Attorney General Opinion – Affirming Labor Rights and Obligations in Public Workplaces, available at https://oag.ca.gov/system/files/attachments/press_releases/AG%20Becerra%20Labor%20Rights%20Advisory%20FINAL.pdf;

b. Connecticut Attorney General Opinion – General Guidance Regarding the Rights and Duties of Public-Sector Employers and Employees in the State of Connecticut after *Janus v. AFSCME Council 31*, available at https://portal.ct.gov/AG/General/Guidance_on_Janus;

c. Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Pennsylvania, Vermont, and Washington Attorneys General and Oregon Department of Justice Statement – Response to Liberty Justice Center letter, October 5, 2018;

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[27] *Id.* at 3.

d. District of Columbia Attorney General Opinion – Attorney General Advisory: Affirming Public Sector Labor Rights and Responsibilities After *Janus*, July 30, 2018 available at http://oag.dc.gov/sites/default/files/2018-07/Post_Janus_Advisory_ FINAL.pdf;

e. Illinois Attorney General Opinion – Guidance Regarding Rights and Duties of Public Employees, Public Employers, and Public Employee Unions after *Janus v. AFSCME Council 31*, July 20, 2018, available at http://www.illinoisattorneygeneral.gov/rights/Janus_Advisory_72018.pdf;

f. Maryland Attorney General Opinion – General Guidance on the Rights and Duties of Public-Sector Workers and Employers After Janus, available at http://www.marylandattorneygeneral.gov/news%20documents/After_Janus.pdf;

g. Massachusetts Attorney General Opinion – Attorney General Advisory, Affirming Labor Rights and Obligations in Public Workplaces, July 3, 2018, available at https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20%287-3%29.pdf;

h. New Jersey Joint Opinion – Joint Guidance on the Rights of Public Sector Workers and Employers After Janus, August 22, 2018,

available at https://nj.gov/labor/lwdhome/press/2018/ 20180822janus.html;

i. New Mexico Attorney General Opinion – Attorney General Advisory, Guidance for Public Sector Employers and Employees after *Janus v. AFSCME Council 31*, September 8, 2018, available at https://www.nmag.gov/attorney-general-advisory-on-janus-decision.pdf;

j. New York Attorney General Statement – Response to Liberty Justice Center letter, October 5, 2018;

k. New York Department of Labor Guidance for Public-Sector Employers and Employees in New York State, available at https://www.labor.ny.gov/formsdocs/factsheets/pdfs/janus-guidance.pdf;

l. Oregon Attorney General Opinion – Advisory: Affirming Labor Rights and Obligations in Public Workplaces, July 20, 2018, available at https://www.doj.state.or.us/wp-content/uploads/2018/07/AG_Advisory_on_Janus_Decision.pdf;

m. Pennsylvania Attorney General Opinion – Guidance on the Rights and Responsibilities of Public Sector Employees and Employers Following the U.S. Supreme Court's *JANUS* Decision, August 3, 2018, available at https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-08-03-AG-Shapiro-Janus-Advisory-FAQ.pdf;

n. Rhode Island Attorney General Opinion – Statement on Janus, September 4, 2018;

o. Vermont Attorney General Opinion – Advisory: Public Sector Labor Rights and Obligations Following *Janus*, August 9, 2018, available at https://ago.vermont.gov/wp-content/uploads/2018/08/Janus-Advisory-8.9.2018.pdf; and

p. Washington Attorney General Opinion – Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, July 17, 2018, available at https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-issues-advisory-affirming-labor-rights-and-obligations.

34. Every federal court that has addressed the same basic issue, including the District of Alaska, has similarly agreed that *Janus* does not affect the validity of voluntary union membership and dues deduction authorization agreements. *See*:

a. *Quirarte v. United Domestic Workers AFSCME Local 3930*, __ F. Supp. 3d ___, 2020 WL 619574, at *5-6 (S.D. Cal. Feb. 10, 2020);

b. *Few v. United Teachers Los Angeles*, 2020 WL 633598, at *6 (C.D. Cal. Feb. 10, 2020);

c. *Grossman v. Hawaii Gov't Employees Ass'n/AFSCME Local 152*, 2020 WL 515816, at *6 n.9 (D. Haw. Jan. 31, 2020);

