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

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, v. ALASKA STATE EMPLOYEES ASSOCATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant/Counterclaimant.	)	Case No. 3AN-19-09971CI
ALASKA STATE EMPLOYEES ASSOCATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Third-Party Plaintiff, v. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official capacity as Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; and STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Third-Party Defendants.	)	

OPPOSITION OF THE STATE OF ALASKA AND THIRD-PARTY DEFENDANTS TO THE UNION'S MOTION FOR A TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, & OTHER AUTHORITIES

INTRODUCTION

The Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO ("Union") seeks a temporary restraining order ("TRO") preventing the State of Alaska and the third-party defendants (collectively, "the State") from "taking any actions to implement the AG Opinion and from making any changes to the State employee dues deduction practices that were in place before the AG Opinion was issued." Motion for a Temporary Restraining Order ("Mot") at 46. Specifically, the TRO would enjoin two policies. First, it would force the State to conscript Union dues from state employees who have explicitly told the State that they do not want to associate with the Union. Second, it would prevent the implementation of Administrative Order No. 312—despite the fact that the new opt-in enrollment system the Order creates will not take effect until December 2019 at the earliest and the State is giving the Union 30 days' notice before its implementation. Neither of these "extraordinary" requests is warranted. *Lee v. Konrad*, 337 P.3d 510, 517 & n.11 (Alaska 2014). The Union's request for a TRO, accordingly, should be denied.

First, the Union is not entitled to a TRO forcing the State to deduct dues from nonconsenting employees. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court held that state employees have a First Amendment right not to be compelled to subsidize union speech through "an agency fee [or] any other payment." *Id.* at 2486. A State can deduct union dues or fees only if the employee "affirmatively consents to pay." *Id.* This waiver of First Amendment rights must be "freely given and shown by 'clear and compelling evidence,'" and such a waiver "cannot be presumed." *Id.*

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

Since the release of the Attorney General's opinion on August 27, the State has stopped deducting Union dues for eight individuals in the general government unit (GGU) who contacted the State and explicitly stated that they do not want to have their paychecks deducted to subsidize the Union. Thus, the State clearly lacks "clear and compelling evidence" that these individuals have given their "affirmative consent to pay" money to the Union. Quite the opposite: the State has clear and compelling evidence that these employees do *not* want to associate with the Union. Per *Janus*, the State *must* honor these requests. The Union thus is unlikely to succeed on the merits of their claims that state law requires the State to reject these employee requests.

The Union's contention that it will suffer irreparable harm if the Court does not issue a TRO forcing the State to continue deducting dues from these employees' paychecks also misses the mark. Given that these employee requests involve a tiny fraction of the Union's overall membership (more than 6,000 members) and overall budget (over $5 million a year), the Union's claim rings hollow. Affidavit of Kelly Tshibaka at p. 3. The State and its employees, by contrast, will suffer serious harm if the Court issues this TRO. The State has a constitutional obligation not to violate the First Amendment rights of its employees, and the loss of First Amendment rights, even for minimal periods of time, is irreparable. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Second, a TRO forcing the State to halt implementation of Administrative Order No. 312 is unjustified. Governor Dunleavy issued this Order to "establish a procedure

that ensures that the State of Alaska honors the First Amendment free speech rights of each state employee to choose whether or not to pay union dues and fees through payroll deduction." Exh. 3 to Affidavit of Kelly Tshibaka (Administrative Order) at 1. To protect these rights, the Department of Administration will: (1) create an "opt-in" dues form that clearly informs employees of the First Amendment rights they waive by subsidizing a union's speech; (2) create a "simple and convenient" system that allows employees to directly provide their consent to the State; and (3) process any "opt-in" or "opt-out" requests within 30 days of receipt. *Id.* at 2-3. Under the Order, the State will give unions 30 days' notice before the new system takes effect. *Id.* at 3.

The Union is unlikely to succeed on the merits of its claims that this new system violates state law because the procedures implemented by Administrative Order No. 312 are required by the First Amendment. Under *Janus*, the State must have "clear and compelling evidence" that the authorization to deduct dues and fees has been "freely given." 138 S. Ct. at 2486. And, under longstanding Supreme Court precedent, waiver of constitutional rights cannot be presumed and are valid only if voluntary, knowing, and reasonably contemporaneous. Because the State's current dues deduction system does not meet these requirements, the State *must* implement the policies articulated in Administrative Order No. 312. Under the Supremacy Clause of the U.S. Constitution, state law to the contrary can be given no effect.

Here too, the Union's claim of irreparable harm is untenable. The new opt-in enrollment system that will be implemented pursuant to the Order will not take effect until December 2019 at the earliest; moreover, the State has agreed to provide all unions

30 days' notice before implementing this new system and to meet with each union to discuss any additions or modifications the unions believe are warranted. Nor will there be any barriers to joining the Union once this system—which will be "simple and convenient for employees"—is operational. Administrative Order at 2. There is simply no evidence the Union is in danger of suffering imminent, irreparable harm warranting a TRO.

Third, the Union asks for a "reverse *Boys Market* injunction" to preserve the status quo pending arbitration of its grievance. But no Alaska court has ever recognized the availability of this type of injunction, and even if this Court did, the Union cannot meet its requirements. This type of injunction is not appropriate because the Union's grievance is not arbitrable; here, the grievance does not concern the application or interpretation of the CBA, but rather the meaning of the First Amendment as articulated in *Janus*. Moreover, reverse *Boys Market* injunctions are reserved for situations in which the arbitration will otherwise be rendered a "meaningless ritual." The Union cannot show this type of imminent and irreparable harm. The motion for a TRO should be denied.

STATEMENT OF FACTS

I. The First Amendment to the U.S. Constitution and public sector unions.

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech and association. The First Amendment creates an "open marketplace" in which "differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 308 (2010). 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. *Id.* Free speech thus is critical to our democratic form of government and to the search for truth. *See Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

Importantly, 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. *Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). As the Supreme Court has long recognized: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). 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).

These important First Amendment principles are always at stake whenever a state subsidizes public sector unions through employee paycheck deductions. *Id.* Such state actions receive heightened First Amendment scrutiny, therefore, because collective bargaining, political advocacy, and lobbying of public sector unions is aimed at the government, and bargaining subjects (such as wages, pensions, and benefits) are important political issues. *Id.* at 636. 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. "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,* 567 U.S. at 310-11. Compulsory-fee requirements, therefore, "cannot be tolerated unless [they] pass[] exacting First Amendment scrutiny." *Harris*, 573 U.S. at 647-48 (citation omitted).

II. The State's collective bargaining agreement with the union.

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. 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(2).

