No. ___

IN THE
Supreme Court of the United States

CHRISTOPHER A. WOODS, LINDA CREED, TYLER RIBERIO,
Petitioners,

v.

ALASKA STATE EMPLOYEES ASSOCIATION / AFSCME LOCAL 52, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL SUHR
JEFFREY M. SCHWAB
LIBERTY JUSTICE CENTER
141 W Jackson Blvd.
Suite 1065
Chicago, IL 60604

Counsel for Petitioners Creed and Riberio

WILLIAM MESSENGER
Counsel of Record
W. JAMES YOUNG
ALYSSA K. HAZELWOOD
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Rd.,
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org
Counsel for Petitioners

QUESTIONS PRESENTED

The Court in *Janus v. AFSCME, Council 31* held that public employees have a First Amendment right not to subsidize union speech. 138 S. Ct. 2448, 2486 (2018). The Court also held that government employers and unions will violate that right by seizing payments for union speech from employees unless there is clear and compelling evidence the employees waived their constitutional right. *Id*. The U.S. Court of Appeals for the Ninth Circuit, however, has held that government employers and unions need only proof of employee contractual consent to take payments for union speech from employees, including employees who are not union members and object to the taking.

The questions presented are:

1. Do government employers and unions need clear and compelling evidence that employees waived their First Amendment right to refrain from subsidizing union speech in order to constitutionally seize payments for union speech from employees?
2. When a union acts jointly with a state to deduct and collect union payments from employees' wages, is that union a state actor participating in a state action under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Christopher A. Woods, Linda Creed, and Tyler Riberio were Plaintiff-Appellants in the court below.

Respondents Alaska State Employees Association/AFSCME Local 52 and Paula Vrana, in her official capacity as a Commissioner of Administration for the State of Alaska (or her predecessor Kelly Tshibaka), were Defendant-Appellees in the court below.

Because Petitioners are not corporations, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings

1. *Woods v. Alaska State Emps. Ass'n / AFSCME Local 52,* No. 20-35954, U.S. Court of Appeals for the Ninth Circuit. Judgment Entered August 11, 2021.

2. *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52,* No. 20-35743, U.S. Court of Appeals for the Ninth Circuit. Judgment Entered August 16, 2021.

3. *Woods v. Alaska State Emps. Ass'n / AFSCME Local 52,* No. 3:20-cv-0074, U.S. District Court for the District of Alaska. Judgment Entered November 2, 2020.

4. *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, 3:20-cv-0065, U.S. District Court for the District of Alaska. Judgment Entered November August 13, 2020.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

STATEMENT OF RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Legal background 2

B. Alaska attempts to comply with *Janus'* waiver requirement 6

C. Proceedings below 8

REASONS FOR GRANTING THE PETITION 13

I. This Petition Presents a Unique Vehicle to Reaffirm *Janus'* Waiver Requirement. 14

II. The Ninth Circuit's Decision Conflicts with *Janus* 16

A. *Janus* held that states and unions need clear and compelling evidence of a constitutional waiver to seize union dues from employees 16

B. The Ninth Circuit defied *Janus* by substituting a lesser contract standard for the waiver standard this Court required 18

TABLE OF CONTENTS—Continued

Page

C. *Janus* requires reversal of the lower courts' decisions because petitioners did not waive their First Amendment rights..... 23

D. The Ninth Circuit's state action and state actor holdings conflict with this Court's precedents and Seventh Circuit case law..... 25

III. The Questions Presented Are Exceptionally Important..... 29

CONCLUSION..... 33

APPENDIX

Appendix A

Order, United States Court of Appeals for the Ninth Circuit, *Woods v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 20-35954 (Aug. 11, 2021) App-1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit, *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 20-35743 (Aug. 16, 2021) App-2

Appendix C

Order, United States District Court for the District of Alaska, *Woods v. Alaska State Emps. Ass'n / AFSCME Local 52*, 496 F. Supp. 3d 1365 (Oct. 27, 2020).....App-3

Appendix D

Judgment, United States District Court for the District of Alaska, *Woods v. Alaska*

TABLE OF CONTENTS—Continued

Page

State Emps. Ass'n / AFSCME Local 52, 3:20-cv-0074 (Nov. 2, 2020).....App-22

Appendix E

Order, United States District Court for the District of Alaska, *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, 472 F. Supp. 3d 518 (July 15, 2020) App-24

Appendix F

Order, United States District Court for the District of Alaska, *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, 3:20-cv-0065 (Aug. 4, 2020) App-49

Appendix G

Judgment, United States District Court for the District of Alaska, *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, 3:20-cv-0065 (Aug. 13, 2020).....App-51

Appendix H

First Amendment Rts. and Union Due Deductions and Fees, Alaska Att'y Gen. Op. (Aug. 26, 2019) App-53

Appendix I

Administrative Order No. 312, Governor of Alaska (Alaska Gov. Sept. 26, 2019) App-73

Appendix J

Final Judgment, *State of Alaska v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 3AN-19-9971 (Alaska Superior Ct. Aug. 4, 2021) App-79

TABLE OF AUTHORITIES

Page(s)

CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1991).....26

Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Local 11, No. 2:19-cv-3709, 2020 WL 1322051 (S.D. Ohio Mar. 20, 2020).....4

Belgau v. Inslee,
975 F.3d 940 (9th Cir. 2020) .....*passim*

Bennett v. AFSCME Council 31,
991 F.3d 724 (7th Cir. 2021).....*passim*

Chicago Teachers Union No. 1 v. Hudson,
475 U.S. 292 (1986).....26

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991).....21, 22

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).....16, 18

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967).....*passim*

D.H. Overmyer Co. v. Frick Co.,
405 U.S. 174 (1972).....18

Davenport v. Wash. Educ. Ass'n,
551 U.S. 177 (2007).....25

Edwards v. Arizona,
451 U.S. 477 (1981).....18

TABLE OF CONTENTS—Continued

Page

Fuentes v. Shevin,
407 U.S. 67 (1972).....18, 27

Harris v. Quinn,
573 U.S. 616 (2014).....17, 26

Hendrickson v. AFSCME Council 18,
992 F.3d 950 (10th Cir. 2021) .....*passim*

Hoekman v. Educ. Minn.,
519 F. Supp. 3d. 497 (D. Minn. 2021) 4

Janus v. AFSCME, Council 31,
138 S. Ct. 2448 (2018).....*passim*

Int'l Ass'n of Machinists Dist. Ten v. Allen,
904 F.3d 490, 492 (7th Cir. 2018).....21

Johnson v. Zerbst,
304 U.S. 458 (1938).....16, 18

Knox v. SEIU Local 1000,
567 U.S. 298 (2012).....16, 25

Moran v. Burbine,
475 U.S. 412 (1986).....23

Savas v. Cal. State L. Enf't Agency,
485 F. Supp. 3d 1233 (S.D. Cal. 2020) 4

Sniadach v. Fam. Fin. Corp,
395 U.S. 337 (1969).....27

Town of Newton v. Rumery,
480 U.S. 386 (1987).....18, 24, 32

W. Va. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943).....31

TABLE OF CONTENTS—Continued

Page

Weyandt v. Pa. State Corr. Officers Ass'n,
No. 1:19-cv-1018, 2019 WL 5191103
M.D. Pa. Oct. 15, 2019).....4

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. I .....*passim*

Federal Statutes
28 U.S.C. § 1254.....1
42 U.S.C. § 1983.....12, 27, 32

State Statutes
Alaska Stat. § 23.40.220 .....*passim*
Cal. Gov't Code § 1157.12 4
Cal. Educ. Code § 45060.....4
Colo. Rev. Stat. § 24-50-1111(2).....4
Conn. Publ. Act No. 21-25, §§ 1(a)(i–j) 4
Del. Code Ann. tit. 19, § 1304 4
Haw. Rev. Stat. Ann. § 89-4(c).....4
5 Ill. Comp. Stat. § 315/6(f).....4
Ind. Code § 20-29-5-6(c)(3) 5
Mass. Gen. Laws ch.180 § 17A 4
Nev. Rev. Stat. § 288.505(1)(b) 4
N.J. Stat. Ann. § 52:14-15.9e 4
N.Y. Civ. Serv. Law § 208(1)(b) 4
Or. Rev. Stat. § 243.806(6).....4
Wash. Rev. Code § 41.80.100(d).....4

OTHER AUTHORITIES

A Bill for Establishing Religious Freedom, 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed. 1950) 31

Affirming Lab. Rts. and Obligations in Pub. Work-places, Cal. Att'y Gen. Op. (undated) 3

TABLE OF CONTENTS—Continued

Page

Affirming Lab. Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated) 3

Affirming Lab. Rts. and Obligations in Pub. Workplaces, Or. Att'y Gen. Op. (undated) 3

Affirming Lab. Rts. and Obligations in Pub. Workplaces, Wash. Att'y Gen. Op. (undated).....3

Application of the U.S. Supreme Court's *Janus* Decision to Pub. Emp. Payroll Deductions for Emp. Org. Membership Fees and Dues, Att'y Gen. of Tex., Op. No. KP-0310, 2020 WL 7237859 (May 31, 2020) 5

Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 Indus. & Labor Rels. Rev. (2003).....29

Guidance for Pub. Emps., N.Y. Dep't of Lab. (undated) 3

Guidance on the Rts. and Responsibilities of Pub. Emps. Following *Janus*, Pa. Att'y. Gen. Op. (undated) 3

Guidance Regarding Rts. and Duties of Pub. Emps. after *Janus*, Ill. Att'y Gen. Op. (July 19, 2018).....3

Guidance Regarding the Rts. and Duties of Pub. Emps. After *Janus*, Conn. Att'y Gen. Op. (undated) 3

Guidance on the Rts. and Duties of Pub. Emps. After *Janus*, Md. Att'y Gen. Op. (undated).....3

TABLE OF CONTENTS—Continued

Page

Payroll Deductions for Pub. Sector Emps., Ind. Att'y Gen. Op., 2020 WL 4209604 (June 17, 2020).....5

Pub. Lab. Rts. and Obligations Following *Janus*, Vt. Att'y Gen. Op. (undated).....3

Pub. Sector Emps. After *Janus*, N.M. Att'y Gen. Op. (undated).....3

OPINIONS BELOW

This joint petition arises from two parallel cases brought by different plaintiffs against the same defendants: *Woods v. Alaska State Employees Association/AFSCME Local 52* and *Creed v. Alaska State Employees Association/AFSCME Local 52.*

The district court's order in *Woods* granting summary judgment to the Alaska State Employees Association ("ASEA") is reported at 496 F. Supp. 3d 1365 and reproduced at Pet.App. 3. The district court's order in *Creed* dismissing the complaint is reported at 472 F. Supp. 3d 518 and reproduced at Pet.App. 24. The Ninth Circuit summarily affirmed both orders in unreported orders reproduced at Pet.App.1 and 2.

JURISDICTION

The Ninth Circuit issued its affirmance orders in *Woods* and *Creed* on August 11, 2021 and August 16, 2021, respectively. Pet.App. 1–2. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance."

Alaska Stat. § 23.40.220 states:

> 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.

STATEMENT OF THE CASE

A. Legal background

In 2018, the Court in *Janus v. AFSCME, Council 31*, recognized that public employees have a First Amendment right to not subsidize union speech. 138 S. Ct. 2448, 2486 (2018). The Court 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 such a payment, unless the employee affirmatively consents to pay." *Id*. The Court further held that showing affirmative consent to pay requires proof the employee waived his or her rights. *Id*. The Court explained that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id*. "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id*. (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

States reacted to *Janus'* waiver holding in different ways. A number of states disclaimed the holding and took the position that government employers do *not* need proof of waiver to take payments for union speech from their employees. Specifically, eleven states that filed briefs in *Janus* opposing its ultimate outcome issued strikingly similar guidance declaring *Janus* inapplicable to government deductions of union

dues from employees who sign union membership and dues deduction authorizations.[1] The advisory opinion issued by the Attorney General of Massachusetts is typical in declaring that "[t]he *Janus* decision does not impact any agreements between a union and its members to pay union dues, and existing membership cards or other agreements by union members to pay dues should continue to be honored."[2]

To limit employees' ability to exercise their rights under *Janus*, a dozen states also amended their dues deduction laws to require government employers to enforce restrictions on when employees can stop payroll deductions of union dues. This includes Califor-

---

[1] *See* Affirming Lab. Rts. and Obligations in Pub. Workplaces, Cal. Att'y Gen. Op. (undated), rb.gy/wwetc5; Guidance Regarding the Rts. And Duties of Pub. Emps. After *Janus*, Conn. Att'y Gen. Op. (undated), rb.gy/qaw4ud; Guidance Regarding Rts. and Duties of Pub. Emps. after *Janus*, Ill. Att'y Gen. Op. (July 19, 2018), rb.gy/cphkyj; Guidance on the Rts. and Duties of Pub. Emps. After Janus, Md. Att'y Gen. Op. (undated), rb.gy/v71fyp; Affirming Labor Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), rb.gy/guzdxw; Pub. Sector Emps. After Janus, N.M. Att'y Gen. Op. (undated), rb.gy/vzqh1u; Guidance for Pub. Emps., N.Y. Dep't of Lab. (undated), https://www.nyspffa.org/main/wp-content/uploads/2018/07/nys_dol_janus_guidance.pdf; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Or. Att'y Gen. Op. (undated), rb.gy/ovweir; Guidance on the Rts. and Responsibilities of Pub. Emps. Following Janus, Pa. Att'y. Gen. Op. (undated), rb.gy/mb5ade; Pub. Lab. Rts. and Obligations Following Janus, Vt. Att'y Gen. Op. (undated), rb.gy/umfmzo; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Wash. Att'y Gen. Op. (July 17, 2018), rb.gy/saakuh.