d. *Hendrickson v. AFSCME Council 18*, __ F. Supp. 3d ___, 2020 WL 365041, at *4-5 (D.N.M. Jan. 22, 2020);

e. *Mendez v. Cal. Teachers Ass'n*, __ F. Supp. 3d ___, 2020 WL 256124, at *2 (N.D. Cal. Jan. 16, 2020);

f. *Aliser v. SEIU Cal.*, __ F. Supp. 3d ___, 2019 WL 6711470, at *3-4 (N.D. Cal. Dec. 10, 2019);

g. *Smith v. Teamsters Local 2010*, 2019 WL 6647935, at *8-9 (C.D. Cal. Dec. 3, 2019);

h. *Smith v. N.J. Educ. Ass'n*, 2019 WL 6337991, at *6 (D.N.J. Nov. 27, 2019);

i. *Oliver v. SEIU Local 668*, __ F. Supp. 3d ___, 2019 WL 5964778, at *3 (E.D. Pa. Nov. 12, 2019);

j. *Anderson v. SEIU Local 503*, 400 F. Supp. 3d 1113, 1116-17 (D. Or. 2019);

k. *Seager v. United Teachers Los Angeles*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019);

l. *Smith v. Superior Court, Cty. of Contra Costa*, 2018 WL 6072806, at * 1 (N.D. Cal. Nov. 16, 2018) ("*Smith I*"), *subsequent order*, *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019) ("*Smith II*");

m. *Cooley v. Cal. Statewide Law Enforcement Ass'n*, 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019) ("*Cooley I*"), *subsequent order*, 385 F. Supp. 3d 1077, 1079 (E.D. Cal. 2019) ("*Cooley II*");

n. *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019) ("*O'Callaghan I*"), *subsequent order*, No. CV 19-02289 JVS (C.D. Cal. Sept. 30, 2019) ("*O'Callaghan II*");

o. *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019);

p. *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Belgau I*"), *subsequent order*, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. 2019) ("*Belgau II*");

q. *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019); and

r. *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019).

35. The state courts and labor relations agencies that have addressed the same basic issue have also agreed that *Janus* does not affect the validity of union membership and dues deduction authorization agreements and does not permit public employers to unilaterally cease or alter the processing of member dues deductions. *See*:

a. *Montana Fed'n of Public Emps. v. Vigness*, No. DV 19-0217, Order Granting PI (Mont. D. Ct. Apr. 11, 2019);

b. *In re Woodland Township Bd. of Educ., and Chatsworth Educ. Ass'n*, No. CO-2019-047, 45 NJPER ¶ 24, 2018 WL 4501733 (N.J. Pub. Emp't Relations Comm'n Aug. 31, 2018); and

c. *AFSCME, Local 3277 v. Rio Rancho*, PELRB No. 113-18, TRO and PI (N.M. Pub. Emps. Lab. Relations Bd. Aug. 21, 2018), *aff'd*, No. CV-2019-1398 (N.M. Dist. Ct., Bernalillo Cty. Oct. 28, 2019).

36. Labor arbitrators have also agreed that *Janus* does not affect union members' dues authorization agreements and have sustained grievances brought by unions challenging public employers that erroneously ceased making previously authorized dues deductions based on a misreading of *Janus*. *See, e.g.*:

a. *In re Ripley Union Lewis Huntington Sch. Dist. Bd. of Educ. and OAPSE/AFSCME Local 4, AFL-CIO Local 642*, Cessation of Union Dues Collection Grievance, AAA File No. 01-180004-6755 (Arb. W.C. Heekin, June 18, 2019); and

b. *City of Madison (WI) and IBT, Local 695*, 48 LAIS 35, 2019 WL 3451442 (Arb. P.G. Davis, Feb. 13, 2019).

The State's Re-affirmation of Its Obligation to Process Authorized Dues Deductions

37. The State negotiated its current collective bargaining agreement with ASEA, covering the largest bargaining unit of State employees (the General Government Bargaining Unit), after *Janus* was issued. Following legislative approval of the funding necessary to implement the CBA, Department of Administration Commissioner Kelly Tshibaka, the representative for the State of Alaska, signed the CBA on August 8, 2019—more than a year after the *Janus* opinion was

issued. The CBA is effective for the period July 1, 2019 to June 30, 2022.