The Union, as a public sector union, engages in collective bargaining with the State over the employment terms and conditions of the employees it represents. Through its collective bargaining and lobbying efforts, the Union has advocated on political issues concerning wages, pensions, and employee benefits. In accordance with PERA, the State has negotiated a collective bargaining agreement with the Union ("CBA"). *See* Affidavit of Kate Sheehan ¶¶ 4-6. The CBA governs the employment terms and conditions of approximately 8,000 state and municipal employees in the General Government Unit. *Id.* ¶¶ 4-5.

Section 3.04 of the CBA governs payroll deductions of state employees. It states: "Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number, the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership dues owed for that pay period. The Employer will forward the monies so deducted to the Union together with a list of bargaining unit members from whose wages such monies were deducted no later than the tenth (10th) day of the following calendar month." *Id.* ¶ 6. 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." *Id.*

Thus, it has been the State's practice to withhold money from an employee's paycheck and transfer it to the Union once the Union transmits to the State a payroll deduction authorization form for that employee. According to the Union'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." Exh. 1 to Affidavit of Kelly Tshibaka. 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. *Id.*

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

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

Janus argued that such a scheme violated his First Amendment rights, and the Supreme Court agreed. The Court 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." *Id.* at 2464. These types of compulsory-fee provisions thus required heightened scrutiny under the First Amendment. 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. *Id.* at 2465-69. The Supreme Court thus held that the Illinois law was unconstitutional because it violated Janus' First Amendment rights by compelling him to subsidize private speech on matters of substantial public concern.

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. Going forward, the Court warned, public employers, like the State here, may not deduct "an agency fee nor any other payment" unless "the employee affirmatively consents to pay." *Id.* at 2486. 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." *Id.* Thus, the Court explained: "Unless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

IV. The State's response to *Janus*.

Before *Janus*, the State's collective bargaining agreement with the Union (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. In response to *Janus*, the State, under the administration of then-Governor Bill Walker, stopped deducting agency fees

from non-members' paychecks. Affidavit of Kate Sheehan ¶ 7. It also reached agreement with a number of unions, including the Union here, modifying the terms of the collective bargaining agreements to account for *Janus*. *Id.* The State, however, took no additional steps to comply with *Janus*'s requirements. In particular, it took no steps to ensure that the First Amendment rights of *all* employees (both members and non-members) were being protected. Shortly after taking office, Governor Michael J. Dunleavy requested a legal opinion from Attorney General Kevin G. Clarkson as to whether the State had fully complied with its obligations under *Janus*. The Governor sought this opinion to ensure that the State's employee payroll-deduction process complied with the First Amendment in light of *Janus*.

V. The Attorney General Opinion.

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*." Exh. 2 to Affidavit of Kelly Tshibaka ("AG Opinion") at 2. 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 principle of the Court's ruling ... goes well beyond agency fees and non-members." *Id.* at 5. 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. *Id.*

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)." *Id.* 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." *Id.* In both cases, "the State can only deduct monies from an employee's wages if the employee provides affirmative consent." *Id.* That was why, as the Attorney General further explained, "the Court in *Janus* did not distinguish between members and non-members of a union when holding that 'unless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.'" *Id.*

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." *Id.* at 7-8 (citations omitted).

In turn, the Attorney General identified three basic problems with the State's payroll deduction process. 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." *Id.* at 10. Nor could the State ensure that its employees knew the consequences of their decision to waive their First Amendment rights. *Id.*

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." *Id.* at 10-11. 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. *Id.* Because this process is essentially a "black box," the State has no way of knowing whether the signed authorization form is "the product of a free and deliberate choice rather than coercion or improper inducement." *Id.* at 11.

Third, because unions often add specific terms to an employee's payroll deduction authorization 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 later disagrees with the union's speech or lobbying activities. *Id.* 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." *Id.* An employee, as a consequence, 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." *Id.*

To remedy these First Amendment problems, the Attorney General recommended that the State implement a new payroll deduction process in order to comply with *Janus*. 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. *Id.* at 12. 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. *Id.*

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

On August 27, 2019, the State sent an email to state employees informing them of the release of the Attorney General's Opinion. Affidavit of Kelly Tshibaka ¶ 8. The State also posted information about the Opinion online. *Id.* A number of state employees thereafter contacted the State to ask it to stop deducting money from their paychecks to give to the Union.

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." Affidavit of Kate Sheehan ¶ 9. 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?" *Id.*

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." *Id.* The employee requested: "I want my payroll deductions to GGU to stop and want back the dues that were deducted without my permission from 2/10/19 to this date." *Id.*

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

In keeping with the Attorney General's opinion, the State has honored these requests to stop deduction of dues and fees. Since the release of the Opinion, the State has stopped dues deductions for fifteen individuals who reached out to the Department of Administration. Affidavit of Kelly Tshibaka ¶ 16. Eight of these individuals were paying dues to the Union here; the remaining individuals were paying dues to other public-sector unions. Affidavit of Kate Sheehan ¶¶ 11-12. Since the end of the last pay period (September 25), the State has received two additional requests to end dues deductions. *Id.* ¶ 13. Neither of these requests are from members of the Union here. *Id.*

VII. Administrative Order No. 312.

On September 26, 2019, Governor Dunleavy released Administrative Order No. 312 in order to "establish a procedure that ensures that the State of Alaska honors the First Amendment free speech rights of each state employee to choose whether or not to pay union dues and fees." Exh. 3 to Affidavit of Kelly Tshibaka ("Administrative Order")

at 1. The Order instructed the Department of Administration to work with the Department of Law to "implement new procedures and forms for affected state employees to 'opt in' and 'opt out' of paying union dues and fees." *Id.* at 2.

First, the Order directed the Department of Administration to create an "opt-in" dues authorization form that the State would require before deducting dues or fees from an employee's paycheck. This form must "clearly inform employees they are waiving their First Amendment right not to pay union dues or fees and thereby not to associate with the union's speech." *Id.* The Order identified the minimum language that the form had to include to satisfy *Janus*. Second, in order to "minimize the risk of undue pressure or coercion and to make the process simple and convenient for employees," the Order instructed the Department of Administration to develop a system for employees to submit the authorization forms directly to the State through electronic means. *Id.* at 2. This new opt-in system will be "simple and convenient for employees." Administrative Order at 2. Third, the Order instructed the Department of Administration to process any "opt-in" forms or "opt-out" requests within thirty days of receipt, so that the requests would take effect at the beginning of the employee's next scheduled pay period. *Id.* at 3.