[2] Affirming Lab. Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), rb.gy/guzdxw.

nia, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington.[3] Government employers in New Mexico, Ohio, Minnesota, and Pennsylvania also enforce restrictions on stopping payroll deductions under preexisting state laws.[4] These restrictions typically prohibit employees from stopping payroll deductions of union dues except during a ten or fifteen day annual revocation period.[5] Some restrictions are even more onerous. California prohibits certain state employees from stopping dues deductions for the duration of a multi-year collective bargaining agreement. *See Savas v. Cal. State L. Enf't Agency*, 485 F. Supp. 3d 1233, 1235 (S.D. Cal. 2020), appeal filed No. 20-56045 (9th Cir. 2021).

---

[3] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code §§ 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act No. 21-25, §§ 1(a)(i–j); Del. Code Ann. tit. 19, § 1304; Haw. Rev. Stat. Ann. § 89-4(c); 5 Ill. Comp. Stat. § 315/6(f); Mass. General Laws ch.180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.J. Stat. Ann. §52:14-15.9e; N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); Wash. Rev. Code § 41.80.100(d).

[4] *See, e.g.*, *Hoekman v. Educ. Minn.*, 519 F. Supp. 3d. 497, 501 (D. Minn. 2021), appeal filed No. 21-1366 (8th Cir. 2021); *Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Local 11*, No. 2:19-cv-3709, 2020 WL 1322051, at *2 (S.D. Ohio Mar. 20, 2020); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 964 (10th Cir. 2021), *petition for cert. filed* No. 20-1606 (May 14, 2021); *Weyandt v. Pa. State Corr. Officers Ass'ns,* No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019).

[5] *See, e.g.*, N.J. Stat. Ann. § 52:14-15.9e (authorizing annual ten-day period for stopping payroll deductions); 5 Ill. Comp. Stat. § 315/6(f) (same and also authorizing "a period of irrevocability that exceeds one year"); Del. Code Ann. tit. 19, § 1304 (authorizing annual fifteen-day period for stopping payroll deductions).

In contrast, other states interpret *Janus* to require government employers to have clear and compelling evidence employees waived their speech rights to deduct payments for union speech from employees. Attorneys General for Alaska, Texas, and Indiana issued opinions that interpret *Janus* in this manner.[6] Thirteen additional State Attorneys General signed onto a brief advocating this interpretation. *See* Amicus Br. of State of Alaska et al., *Troesch v. Chicago Teachers Union, Local 1*, No. 20-1786 (July 23, 2021).

To comply with *Janus*' waiver requirement, Indiana amended its payroll deduction statute to require that employee dues deduction forms include the statement that "I am aware that I have a First Amendment right, as recognized by the United States Supreme Court, to refrain from joining and paying dues to a union (school employee organization)." Ind. Code § 20-29-5-6(c)(3) (as amended by P.L. 98-2021, § 1, eff. Apr.

---

[6] *See* First Amendment Rts. and Union Due Deductions and Fees, Alaska Att'y Gen. Op. (Aug. 26, 2019) (Pet.App. 52–71); Application of the U.S. Supreme Court's *Janus* Decision to Pub. Emp. Payroll Deductions for Emp. Org. Membership Fees and Dues, Tex. Att'y Gen. Op., Op. No. KP-0310, 2020 WL 7237859 (Tex. A.G. May 31, 2020); Payroll Deductions for Pub. Sector Emps., Ind. Att'y Gen. Op., Op. No. 2020-5, 2020 WL 4209604 (Ind. A.G. June 17, 2020).

22, 2021). Indiana's statute also provides that employees can stop payroll deductions at any time. *Id.* at § 20-29-5-6(c)(1).

B. Alaska attempts to comply with *Janus*' waiver requirement.

This petition concerns Alaska's efforts to comply with *Janus*. In August 2019, Alaska's Attorney General issued a legal opinion, which is reproduced at Pet.App. 52, recognizing that, under *Janus*, "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." First Amendment Rts. and Union Due Deductions and Fees, Alaska Att'y Gen. Op. (Aug. 26, 2019) ("Alaska A.G. Op.") (Pet.App. 60). "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." *Id.* (quoting *Janus*, 138 S. Ct. at 2486).

Alaska's Attorney General recognized that "[t]he State's current system for employee payroll deductions cannot ensure that these constitutional standards are met." Pet.App. 68. He concluded that, to comply with *Janus*, Alaska's Governor should establish payroll deduction procedures that "ensure that all waivers [by employees] are knowing, intelligent, and voluntary." *Id.* at 71. In addition,

> 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.

Id.

Alaska's Governor acted on the Attorney General's legal opinion by issuing Administrative Order No. 312, which is reproduced at Pet.App. 73. The Order's purpose is to "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." Pet.App. 74. The Order requires the Alaska State Department of Administration to develop new payroll deduction procedures and an "'opt-in' dues authorization form [that] 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." *Id*. at 75. The Order also calls for creation of an "opt-out" form that permits employees to stop payroll deduction of union dues within approximately thirty days. *Id*.

ASEA, which represents Alaska State employees, opposes the Governor's reforms. In November 2019, at behest of ASEA, a state superior court issued a preliminary injunction that enjoined the State from implementing Administrative Order No. 312. Pet.App. 8. On August 4, 2021, that state court issued a final judgment declaring that the First Amendment does not require the State of Alaska to implement the steps set forth in the Attorney General's opinion and declared Administrative Order 321 invalid. Pet.App. 80–

81. That case is currently on appeal to the Alaska Supreme Court. *State of Alaska v. Alaska State Emps. Ass'n / AFSCME Local 52, AFL-CIO*, Case No. S-18172 (Alaska).

C. Proceedings below

1. Petitioners Christopher Woods, Linda Creed, and Tyler Riberio are employed by the State of Alaska. Pet.App. 4, 25. They are subject to the State's collective bargaining agreement with ASEA, effective from July 1, 2019 through June 30, 2022, which requires the State to deduct dues for ASEA from employees' wages upon the employees' written authorization. Pet. App. 5, 26. Prior to this Court's June 2018 decision in *Janus*, employees in petitioners' bargaining unit who did not authorize dues deductions were required to pay compulsory agency fees to ASEA. Pet.App. 7.

In 2017 or early 2018, petitioners signed dues deduction forms that authorize the State to deduct dues for ASEA from their wages. Pet.App. 5–6, 26–27. The forms provide that employees, including those who resign their union membership, cannot stop these payroll deductions except during a ten-day period. Pet.App. 6, 27. The forms state, in relevant part, that:

> 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 . . . 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.

Pet.App. 6, 27.

In June 2018, the Court issued its seminal decision in *Janus*. In August and September of 2019, Alaska's Attorney General and Governor sought to comply with *Janus* by issuing the earlier-discussed opinion and Administrative Order No. 321. Pet.App. 52, 72.

In 2019, petitioners also attempted to exercise their First Amendment right to not subsidize ASEA's speech. In July and August 2019, petitioners Creed and Riberio provided notice that they resigned their membership in ASEA and wanted to stop payroll deductions of union dues. Pet.App. 28–30. The State stopped deducting union dues from their wages for a time pursuant to Administrative Order No. 312. Pet.App. 30. However, as a result of the state court's temporary restraining order that enjoined the State from implementing Administrative Order No. 312, and that required the State to reinstate cancelled dues deductions, in October 2019 the State started to again take ASEA dues from Creed and Riberio's wages. Pet.App. 30–31. They were required to support ASEA financially, over their objections, until their respective ten-day revocation periods. Pet.App. 30.

On November 26, 2019, Woods notified ASEA that he resigned his union membership and objected to dues deductions. Pet.App. 8–9. While ASEA accepted his resignation, Woods was informed that he could not stop payroll deduction of union dues until his ten-day revocation period. *Id*. The State and ASEA seized dues

from Wood's wages, after he became a nonmember and over his objections, until July 25, 2020. *Id*.

2. Woods, Creed, and Riberio filed suits against ASEA and Alaska's Commissioner of Administration in March and April, 2020. Pet.App. 9, 31. Creed and Riberio allege respondents violated their First Amendment right to not financially support union speech by taking ASEA dues from them without their affirmative consent and an effective waiver of their rights. Pet.App. 31–32, 35. Woods alleges, on behalf of himself and proposed classes of other State employees, that respondents violate the First Amendment by: (1) prohibiting employees from stopping State deductions of ASEA dues except during a ten-day period; and (2) seizing dues from objecting employees without evidence those employees waived their First Amendment rights. Pet.App. 8–9.

On July 15, 2020, the district court dismissed Creed and Riberio's complaint. Pet.App. 48. The court found their prospective claims moot because the State stopped deducting union dues from their wages. Pet.App. 33. The court dismissed their claims for retrospective relief from ASEA on the merits because, according to the court, "[t]heir union membership agreements were binding contracts that remain enforceable even after *Janus*." Pet.App. 47.

On October 27, 2020, the district court granted summary judgment to the respondents in *Woods* based on a stipulated factual record. Pet.App. 21. The court held Woods' claims were foreclosed by the Ninth Circuit's decision in *Belgau v. Inslee*, 975 F.3d 940 (9th

Cir. 2020), *cert. denied* 141 S. Ct. 2795 (2021). Pet.App. 13–18.

Belgau was a First Amendment challenge by Washington State employees to that state's and a union's practice of deducting union dues from employees' wages without proof they waived their First Amendment rights. 975 F.3d. at 945–46. The Ninth Circuit held the employees' claim against the union failed because it was not a state actor. *Id*. at 945–49. The court found the employees' First Amendment claim against the State of Washington failed because they contractually consented to pay union dues. *Id*. at 950–52. The Ninth Circuit concluded that *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id*. at 952.

The Seventh and Tenth Circuits, and the Third Circuit in an unreported decision, later followed the Ninth Circuit's lead in *Belgau*. The courts similarly held that *Janus* does *not* require clear and compelling evidence of a waiver for the government and unions to extract union dues from employees—including employees who become nonmembers of the union—if there exists a contract that authorizes the deductions. *See Bennett v. AFSCME Council 31*, 991 F.3d 724, 730-32 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 18, 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961–62, 964 (10th Cir. 2021), *petition for cert. filed* No. 20-1606 (May 18, 2021); *Fischer v. Gov. New Jersey,* 842 Fed. Appx. 741, 753

(3rd Cir. 2021) (non-precedential opinion), *petition for cert. filed* No. 20-1751 (June 14, 2021).

The Seventh Circuit, however, did not adopt *Belgau's* holding that unions are not state actors under 42 U.S.C. § 1983 when they act jointly with a state to deduct and collect union payments from employees' wages. The holding is contrary to Seventh Circuit case law. *See Hudson v. Chi. Teachers Union Local No.* 1, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd* 475 U.S. 292 (1986). Indeed, on remand from this Court's *Janus* decision, the Seventh Circuit held that a union acts under color of state law when participating in an arrangement in which a state "deduct[s] fair-share fees from the employees' paychecks and transfer[s] that money to the union . . . ." *Janus v. AFCSME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus* II").

Woods, Creed, and Riberio appealed to the Ninth Circuit. Given their appeals were controlled by *Belgau*, they moved for summary affirmance on that basis so they could promptly petition this Court for a writ of certiorari.[7] The Ninth Circuit granted summary affirmance in both cases. Pet.App. 1–2.

---

[7] In their summary affirmance motions, petitioners reserved their positions that their First Amendment claims are meritorious, that *Belgau* was wrongly decided, and that the district court's judgment should be reversed. Creed and Riberio also acknowledged their claims for prospective relief are moot. *See* Woods C.A. Mot. for Summ. Affirmance, 3 (Dkt. No. 18, June 29, 2021); Creed C.A. Mot. for Summ. Affirmance, 4-4 (Dkt. No. 18, July 2, 2021).

REASONS FOR GRANTING THE PETITION

This petition presents the Court with a unique vehicle to resolve confusion among states over what the Court meant in *Janus* when it held that, to deduct union payments from nonmembers, a "waiver must be freely given and shown by 'clear and compelling' evidence.'" 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). Alaska's Governor and Attorney General agree with petitioners that the Court meant what it wrote in *Janus*: states cannot take payments for union speech from employees unless they waive their right not to subsidize that speech. ASEA, like the Ninth Circuit in *Belgau*, takes the position that *Janus* does not require proof of a waiver, but only proof of a contract for states to deduct union dues from employees' wages—including objecting employees who are nonmembers of the union. This petition presents an excellent vehicle for definitively resolving whether and when a waiver is required under *Janus*.