38. The new CBA re-affirmed the State's contractual obligation to continue processing dues deductions pursuant to the written authorizations that thousands of union members have already signed. In the new CBA, the parties removed the agency fee provisions that had been invalidated by *Janus* but otherwise obligated the State to deduct dues in accordance with the dues authorizations contained in the membership agreements signed by ASEA's members.

39. The CBA provides: "Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member . . . the Employer shall" deduct union dues each pay period and forward those dues to the Union.[28] The CBA provides that "[b]argaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the state."[29] The CBA also provides that "[t]he Employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union."[30]

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[28] ASEA CBA Art. 3.04.A.

[29] *Id.*

[30] *Id.* at 3.01.

40. The Alaska Department of Administration's official summary of changes to the CBA acknowledges that the CBA was "[u]pdated to comply with *Janus* decision."[31]

The State's New and Erroneous Reading of *Janus*

41. On August 27, 2019, apparently in response to a request from Alaska's Governor, Alaska Attorney General Kevin G. Clarkson issued a new legal opinion letter concerning the *Janus* decision. Attorney General Clarkson's letter reaches the opposite conclusion from Attorney General Lindemuth's September 7, 2018 legal memorandum and from all of the court decisions, administrative decisions, and arbitration decisions cited above.

42. Attorney General Clarkson's letter opines that *Janus* "goes well beyond agency fees and non-members,"[32] and that Alaska statutes and collective bargaining agreements that provide for public employers to deduct union dues in accordance with authorizations voluntarily executed by public employees somehow violate the First Amendment rights of those same public employees.

43. According to Attorney General Clarkson's opinion letter: a) public employers cannot continue to

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[31] *See* http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/training/ASEASummary2019.pdf.

[32] Alaska AG Letter at 5, Aug. 27, 2019, publicly available at http://www.law.state.ak.us/pdf/opinions/opinions_2019/19-002_JANUS.pdf.

deduct dues based on the union membership agreements and dues deduction authorizations already signed by public employees in Alaska; b) public employers can only deduct union dues for union members who sign new authorizations on forms created by the government after receiving a government warning that they are "waiving" their First Amendment rights and may be agreeing to support causes with which they disagree; c) all public employees can immediately terminate their current dues deduction authorizations, even if their membership agreements provide for the authorization to remain in effect for a one-year period; and d) all dues deduction authorizations must expire after 12 months, so union members must continuously renew them after receiving a government warning intended to discourage them from doing so.

44. The Attorney General's August 27, 2019 opinion letter is based on an egregious misreading of the *Janus* decision that has been rejected by every federal judge to consider this issue. The Attorney General's August 27, 2019 opinion letter was issued without offering public employee unions the opportunity to submit any legal briefing and ignores the legal authority that uniformly rejects the Attorney General's erroneous interpretation of *Janus*.

The State and Third-Party Defendants' Violations of the CBA and State Law

45. The same day that the Attorney General issued his erroneous opinion letter, Department of Administration Commissioner Kelly Tshibaka immediately notified every State employee by email of

the erroneous opinion letter and informed State employees that the Attorney General had "conclude[d] that the State is currently not in compliance with the U.S. Supreme Court's decision" in *Janus* and that "[t]he Department of Administration will be working with the Office of the Governor and the Department of Law on a plan to bring the State into compliance with the law, in short order, and that plan will be rolled out in the next couple of weeks." Commissioner Tshibaka's email message to State employees attached a copy of the Attorney General's opinion letter and of the *Janus* decision. The email message was also accompanied by a list of "frequently asked questions" that included multiple factually and legally inaccurate statements. Commissioner Tshibaka sent the email to all State employees without consulting ASEA.

46. The purpose and effect of third-party defendants' coordinated actions to immediately distribute the Attorney General's erroneous opinion letter and accompanying erroneous information to all State employees, without any consultation with ASEA, was to interfere with ASEA's relationship with its members, encourage ASEA's members to resign their memberships, and cause ASEA to divert resources to responding to the mass distribution of the erroneous information.

47. The State and third-party defendants have already started to unilaterally change the State's longstanding practices for union dues deductions in order to implement the erroneous Attorney General opinion letter. On September 9, 2019, the Alaska Department of Administration notified ASEA that the

Department is dealing directly with some ASEA members about the cancellation of dues deductions, which violates PERA as well as ASEA's CBA with the State.