Later that same day, the State sent state employees an email informing them of the release of Administrative Order No. 312. Affidavit of Kelly Tshibaka ¶ 10. The State also posted information online about the effect of the Order. *Id.*. The State anticipates that the new opt-in system will take two months to complete and thus will not be operational until December 2019, at the earliest. *Id.* ¶ 12. The State will provide all unions with 30 days' notice before implementing the new system, and will offer to meet with each union to

discuss any additions or modifications the unions believe are warranted. Administrative Order at 3.

PROCEDURAL HISTORY

Within hours of the release of the Attorney General's legal opinion, the Union threatened to sue the State. *See, e.g.,* Zachariah Hughes, *After SCOTUS Ruling, AG Urges Dunleavy to Limit Public Employees' Unions,* Alaska Public Media (Aug. 27, 2019) (calling the Attorney General's opinion "legally incorrect" and warning that "[i]f [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."). Similarly, after the State informed the Union that individuals had contacted the State to cease their dues deduction and that these requests would be honored, the Union told the State: "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." Affidavit of Kate Sheehan ¶ 10.

On September 19, 2019, in response to these threats of litigation, the State filed a complaint against the Union seeking, *inter alia*, a declaratory judgment 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. On September 25, the Union answered the complaint and filed counterclaims, asserting, *inter alia*, that the State's actions were in violation of the Public Employment Relations Act ("PERA"), the Alaska Contract Clause, and the Administrative Procedure Act. The Union also filed a motion for a temporary restraining order and for a preliminary injunction asking the Court to "halt[] implementation of the Attorney

General's August 27, 2019 opinion letter and enjoin[] any changes to the State's dues deduction procedures pending the resolution of this litigation." Mot. 46.

On September 26, following the release of Administrative Order No. 312, the State moved to amend its complaint to seek, *inter alia*, a declaration that the State cannot deduct dues or fees from an employee to give to the Union unless it has clear and compelling evidence that an employee has freely given his or her consent to subsidize the Union' speech. The State also sought a declaration that the mechanisms for collecting dues in the State's CBA with the Union violates the First Amendment under controlling precedent.

On September 27, at a scheduling conference with the Court, the Union renewed its request for a temporary restraining order. The Court instructed that the State should provide any opposition to the Motion for a TRO by 4:30 pm on Tuesday, October 1.

STANDARD OF REVIEW

A TRO is an "extraordinary remedy" that should not be lightly granted. *Lee*, 337 P.3d at 517 & n.11; *State v. Norene*, 457 P.2d 926, 932 (Alaska 1969) (same). The standard for a TRO is the same as for a preliminary injunction. *See State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).

"The showing required to obtain a preliminary injunction depends on the nature of the threatened injury." *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005). "If the plaintiff faces the danger of irreparable harm and if the opposing party is adequately protected, then [the Court] appl[ies] a balance of hardships approach in which the plaintiff must raise serious and substantial questions going to the merits of the case;

that is, the issues raised cannot be frivolous or obviously without merit." *Id.* (citation omitted). "If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then [the Court] demands of the plaintiff the heightened standard of a clear showing of probable success on the merits." *Id.* (citation omitted).

In addition, courts have no authority to issue a TRO that will curtail First Amendment rights. Preliminary injunctions restricting speech "are almost always held to be unconstitutional burdens on speech because they involve restraints on speech before the speech has been fully adjudged to not be constitutionally protected." *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014). A preliminary injunction barring speech "may be permissible only if the trial court has fully adjudicated and determined that the affected speech is not constitutionally protected." *Id.* That is because a party "would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the [speech] is ultimately found to be [protected]." *Id.* at 57 n.34 (quoting *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)); *Alsworth*, 323 P.3d at 54 & n.34. These principles, of course, apply with equal force to preliminary injunctions *compelling* speech. *See Janus*, 138 S. Ct. at 2464 ("[M]easures compelling speech are at least as threatening" as restrictions on speech); *Riley*, 487 U.S. at 796-97 (same). Hence, a TRO compelling an individual to speak or subsidize speech before the merits of a case have been fully adjudicated should never be issued. *See Alsworth*, 323 P.3d at 54 & n.34.

ARGUMENT

I. The Court should not grant a TRO forcing the State to take fees from nonconsenting employees.

A. The Union is unlikely to succeed on the merits of its claims.

The Union contends that the State is required to take fees from nonconsenting employees and transfer the funds to the Union. The Union contends this forced transfer is required under: (1) the Public Employment Relations Act ("PERA"); (2) the Alaska Contracts Clause; and (3) the Administrative Procedure Act. None of these arguments has merit.

1. The First Amendment prohibits the State from taking fees from nonconsenting employees.

a. The First Amendment prohibits the State from deducting dues from an employee if it lacks the employee's "affirmative consent."

Under the Supremacy Clause, the U.S. Constitution is "the supreme Law of the Land; the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. State courts thus "must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). Because the First Amendment to the U.S. Constitution prohibits the State from taking fees from nonconsenting employees, any Alaska law to the contrary cannot be given effect. *Id.*

In *Janus*, the Court held that public employers may not deduct "an agency fee nor any other payment" unless "the employee affirmatively consents to pay." 138 S. Ct. at 2486. 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." *Id.* 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." *Id.* As explained further below, *infra* 27-29, *Janus*'s requirement of "clear and compelling evidence" means that the State cannot deduct dues or fees from its employees unless the employee's waiver is: (1) knowing and intelligent, (2) voluntary and free from coercion, and (3) reasonably contemporaneous. Because the State's payroll system lacks these critical safeguards, it is not complying with *Janus*. *Infra* 29-31.

The State is in the process, therefore, of implementing Administrative Order No. 312 to ensure that all of its employees truly have given their "affirmative consent" to deduct union dues and fees. But for individuals who have directly contacted the State and asked it to halt their dues deduction, the State must promptly process these requests. For such employees, after all, there is *no dispute* that they do not wish to have Union dues deducted from their paychecks. Indeed, they have not only failed to "affirmatively consent to pay" dues to the Union; they have unequivocally indicated the opposite. *Janus*, 138 S. Ct. at 2486. For example, one employee told the State: "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." Affidavit of Kate Sheehan ¶ 9. For this employee and others who have contacted the State, their written requests to the State are unequivocal evidence of their lack of affirmative consent. *Supra* 10-11. As a consequence, the State can no longer deduct fees from their paychecks. *Janus*, 138 S. Ct. at 2486 (requiring an employee's "affirmative

consent to pay" money to a union through "clear and compelling" evidence).

b. The Union's attempt to limit *Janus* fails.

The Union first argues that *Janus* is inapplicable because the opinion "did not address the relationship between unions and their voluntary members." Mot. 27-31. As an initial matter, individuals who are forced to pay membership dues (despite explicit requests to the contrary) are not "voluntary members." *Janus* makes clear that the First Amendment prohibits such compulsion. *See supra* 6-7, 15-16.