The Court should resolve this issue for at least three reasons. *First*, the Ninth Circuit deviated from *Janus* by replacing this Court's constitutional waiver requirement with its own lesser contract requirement. The need for proof of a waiver is especially apparent where, as here, a state and union prohibit objecting nonmembers from stopping the seizure of union dues from their wages. States and unions cannot restrict when employees can exercise their right under *Janus* unless employees waive that rights.

Second, the Ninth Circuit's holding that unions are not state actors when they work jointly with states to deduct and collect union dues from employees' wages

conflicts with this Court's decisions in *Janus* and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and with two Seventh Circuit precedents, *see Janus* II, 942 F.3d at 361; *Hudson*, 743 F.2d at 1191. The Court should resolve this conflict.

Finally, the vitality of *Janus*' waiver requirement is an issue of exceptional importance. The requirement protects employees' ability to freely exercise their speech rights by ensuring that employee who authorize the government to take payments for union speech from their wages do so voluntarily and with an understanding of their rights. *Janus*' waiver requirement also ensures that states and unions cannot restrict employees' right to stop paying for union speech unless employees knowingly and voluntarily agree to the restriction and enforcement of the restriction is not against public policy.

If *Janus'* waiver requirement is not enforced, states and unions will continue to severely restrict when public employees can stop paying for union speech. The Court should not allow the fundamental speech rights it recognized in *Janus* to be hamstrung in this way. The Court should grant the petition to instruct lower courts to enforce *Janus*'s waiver requirement.

I. This Petition Presents a Unique Vehicle to Reaffirm *Janus'* Waiver Requirement.

Woods and *Creed* are different from other cases in which dissenting employees assert that a state employer and union violated their First Amendment rights by seizing union dues from them without proof they waived their constitutional rights. Here, the State agrees with the dissenting employees that *Ja-*

nus requires such a waiver. The Alaska Attorney General issued a written a legal opinion to that effect, Pet.App 53; the Governor issued Administrative Order No. 312 to implement that opinion's recommendations, Pet.App. 73; and respondent Alaska Commissioner of Administration filed briefs supporting petitioners' positions in the district court, *see* Pet.App. 4, 25. The State and petitioners' interpretation of *Janus*, however, is now at odds with Ninth Circuit case law.

Woods and *Creed* thus squarely present the question: which of two competing interpretations of *Janus* is correct? Does *Janus* require clear and compelling evidence of a waiver, as the decision states and as Alaska and fifteen other State Attorneys General concluded? *See supra* at 5. Or is *Janus*' waiver language inapplicable to employees who sign dues deduction contracts, as ASEA, eleven State Attorneys General, and three circuit courts concluded? *See supra* 3-4.

The petition presents ideal facts for resolving this dispute. Woods, Creed, and Riberio each had payments for union speech deducted from their wages after they became nonmembers and over their objections. Absent an extenuating circumstance, this action certainly violated petitioners' First Amendment rights under *Janus*, 138 S. Ct. at 2486. The district court found the restrictive dues deduction forms petitioners signed to be an extenuating circumstance that rendered the deductions constitutional. *See* Pet.App. 15–18, 47–48. This fact pattern presents the issue of what legal standard a dues deduction form must satisfy—a constitutional-waiver standard or a state-contract-law standard—to permit states to constitutionally take union dues from employees and to restrict when they can stop paying for union speech.

The record in *Woods* and *Creed* is more than sufficient to enable the Court to resolve the questions presented. *Woods*, which was filed as class action, was decided on stipulated factual record that included all material documents. Pet.App. 4 n.4. *Woods* and *Creed* provide the Court with both a unique and suitable vehicle to clarify when a waiver is required under *Janus*.

II. The Ninth Circuit's Decision Conflicts with *Janus*.

A. *Janus* held that states and unions need clear and compelling evidence of a constitutional waiver to seize union dues from employees.

1. In *Janus*, the Court held the following standard governs when the government and unions can constitutionally take union dues or fees from employees:

> 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. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see *also Knox* [v. *SEIU Local 1000*, 567 U.S. 298, 312–13 (2012)]. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999).

> Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486.

The Court's waiver requirement makes sense. Given that employees have a First Amendment right not to pay for union speech, it follows that states must have proof employees waived that right to constitutionally take payments from them for union speech.

The need for a waiver is especially apparent when, as here, employees resign their union membership and object to financially supporting the union. Without proof of a waiver, states necessarily violate these dissenting nonmembers' First Amendment rights by seizing from them payments for union speech. The seizures violate the "bedrock principle" that "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).

It is equally apparent that states must have proof that employees waived their speech rights to prohibit those employees from stopping deductions of union dues for periods of time, such as for 355 days of each year. States and unions cannot restrict when employees can exercise their First Amendment right to not subsidize union speech unless employees earlier waived that constitutional right.

2. The standard to establish a waiver of constitutional rights is exacting. The Court explained in *Janus* that "a waiver cannot be presumed," but "must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The Court then cited three precedents

holding an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege.'" *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Johnson*, 304 U.S. at 464); *see Curtis Publ'g*, 388 U.S. at 143–45 (applying this standard to an alleged waiver of First Amendment rights).

The Court has sometimes formulated these criteria as requiring that a waiver must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *see Fuentes v. Shevin,* 407 U.S. 67, 94–95 (1972) (same); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (similar). Along with these criteria, a purported waiver is unenforceable as against public policy "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). Under *Janus*, this is the standard that states must satisfy to constitutionally deduct payments for union speech from employees' wages.

B. The Ninth Circuit defied *Janus* by substituting a lesser contract standard for the waiver standard this Court required.

The Ninth Circuit, followed by the Seventh and Tenth Circuits, gutted *Janus*'s waiver requirement. The courts held that proof of a waiver is not required for governments and unions to seize union dues from objecting, nonmember employees if those employees contractually consented to restrictions on when they can stop payroll deductions. *Belgau*, 975 F.3d at 951–52; *Bennett*, 991 F.3d at 732–33; *Hendrickson*, 992 F.3d at 961–62, 964. The courts thus substituted their own, lesser *contract* standard for the constitutional

waiver requirement this Court set forth in *Janus* to govern when states and unions can deduct and collect payments for union speech from employees.

The Court should reject the lower courts' holdings because they conflict with *Janus*, 138 S. Ct. at 2486. The lower courts' two rationales for not enforcing *Janus*'s waiver requirement are both untenable.

1. The Ninth and Seventh Circuits found evidence of a constitutional waiver unnecessary because employees who contractually consent to pay union dues for a time period are, supposedly, not compelled to subsidize union speech in violation of their First Amendment rights. *Belgau*, 975 F.3d at 951–52; *Bennett*, 991 F.3d at 732–33. This rationale ignores that *Janus* requires evidence of a waiver to establish employee consent to paying for union speech—i.e., a waiver is a prerequisite to proving consent. 138 S. Ct. at 2486. Without evidence employees waived their right not to subsidize union speech, the government has not satisfied this Court's standard that "employees [must] clearly and affirmatively consent before any money is taken from them." *Id*.

Most glaringly, the Ninth and Seventh Circuits ignored the dispositive fact that the plaintiff-employees resigned their union membership and affirmatively objected to paying union dues. *Belgau*, 975 F.3d at 951–52; *Bennett*, 991 F.3d at 732–33. Restrictions on when employees can stop payroll deductions of union dues necessarily compel employees who no longer wish to support a union—or who never freely chose to do so in the first place—to continue to support that union financially. Here, Woods, Creed, and Riberio

had union dues seized from their wages *after* they provided notice that they were nonmembers and did not consent to the continued seizure of union dues. *See* Pet.App. 8–9, 29–31. To say that these dissenting employees were not compelled to subsidize ASEA's speech would require ignoring that they affirmatively stated they opposed financially supporting ASEA and were forced to do so against their will.

For employees who become nonmembers of a union, a requirement that they continue to pay union dues for a time period is effectively an agency fee requirement with a limited duration. In some ways, it is worse. Agency fee clauses required government employers to deduct from nonmembers' wages *reduced* union fees that excluded monies used for some political purposes. *Janus*, 138 S. Ct. at 2460–61. Here, Alaska seized *full* union dues from Petitioners' wages after they became nonmembers, including monies used for partisan political purposes, until the ten-day revocation period. Pet.App. 8–9, 29–31. For employees who do not want to support union expressive activities, a restriction on stopping payroll deductions of union dues can be more harmful to their speech rights than an agency fee requirement.

If *Janus*'s waiver requirement applies in any circumstance, it must apply when employees are prohibited from exercising their First Amendment rights to stop subsidizing union speech. The Ninth Circuit's conclusion that no waiver is required for the government and unions to continue to seize dues from nonmembers over their express objections cannot be reconciled with this Court's holding in *Janus*.

2. The other justification the Ninth, Seventh, and Tenth Circuits set forth for not requiring evidence of a waiver is the proposition that state enforcement of a private agreement pursuant to a law of general applicability does not violate the First Amendment under *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *Belgau*, 975 F.3d at 950; *Bennett*, 991 F.3d at 730–31); *Hendrickson*, 992 F.3d at 964. The proposition is inapposite because state systems for deducting union payments from employees' wages do not involve private agreements, are not laws of general applicability, and can violate employees' First Amendment rights under *Janus*.

Cohen concerned a promissory estoppel action against a newspaper based on an alleged breach of a private contract. 501 U.S. at 666–67. The Court found that enforcing a promissory estoppel law against the newspaper for that breach did not violate the newspaper's First Amendment rights because it was "a law of general applicability." *Id.* at 669–70. The Court did not need to address whether the newspaper waived its First Amendment rights because it found those rights were not violated in the first place.

The situation here is nothing like that in *Cohen*. *First*, a dues deduction form purporting to authorize the State of Alaska to deduct union dues from employees' wages is a not "private" agreement, but is an agreement with the State. *See Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018) (recognizing that "[a] dues-checkoff authorization is a contract between an employer and employee for payroll deductions" and that "[t]he union itself is not a party to the authorization"). The form here states that "I hereby voluntarily authorize and direct

my Employer to deduct from my pay . . . .” Pet.App. 6, 27 (emphasis added). The State also is the entity that makes those deductions and enforces restrictions on stopping them. *See* Alaska Stat. § 23.40.220 (requiring 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 . . .”) (emphasis added).

Second, the State does not deduct union dues from employees’ wages pursuant to a “law of general applicability.” *Cohen,* 501 U.S. at 670. The State does so pursuant to a narrow dues-deduction law and its collective bargaining agreement with ASEA. *See* Alaska Stat. § 23.40.220; Pet.App. 5; *see also supra* at 4 n.3 (citing other dues deduction laws). A state can violate employees’ First Amendment rights by enforcing a law that requires it to deduct union payments from employees’ wages. *See Janus*, 138 S. Ct. at 2486 (finding a statute that required Illinois to deduct agency fees from employees’ wages to be unconstitutional).

Finally, unlike the conduct at issue in *Cohen*, it certainly violates the First Amendment for a state and unions to seize union dues from nonconsenting employees. *See Janus*, 138 S. Ct. at 2486. And that is what the State and ASEA did to Woods, Creed, and Riberio: the respondents seized payments for ASEA from those employees’ wages after they resigned their union membership and objected to financially supporting ASEA. Thus, unlike in *Cohen*, a waiver analysis must be conducted here because, absent proof petitioners waived their First Amendment rights to stop subsidizing union speech, the State and ASEA’s seizures were unconstitutional.

C. *Janus* requires reversal of the lower courts' decisions because petitioners did not waive their First Amendment rights.

The lower courts' decisions in *Woods* and *Creed* cannot survive judicial review if *Janus'* waiver requirement is enforced. The State and ASEA cannot prove, by clear and compelling evidence, that petitioners waived their First Amendment right to not subsidize ASEA's speech. Indeed, respondents cannot satisfy any of the criteria for proving a waiver.

1. *Petitioners did not knowingly or intelligently waive their First Amendment rights*. These criteria require that a party have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986). Nothing on the State and ASEA's dues deduction form notified petitioners of their right not to support ASEA financially or stated that they were agreeing to waive that right. Pet.App. 6–7, 27. On their face, the forms do not prove petitioners knowingly or intelligently waived their rights under *Janus*.

In fact, petitioners and others who signed dues deduction forms before *Janus* could not have knowingly or intelligently waived their First Amendment right not to subsidize union speech. An individual cannot knowingly waive a right that has yet to be recognized. *See Curtis Publ'g*, 388 U.S. at 143–45 (holding a defendant did not knowingly waive a First Amendment defense at trial because the defense was recognized only after the trial had concluded).

2. *Petitioners did not voluntarily waive their First Amendment rights*. This criterion requires a purported waiver be "freely given." *Janus*, 138 S. Ct. at 2486. Employees required to subsidize union speech when they signed dues deduction forms could not have voluntarily waived their constitutional right not to subsidize union speech because they were not given that option. When Woods, Creed, and Riberio signed dues deduction forms, they had no choice but to subsidize ASEA and its speech because they were subject to agency fee requirements. Pet.App. 5–7, 26–28. Petitioners and similarly situated employees could not have voluntarily waived a right they were not afforded at the time they signed the forms.