48. On September 13, 2019, when the Department of Administration processed payroll for General Government Bargaining Unit members, the Department did not deduct dues for some ASEA members or former members who had signed membership/dues authorization agreements committing to pay dues through payroll deduction for a one-year period that had not yet ended. This cessation of dues deductions contrary to the authorization cards signed by ASEA members violates PERA as well as ASEA's CBA with the State.

49. On September 26, 2019, the day after ASEA filed a motion for temporary restraining order and preliminary injunction in this action, the State and third-party defendants took the following actions:

(a) Governor Dunleavy issued Administrative Order No. 312 ("AO"), implementing Attorney General Clarkson's August 27, 2019 opinion letter;

(b) Department of Administration Commissioner Tshibaka emailed all State employees with a letter announcing the release of the AO. The letter included hyperlinks to the AO and the Attorney General's August 27, 2019 opinion letter and attached a "Janus AO Press Release" and a document entitled "Frequently Asked Questions," which

included inaccurate statements about the *Janus* opinion and the alleged necessity for the AO;

(c) The Governor, Attorney General, and Commissioner held a press conference regarding the AO, during which Attorney General Clarkson stated that the State of Alaska is "not going to sit and wait for the grievance to be played out or the litigation to be played out";

(d) The Department of Administration then emailed ASEA a copy of the AO, along with a letter stating that the Attorney General's August 27, 2019 opinion "has or will likely have a direct impact on your Union's collective bargaining agreement with the State, as well as the State's continued deduction of ... Union dues"; and

(e) A representative of the Department of Administration emailed ASEA informing ASEA that the Department would be ceasing dues deductions immediately for certain members, and stating that the Department had been engaging in direct communications with ASEA members.

ASEA's Grievance

50. After Commissioner Tshibaka notified state employees on August 27, 2019 that the State would be implementing the Attorney General's erroneous opinion letter, and the State began to change its past practice regarding the processing of dues deductions, ASEA

filed a grievance under its collective bargaining agreement challenging the unilateral implementation of the Attorney General's opinion letter as a violation of that agreement.

51. On October 16, 2019, Commissioner Tshibaka formally denied ASEA's grievance. ASEA then submitted the grievance to arbitration pursuant to the parties' CBA and demanded that the parties strike for arbitrators. On November 6, 2019, the State informed ASEA that the State refused to select arbitrators or otherwise proceed with the arbitration of ASEA's grievance.

Irreparable Harm Caused by the Third-Party Defendants' Actions

52. The third-party defendants' actions are already causing ASEA to suffer irreparable harm, and ASEA will continue to suffer additional irreparable harm if the State and third-party defendants are not enjoined from implementing the Attorney General's erroneous opinion letter.

53. By incorrectly instructing ASEA's members that their written authorizations of dues deductions are invalid, that they must "waive" their First Amendment rights to authorize dues deductions, and that the State must control the process of dues authorizations through imposing new, onerous, one-sided requirements that make the continued deduction of member dues far more difficult, the third-party defendants are discouraging prospective and current ASEA members from joining or continuing their membership with ASEA and encouraging current

members to withdraw their memberships and dues deduction authorizations.

54. The State and third-party defendants' actions also seriously harm ASEA's status and authority in the eyes of ASEA's current and prospective members, causing a loss of support and strength that cannot be easily recovered. The third-party defendants are inaccurately informing State employees that ASEA is not collecting member dues in a lawful manner, impugning ASEA's status and integrity in its own members' eyes. The third-party defendants are also sending the message to all State employees that the Governor can violate with impunity the collective bargaining agreement the Union fought hard to negotiate, critically undermining ASEA's standing, authority, and support among those employees.

55. These harms are already occurring. Following the release of the Attorney General's opinion letter and the email to all State employees from the Commissioner of the Department of Administration discussing that opinion letter on August 27, 2019, ASEA has already lost members. ASEA will be required to expend substantial resources to counteract the unlawful messages sent to all State employees by the Attorney General's erroneous opinion letter and the Commissioner's email. Indeed, ASEA has already had to expend resources to counteract the third-party defendants' messages. These are all harms that will increase so long as the State and third-party defendants are not enjoined from implementing their change in policy, and these harms cannot be monetarily

quantified or easily repaired following the resolution of this litigation.