In any event, the fact that *Janus* involved an individual who was not a member of a union does not mean that the Court's decision has no application outside of nonmembers. It is "the interpretation of the [Constitution] enunciated by [the] Court ... [that] is the supreme law of the land." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Lower courts are not "free to strip content from principle by confining the Supreme Court's holdings to the precise facts before [it]." *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994) (citation omitted); *United States v. Yakubu*, 936 F.2d 936, 939 (7th Cir. 1991) ("Of course, the facts of each case differ. The Supreme Court does not sit to decide cases that will control only cases having identical facts."). In *Janus*, the Supreme Court "laid down broad principles" dictating States' obligations when deducting dues and fees from their employees. *Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir. 1989). Even language considered dicta—which this is not—must be followed. *See United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) ("Carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."). The Court in *Janus* was crystal clear about the State's obligations for *all* state employees going

forward.

The Union next argues that *Janus* does not require the State to honor the opt-out requests of its employees because dues deduction involves "private conduct" between the Union and the state employees, and so there is no "state action." Mot. 31-33. But whether there is "state action" such that a plaintiff could bring a section 1983 claim is not the key consideration. The State is implementing these changes because Supreme Court precedent requires it.

Even if the "state action" doctrine were relevant, the State easily meets the requirements. State action occurs when the challenged activity "results from the State's exercise of coercive power," when the State "provides significant encouragement, either overt or covert," or when a private actor "operates as a willful participant in joint activity with the State or its agents." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001) (citations and alterations omitted). The State can satisfy all three of these tests. Indeed, it is passing strange that the Union argues otherwise. According to the Union, the State must deduct dues from nonconsenting individuals because: (1) state law (PERA) requires it; and (2) the State entered into a contract with the Union in which it promised to take money out of employee's paychecks and give it to the Union if the State is told that the employee authorized it. This is obviously "state action." *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) ("State action ... may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action.").

Finally, the Union argues that state employees are prohibited from ending their

financial support for the Union because they waived their First Amendment rights when they made a "contractual commitment" to pay dues for an entire year. Mot. 34-37. As explained further below, state employees did *not* validly waive their First Amendment rights, as the State lacks evidence that the waiver was knowing, voluntary, and reasonably contemporaneous. *Infra* 29-32. Such a "contract" cannot be enforced.

Yet even if these employees had successfully waived their constitutional rights (which, again, they did not), this waiver is not irrevocable. Indeed, such a rule would conflict with longstanding precedent on waivers of constitutional rights. *See, e.g., United States v. Farrar*, 2017 WL 741560, at *11 (D. Haw. Feb. 24, 2017) ("[A] defendant may rescind a waiver of the right to be silent, even after questioning has begun. In that event, questioning must stop.") (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)); *United States v. Lattimore*, 87 F.3d 647, 651 (4th Cir. 1996) ("[A] consent to a search is not irrevocable, and thus if a person effectively revokes . . . consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent.").

These rights apply no less to the First Amendment. State employees have a constitutional right not to be compelled to subsidize the speech of a union. *See Janus*, 138 S. Ct. at 2486. State employees also have a constitutional right to resign their membership in the Union at any time. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association ... plainly presupposes a freedom not to associate."). Although a state employee can agree to waive his First Amendment rights and support a union, the Supreme Court has never indicated that an employee cannot revoke his waiver

of these rights when he no longer wishes to associate with or subsidize the speech of a union. *See Janus*, 138 S. Ct. at 2486; *McCahon v. Pennsylvania Tpk. Comm'n*, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007) ("Despite plaintiffs' apparent disagreement with the Union's ideology or politics, the 'maintenance of membership' provision forces their continued membership. And the Union continues to collect full union dues from plaintiffs.... [T]he 'maintenance of membership' provision may have a direct and deleterious impact on plaintiffs' rights under the First Amendment."); *Debont v. City of Poway*, 1998 WL 415844 at *6 (S.D. Cal. Apr. 14, 1998) (finding that the plaintiff "has shown he is likely to succeed on his First Amendment claim" where a "maintenance of membership" provision prevented him from resigning from the union until the CBA expired).

As one court recognized in rejecting a similar claim, the union's argument "assume[s] that because [the employee] chose to join the union, a requirement that he continue to pay dues until the [contract] expires cannot amount to forced support of an ideological cause which he opposes." *Id.* at *5. But this "ignores the fact that [the employee] now asserts he no longer agrees with the union's activities and, therefore, has attempted to resign his membership. The refusal to allow him to resign and cease paying dues may well constitute a requirement that he support an ideological cause which he opposes." *Id.* After all, "at the heart of the First Amendment in this country is the freedom of expression, the freedom of speech, the freedom not to speak, the freedom to associate, the freedom not to associate, and all of which inherently also involve the freedom to change one's mind. That's the great part of the American system[,] the right

to change your mind." *Id.* at *6.

The Union's "contractual commitment" argument also fails because the dues deduction form is not a "contract" under Alaska law. There is no other party to the dues deduction form, and the Union provides no consideration in return. *See Hall v. Add-Ventures, Ltd.*, 695 P.2d 1081, 1087 n.9 (Alaska 1985) ("Formation of a contract requires an offer, encompassing all essential terms, an unequivocal acceptance by the offeree of all terms of the offer, consideration, and intent to be bound by the offer."). The dues deduction form is nothing more than a unilateral directive that the state employee is free to revoke at any time.

To be sure, private parties are free to sign a contract in which one person agrees to make regular payments for a set period of time in exchange for consideration. But that is wholly different from the situation here where (1) the state employee's First Amendment rights are at stake; (2) the State is intimately involved in the implementation and enforcement of the dues-deduction process; and (3) the dues authorization form does not meet the definition of a "contract." This State-imposed process thus is vastly different from the private agreement enforced in *Cohen v. Cowles Media Co.*, where the Court did nothing more than recognize that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." 501 U.S. 663, 668 (1991). The Union thus cannot force state employees to continue subsidizing the Union's speech, notwithstanding the language on the dues-deduction form.

2. PERA does not require the State to deduct fees from nonconsenting employees.

The Union contends that Public Employment Relations Act ("PERA") requires the State to deduct fees from nonconsenting employees. Mot. 17-20. That is incorrect too. As explained above, the First Amendment prohibits the State from deducting fees from nonconsenting employees. *Supra* 15-20. Thus, regardless of what PERA says, the Court cannot give effect to the state law if it conflicts with the requirements of the First Amendment, as articulated in *Janus*. *See* U.S. Const., art. VI, cl. 2; *Armstrong*, 135 S. Ct. at 1383 (2015).