3. *Enforcing Respondents' restriction on stopping payroll deductions would be against public policy*. A purported waiver is unenforceable if the "interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392. The State and ASEA's onerous restriction on when employees can stop paying for union speech is unenforceable under this standard.

The policy weighing against prohibiting employees from exercising their rights under *Janus* for 355 days of each year is of the highest order: employees' First Amendment right not to subsidize speech they do not wish to support. *See Janus*, 138 S. Ct. at 2463–64. "[C]ompelled subsidization of private speech seriously impinges on First Amendment rights" and "cannot be casually allowed." *Id.* at 2464. In *Curtis Publishing*, the Court rejected an alleged waiver of First Amendment freedoms, finding that "[w]here the ultimate ef-

fect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." 388 U.S. at 145.

There is no countervailing interest in enforcing severe restrictions on when employees can exercise their First Amendment rights to stop paying for union speech. The Court held in *Knox* that unions have no constitutional entitlement to monies from dissenting employees. 567 U.S. at 313 (citing *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007)). The Court further held that a union's financial self-interest in collecting monies from dissenting employees—even monies to which the union arguably was entitled under state law—does not outweigh dissenting employees' First Amendment rights. *Id.* at 321.

In sum, the constitutional-waiver analysis that *Janus* requires would make all the difference in this case. Because the State and ASEA cannot prove by clear and compelling evidence that petitioners waived their First Amendment rights, the State and ASEA violated their rights by compelling petitioners to pay for union speech after they became nonmembers.

D. The Ninth Circuit's state action and state actor holding conflicts with this Court's precedents and Seventh Circuit case law.

The Ninth Circuit in *Belgau* held the First Amendment does not apply to unions that collect dues from dissenting employees pursuant to state payroll deductions because, according to the court, this is not a state action and unions are not state actors. 975 F.3d at 947. This holding, which the district court applied in *Woods*, Pet.App. 12–14, conflicts not only with *Janus*,

but also with this Court's decision in *Lugar* and Seventh Circuit precedents.

1. The state action here is the same as in *Janus*: a state and union, acting jointly pursuant to a state law and collective bargaining agreement,[8] deducted and collected union payments from nonmembers' wages. *Janus* held that *unions* that engage in this action violate the First Amendment. 138 S. Ct. at 2486 (holding "States and public-sector unions may no longer extract agency fees from nonconsenting employees."). Indeed, the Court has long held that unions can violate individuals' constitutional rights when working with a state to seize payments from those individuals. *See Harris*, 573 U.S. at 656; *Chi. Teachers Union No. 1 v. Hudson*, 475 U.S. 292, 310 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–37 (1977).

On remand in *Janus*, the Seventh Circuit explained that it is "sufficient for the union's conduct to amount to state action" if a state agency "deducted fair share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement." *Janus* II, 942 F.3d at 361. The Seventh Circuit reached a similar conclusion decades earlier, holding:

> when a public employer assists a union in coercing public employees to finance political activities,

---

[8] Specifically, Alaska Statute § 23.40.220 authorizes payroll deductions of union dues and Article 3.04 of ASEA's current collective bargaining agreement requires the State make these deductions. *See* Pet. App. 26.

> that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 along with the agency.

Hudson, 743 F.2d at 1191.

The Seventh Circuit's conclusions are consistent with a line of this Court's precedents finding state action when a plaintiff challenged the constitutionality of a state procedure that permitted a party to seize money or property possessed by the plaintiff. *See Lugar*, 457 U.S. at 941–42; *id.* at 932–34 (discussing *Sniadach v. Fam. Fin. Corp.*, 395 U.S. 337 (1969), *Fuentes,* 407 U.S. 67, and other cases). In *Lugar*, this Court explained that a party is liable for constitutional deprivations under Section 1983 if the deprivation was "caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the state" and "the party charged with the deprivation . . . [is] a person who may be fairly said to be a state actor." *Id.* at 937. The *Lugar* Court held a statutory procedure permitting a private party to attach disputed property "obviously is the product of state action." *Id.* at 941. The Court further found "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'" *Id.*

Lugar is controlling here. The State's procedure for deducting union dues from petitioners' and other employees' wages obviously is the product of state action. Indeed, Alaska's Governor and Attorney General seek to reform these State procedures to comply with the First Amendment. *See* Pet.App. 53, 78. ASEA's "joint

participation with state officials in the seizure of disputed property"—here, monies from petitioners' wages after they became nonmembers—"is sufficient to characterize that party as a 'state actor'" under *Lugar*, 457 U.S. at 941. ASEA is a state actor under *Lugar*, as well as under *Janus*.

2. The district court found a lack of state action in *Woods* because the Ninth Circuit held in *Belgau* that "'the source of the alleged constitutional harm' [was] not a state statute or policy but the particular agreement between the union and Employees." Pet.App. 12 (quoting *Belgau*, 975 F.3d at 947). According to the Ninth Circuit, the state's "role was to enforce a private agreement" and "private dues agreements do not trigger state action and independent constitutional scrutiny." *Belgau*, 975 F.3d at 949. This reasoning is untenable in at least two respects.

First, the source of the constitutional harm here, as in *Janus*, is a state and union seizing payments for union speech from nonmembers' wages. Petitioners challenge those seizures, with Woods alleging that Alaska Statute § 23.40.220 is unconstitutional to extent that it authorizes those seizures.[9] Petitioners' dues deduction forms did not cause their injuries, but are just evidence that petitioners did not knowingly waive their right to stop subsidizing ASEA's speech.

Second, a form that authorizes the *State of Alaska* to make payroll deductions is not a "private" agreement. It is an agreement with the State. *See supra* at 21. This is illustrated by the Governor ordering a

---

[9] Compl. ¶¶ 60–61, *Woods v. Alaska State Emps. Ass'n*, 3:20-cv-0074, ECF No. 1 (D. Alaska Apr. 1, 2020).

State agency to develop and use a new form to authorize State payroll deductions that complies with *Janus*. Pet.App. 75–76.

Belgau's state-actor holding collapses when deprived of the false premise that a state system for taking union payments from employees' wages amounts to nothing more than "ministerial processing" of private agreements. 975 F.3d at 948. As Alaska's Attorney General recognized, a "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." Alaska A.G. Op. (Pet.App. 61). Unions, like ASEA, that use this state process to extract union dues from objecting employees in violation of their First Amendment rights are state actors.

The Ninth Circuit's state-action and state-actor holdings conflict with *Janus* and *Lugar*, and with the Seventh Circuit's decisions in *Janus* II and *Hudson*. The Court should resolve this conflict.

III. The Questions Presented Are Exceptionally Important.

In 2019, approximately 6.75 million state and local government employees were covered by union collective bargaining agreements.[10] *Janus'* waiver requirement is essential to ensuring that these employees

---

[10] Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 Indus. & Labor Rels. Rev. 349–54 (2003) (updated annually at unionstats.com); https://www.unionstats.com/Federal-Postal-State-Local.htm (estimating that 2,347,300 state employees and 4,408,600 local government employees were covered by union collective bargaining agreement in 2019).

can freely exercise the speech rights the Court recognized in that opinion.

Under a waiver standard, employee decisions to authorize their government employer to take payments for union speech from their wages will have to be voluntarily, knowingly, and intelligently made. *See supra* at 18; Alaska A.G. Op. (Pet.App. 63–64, 68). The "knowing" criteria for a waiver is especially important, as it will require that employees be notified of their constitutional rights, allowing them to make informed decisions about whether to subsidize a union and its expressive activities.

In contrast, if *Janus'* waiver requirement is not enforced, states and unions will continue to severely restrict when employees can exercise their right to stop paying for union speech. As earlier discussed, a dozen states amended their dues-deductions laws to require government employers to enforce restrictions on when employees can stop payroll deduction of union dues. *See supra* at 3–4. These types of restrictions also are enforced in at least five other states, including Alaska. *Id*. As a result, public employees in these states often are prohibited from exercising their First Amendment rights under *Janus* for 350-55 days of each year, if not for longer periods. *Id*.

These restrictions infringe on fundamental speech and associational rights. The Court reiterated in *Janus* that "[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."

138 S. Ct. at 2463 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (emphasis omitted). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Id.* "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* at 2464. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* (quoting A Bill for Establishing Religious Freedom, 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed. 1950)). The sole effect of a restriction on when employees can stop paying union dues is to compel employees who no longer want to contribute money to propagate union speech to continue to do so.

The Ninth, Seventh, and Tenth Circuits have given states and unions a green light to impose these restrictions on employees by holding *Janus*'s waiver requirement inapplicable if an employee signs a dues deduction contract. *Belgau*, 975 F.3d at 951–52; *Bennett*, 991 F.3d at 732–33; *Hendrickson*, 992 F.3d at 964. Under this lesser contract standard, governments and unions can easily restrict when employees may exercise their First Amendment rights under *Janus* simply by writing restrictions into the fine print of their dues deduction forms. There is no requirement that employees presented with those forms be notified of their constitutional right not to financially support the union. There are few impediments to states and unions including oppressive restrictions in the forms, such as a requirement that employees cannot stop state dues deductions except during annual ten-day periods. Employees can unwittingly sign their First

Amendment rights away for a year or more without having any idea they are doing so.

Worse, the Ninth Circuit's holding that unions are not state actors exempts their conduct from all constitutional scrutiny. Unions in Alaska, California, Oregon, and Washington can mislead or coerce employees to authorize dues deductions, and impede employees' ability to stop paying for union speech, without fear of liability under Section 1983.

First Amendment speech and associational rights deserve greater protections than this. And the Court provided for such protections in *Janus* with its waiver holding. 138 S. Ct. at 2486. The Court's waiver requirement will ensure employees who are solicited to surrender their right to stop subsidizing union speech for a time period are notified of the First Amendment right they are being asked to waive. That purported waivers are unenforceable if against public policy under *Rumery*, 480 U.S. at 392, will curtail the ability of states and unions to impose onerous restrictions on employees, such as the ones that prohibit employees from exercising their constitutional rights except during a ten-day annual period.

It is important that the Court make clear that it meant what it said in *Janus*: that states and unions cannot seize payments for union speech from employees unless they waive their right not to subsidize that speech. 138 S. Ct. at 2486. Otherwise, a number of states and unions, with the blessing of three appellate courts, will continue to hamstring the First Amendment right the Court recognized in *Janus*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

DANIEL SUHR
JEFFREY M. SCHWAB
LIBERTY JUSTICE CENTER
141 W Jackson Blvd.
Suite 1065
Chicago, IL 60604

Counsel for Petitioners Creed and Riberio

WILLIAM MESSENGER
Counsel of Record
W. JAMES YOUNG
ALYSSA K. HAZELWOOD
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioners

OCTOBER 25, 2021

APPENDIX

TABLE OF APPENDICES

Appendix A

Order, United States Court of Appeals for the Ninth Circuit, *Woods v. Alaska State Employees Ass'n / AFSCME Local 52*, No. 20-35954 (Aug. 11, 2021) App-1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit, *Creed v. Alaska State Employees Ass'n / AFSCME Local 52*, No. 20-35743 (Aug. 16, 2021) App-2

Appendix C

Order, United States District Court for the District of Alaska, *Woods v. Alaska State Employees Ass'n / AFSCME Local 52*, 496 F. Supp. 3d 1365 (Oct. 27, 2020) App-3

Appendix D

Judgment, United States District Court for the District of Alaska, *Woods v. Alaska State Employees Ass'n / AFSCME Local 52*, 3:20-cv-0074 (Nov. 2, 2020).....App-22

Appendix E

Order, United States District Court for the District of Alaska, *Creed v. Alaska State Employees Ass'n / AFSCME Local 52*, 472 F. Supp. 3d 518 (July 15, 2020).....App-24

Appendix F

Order, United States District Court for the District of Alaska, *Creed v. Alaska State Employees Ass'n / AFSCME Local 52*, 3:20-cv-0065 (Aug. 4, 2020) App-49

Appendix G

Judgment, United States District Court for the District of Alaska, *Creed v. Alaska State Employees Ass'n / AFSCME Local 52*, 3:20-cv-0065 (Aug. 13, 2020).....App-51

Appendix H

First Amendment Rights and Union Due Deductions and Fees, Office of the Alaska Att'y Gen. (Alaska A.G. Aug. 26, 2019).....App-53

Appendix I

Administrative Order No. 312, Governor of Alaska (Alaska Gov. Sept. 26, 2019) App-73

Appendix J

Final Judgment, *State of Alaska v. Alaska State Employees Ass'n / AFSCME Local 52*, No. 3AN-19-9971 (Alaska Superior Ct. Aug. 4, 2021) App-79

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35954

CHRISTOPHER A. WOODS, on behalf of himself and the class he seeks to represent,

Plaintiff-Appellant,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, in her official capacity as Commissioner of Administration for the State of Alaska,

Defendants-Appellees.

Filed: August 11, 2021

Before: SCHROEDER, TASHIMA, and HURWITZ, Circuit Judges.

Appellant's unopposed motion for summary affirmance (Docket Entry No. 15) is granted.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35743

LINDA CREED; TYLER RIBERIO,

Plaintiff-Appellant,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, in her official capacity as Commissioner of Administration for the State of Alaska,

Defendants-Appellees.