56. In addition, by implementing their new policy the State and third-party defendants will cut off ASEA's primary source of revenue—dues from its own members—harming ASEA's ability to operate on a day-to-day basis and to fulfill its statutory representational duties. Implementation of the State and third-party defendants' new policy will deprive ASEA of the operating funds that ASEA needs to keep functioning at its current level. If ASEA is not able to provide the full representational services that it currently provides to all bargaining unit members while this litigation remains pending, it will not be able to negotiate the same collective bargaining agreements and will not be able to enforce its current collective bargaining agreements to the same extent as it would be able to do if its own members' dues payments are not cut off. The resulting loss of collective bargaining strength and ability to enforce current contracts on day-to-day basis are harms that could not be monetarily quantified or easily remedied following resolution of this litigation.

57. The purpose and effect of the State and third-party defendants' new dues deduction policy is to cause all these harms to ASEA and other public employee unions across Alaska that have been critical of the Governor's policies—unlawfully attacking their status and negotiating strength, their standing with their current and prospective members, and their basic ability to function.

COUNT I
Breach of Contract

58. ASEA realleges and incorporates by reference all previous paragraphs.

59. The CBA between ASEA and the State is a binding contract.

60. The CBA provides that, "[u]pon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member ... the Employer shall" deduct union dues each pay period and forward those dues to the Union.[33]

61. The CBA provides that "[b]argaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the state."[34]

62. The CBA provides that "[t]he Employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union."[35]

63. The State and third-party defendants' implementation of the Attorney General's erroneous August 27, 2019 opinion letter and the Governor's AO

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[33] ASEA CBA Art. 3.04.A.

[34] *Id.*

[35] *Id.* at 3.01.

has violated the CBA and will continue to violate the CBA if not enjoined.

64. The State's breach of the CBA has caused, and will continue to cause, damages and other non-monetary harms to ASEA, including through the loss of dues to which ASEA is entitled and interference with ASEA's relationships with its current and prospective members.

65. The parties' CBA contains a provision requiring arbitration of claims regarding the application or interpretation of the CBA. The State, however, has refused to arbitrate ASEA's grievance, thereby waiving its right to insist that ASEA's breach of contract claim be submitted to arbitration.

66. The State and third-party defendants assert that their violations of the CBA are necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state attorney general that has addressed the issue has agreed. None of the breaches of the CBA that the implementation of the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

67. The State and third-party defendants' actions are therefore illegal, invalid, and have no lawful effect, and ASEA is entitled to damages and other equitable relief to make ASEA whole for the State's breach of its binding contract with ASEA.

COUNT II
Breach of Implied Covenant of Good Faith and Fair Dealing

68. ASEA realleges and incorporates by reference all previous paragraphs.

69. ASEA's contract with the State includes an implied covenant of good faith and fair dealing. "Every contract in Alaska includes an implied covenant of good faith and fair dealing."[36]

70. By taking the actions alleged above, the State breached the covenant of good faith and fair dealing, including by intentionally, unilaterally, and without advance notice to ASEA taking actions intended to deprive ASEA of the benefits of its contract with the State. The State's actions were motivated by that impermissible purpose. The State's actions were also objectively unfair to ASEA.

71. As alleged above, as a result of the State's actions, ASEA suffered damages and will continue to suffer damages.

72. The parties' CBA contains a provision requiring arbitration of claims regarding the application or interpretation of the CBA. The State, however, has refused to arbitrate ASEA's grievance, thereby waiving its right to insist that ASEA's breach of the covenant of good faith and fair dealing claim be submitted to arbitration.

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[36] *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 844 (Alaska 2010).

73. The State and third-party defendants assert that their violations of the covenant of good faith and fair dealing are necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state attorney general that has addressed the issue has agreed. None of the breaches of the covenant of good faith and fair dealing that the implementation of the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

74. The State and third-party defendants' actions are therefore illegal, invalid, and have no lawful effect, and ASEA is entitled to damages and other equitable relief to make ASEA whole for the State's breach of the covenant of good faith and fair dealing.