In any event, the Union misstates PERA's requirements. The Union argues that the State cannot honor an employee's request to no longer deduct dues from his or her paycheck because "PERA requires the State to deduct union dues '[u]pon written authorization of a public employee.'" Mot. 18 (quoting AS 23.40.220). But the State has no "written authorization" once an employee informs the State in writing that he does not want dues deducted from his paycheck to support a union. Nothing in PERA provides that an employee's "written authorization" can never be revoked once given.[1]

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[1] The Union argues that the State has "consistently interpreted and applied this statute to *require* public employers to make member dues deductions pursuant to the terms of the authorizations on the Union's membership cards/dues deduction authorizations." Mot. 18 (emphasis added). But its only authority for this claim—a 1984 Attorney General opinion—merely analyzed whether the State "may negotiate a mandatory dues deduction provision in a collective bargaining agreement." Attorney General Opinion, File No. 366-465-84, 1984 WL 61014, at *1 (Alaska AG Mar. 14, 1984).

Next, the Union contends that honoring the requests of employees to stop dues deductions "would require the State to violate its contract with the Union" which, in turn, would "violate PERA's requirement that the State employer honor its contracts." Mot. 18-19. As explained below, however, halting dues deduction once requested by a state employee does not violate the State's CBA with the Union and thus cannot violate PERA. *See infra* 22-23.

The Union also argues that PERA "prohibits the State from unilaterally changing how it administers union member dues deductions." Mot. 19. But honoring a request from an individual employee to stop deducting dues from his paycheck is not a mandatory subject of bargaining under PERA because the State's actions are *mandated* by the First Amendment. The State has no obligation to "negotiate with" the Union over an issue that is non-negotiable. *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854 (5th Cir. 1986) ("It is inescapably correct ... that no employer may be required to bargain over or engage in illegal activity even if that activity is necessary to comply with the terms of the bargaining agreement.").

Last, the Union claims that the State's "refus[al] to honor state statutes and the State's CBA" regarding dues deductions violates the Union's right to be "free of harassment and undue interference from the State." Mot. 19-20 (citing AS 23.40.110(a)(1), (2), (3)). As explained above, however, the State's actions are not in violation of "state statutes and the State's CBA" and thus cannot be considered "harassment and undue interference." Nor is there any provision of PERA that prohibits the State from communicating accurate information with its employees about their

constitutional rights. *Cf. Manhattan Hosp.*, 280 NLRB 113, 123 (1986) ("The applicable general principle of law is that employers may not solicit employees to withdraw from union membership, but they may bring to employees' attention their right to resign from the union, may supply information about the procedure for doing so and may even supply forms.").

3. The Contracts Clause does not require the State to deduct fees from nonconsenting employees.

The Union incorrectly argues that the State's decision to honor "opt out" requests from state employees violates the Alaska Constitution's Contract Clause. Mot. 20-22. Alaska's Contract Clause provides: "No law impairing the obligation of contracts . . . shall be passed." Alaska Const. art. I, § 15. To determine whether a state law that has been passed impairs the obligation of a contract, the Court (1) must consider "whether the change in state law has operated as a substantial impairment of a contractual relationship"; and (2) "[i]f there is a substantial impairment," it must consider "whether the impairment is reasonable and necessary to serve an important public purpose." *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 451 (Alaska 2009). Here, the Union's Contracts Clause argument fails for multiple reasons.

First, there has been no "change in state law" such that the Alaska Contracts Clause is even implicated. *Id.*; *see also* Alaska Const., art. I, § 15 ("*No law* impairing the obligation of contracts . . . *shall be passed.*") (emphasis added). "Without some change to a statute or regulation, there can be no constitutionally recognized impairment of a contract." *Kendall v. Superior Court, Gov't of the Virgin Islands*, 2013 WL 785518, at

*17 (D.V.I. Mar. 1, 2013), *aff'd sub nom. Kendall v. Gov't of Virgin Islands*, 596 F. App'x 150 (3d Cir. 2015). "Although a state may, through its conduct, cause a contract to be impaired, if such conduct does not stem from legislation it is not a violation of the Contracts Clause." *Id.* The Contracts Clause thus is not even implicated.

Second, even if the Contracts Clause did apply, the State's decision to honor employee requests to stop dues deduction is not a "substantial impairment of a contractual relationship." *Hageland Aviation Servs., Inc.*, 210 P.3d at 451. Indeed, it is not a violation at all. Although the CBA provides that the State will deduct dues from an employee "[u]pon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees," nowhere does that agreement provide that the State is prohibited from stopping such dues deductions if directly requested by the employee. *See* CBA § 3.04. And, even if there were some "impairment," it has not been "substantial," given that it does not cause a "significant change" to the CBA. *See Sveen v. Melin*, 138 S. Ct. 1815, 1821-23 (2018) (even if the law "makes a significant change," there is no violation of the Contracts Clause unless there is a "substantial impairment of the contractual relationship").

Third, even if the State's decision to honor these employee requests is a "change in state law" and such a change violates the CBA—neither of which is true—the State still would not be in violation of the Contracts Clause because the State's policy is "reasonable and necessary to serve an important public purpose"—namely, complying with the U.S. Supreme Court's decision in *Janus*. *See Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983); *Armstrong*, 135 S. Ct. at 1383.

4. Stopping the collection of dues from nonconsenting employees does not violate the APA.

The Union contends that the State's decision to stop deducting dues of nonconsenting employees is a "regulation" that must go through notice and comment under the Administrative Procedure Act ("APA"). That is likewise incorrect. Under the APA, every "regulation" must be promulgated under the APA procedures to be valid. *Chevron U.S.A., Inc. v. State Dep't of Revenue*, 387 P.3d 25, 36 (Alaska 2016). An agency action is a "regulation" only if "(1) the agency action implements, interprets, or makes specific the law enforced or administered by the agency; and (2) the agency action affects the public or is used by the agency in dealing with the public." *Id.* (citations omitted). "An agency action must satisfy both prongs in order for APA rulemaking requirements to apply to that action." *Id.* at 35-36. Neither requirement is met here.

First, the State's decision does not "implement[], interpret[], or make[] specific the law enforced or administered by the agency." *Id.* at 35. The State is implementing the requirements of *Janus* and the First Amendment—not AS 23.40.220, as the Union claims. *See* Mot. 24. Second, the State's decision to stop deducting dues from nonconsenting employees does not "affect the public" and is not "used by the agency in dealing with the public." *Chevron*, 387 P.3d at 36. This involves "internal management of a state agency" that relates only to *state employees*. AS 44.62.640. Because the State's decision was not a "regulation," the State had no obligation to follow APA procedures. Indeed, when the State made initial changes following *Janus*, none of the changes went

through APA procedural requirements, *supra* 7-8, and no union argued that they should have.