Filed: August 16, 2021

Before: SCHROEDER, TASHIMA, and HURWITZ, Circuit Judges.

Appellant's unopposed motion for summary affirmance (Docket Entry No. 18) is granted.

AFFIRMED.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 3:20-cv-0074

CHRISTOPHER A. WOODS, on behalf of himself and the class he seeks to represent,

Plaintiff,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, Commissioner of Administration for the State of Alaska,

Defendants.

Filed: Oct. 27, 2020

ORDER

Motion for Summary Judgment

H. RUSSEL HOLLAND, United States District Judge

Defendant Alaska State Employees Association/AFSCME Local 52 ("ASEA") moves for summary judgment.[1] This motion is opposed by plaintiff Christopher A. Woods[2] and defendant Kelly Tshibaka.[3] Oral argument was not requested and is not deemed necessary.

Facts[4]

Plaintiff is employed as a vocational instructor by the State of Alaska. Plaintiff is employed in a bargaining unit that ASEA exclusively represents for purposes of collective bargaining, the General Government Unit ("GGU"). Tshibaka is the Commissioner of the Department of Administration for the State of Alaska and is the state official responsible for the implementation of the State's collective bargaining agreements with ASEA.

Employees of the State of Alaska are not required to become union members as a condition of employment. "Alaska law makes union membership for state employees voluntary." *Creed v. Alaska State Employees Association/AFSCME Local 52*, 472 F.Supp.3d 518, 520 (D. Alaska 2020).

Employees who sign union membership and dues deduction authorization forms become ASEA members and pay union membership dues to ASEA by deductions from their paychecks. ASEA members have

---

[1] Docket No. 38.

[2] Docket No. 40.

[3] Docket No. 39.

[4] Plaintiff and ASEA stipulated to the facts that they believed were material to the instant motion for summary judgment. Docket No. 36. The facts as set out below are largely taken from these stipulated facts.

membership rights including, for example, the right to vote in union officer elections, run for union office, participate in the union's internal affairs, be elected or appointed to serve as a union steward, and vote on whether to ratify a collective bargaining agreement applicable to their bargaining unit. ASEA members also have access to members-only benefits, including, for example, discounts on various goods and services including credit cards and rental cars; access to the GGU dental benefit, AFSCME's free college benefit, and no-cost life insurance; and invitations to members-only events. Non-members do not have these membership rights or access to these members-only benefits.

The State and ASEA are currently parties to a collective bargaining agreement effective from July 1, 2019 through June 20, 2022 ("the current CBA"). The current CBA governs the terms and conditions of employment of state employees in the GGU bargaining unit. In accordance with the current CBA, the State deducts union membership dues from the wages of employees who signed a dues deduction authorization form, and remits those dues to ASEA.

Plaintiff first joined ASEA in June 2013. In April 2017, plaintiff volunteered and was elected by the Mat-Su Chapter of ASEA to serve as a Union Steward for that chapter. Plaintiff signed a new union membership and dues deduction authorization form on August 14, 2017. That authorization form provided:

> 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 . . . 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 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 ... 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) before the end of any yearly period.[5]

---

[5] Union Membership Care/Payroll Deduction Authorization at 1, Exhibit G, Joint Stipulation of Material Facts, Docket No. 36.

Plaintiff also checked the box on the form that read: "Yes, I choose to be a union member."[6]

On June 27, 2018, the Supreme Court issued its decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). *Janus* involved a challenge by an Illinois state employee to a state statute that authorized the imposition of agency fees for nonunion members. *Id.* at 2461. The Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" because "[t]his procedure violates the First Amendment. . . ." *Id.* at 2486. The Court stated 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 such a payment, unless the employee affirmatively consents to pay." *Id.*

Before the Supreme Court decided *Janus*, employees in the GGU bargaining unit who did not choose to join ASEA were required to pay agency fees to ASEA to cover their share of the cost of providing collective bargaining representation. The chargeable portion of agency fees was less than full member dues. At the time, these fees were authorized under Supreme Court precedent and state law (AS 23.40.110(b)(2)). Immediately after the Supreme Court issued its decision in *Janus*, the State stopped collecting and ASEA stopped receiving agency fees from nonmembers.

In September 2019, the State, pursuant to Administrative Order No. 312, stopped dues deductions for

---

[6] *Id.* at 2.

state employees, including plaintiff. Administrative Order No. 312 was "issue[d] 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."[7] The procedure set out in Administrative Order No. 312 called for employees to provide their consent for the deduction of union dues or fees directly to the State and gave employees the right to revoke their consent at any time.[8] Legal action between the State and ASEA over Administrative Order No. 312 ensued, and on October 3, 2019, a state court issued a temporary restraining order enjoining the State from implementing Administrative Order No. 312 or changing the State's union dues deduction practices.[9] On November 5, 2019, the state court issued a preliminary injunction incorporating all of the terms of the temporary restraining order. This preliminary injunction remains in place.

Plaintiff's term as a union steward ended on September 30, 2019. On November 26, 2019, plaintiff sent ASEA a written resignation of his membership and objection to dues deductions. Plaintiff was advised that he was not eligible to opt out of paying dues until June 2020.[10] ASEA has treated plaintiff's lawsuit as a revocation request and instructed the State to stop

---

[7] Administrative Order No. 312, Exhibit O at 1, Joint Stipulation of Material Facts, Docket No. 36.

[8] *Id*. at 3–4.

[9] Exhibit P at 22–23, Joint Stipulation of Material Facts, Docket No. 36

[10] Email from Toya Winton to Christopher A. Woods, Exhibit K at 3, Joint Stipulation of Material Facts, Docket No. 36.

making deductions from plaintiff's wages as of July 25, 2020, the beginning of the revocation window period stated in plaintiff's August 14, 2017 dues authorization form.

On April 1, 2020, plaintiff commenced this action on behalf of himself and others similarly situated. Plaintiff's complaint contains three counts. In Count I, plaintiff asserts a § 1983 claim based on allegations that defendants have violated his First Amendment rights by only allowing him to revoke his dues deduction authorization during one ten-day period each year. In Count II, plaintiff asserts a § 1983 claim based on allegations that defendants have deprived him of his First Amendment rights because they are deducting and collecting union dues without clear and compelling evidence that he has waived his First Amendment rights to free speech and association. In Count III, plaintiff asserts a § 1983 claim based on allegations that the indemnification clause in the current CBA is void and unenforceable as against public policy.

ASEA now moves for summary judgment on all of plaintiff's claims asserted against it and defendant Tshibaka. Although Tshibaka has opposed the instant motion, ASEA contends that judgment should be granted in her favor was well as ASEA's because plaintiff's claims against both defendants fail as a matter of law. "When a plaintiff's claims fail as a matter of law on a motion for summary judgment filed by one defendant, then all defendants are entitled to a final judgment in their favor on those claims, regardless of whether they joined in the motion." *HSBC Bank USA, N.A. v. Williston Investment Group LLC*, Case No. 2:17-CV-331 JCM (CWH), 2018 WL

2110599, at *3 (D. Nev. May 7, 2018) (citing *Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001)).

Discussion

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The initial burden is on the moving party to show that there is an absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets its initial burden, then the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding a motion for summary judgment, the court views the evidence of the non-movant in the light most favorable to that party, and all justifiable inferences are also to be drawn in its favor. *Id.* at 255, 106 S. Ct. 2505. "'[T]he court's ultimate inquiry is to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence.'" *Arandell Corp. v. Centerpoint Energy Services, Inc.*, 900 F.3d 623, 628–29 (9th Cir. 2018) (quoting *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987)).

All of plaintiff's claims are § 1983 claims. "'To state a claim under § 1983, a plaintiff [1] must allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting

under color of state law.'" *Naffe v. Frey*, 789 F.3d 1030, 1035–36 (9th Cir. 2015) (quoting *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)). ASEA argues that plaintiff's claims fail as to both elements.

First of all, ASEA argues that plaintiff's claims against it fail because it was not acting under color of state law.[11] "'[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.'" *Marsh v. County of San Diego*, 680 F.3d 1148, 1158 (9th Cir. 2012) (quoting *Amer. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)). The court applies a "two-prong framework for analyzing when governmental involvement in private action is itself sufficient in character and impact that the government fairly can be viewed as responsible for the harm of which the plaintiff complains." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013). "The first prong asks whether the claimed constitutional deprivation resulted from the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id*. (citation omitted). "The second prong determines whether the party charged with the deprivation could be described in all fairness as a state actor." *Id*.

The Ninth Circuit recently held that the first prong was not met in a case in which union members alleged that their First Amendment rights were violated because the dues deduction forms that they signed, which were identical to the one signed by plaintiff in

---

[11] ASEA only advances this argument on behalf of itself.

2017, "were signed without a constitutional waiver of rights." *Belgau v. Inslee*, 975 F.3d 940, 947 (9th Cir. 2020). The Ninth Circuit concluded that "the 'source of the alleged constitutional harm' is not a state statute or policy but the particular private agreement between the union and Employees." *Id.* (quoting *Ohno*, 723 F.3d at 994). ASEA argues that the same is true here, that the source of plaintiff's alleged constitutional harm is the private agreement between him and ASEA.

Plaintiff argues however that the first prong is met here because the dues deductions at issue were made pursuant to a state statute, namely AS 23.40.220, which 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.

Plaintiff argues that his injury stems from this statute and the State's agreement with ASEA rather than his agreement with ASEA. Plaintiff argues that his injury did not result from the dues deduction form because his constitutional rights were violated not because of some words on this form but rather because of "the State's and ASEA's seizure of monies for union

speech from [p]laintiff's and [putative] class members' wages."[12]

Belgau involved a state statute similar to AS 23.40.220 which "directed Washington to collect the dues on behalf of [the union] from union members who authorized the deduction." *Belgau*, 975 F.3d at 946. Yet, despite this state statute, the Ninth Circuit found that the "'source of the alleged constitutional harm' [was] not a state statute or policy but the particular agreement between the union and Employees." *Id*. at 947 (quoting *Ohno*, 723 F.3d at 994). The same is true here. The source of plaintiff's alleged constitutional harm is his agreement with ASEA, not a state statute or policy, which means the first prong, the state policy prong, has not been met.

But even if there were some question as to whether the first prong was met here, ASEA argues that the second prong, the state actor prong, has not been met. Plaintiff argues that ASEA is a state actor under either the "public function" test or the "joint action" test. "The former treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government." *Ohno*, 723 F.3d at 996. "The latter focuses on whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Id*. (citation omitted). "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party[.]" *Id*.

---

[12] Plaintiff's Opposition to [ASEA's] Motion for Summary Judgment at 16, Docket No. 40 (emphasis omitted).

Any argument that ASEA meets the "joint action" test is foreclosed by Belgau, which involved the same issues and nearly identical facts as this case. There, the Ninth Circuit held that the union was not a state actor under the joint action test. *Belgau*, 975 F.3d at 947.

Any argument that ASEA meets the "public function" test is also foreclosed by *Belgau*, in which the Ninth Circuit noted that the union did "not qualify as a state actor under other tests the Supreme Court has articulated--the public function, the state compulsion, and the governmental nexus tests." *Id*. at 947 n.2. Contrary to plaintiff's contention, the State of Alaska has not partially delegated to ASEA how much it will pay its employees. Moreover, paying employees is not a function that is "both traditionally and exclusively governmental." *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002). Rather, it is a function that every employer, private or public, carries out.

Neither the joint action test nor the public function test is met here. Thus, ASEA is not a state actor, which means all of plaintiff's claims against ASEA fail because it was not acting under color of state law.

But even if it were acting under color of state law, ASEA argues that plaintiff's claims in Count I and II against it and defendant Tshibaka would still fail because plaintiff's First Amendment rights have not been violated. "Compelling a person to subsidize the speech of other private speakers raises . . . First Amendment concerns." *Janus*, 138 S. Ct. at 2464. 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, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

In Count I, plaintiff contends that ASEA violated his First Amendment rights by limiting his right to revoke his dues deduction authorization to a ten-day window each year. This court recently rejected a similar argument in *Creed*, 472 F. Supp. 3d at 527, because the plaintiffs in that case had "affirmatively consented to pay union dues and agreed that their consent could only be revoked during a specific period." *Id.* "'Each court that has examined this issue has rejected the claim that Janus entitles union members to resign and stop paying dues on their own—rather than on the contract's—terms.'" *Id*. (quoting *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1024 (D.N.M. 2020)). Here, it is undisputed that plaintiff affirmatively consented to pay union dues and agreed that his consent could only be revoked during a specific period. As the Ninth Circuit recently observed, "[t]he First Amendment does not support [an employee's] right to renege on [his] promise to join and support the union. This promise was made in the context of a contractual relationship between the union and its employees." *Belgau*, 975 F.3d at 950. Thus, plaintiff's § 1983 claim in Count I fails because there has been no violation of his First Amendment rights in connection with the revocation window.