COUNT III
Violation of Separation of Powers and Public Employment Relations Act (Alaska Const. art. II, §§ 1, 16, art. XII, § 11; AS 23.40.070-.230)

75. ASEA realleges and incorporates by reference all previous paragraphs.

76. Alaska's Constitution vests the legislative power in the Legislature, not the Governor.[37] The Governor is "responsible for the faithful execution of

[37] Alaska Const. art. II, § 1; *id.* art. XII, § 11 ("law-making powers" are "assigned to the legislature").

the laws,"[38] and has no authority to act contrary to state statute.[39]

77. PERA requires that public employers must deduct union dues from a public employee's pay when the employee has authorized those deductions:

> Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative.[40]

78. PERA also requires that public employers must comply with the collective bargaining agreements they have reached with public employee unions. Under PERA, "[u]pon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement."[41] The Legislature implicitly ratifies each State collective bargaining agreement by appropriating funds to cover the State's contractual

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[38] *Id.* art. III, § 16.

[39] *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) ("The doctrine of separation of powers is implicit in the Alaska Constitution.").

[40] AS 23.40.220.

[41] AS 23.40.210(a).

commitments made in the agreement after the "complete monetary and nonmonetary terms" of the agreement are "submitted to the legislature . . . to receive legislative consideration ...."[42] ASEA's collective bargaining agreement with the State, which was signed by representatives of the State and implicitly ratified by the Legislature, requires the State to deduct dues that have been authorized in writing by union members.

79. PERA requires that public employers must bargain in good faith with certified employee representatives. Even if the issue of dues deductions were not already covered by a binding contract (which it is), the procedures for the deduction of union membership dues are mandatory subjects of bargaining, so PERA prohibits the State from making unilateral changes to those terms.[43]

80. PERA also prohibits the State from "interfer[ing] with, restrain[ing], or coerc[ing] an employee in the exercise of the employee's rights guaranteed in [PERA]," from "discriminat[ing] in regard to ... a term or condition of employment to ... discourage membership in a[] [labor] organization," and from "interfer[ing] with the formation, existence, or administration of a[] [labor] organization."[44] "Implicit in Alaska's public union statutory rights is the right of

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[42] AS 23.40.215(a)-(b).

[43] AS 23.40.070(2), .110(a)(5).

[44] AS 23.40.110(a)(1), (2), (3).

the union and its members to function free of harassment and undue interference from the State."[45]

81. The State and third-party defendants' implementation of the Attorney General's erroneous August 27, 2019 opinion letter exceeds the executive branch's authority in violation of the separation of powers enshrined in Alaska's Constitution because implementation of that opinion letter: a) abrogates State employers' statutory obligation to make dues deductions that have been authorized by members of public employee unions; b) abrogates State employers' statutory obligation to comply with the terms of the State's collective bargaining agreements; c) abrogates State employers' statutory duty to bargain about dues deduction procedures; and d) abrogates the State's statutory duty not to interfere with ASEA's and other public employee unions' relationships with their members.

82. The State and third-party defendants assert that their new policy is necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state attorney general that has addressed the issue has agreed. None of the violations of state law and the CBA that the implementation of the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

83. The State and third-party defendants' actions are therefore illegal, invalid, and have no lawful effect,

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[45] *Peterson v. State*, 280 P.3d 559, 565 (Alaska 2012).

and ASEA is entitled to injunctive and declaratory relief prohibiting them from implementing a new union dues deduction policy.

COUNT IV
Violation of Administrative Procedure Act
(AS 44.62.010-.950)

84. ASEA realleges and incorporates by reference all previous paragraphs.

85. Commissioner Tshibaka and the Department of Administration's implementation of new union member dues deduction procedures violates Alaska's Administrative Procedure Act ("APA").[46]

86. The APA requires state agencies and departments to engage in a deliberative rulemaking process that includes notice and public comment before adopting or changing state regulation.[47] "Regulations that are not promulgated under APA procedures are invalid."[48]

87. The APA applies to the Department of Administration's administration of the "statewide personnel program, including central personnel

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[46] AS 44.62.010-.950.

[47] AS 44.62.180-.290.

[48] *Chevron US.A., Inc. v. State Dep't of Revenue*, 387 P.3d 25, 35 (Alaska 2016).

services such as . . . pay administration" for all State employees.[49]

88. "The APA defines a regulation as 'every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it.'"[50] Commissioner Tshibaka and the Department of Administration's new rules for union member dues deductions constitute a regulation under that broad definition.