B. The balance of hardships weighs against granting a TRO.

1. Honoring employee requests to stop dues deductions will not cause the Union irreparable harm.

The Union contends that it will suffer irreparable harm if the Court does not force the State to continue deducting fees from nonconsenting employees. As explained below, that argument fails at every level.

First, the Union argues that allowing employees who revoke their consent to stop paying membership dues will "cut-off ... the Union's primary source of revenue" and "seriously impede the Union's ability to continue its day-to-day operations." Mot. 39. Since the release of the Attorney General opinion, however, the State has stopped deducting Union dues for eight individuals in the general government bargaining unit (GGU) who requested it. Affidavit of Kate Sheehan ¶ 12. These eight individuals represent a small fraction of the 6,360 members of ASEA. *Id.* ¶¶ 5, 12. Their total dues deduction also represents a miniscule amount of the Union's multi-million-dollar budget. *See* Affidavit of Kelly Tshibaka ¶¶ 6-7. There is simply no imminent threat to the Union's ability to operate. And even if there were, money damages do not constitute irreparable harm. *See, e.g., Amwest Sur. Ins. Co. v. Reno*, 52 F.3d 332 (9th Cir. 1995) ("Economic injury, by itself, does not constitute irreparable harm.").

Second, the Union argues that it needs a TRO because the State is "encouraging members to withdraw their membership or authorization of dues deductions,

discouraging prospective members from joining, and undermining current and prospective members' perceptions of the Union's authority by sending the message that the Governor can violate with impunity the CBA the Union fought hard to negotiate." Mot. 39. According to the Union, the State is taking these actions because it hopes to "cripple the effectiveness of ASEA and other public employee unions in Alaska." Mot. 4. These allegations are absurd. The State is doing nothing more than honoring the requests of state employees to end their dues deductions and implementing new procedures that will provide basic safeguards to protect the First Amendment rights of state employees. That the State has provided information about these steps to its employees and the general public is not surprising. Nothing in PERA or the CBA prevents the State from sharing accurate information with state employees about their First Amendment rights. *Supra* 21-22. Moreover, these (baseless) allegations are irrelevant to the Court's inquiry into what *Janus* and the First Amendment require and whether it should order the State to deduct dues from employees who have asked the State to stop. Enjoining the State from honoring these requests could not possibly affect the "misperceptions" the Union's members have supposedly received as a result of the State's announcements.

2. The State and the public interest will be harmed by a TRO.

Unlike the Union, the State and its employees will be irreparably harmed if the Court orders the State to continue deducting dues from nonconsenting employees. Certain state employees have approached the State and made clear they do not want to pay Union dues. Some, in particular, say they *never* wanted to associate with and support the Union and did so only because they believed it was mandatory. *Supra* 10-11. Under the First

Amendment, these employees cannot be forced to subsidize the Union, and the State has an obligation to follow the law.

If the Court issues a TRO, these employees' wages will be instantly reduced. Not only will this affect their pocketbook, but it will cause the irreparable loss of their First Amendment right against compelled speech. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see Alsworth*, 323 P.3d at 57 (same); *see also Debont*, 1998 WL 415844, at *7 (enjoining a union "from seizing union dues from Plaintiff, or taking any other steps against Plaintiff to enforce the 'Maintenance of Membership' provisions" because the loss of the Plaintiff's First Amendment freedoms through the forced dues deduction was irreparable). Thus, while the loss of dues for these individuals is a miniscule injury for the Union, it is of enormous importance to these state employees. The Court must take these factors into account. *See id.*; *see also Powell v. City of Anchorage*, 536 P.2d 1228, 1229 n.2 (Alaska 1973) (courts should consider the "harm to the public interest").

II. The Court should not grant a TRO enjoining the implementation of Administrative Order No. 312.

A. The Union is unlikely to succeed on the merits of its claims.

The Union seeks a TRO "halting implementation of the Attorney General's August 27, 2019 opinion letter." Mot. 46. In effect, the Union is asking this Court to bar the State from implementing Administrative Order No. 312, which was recently issued in response to the Attorney General's August 27, 2019 opinion. *Supra* 11-12. The Union contends Administrative Order No. 312 violates (1) PERA; (2) the Alaska Constitution's

Contracts Clause; and (3) the Administrative Procedure Act. None of these arguments has merit.

1. The First Amendment mandates the employee protections created by Administrative Order No. 312.

As explained above, the Supremacy Clause prohibits state courts from "giv[ing] effect to state laws that conflict with federal laws." *Armstrong*, 135 S. Ct. at 1383; U.S. Const., art. VI, cl. 2. Because the First Amendment requires the employee protections outlined in Administrative Order No. 312, any Alaska law to the contrary cannot be given effect. *Id.*

a. An employee's consent to subsidize a union's speech is not valid unless it is knowing, voluntary, and reasonably contemporaneous.

In *Janus*, the Supreme Court held that state employees have a First Amendment right not to be compelled to subsidize union speech through "an agency fee [or] any other payment." 138 S. Ct. at 2486. A State can deduct union dues or fees only if the employee "affirmatively consents to pay." *Id.* This waiver of First Amendment rights must be "freely given and shown by 'clear and compelling evidence,'" and such a waiver "cannot be presumed." *Id.* Thus, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

In articulating the "clear and compelling evidence" standard, the Court in *Janus* relied on a long line of decisions articulating the standard for determining a valid waiver of constitutional rights. *See id.* at 2486 (citing *Knox*, 567 U.S. at 312-13; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Curtis Pub.*

Co. v. Butts, 388 U.S. 130, 144 (1967); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). These and other Supreme Court decisions dictate the contours of a system of payroll deductions for union dues and fees that can pass constitutional muster. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) ("The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.").

As an initial matter, Supreme Court precedent makes clear that a waiver of the First Amendment right against compelled speech "cannot be presumed." *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.'"). To the contrary, courts "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Zerbst*, 304 U.S. at 464. In light of these principles, three requirements are necessary for a waiver of Constitutional rights to be valid.

First, a waiver of First Amendment rights must be "voluntary." *See Janus*, 138 S. Ct. at 2486 (holding that "the waiver must be freely given"); *Boykin*, 395 U.S. at 242 (waiver of federal rights must be "intelligent and voluntary"). A waiver of constitutional rights is voluntary if "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). In the context of payroll deductions for union-related dues and fees, that means an employee's waiver is "voluntary" only if the employee is free from coercion or improper inducement in deciding whether to authorize the deduction. *See id.*

Second, a valid waiver of First Amendment rights must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely

consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). An individual's waiver is knowing and intelligent only 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." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). In the context of a payroll deduction for union dues and fees, that means an employee must be aware of the nature of his or her right—namely, 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. 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 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.