Plaintiff's and Tshibaka's arguments to the contrary are unavailing Plaintiff argues that this case is distinguishable from *Creed* because there, the plaintiffs did not "argu[e] that the revocation window is itself unconstitutional." *Creed*, 472 F. Supp. 3d at 530. But

here, plaintiff contends he has alleged that the revocation window is unconstitutional. Plaintiff also argues that Janus plainly applies to this case because he was required to continue paying union dues after he resigned from the union. In other words, plaintiff argues that when he resigned his union membership, he became a nonmember, which means that "*Janus* governs the dues seizures at issue in this case."[13] Tshibaka similarly argues that plaintiff's First Amendment rights were violated after he withdrew his consent. Tshibaka argues that "an employee has the constitutional right to stop associating with a union at any time."[14]

But this is the very argument that the Ninth Circuit rejected in *Belgau*. There, the plaintiffs had voluntarily joined the union and then "[a]fter the *Janus* decision," notified the union "that they no longer wanted to be union members or pay dues." *Belgau*, 975 F.3d at 946. "However, pursuant to the terms of the revised membership agreements, Washington continued to deduct union dues from [the] Employees' wages under the irrevocable one-year terms expired." *Id.* The "Employees . . . argue[d] that the Court's decision in *Janus* voided the commitment they had made and now requires the state to insist on strict constitutional waivers with respect to deduction of union dues." *Id.* at 950. The Ninth Circuit rejected that argument, ex-

---

[13] Plaintiff's Opposition to [ASEA's] Motion for Summary Judgment at 8, Docket No. 40.

[14] Response of Defendant Kelly Tshibaka to Defendant ASEA's Motion for Summary Judgment at 14, Docket No. 39.

plaining that "[t]he First Amendment does not support Employees' right to renege on their promise to join and support the union." *Id.*

Similarly here, plaintiff voluntarily joined the union and agreed that he could only revoke his dues authorization during a ten-day period each year. Nothing in *Janus* allows him to avoid these commitments. As the Ninth Circuit explained, "'[t]he First Amendment [does not] provide a right to 'disregard promises that would otherwise be enforced under state law.'" *Id.* (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991)). Plaintiff's First Amendment rights have not been violated because he was only allowed to revoke his dues deduction authorization during a specific ten-day window each year. Thus, plaintiff's First Amendment claim in Count I fails as a matter of law.

In Count II, plaintiff contends that defendants violated his First Amendment rights because they were deducting and collecting union dues without clear and compelling evidence that he had waived his First Amendment rights to free speech and association. But, the Ninth Circuit recently "join[ed] the swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues." *Id.* at 951. The Ninth Circuit rejected the argument "that *Janus* requires . . . any waiver of the First Amendment right to be 'freely given and shown by clear and compelling' evidence." *Id.* at 951–52 (quoting *Janus*, 138 S. Ct. at 2486). The Ninth Circuit explained that *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id.* Because the plaintiffs in *Belgau* had

"affirmatively consented to the deduction of union dues[,]" the Ninth Circuit held that there had been no First Amendment violation. *Id*. at 944.

Plaintiff, however, argues that his First Amendment rights were violated because the dues deduction form does not provide a knowing and intelligent waiver of First Amendment rights. Tshibaka similarly argues that the dues deduction form does not provide a clear waiver of First Amendment rights. Plaintiff and Tshibaka appear to be arguing that the form does not make it clear that the individual is waiving his First Amendment right to stop associating with the union at a time of his choosing.

This argument fails in light of *Belgau*. The Ninth Circuit "recogniz[ed] that *Janus* does not extend a First Amendment right to avoid paying union dues." *Id*. at 951. Yet, that is exactly what plaintiff is arguing here. Thus, plaintiff's First Amendment claim in Count II fails as a matter of law.

As for Count III, plaintiff's claim in this count is based on allegations that the indemnification clause in the current CBA is void and unenforceable as against public policy. The indemnification clause in the current CBA provides that

> [t]he Union shall defend, indemnify, and save the Employer harmless against any and all claims, demands, suits, grievances, or other liability (including attorneys' fees incurred by the Employer) that arise out of or by reason of actions taken by the Employer pursuant to this Article [which includes a provision on payroll

> deductions], except those actions caused by the Employer's negligence.[15]

Plaintiff alleges that maintenance of this clause violates his First Amendment rights and thus it is void and unenforceable as against public policy.

ASEA argues that even if it were acting under color of state law, which it was not, plaintiff's claim in Count III would fail for a lack of standing. "In order to have standing, a plaintiff must establish an injury in fact, causation, and redressability." *Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002). In *Prescott*, the court considered whether "the plaintiffs lacked standing to challenge an indemnification provision in a collective bargaining agreement." *Id*. at 845. The indemnification "provision require[d] the union to hold the employer harmless from any liability arising out of the collection of agency fees from non-union members of the bargaining unit." *Id*. The plaintiffs were "non-union members of an agency shop bargaining unit employed by defendant El Dorado County, California." *Id*. "The only cognizable injury the plaintiffs allege[d was] that the union did not give them adequate notice of the basis of the fees." *Id*. Pursuant to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986), the union was required to "provide notice of the basis of agency fees that plaintiffs must pay as members of an agency shop. . . ." *Id*. at 846. The plaintiffs alleged that they had been injured because the

---

[15] Current CBA, Art. 3, § 3.06, page 8, Exhibit A, Joint Stipulation of Material Current CBA, Art. 3, § 3.06, page 8, Exhibit A, Joint Stipulation of Material Facts, Docket No. 36. Facts, Docket No. 36.

union failed to comply with the *Hudson* notice requirement. *Id*. The court found that there was no "causal relationship" between this alleged injury and the indemnification provision. *Id*. The plaintiffs had argued that there was such a relationship "because the *Hudson* notice requirement is triggered by the collective bargaining agreement, and because the employer has stipulated that it would not have entered into the collective bargaining agreement unless it contained the indemnification clause, the indemnification clause is the legal cause of the inadequate *Hudson* notice." *Id*. But, the court found this causal relationship to be "too remote[.]" *Id*. The court also found that the plaintiffs had failed to meet the redressability requirement of standing because "[t]he remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson*, nor does it prevent future violations." *Id*.

Plaintiff argues that, unlike the plaintiffs in *Prescott*, he has standing. He contends that his constitutional injury was the seizure of "union dues from [his] wages without clear and convincing evidence that [he] consented to those deductions and waived [his] First Amendment rights."[16] Plaintiff argues that the indemnification clause relieves the State of its duty to not violate its employees' First Amendment rights and therefore there is a causal connection between his constitutional injury and the indemnification clause in the current CBA.

---

[16] Plaintiff's Opposition to [ASEA's] Motion for Summary Judgment at 24, Docket No. 40.

But, as discussed above, there has been no violation of plaintiff's First Amendment rights. So, it follows that plaintiff's challenge to the indemnification clause in the current CBA fails for a lack of standing because he cannot show any injury in fact.

Conclusion

ASEA's motion for summary judgment[17] is granted. The clerk of court shall enter judgment dismissing plaintiff's complaint against ASEA and Tshibaka with prejudice.

[17] Docket No. 38.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. 3:20-cv-0074

CHRISTOPHER A. WOODS, on behalf of himself and the class he seeks to represent,

Plaintiff,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, Commissioner of Administration for the State of Alaska,

Defendants.

Filed: Nov. 2, 2020

JUDGMENT IN A CIVIL ACTION

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ DECISION BY COURT. This action came to trial or decision before the Court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT plaintiff's complaint against defendants, Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) and Kelly Tshibaka, is dismissed with prejudice.

APPROVED:

s/ H. Russel Holland
H. Russel Holland
United States District Judge

Date: November 2, 2020

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 3:20-cv-0065

LINDA CREED and TYLER RIBERIO,

Plaintiffs,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, Commissioner of Administration for the State of Alaska,

Defendants.

Filed: July 15, 2020

ORDER

Motion to Dismiss;

Cross-Motion for Summary Judgment

H. Russel Holland, United States District Judge

Defendant ASEA moves to dismiss plaintiffs' complaint.[1] This motion is opposed by plaintiffs[2] and

---

[1] Docket No. 24

[2] Docket No. 28

plaintiffs cross-move for summary judgment.[3] Defendant Tshibaka does not oppose plaintiffs cross-motion but does oppose ASEA's motion to dismiss.[4] Defendant ASEA opposes plaintiffs' cross-motion.[5] Oral argument was not requested and is not deemed necessary.

Facts

Plaintiffs are Linda Creed and Tyler Riberio. Defendants are the Alaska State Employees Association/AFSCME Local 51 ("ASEA") and Kelly Tshibaka, in her official capacity as the Commissioner of Administration for the State of Alaska.

Plaintiffs are Alaska state employees. Alaska law makes union membership for state employees voluntary. *See* AS 23.40.080 ("[p]ublic employees may 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"). "Membership" in ASEA "is not a condition of employment, and employees must sign [a] form if they wish to join the union." *State of Alaska v. Alaska State Employees Association*, Case No. 3AN-19-09971CI, Temporary Restraining Order at 3, 2019 WL 7597328 (Oct. 3, 2019).[6] AS 23.40.220 provides that

---

[3] Docket No. 27

[4] Docket No. 30

[5] Docket No. 33

[6] A copy of this order is attached as Exhibit A to the Declaration of Jake Metcalfe [etc.], which is appended to ASEA's Motion to Dismiss, Docket No. 24.

> [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 as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative.

ASEA's collective bargaining agreement with the state provides:

> 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.[7]

Creed alleges that she joined ASEA on July 19, 2017.[8] Creed alleges that at the time she joined the union, "she was forced to either join and pay dues or not join and pay fees, so she chose to join."[9] Riberio alleges that he joined ASEA on February 12, 2018.[10] Riberio alleges that at the time he joined the union, "he believed that membership would provide value to him and his colleagues."[11]

---

[7] Exhibit A at ¶ 3.04(A), Complaint, Docket No. 1.

[8] Complaint at 3, ¶ 6, Docket No. 1.

[9] *Id*. at 5, ¶ 18.

[10] *Id*. at 3, ¶ 7.

[11] *Id*. at 5, ¶ 19.

The Union Membership Card/Payroll Deduction Authorization that plaintiffs signed provided:

> Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each 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 . . . 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) before the end of any yearly period.[12]

Both plaintiffs also checked the box on the form that read: "Yes, I choose to be a union member."[13]

On June 27, 2018, the Supreme Court issued its decision in *Janus v. American Federation of State*,

---

[12] Exhibit B at 1, Complaint, Docket No. 1.

[13] Exhibit C at 1; Exhibit D at 1, Metcalfe Declaration, which is amended to Motion to Dismiss, Docket No. 24.

County, and Municipal Employees, Council 31, —— U.S. ——, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). *Janus* involved a challenge by an Illinois state employee to a state statute that authorized the imposition of agency fees for nonunion members. *Id*. at 2461. The Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" because "[t]his procedure violates the First Amendment. . . ." *Id*. at 2486. The Court stated 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 such a payment, unless the employee affirmatively consents to pay." *Id*.

More than one year later, on July 31, 2019, Riberio "wrote to the union . . . to resign his position as a union steward and to cancel his membership and dues authorization[.]"[14] Riberio alleges that he did so because "[h]e learned through experience within the union that its priorities and values did not comport with his views on important topics."[15]

On August 27, 2019, the Attorney General for the State of Alaska opined "that *Janus* requires a significant change to the State's current" union-related dues and fees "practice in order to protect state employees' First Amendment rights."[16] The Attorney General opined that "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

---

[14] Complaint at 5-6, ¶ 19, Docket No. 1.

[15] *Id*. at 5, ¶ 19.

[16] Clarkson Memo, Exhibit C at 2, Complaint, Docket No. 1.

unless it has 'clear and compelling evidence' of the employee's consent."[17] The Attorney General opined that "*Janus* did not distinguish between members and non-members of a union" and "[t]hus 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 from another's."[18] The Attorney General recommended that the State have employees provide their consent to join the union or pay fees directly to the State, rather than providing this consent to the union.[19] This would, according to the Attorney General, ensure "that an employee's consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary."[20]

Creed alleges that the day after the Attorney General's opinion was released, she "wrote to ASEA to cancel her [union] membership and dues authorization[.]"[21] She alleges that ASEA advised her "that she was obligated to continue paying dues until her opt-out window ten months in the future."[22]

Riberio alleges that on August 28, 2019, he "wrote a letter to Commissioner Tshibaka's agency to end continued deduction of union dues from his paycheck" and that he included "a copy of his letter of July 31,

---

[17] *Id*. at 4.

[18] *Id*. at 6.

[19] *Id*. at 12–13.

[20] *Id*. at 12.

[21] Complaint at 6, ¶ 21, Docket No. 1.

[22] *Id*.

2019."[23] Riberio also alleges that on September 20, 2019, he "completed a standard State of Alaska payroll form to cease his union dues deductions."[24]

In September 2019, the State, pursuant to Administrative Order No. 312, stopped dues deductions for state employees, including plaintiffs. Administrative Order No. 312 was "issue[d] 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."[25] The procedure set out in Administrative Order No. 312 called for employees to provide their consent for the deduction of union dues or fees directly to the State and gave employees the right to revoke their consent at any time.[26] Legal action between the State and ASEA over Administrative Order No. 312 ensued, and on October 3, 2019, a state court issued a temporary restraining order which required "the reinstatement of cancelled dues authorizations, including those of [p]laintiffs. . . ."[27]

Creed alleges that "[o]n October 7, 2019, Defendant Commissioner Tshibaka wrote to [her] to inform her that pursuant to the state court's order, [Tshibaka]

---

[23] *Id*. at 6, ¶ 22.