89. Even if the State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter did not violate state statute (which it does), Commissioner Tshibaka and the Department of Administration would still have to comply with the procedural requirements for rulemaking under the APA, including but not limited to notice and public comment periods before the implementation of new regulations.

90. The State and third-party defendants assert that their implementation of the August 27, 2019 opinion letter is necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state attorney general that has addressed the issue has agreed. None of the violations of state law and the State's contract with ASEA that the implementation of

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[49] AS 44.21.020(8); *see* AS 44.62.640(a)(4).

[50] *Chevron*, 387 P.3d at 35 (quoting AS 44.62.640(3)).

the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

91. Because the State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter violates the APA, ASEA is entitled to injunctive and declaratory relief prohibiting that implementation.

COUNT V
Declaratory Judgment Pursuant to the Declaratory Judgment Act
(AS 22.10.020(g))

92. ASEA realleges and incorporates by reference all previous paragraphs.

93. Alaska's Declaratory Judgment Act, codified at AS 22.10.020(g), provides in relevant part: "[i]n case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration .... Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment."

94. An actual controversy exists between ASEA and the State and third-party defendants because the third-party defendants have already taken unilateral action to alter the State's practice of administering employees' voluntary union membership dues deductions.

95. The State and the third-party defendants' actions have already caused injury to ASEA, and these injuries are ongoing.

96. ASEA has notified the State that its actions violate Alaska state law and the State's CBA with ASEA.

97. The Alaska Supreme Court has recognized that disputes over statutory requirements are suitable for declaratory judgment.[51]

98. The parties' dispute involves the rights and legal relations of the State and ASEA, and a grant of declaratory judgment "would . . . terminate the controversy [and] the uncertainty which gave rise to the declaratory proceeding."[52]

99. Accordingly, ASEA is entitled to declaratory judgment that the State and third-party defendants, by implementing the change in policy regarding union membership dues deductions and other unilateral actions, have violated the State's CBA with ASEA, the

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[51] *Jefferson v. Asplund*, 458 P.2d 995, 999 (Alaska 1969) (declaratory judgment appropriate "to determine ... construction of statutes and public acts").

[52] *Id.* at 998.

Alaska State Constitution's separation of powers clauses,[53] PERA,[54] and the APA.[55]

100. ASEA is further entitled to declaratory judgment that implementing the Attorney General's opinion letter violates the State's CBA with ASEA, the Alaska State Constitution's separation of powers clauses, PERA, and the APA.

101. ASEA is further entitled to declaratory judgment that honoring employees' voluntary written dues deduction authorizations does not infringe any rights under the First Amendment to the U.S. Constitution, and that "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law."[56]

102. ASEA is also entitled to declaratory judgment that the Supreme Court's decision in *Janus v. AFSCME Local 31*—wherein the Court stated that public employers may not require *nonmembers* to pay for their share of the costs of union collective bargaining representation but that otherwise "States can keep their labor-relations systems exactly as they are"[57]—does not require changes to Alaska's payroll

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[53] Alaska Const. art. 11, §§ 1, 16, art. XII, § 11.

[54] AS 23.40.070-.230.

[55] AS 44.62.010-.950.

[56] *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

[57] 138 S.Ct. 2448, 2485 n.27 (2018).

dues deduction procedures for voluntary union members.

PRAYER FOR RELIEF

ASEA respectfully requests the following relief:

1. A temporary, preliminary, and permanent injunction restraining the State of Alaska and the third-party defendants from taking any actions to implement the Attorney General's August 27, 2019 opinion letter or the Governor's AO and from making any changes to the State employee union dues deduction processes that were in place before that opinion letter was issued.

2. A declaratory judgment that implementation of the Attorney General's August 27, 2019 opinion letter or the Governor's AO is unlawful.

3. Damages subject to proof at trial and other equitable relief to make ASEA whole for the State's breaches of contract and the covenant of good faith and fair dealing.

4. Attorneys' fees and costs of suit.

5. Such other and further relief as is equitable, just, and proper.

DATED this 4th day of March 2020, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 4, 2020 a true and correct copy of the foregoing document was served by:

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[X] email

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