Third, as explained above, *supra* 18-19, an individual's consent to waive his or her rights must be reasonably contemporaneous. This is because circumstances change over time, and individuals may choose to no longer associate with a union. *See Farrar*, 2017 WL 741560, at *11 ("[A] defendant may rescind a waiver of the right to be silent, even after questioning has begun. In that event, questioning must stop.") (citing *Miranda*, 384 U.S. at 474); *Lattimore*, 87 F.3d at 651 ("[A] consent to a search is not irrevocable, and thus if a person effectively revokes ... consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent."). In the

context of a payroll deduction for union dues and fees, that means an employee has the constitutional right to stop associating with a union at any time. *Supra* 18-19; *see also Janus*, 138 S. Ct. at 2486; *McCahon*, 491 F. Supp. 2d at 527; *Debont*, 1998 WL 415844 at *5.

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

Governor Dunleavy issued Administrative Order No. 312 because the State's current system for employee payroll deductions fails to ensure that these constitutional standards are met. *Supra* 11-12. As the Attorney General recognized in his Opinion, the State has "effectively ceded to the unions widespread power to elicit employees' consent to payroll deductions of dues and fees." AG Opinion at 10. After *Janus*, this arrangement is no longer tenable because it "fails to yield 'clear and compelling evidence' that state employees have 'freely given' their consent to deducting union dues and fees from their wages." *Id.* Without that consent, the State is constitutionally barred from making those deductions. The current system fails all three of the requirements for obtaining a valid waiver of Constitutional rights.

First, the current system does not ensure that an employee's waiver of his constitutional rights is "voluntary." 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.

Id. at 10-11. 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." *Id.* at 11. 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.'" *Id.* (quoting *Comer*, 480 F.3d at 965). 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." *Janus*, 138 S. Ct. at 2486.

Second, the current system does not ensure that an employee's waiver of his constitutional rights is "knowing and intelligent." 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." AG Opinion at 10. The current system allows the unions to design the form by which an employee gives written authorization for payroll deductions. *Id.* But there is "no guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right not to authorize any payroll deductions to subsidize the unions' speech." *Id.*

Third, the current system cannot ensure that the employee's waiver is "reasonably contemporaneous." As the Attorney General recognized, unions often add specific terms to an employee's payroll deduction authorization making the payroll deduction irrevocable for up to twelve months. *Id.* at 11. 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." *Id.* 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." *Id.* 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*." *Id.* Instead it "induces the State to unknowingly burden the First Amendment rights of untold numbers of its own employees."

c. Administrative Order No. 312 brings the State into compliance with *Janus*.

Administrative Order No. 312 fixes the constitutional problems with the current system. First, it orders the creation of a simple and convenient system that will allow employees to directly provide their consent to the State. *See* Administrative Order at 2. This will ensure that each employee's consent is "voluntary" and "free from coercion." *See Janus*, 138 S. Ct. at 2486. Second, it creates an "opt-in" dues form that will clearly inform employees of the First Amendment rights they are waiving by subsidizing a union's speech. *See* Administrative Order at 2-3. This will ensure that each state employee's waiver is "knowing" and "intelligent." *Brady*, 397 U.S. at 748. Third, it instructs the Department of Administration to process any "opt-in" or "opt-out" requests within 30 days of receipt. *See* Administrative Order at 3. This will help ensure that waivers are "reasonably contemporaneous." This Administrative Order, the State has

correctly determined, will bring the State into compliance with the Court's decision in *Janus*.

d. The Union's attempts to limit *Janus* fails.

In addition to the arguments discussed above, *see supra* 16-20, the Union makes two arguments for why *Janus* does not require Administrative Order No. 312. Neither is persuasive.

To begin, the Union argues that the State's new dues-deduction system will "unilaterally void voluntary, affirmative agreements between a union and its members" and thus is "incompatible with the First Amendment rights of public employees to associate with one another and their unions on their own agreed-upon terms." Mot. 31. But the new system will do no such thing. The Union and its members are free to associate with each other upon their own terms; they need no State involvement to do so. The First Amendment is not implicated because Administrative Order No. 312 neither restricts nor compels speech or association. *Janus*, 138 S Ct. at 2463-65.

The Union also contends that the State's new dues deduction system is not compelled by *Janus* because the Union's members already have provided the necessary consent through the current dues deduction form. Mot. 34-37. That is wrong. First, the form provides no evidence that the employee's waiver is "voluntary" and "free from coercion." Because the Union "controls the environment in which the employee is asked to authorize a payroll deduction," 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.'" AG Opinion at 10-11 (quoting *Comer*, 480 F.3d at 965). Indeed, the State

has received complaints that state employees believed they were *required* to join the Union. *Supra* 10-11. Second, the Union's dues deduction form does not ensure that the employee's waiver is "knowing and intelligent," as it nowhere states that the employee has a *First Amendment* right not to associate with the Union. *Compare* Exh. 1 to Affidavit of Kelly Tshibaka *with* Administrative Order at 2-3. In fact, many state employees have dues deducted from their paychecks under an authorization form that was signed *before Janus* was issued in June 2018; these employees obviously could not have knowingly waived the rights articulated in *Janus*. Finally, as this dispute makes clear, the Union's form does not ensure the employee's waiver is "reasonably contemporaneous," as it purports to prohibit an employee from stopping his or her support of a union except in a narrow 10-day window at the end of the year.

2. PERA cannot override the requirements of the First Amendment.

The Union argues that the State cannot implement Administrative Order No. 312 because "PERA requires the State to deduct union dues '[u]pon written authorization of a public employee.'" Mot. 18 (quoting AS 23.40.220). The Union also argues that implementing Administrative Order No. 312 "would require the State to violate its contract with the Union" which, in turn, would "violate PERA's requirement that the State employer honor its contracts." Mot. 18-19. As explained above, however, Administrative Order No. 312 is required by the First Amendment, as articulated in *Janus*. Contrary State law thus has no effect. *Supra* 27-32.

The Union next argues that PERA "prohibits the State from unilaterally changing how it administers union member dues deductions." Mot. 19. But also as explained above, these changes are mandated by the First Amendment and thus are not the subject of negotiation. *Supra* 21, 27-32. Even if negotiation is required, however, the State will satisfy these requirements. The State has promised to "provide notice to all affected unions at least 30 days before implementation" and will "offer to meet with each union to discuss any additions or modifications the unions believe" are warranted. Administrative Order at 3.