[24] *Id*. at 6, ¶ 23.

[25] Administrative Order No. 312, Exhibit D at 1, Complaint, Docket No. 1.

[26] *Id*. at 3–4.

[27] Complaint at 7, ¶ 26, Docket No. 1. The TRO was converted into a preliminary injunction on November 5, 2019. Exhibit B, Metcalfe Declaration, which is appended to Motion to Dismiss, Docket No. 24.

was reinstating the dues deduction from Creed's paychecks."[28] Creed alleges that "[t]he opt-out window for [her] pursuant to her dues checkoff authorization[ ] will not arise until July 2020."[29] ASEA contends that Creed's opt-out window began on June 30, 2020 and Jake Metcalfe, the Executive Director of ASEA, avers that "ASEA will consider this lawsuit to be a request to end her deductions when that window period begins, and ASEA will instruct the Alaska Department of Administration to end Plaintiff Creed's dues deductions as of June 30, 2020."[30]

Riberio alleges that "[i]n January 2020, which was during the resignation period prescribed in the dues checkoff authorization he signed, [he] sent a letter resigning his membership from the union. Defendant ASEA executed his opt-out and the State stopped withholding dues from his paycheck at the new payperiod."[31]

On March 16, 2020, plaintiffs commenced this action. In their complaint, they assert § 1983 claims based on allegations that defendants violated their "First Amendment rights to free speech and free association to not financially support a union without their affirmative consent."[32] Plaintiffs seek damages and declaratory and injunctive relief. Specifically, plaintiffs seek

---

[28] *Id.* at 7, ¶ 27.

[29] *Id*. at 8, ¶ 29.

[30] Metcalfe Declaration at 2, ¶ 8, which is appended to Motion to Dismiss, Docket No. 24.

[31] Complaint at 7-8, ¶ 28, Docket No. 1.

[32] Complaint at 10, ¶ 40, Docket No. 1.

1) a declaration that "limiting the ability of [p]laintiffs to revoke the authorization to withhold union dues from their paychecks to a window of time is unconstitutional because they did not provide affirmative consent;"

2) a declaration that their "signing of the union card cannot provide a basis for their affirmative consent to waive their First Amendment rights upheld in *Janus* because such authorization was based on an unconstitutional choice between paying the union as a member or paying the union as a non-member, and was made without full information as to their rights;"

3) a declaration "that the practice by Defendant Commissioner Tshibaka of withholding union dues from [p]laintiffs' paychecks was unconstitutional because [p]laintiffs did not provide affirmative consent for her to do so;"

4) "an injunction ordering ASEA to immediately allow [p]laintiff Creed to resign her union membership;"

5) an injunction prohibiting "Tshibaka from continuing to deduct . . . dues from [p]laintiff Creed's paychecks;"

6) an injunction prohibiting ASEA from accepting dues deducted from Creed's paychecks; and

7) damages in the form of dues collected both pre- and post-*Janus*.[33]

ASEA now moves to dismiss plaintiffs' claims, and plaintiffs cross-move for summary judgment on their claims against both defendants.

Discussion

---

[33] Complaint at 10–11, Docket No. 1.

ASEA first moves to dismiss plaintiffs' claims for prospective relief pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. "Pursuant to Rule 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction." *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 545 (N.D. Cal. 2012). "Federal courts lack subject matter jurisdiction over moot claims." *GLW Ventures LLC v. United States Dep't of Agric.*, 261 F. Supp. 3d 1098, 1103 (W.D. Wash. 2016). "'A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013)).

Plaintiffs' claims for prospective relief are moot because the State is no longer deducting union dues from their paychecks. Thus, plaintiffs' claims for prospective relief as to ASEA are dismissed. Plaintiffs are not given leave to amend as to these claims as amendment would be futile.

ASEA next moves to dismiss plaintiffs' remaining claims pursuant to Rule 12(b)(6). "'To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937). "The

plausibility standard requires more than the sheer possibility or conceivability that a defendant has acted unlawfully." *Id.* "'Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937). "[T]he complaint must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *In re Rigel Pharmaceuticals, Inc. Securities Litig.*, 697 F.3d 869, 875 (9th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff." *Adams v. U.S. Forest Srvc.*, 671 F.3d 1138, 1142–43 (9th Cir. 2012). "However, the trial court does not have to accept as true conclusory allegations in a complaint or legal claims asserted in the form of factual allegations." *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016).

"'To state a claim under § 1983, a plaintiff [1] must allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting under color of state law.'" *Naffe v. Frey*, 789 F.3d 1030, 1035–36 (9th Cir. 2015) (quoting *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)). "Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element." *Id.* at 1036.

Plaintiffs' § 1983 claims are based on allegations that their First Amendment rights were violated. "Compelling a person to subsidize the speech of other private speakers raises . . . First Amendment concerns." *Janus*, 138 S. Ct. at 2464. 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, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

Plaintiffs allege that "[r]equiring a government employee to pay money to a union violates that employee's First Amendment rights to free speech and free association unless the employee 'affirmatively consents' to waive his or her rights."[34] Plaintiffs allege that "[f]rom when they joined the union until June 27, 2018, . . . because they were not given the option of paying nothing to the union as a non-member of the union, [they] could not have provided affirmative consent to . . . have dues deducted from their paychecks."[35] Plaintiffs allege that their "consent to dues collection was not 'freely given' because it was given based on an unconstitutional choice of either paying the union as a member or paying the union agency fees as a non-member."[36] Plaintiffs also allege that "[s]ubsequent to the Supreme Court's decision in *Janus* on June 27, 2018, [they] communicated that they did not provide affirmative consent to remain members of Defendant ASEA or to having union dues

---

[34] Complaint at 8, ¶ 31, Docket No. 1.

[35] *Id*. at 10, ¶ 41.

[36] *Id*. at 10, ¶ 42.

withheld from their paychecks by Defendant Commissioner Tshibaka."[37] Plaintiffs alleged that defendants violated their First Amendment rights "by continuing to withhold union dues from their paychecks"[38] after they had revoked their consent.

Plaintiffs have not plausibly alleged a First Amendment violation because they affirmatively consented to having dues collected from their paychecks when they signed the Payroll Deduction Authorization forms. Those forms provided that "Yes, I chose to be a union member[,]" that "I hereby voluntarily authorize and direct my Employer" to deduct union dues, that "[m]y decision to pay my dues by way of payroll deduction . . . is voluntary and not a condition of my employment[,]" and that "[t]his voluntary authorization and assignment shall be irrevocable . . . unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) before the end of any yearly period."[39]

These Payroll Deduction Authorization forms plaintiffs signed created a contract between plaintiffs and ASEA. *See Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019) (holding that a similar agreement "to become union members in exchange for benefits created a contract" between the members and the unions). Plaintiffs' and Tshibaka's arguments to the contrary are unavailing. Plaintiffs appear to argue that there is no contract between them and ASEA because the dues authorization form is not a traditional

---

[37] *Id*. at 9, ¶ 36.

[38] *Id*. at 2, ¶ 4.

[39] Exhibits C & D, Metcalfe Declaration, which is appended to Motion to Dismiss, Docket No. 24.

two-party contract, but rather a three-party assignment. *See, e.g., N.L.R.B. v. Cameron Iron Works*, *Inc.*, 591 F.2d 1, 3 (5th Cir. 1979) (referring to dues authorization as "assignment"). But, the fact the due authorization form also involves an assignment to a third party does not mean it is not a contract between plaintiffs and ASEA. Tshibaka's contention that the dues authorization form provides no consideration in return for the employee's agreement to join the union and pay dues is simply wrong. Although formation of a contract requires mutual consideration, *Hall v. Add-Ventures, Ltd.*, 695 P.2d 1081, 1087 n.9 (Alaska 1985), plaintiffs received access to union membership rights and benefits in exchange for agreeing to join the union and pay dues.

"[T]he First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law[.]" *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991). This principle applies here. As one district court explained,

> [t]he freedom of speech and the freedom of association do not trump the obligations and promises voluntarily and knowingly assumed. The other party to that contract has every reason to depend on those promises for the purpose of planning and budgeting resources. The Constitution says nothing affirmative about reneging legal and lawful responsibilities freely under-taken.

Fisk v. Inslee, Case No. C16-5889RBL, 2017 WL 4619223, at *5 (W.D. Wash. Oct. 16, 2017). And, the

Ninth Circuit affirmed the district court in an unpublished decision, explaining that "[a]lthough Appellants resigned their membership in the union and objected to providing continued financial support, the First Amendment does not preclude the enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law." *Fisk v. Inslee*, 759 Fed.Appx. 632, 633 (9th Cir. 2019) (quoting *Cohen*, 501 U.S. at 668–71, 111 S. Ct. 2513). Nothing in *Janus* changes this.

"*Janus* is inapplicable to situations where an employee chooses to join a union, authorizes dues deductions over an entire . . . year, receives union benefits not available to nonmembers, and then later attempts to cancel deductions outside of the opt-out period they earlier agreed to." *Durst v. Oregon Education Association*, 450 F. Supp. 3d 1085, 1091, (D. Or. 2020). "The animating principle of Janus was not that the payment of union dues violates the First Amendment, but rather that compelling non-union members to support a union by paying fees violates the First Amendment." *Molina v. Pennsylvania Social Service Union, Service Employees Int'l*, —— F. Supp. 3d ——, ——, 2020 WL 2306650, at *8 (M.D. Pa. May 8, 2020) Janus involved an employee who "[u]nder his unit's collective-bargaining agreement, . . . was required to pay an agency fee of $44.58 per month[,]" even though he had not joined the union. *Janus*, 138 S. Ct. at 2461. The Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" because "[t]his procedure violates the First Amendment. . . ." *Id.* at 2486. The Court explained:

> 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.

Id. (internal citations omitted) (emphasis added). "*Janus* says nothing about people who join a union, agree to pay dues, and then later change their mind about paying union dues." *Crockett*, 367 F. Supp. 3d at 1008 (citation omitted). Plaintiffs "want[ ] *Janus* to stand for the proposition that any union member can change his mind at the drop of a hat, invoke the First Amendment, and renege on his contractual obligation to pay dues." *Smith v. Superior Court, County of Contra Costa*, Case No. 18-cv-05472-VC, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018). But, "[f]ar from standing for that proposition, *Janus* actually acknowledges in its concluding paragraph that employees can waive their First Amendment rights by affirmatively consenting to pay union dues." *Id*.

That is exactly what plaintiffs did here. They affirmatively consented to pay union dues and agreed that their consent could only be revoked during a specific period. "[E]ach court that has examined this issue has rejected the claim that *Janus* entitles union members to resign and stop paying dues on their own—rather than on the contract's—terms." *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1024 (D.N.M. 2020) (citing *Oliver v. Serv. Emp's Int'l Union Local*

668, 415 F. Supp. 3d 602, 606–07 (E.D. Pa. 2019); *Seager v. United Teachers L.A.*, No. 219CV00469JLSDFM, 2019 WL 3822001, at *1 (C.D. Cal. Aug. 14, 2019); *Smith v. Bieker*, No. 18-cv-05472-VC, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019); *O'Callaghan v. Regents of the Univ. of Cal.*, Case No. CV 19-02289JVS (DFMx), 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Belgau v. Inslee*, No. 18-5620 RJB, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018)); *see also*, *Loescher v. Minnesota Teamsters Public & Law Enforcement Employees' Union, Local No. 320*, 441 F. Supp. 3d 762, 773, (D. Minn. Feb. 26, 2020) (quotation marks omitted) (rejecting argument "that the Supreme Court broadly held . . . that deduction of agency fees and any other payment to the union—which [Loescher] believes includes full dues—without affirmative consent violates the First Amendment" because "[n]othing in *Janus* suggests that its holding, which expressly pertains to union-related deductions from a nonmember's wages, should apply to similar collections from a union member's wages"). In short, "federal courts around the country have concluded that *Janus* does not apply to claims brought by union members." *Molina*, —— F. Supp. 3d at ——, 2020 WL 2306650, at *8.

Tshibaka's contention that *Janus* stands for the proposition that "[n]either an agency fee nor any other payment to the union" may be deducted from an employee's wages "unless the employee affirmatively consents to pay[,]" *Janus*, 138 S. Ct. at 2486 (emphasis added), is incorrect. Tshibaka has selectively quoted from *Janus*. The full quote from *Janus* is 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 such a payment, unless the employee affirmatively consents to pay." *Id.* (emphasis added). The *Janus* Court was expressly addressing the payment of agency fees or other payments to a union made by nonmembers, not the payment of dues by union members such as plaintiffs.

