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

STATE OF ALASKA, Plaintiff, v. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant.	Case No.: 3AN 19-9971 CI

COMPLAINT FOR DECLARATORY JUDGMENT

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

PARTIES

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

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

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

JURISDICTION AND VENUE

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

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

STATEMENT OF FACTS

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

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

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

7. Freedom of speech protects more than the right to speak freely and to associate with others. It also protects the right *not* to speak and the right *not* to associate. As the Supreme Court has long recognized, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

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

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

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

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

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

B. The State's Collective Bargaining Agreement with Defendant

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

13. Under PERA, public employers must "negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment." AS 23.40.070.

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

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

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

17. Section 3.04 of the CBA governs payroll deductions of state employees. It states: "Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number, the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
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dues owed for that pay period. The Employer will forward the monies so deducted to the Union together with a list of bargaining unit members from whose wages such monies were deducted no later than the tenth (10th) day of the following calendar month."

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

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

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

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

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

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

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

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

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

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

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

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

28. In finding this law unconstitutional, the Court made clear that its holding was not limited to the facts before it. *All* employees—not just non-members like Mr. Janus—had a First Amendment right not to be forced to subsidize the speech of public unions.

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

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

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

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

D. The State's Response to *Janus*

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

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

34. The State, however, failed to take sufficient steps to comply with *Janus*'s requirements. In particular, the State did not ensure that the First Amendment rights of *all* employees (both members and non-members) were protected.

35. Shortly after taking office, Governor Michael J. Dunleavy requested a legal opinion from Attorney General Kevin G. Clarkson as to whether the State had fully

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

complied with its obligations under *Janus*. The Governor sought this opinion to ensure that the State's employee payroll-deduction process complied with the First Amendment in light of *Janus*.

E. The Attorney General Opinion

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

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

38. The Attorney General explained: "Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented)." Thus, "the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's." In both cases, "the State can only deduct monies from an employee's wages if the employee provides affirmative consent."

39. That was why, as the Attorney General further explained, "the Court in *Janus* did not distinguish between members and non-members of a union when holding

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

that 'unless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.'"

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

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

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

43. Second, because unions control the environment in which an employee is asked to authorize a payroll deduction, the State cannot ensure that an employee's authorization is "freely given." For example, some collective bargaining agreements require new employees to report to the union office within a certain period of time so that a union representative can ask the new employee to join the union and authorize the deduction of union dues and fees from his or her pay. Because this process is essentially a

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1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

"black box," the State has no way of knowing whether the signed authorization form is "the product of a free and deliberate choice rather than coercion or improper inducement."

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

45. To remedy these First Amendment problems, the Attorney General recommended that the State implement a new payroll deduction process to bring the State into compliance with the Supreme Court's *Janus* decision.

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

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

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1031 W. 4th Avenue, Suite 200
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F. Defendant Threatens to Sue the State

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

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

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

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

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

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

to the article, Defendant "will plan to fight the implementation of any changes through the courts."

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

G. Employees Contact the State Seeking an End to Their Paycheck Deductions

54. Following the release of the Attorney General's Opinion, many state employees contacted the State to ask it to stop deducting money from their paychecks to give to Defendant.

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

56. Another employee told the State: "After I was hired I received what I felt was a threatening letter from the Union saying that I had TEN DAYS, in caps and underlined, to contact the union office within the time specified or failure to do this may result in dues arrearage." The employee requested: "I want my payroll deductions to

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
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GGU to stop and want back the dues that were deducted without my permission from 2/10/19 to this date."

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

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

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

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

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

CLAIM FOR RELIEF
(Declaratory Judgment)

61. Plaintiff realleges paragraphs 1 through 60 as if fully stated herein.

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

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

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

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

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

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

68. Accordingly, an actual controversy has arisen and now exists between the State and the Union regarding whether the First Amendment requires the State to stop

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

deducting dues and/or fees from an employee's paycheck when the employee informs the State that he or she no longer wishes to subsidize the Union's speech.

69. To resolve this legal uncertainty, the State is entitled to a declaratory judgment that (1) the State, in accordance with the First Amendment, cannot deduct dues or fees from an employee to give to the Union unless the State has clear and compelling evidence that an employee has given his or her consent to subsidize the Union's speech; and (2) the State must timely stop deducting dues or fees from an employee's paycheck when the employee informs the State that he or she no longer wishes to subsidize the Union's speech.

WHEREFORE, Plaintiff respectfully requests that the Court:

(1) Declare that the State cannot deduct dues or fees from an employee to give to the Union unless the State has clear and compelling evidence that an employee has freely given his or her consent to subsidize the Union's speech;

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

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

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

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

DATED: September 16, 2019

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:

Tregarrick R. Taylor
Deputy Attorney General
Alaska Bar No. 0411081

William S. Consovoy (*pro hac vice* forthcoming)
J. Michael Connolly (*pro hac vice* forthcoming)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
Tel: (703) 243-9423
will@consovoymccarthy.com
mike@consovoymccarthy.com

Counsel for Plaintiff State of Alaska

Department of Law, Civil Division
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5100 Fax: (907) 276-3697

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Defendant.

Case No.: 3AN-19-_____CI

CERTIFICATE OF SERVICE

I certify that on this date true and correct copies of the **Summons and Notice to Both Parties of Judicial Assignment, Complaint for Declaratory Judgment,** and this **Certificate of Service** were served via process server on the following:

Jake Metcalfe
Executive Director, ASEA
2601 Denali Street
Anchorage, AK 99503

Kelly M. West
Law Office Manager

9/16/19
Date

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100