Plaintiffs' allegations that their waiver was not sufficient under *Janus* does not save their claims. Plaintiffs have alleged that the

> [u]nion dues checkoff authorizations signed by government employees in Alaska before the Supreme Court's decision in Janus cannot constitute affirmative consent by those employees to waive their First Amendment right to not pay union dues or fees. Union members who signed such agreements could not have freely waived their right to not join or pay a union because the Supreme Court had not yet recognized that right.[40]

Plaintiffs allege that their "consent to dues deduction was not an effective waiver of their rights because they did not have and were not provided with complete information about their rights at the time they joined."[41]

"'Waiver is the intentional relinquishment or abandonment of a known right.'" *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1102 (9th Cir. 2005) (quoting *United States v. Hamilton*, 391 F.3d 1066,

---

[40] Complaint at 1–2, ¶ 2, Docket No. 1.

[41] *Id.* at 10, ¶ 43

1071 (9th Cir. 2004)). "'Constitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent.'"[42] *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997) (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991)). "A waiver of constitutional rights is voluntary if, under the totality of the circumstances, it was the product of a free and deliberate choice rather than coercion or improper inducement." *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

Plaintiffs argue that they did not know at the time they signed the dues authorization that they had a choice to pay nothing because *Janus* had not been decided at that time. They argue that at the time they signed the dues authorization they did not know they had a constitutional right to pay nothing. In short, plaintiffs argue that they could not voluntarily waive a right they did not know they had.

Tshibaka argues that this also means that plaintiffs' waiver was not knowing and intelligent. Tshibaka contends that in order for plaintiffs' waiver to be knowing and intelligent, they must have had "'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Patterson v. Illinois*, 487 U.S. 285, 292, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988) (quoting *Moran v.*

---

[42] As ASEA points out, "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial[.]" *Schneckloth v. Bustamonte*, 412 U.S. 218, 237, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). But for purposes of ASEA's motion to dismiss, the court will assume that this heightened standard applies here.

Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). Tshibaka argues that plaintiffs' waiver was not knowing and intelligent because they were not aware that they had an option to not pay any union dues or fees. Tshibaka cites to two cases in support this argument.

In *Curtis Publishing Company v. Butts*, 388 U.S. 130, 137–38, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), Butts brought a libel action against *Curtis* and on appeal, Curtis raised constitutional defenses that it had not raised at trial. The issue before the Court was whether "Curtis' failure to raise constitutional defenses amounted to a knowing waiver." *Id.* at 143, 87 S. Ct. 1975. The Court held that Curtis had not waived its constitutional defenses because the constitutional defense at issue had not been "known" at the time of the trial. *Id.* at 145, 87 S. Ct. 1975. Rather, the defense at issue had been established by the Court in the New York Times case, a decision that was not available at the time of the Butts/Curtis trial. *Id.*

Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 687 (6th Cir. 1981), "raise[d] novel freedom of speech issues regarding the standard for the waiver of first amendment rights and the scope of first amendment protection to be afforded 'offensive' commercial speech." Sambo's sued the City after it "revoked . . . sign permits on the grounds that the use of the name 'Sambo's' violated the 1972 'agreement' with the City." *Id.* at 688. The 1972 "agreement" was a site plan in which Sambo's agreed to not use that name on its restaurant in order to gain the City's approval of the site plan. *Id.* On appeal, the City argued that Sambo's had waived its First Amendment rights in 1972. But, the court found that

> Sambo's did not have First Amendment commercial speech rights in 1972 which it could waive. A waiver, at the least, is the relinquishment of a known right. Since Sambo's had no commercial speech rights protected by the First Amendment in 1972, it could not have waived any rights by stating that the name "Sambo's" would not be used in connection with the restaurant.

Id. at 693 (internal citation omitted).

Tshibaka's reliance on these cases is misplaced as neither case involved "a situation where there is an agreement which is binding as a matter of state contract law." *Id*. at 691. As one court recently stated, *Sambo's* "does not stand for the proposition that newly recognized First Amendment rights can vitiate a preexisting contract." *Allen v. Ohio Civil Service Employees Association AFSCME, Local 11*, Case No. 2:19-cv-3709, 2020 WL 1322051, at *9 (S.D. Ohio Mar. 20, 2020). Here, there was a preexisting contract between plaintiffs and ASEA in which plaintiffs voluntary chose to become union members and have dues deducted from their paychecks unless and until they revoked their authorizations during a specific revocation window.

Tshibaka also argues that plaintiffs' waiver cannot be considered voluntary because ASEA controls the environment in which the employee is asked to sign the authorization. In his opinion about the impact of *Janus*, the State Attorney General contended that "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" and that the State has no way of knowing what information the employee is provided "at the critical moment the employee is confronted with the decision whether to waive his or her First Amendment rights."[43] That ASEA may have controlled the environment in which plaintiffs made their decision to join the union does not mean that plaintiffs' waiver of the First Amendment rights was coerced, as opposed to voluntary.

First of all, Riberio does not allege that he felt "forced" to join the union. Rather, Riberio alleges that he joined the union because he thought it would benefit him.[44] Creed does allege that she felt "forced" to either join the union and pay dues or not join the union and pay fees,[45] an allegation that the court accepts as true for purposes of a motion to dismiss. But, she alleges that her decision was "forced" because she was not given the right identified in *Janus*, the right to not join the union and not pay any fees.[46] And, courts have routinely rejected such an argument, that an employee's consent to join the union was not voluntary because he or she did not know of the constitutional right declared in *Janus*. *See Crockett*, 367 F. Supp. 3d at 1008 ("[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 decision does not mean their decision was therefore coerced"); *Quirarte v.*

---

[43] Clarkson Opinion, Exhibit C at 11–12, Complaint, Docket No. 1.

[44] Complaint at 5, ¶ 19, Docket No. 1.

[45] *Id*. at 5, ¶ 18.

[46] *Id*. at 10, ¶ 41.

United Domestic Workers/AFSCME Local 3930, 438 F.Supp.3d 1108, 1119 (S.D. Cal. 2020) (same); *Bennett v. Amer. Federation of State, County, and Municipal Employees, Council 31*, —— F. Supp. 3d ——, ——, 2020 WL 1549603, at *5 (C.D. Ill. Mar. 31, 2020) ("[t]he fact that Plaintiff did not sign a waiver of the later-identified First Amendment right to not pay a fair-share fee does not invalidate her agreement to join the Union" as that agreement "was not the product of coercion and was not involuntary simply because *Janus* made union membership less appealing"); *Oliver*, 415 F. Supp. 3d at 607 (the "[p]laintiff contend[ed] that if only she had known of a constitutional right to pay nothing for services rendered by the Union—despite knowledge of her right at the time to refuse membership and pay less—she would have declined union membership completely" but the court could "discern no logic in such a position" in part because the "plaintiff [did] not allege[ ] she was actively pressured to join" the union); *Babb v. Calif. Teachers Assoc.*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019) (citation omitted) ("[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 decision does not mean their decision was therefore coerced"). As the court in *Bennett*, —— F.Supp.3d at ——, 2020 WL 1549603, at *4, explained "[i]f incarcerated defendants cannot rescind agreements as involuntary in light of subsequently developed constitutional caselaw,[47] civil litigants disputing property rights

---

[47] *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (observing that "a voluntary plea of guilty intelligently made in the light of the then applicable law

should fare no differently. Accordingly, [the p]laintiff's obligation to pay union dues . . . remains enforceable despite the new constitutional right identified in *Janus*." Here too, plaintiffs cannot avoid their contractual obligations by alleging that their waiver of their First Amendment rights was not voluntary based on "the new constitutional right identified in *Janus*." *Id.*

In addition, any argument that the revocation window in plaintiffs' contract is itself unconstitutional fails, and in fact, plaintiffs contend that they are not arguing that the revocation window is itself unconstitutional.[48] Rather, they contend that they are arguing that they must be released from their authorizations outside the revocation window because the authorizations were invalid in the first place.

But, as discussed above, plaintiffs voluntarily agreed to join the union and have dues deducted from their paychecks. Their union membership agreements were binding contracts that remain enforceable even after *Janus*. *See Crockett*, 367 F. Supp. 3d at 1008 ("Plaintiffs McKee and Liston's agreement to become union members in exchange for benefits created a contract between them and their unions that remains enforceable after *Janus*"); *Belgau*, 2018 WL 4931602, at *5 ("[h]ere, unlike in *Janus*, the Plaintiffs entered into a contract with the Union to be Union members and

---

does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise").

[48] Plaintiffs acknowledge that "[i]f a new employee knowingly, intelligently gave affirmative consent post-Janus to a membership form, that could legally bind him or her to a reasonable once-annual revocation window." Plaintiffs' Memorandum in Response to ASEA's Motion to Dismiss and in Support of Their Cross Motion for Summary Judgment at 18, Docket No. 28.

agreed in that contract to pay Union dues for one year"); *Smith*, 2018 WL 6072806, at *1 (Smith "formed a contract with Local 2700 in which he agreed to pay dues for a year" and "Smith cannot now invoke the First Amendment to wriggle out of his contractual duties"); *Fisk*, 2017 WL 4619223, at *4 (finding that "[a] signed Membership Card is a valid contract").

Because of these binding contracts, plaintiffs have not stated a plausible violation of their First Amendment rights. Thus, they have failed to state plausible § 1983 claims.[49] Plaintiffs' § 1983 First Amendment claims are dismissed. Plaintiffs are not given leave to amend these claims, which are the only claims asserted in their complaint, as any amendment would be futile.

Conclusion

Based on the foregoing, ASEA's motion to dismiss is granted, and plaintiffs' cross-motion for summary judgment is denied as moot.

---

[49] Because plaintiffs have not plausibly alleged a constitutional violation, the court need not address the issue of whether ASEA was acting under color of state law or its good faith defense.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 3:20-cv-0065

LINDA CREED and TYLER RIBERIO,
Plaintiffs,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, Commissioner of Administration for the State of Alaska,

Defendants.

Filed: Aug. 4, 2020

ORDER

Plaintiffs' Response to Order and;
Request for Sua Sponte 12(b)(6) Dismissal

The court is in receipt of plaintiffs' response to order and request for sua sponte dismissal of defendant

Kelly Tshibaka.[1] The request is granted and defendant Kelly Tshibaka is dismissed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

DATED at Anchorage, Alaska, this 4th day of August, 2020.

/s/ H. Russel Holland
United States District Judge

[1] Docket. No. 39.

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 3:20-cv-0065

LINDA CREED and TYLER RIBERIO,

Plaintiffs,

v.

ALASKA STATE EMPLOYEES ASS'N/ AFSCME LOCAL 52, AFL-CIO; and KELLY TSHIBAKA, Commissioner of Administration for the State of Alaska,

Defendants.

Filed: Aug. 13, 2020

JUDGMENT IN A CIVIL ACTION

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ DECISION BY COURT. This action came to trial or decision before the Court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT the plaintiff's recover nothing, the action be dismissed on the merits.

APPROVED:

s/ H. Russel Holland
H. Russel Holland
United States District Judge

Date: November 2, 2020

Appendix H

Office of the Attorney General

Re: *First Amendment Rights and Union Due Deductions and Fees*

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

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 decision 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

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

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 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

---

[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."

[4] 138 S. Ct. at 2460.

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]

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 nonmember'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

---

[5] *Id.* at 2486.

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

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 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

[7] *Id.* at 2486.

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 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

---

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

[9] *Id.*

[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)).

that can include healthcare, education, climate change, sexual orientation, and child welfare.[13]

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

---

[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)).

[14] *Id.* at 2464.

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

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

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 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

---

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

[18] *Id.* at 2486.

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

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]

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

---

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

[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)).

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.

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

---

[23] *Id.* at 2486.

[24] *Id.*

[25] *Id.* at 2465.

for a payroll deduction system that creates the least possible risk of deducting union dues or fees from 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]

---

[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 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

---

[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)).

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 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

---

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

[34] *Id.* at 145.

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 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 con-

---

[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).

[39] *Id.* at 100–01.

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

---

[40] *Id.* at 101–02.

[41] *Id.* at 110.

[42] 384 U.S. 436, 467–72 (1966).

[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'

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 the individual to rethink that waiver.[44] Because the right to be free from compelled speech is a "fixed star in our

---

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)).

[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).

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.

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

---

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

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 of to 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]

---

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

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

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 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 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

---

[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").

Appendix I

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 1 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 au-

tomatically 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 Anchorage, Alaska, this 26th day of September, 2019.

Michael J. Dunleavy, Governor

Appendix J

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

No. 3 AN-19-09971 CI

STATE OF ALASKA,

Plaintiff / Counterclaim Defendant,

vs.

ALASKA STATE EMPLOYEES ASS'N / AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO;

Defendant / Counterclaimant.

ALASKA STATE EMPLOYEES ASS'N / AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, 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 Acting Attorney General Alaska; AMANDA HOLLAND, in her official capacity as Commissioner of the Alaska Department of Administration; and STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION;

Third-Party Defendants.

Filed: Aug 4, 2021

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 4, 2021 (date of final judgment). (688 days x $16.56/day)	$11,395.68
c. Subtotal	$197,416,32
d. Attorney Fees (motion due per Rule 82 timelines). i. Date awarded: ii. Judge:	
e. Costs (Cost bill per Rule 79 times) i. Date awarded: ii. Judge:	

f. TOTAL JUDGMENT	$197,416.32
g. Post-Judgment Interest Rate	3.25%

Date: August 4, 2021

The Honorable Gregory A. Miller
Superior Court Judge