The Union finally claims that the State's "refus[al] to honor state statutes and the State's CBA" regarding dues deductions violates the Union's right to be "free of harassment and undue interference from the State." Mot. 19-20 (citing AS 23.40.110(a)(1)-(3)). But Administrative Order No. 312 is required by federal law and thus does not violate state statutes or the CBA. *Supra* 20, 27-32. The State therefore has not been engaging in "harassment and undue interference." *Supra* 21-22.

3. The Contracts Clause does not prohibit the implementation of Administrative Order No. 312.

The Union argues that implementing Administrative Order No. 312 violates the Alaska Constitution's Contract Clause. Mot. 20-22. For the reasons explained above, that is incorrect. There has been no "change in state law" such that the Alaska Contracts Clause is even implicated. *See supra* 22-23. Even if the Contracts Clause did apply, the State's decision to honor employee requests to stop dues deduction is not a "substantial impairment of a contractual relationship," *Hageland Aviation Servs., Inc.*, 210 P.3d at

451, as employees can simply register electronically with the State instead of with the Union. And even if the State's new system was a "change in state law" and such a change violates the CBA—neither of which is true—the State still would not be in violation of the Contracts Clause because the State's policy is "reasonable and necessary to serve an important public purpose"—namely, complying with the U.S. Supreme Court's decision in *Janus*. *Id.*; *supra* 22-23.

4. Implementing Administrative Order No. 312 does not violate the APA.

As explained above, implementing Administrative Order No. 312 does not violate the APA. *See supra* 23-24. That is because Administrative Order No. 312 is not a "regulation." *Id.* Administrative Order No. 312 does not "implement[], interpret[], or make[] specific the law enforced or administered by the agency." *Chevron*, 387 P.3d at 36. It instead implements the requirements of *Janus*, not AS 23.40.220, as the Union claims. *See* Mot. 24. Administrative Order No. 312 also does not "affect the public" and is not "used by the agency in dealing with the public," *Chevron*, 387 P.3d at 36, because it is an internal management decision of the Department of Administration dealing with its state employees. *Supra* 23-24.

B. The balance of hardships weighs against granting a TRO.

1. The Union will suffer no irreparable harm if Administrative Order No. 312 is implemented.

In seeking to enjoin Administrative Order No. 312, the Union argues that its "relationships with [its] members" and "status and authority" will suffer if state employees are told that they "must re-authorize union dues after being told that by doing

so they will be 'waiving' their First Amendment rights." Mot. 38. But adopting the new system of dues deduction should not cause any "relationship" and "status" harms because these protections are required by *Janus*. *Supra* 27-32. Union members should not blame the Union or question its "status and authority" because the State has taken steps to comply with the U.S. Constitution. In any event, if these harms justified a TRO, then *any* dispute between a union and the State would justify a TRO, as the Union's disagreement with the State will always create these supposed "status and authority" harms.

The Union also insists that Administrative Order No. 312 will cause "the immediate cut-off of the Union's primary source of revenue" and thus "seriously impede the Union's ability to continue its day-to-day operations." But the State's new opt-in/opt-out system will not be implemented until December 2019 at the earliest. *Supra* 12. And the State is providing all unions with 30 days' notice before implementing the new policies and offering to meet with each union to discuss any additions or modifications the unions believe are warranted. Administrative Order at 3. This will allow the State to receive any feedback from the Union about the new system and ensure that state employees are prepared to comply with the new consent requirements. *Id.* Nor will there be any barriers to joining the Union once this system is operational. The State is creating an opt-in system that will be "simple and convenient for employees." Administrative Order at 2. It will allow forms to be submitted electronically, but also include a process for submission of paper forms for those employees with "little or no computer or Internet access." And the State is committed to working with the Union (indeed, all unions) to discuss any additions or modifications they believe are warranted. There thus is no

imminent danger of the Union's funds being "immediately cut-off." The Union's claim of irreparable harm is premature, speculative, and overstated.

2. The State and the public interest will be harmed by an injunction.

Unlike the Union, the State and the public interest will be harmed if the Court enjoins it from implementing Administrative Order No. 312. The State has concluded that it is currently violating federal law by continuing to deduct union dues and fees without clear and compelling evidence that employees agreed to this deduction. *Supra* 8-10, 27-32. The State has an urgent need to bring its policies into compliance—both to protect the State from liability, and to ensure that Alaskans' First Amendment rights are protected.

The State's new dues-deduction system, however, will take time to create. The State already has begun the process of creating this system. *See* Affidavit of Kelly Tshibaka ¶ 12. Given the State's other obligations, it is imperative that the State's work on the new system not be impeded. The State's contractor estimates that this system will take at least two months to create. *Id.* The State's contractor must schedule development of this new system around its pre-existing workload, including deployment of a biweekly payroll system in December and an upgrade to the IRIS state-wide accounting system. *Id.* ¶13. This pre-planned upgrade, in particular, is scheduled to begin in March 2020 and will take roughly 17 months to complete. *Id.* During a significant portion of that time, a code freeze will be in effect that will prevent the Department from simultaneously developing the new opt-in/opt-out system. *Id.* In addition, the State's contractors and the Division of Finance's entire HRM and Information Technology teams

will need to devote all of their time to those upgrades during that 17-month period. *Id.* Consequently, if the State does not begin developing the new system soon (by early January 2019, at the latest), the new system will not be available to employees until significantly later—likely around August 2021. *Id.* ¶ 14. This is because the State's contractor needs to begin work on its previously scheduled projects (starting in March 2020) and so will have to postpone work on the new opt-in/opt-out system until after its other project is complete. *Id.*

Consequently, the State will suffer harms if it is forced to delay development or implementation of this new opt-in/opt-out system. *See id.* ¶¶ 12-15. So, too, will state employees who are compelled to subsidize speech with which they disagree. *See supra* 14, 26; *Elrod*, 427 U.S. at 373.

III. The Union is not entitled to a TRO to maintain the status quo pending arbitration of its grievance.

Finally, the Union asks the Court to issue a "reverse *Boys Market*" injunction that will "preserve the status quo pending the arbitration of a labor dispute under a CBA grievance procedure." Mot. 41-46. Such an injunction is not warranted.

As the Union concedes, no Alaska court has ever recognized the authority to issue a reverse *Boys Market* injunction. *See* Mot. 41-42. Yet even if the Court could issue such an injunction, the Union is not entitled to one. To begin, the Union argues that it is entitled to this type of injunction if it can prove that "the underlying grievance is one that the parties are contractually bound to arbitrate" and it shows *one* of "the traditional bases for equitable injunctive relief exists," such as "the employer's breach of the collective

bargaining agreement is of an ongoing nature, (b) the union will suffer irreparable harm from the employer's breach, or (c) the union will suffer more from the denial of the injunction that the employer will from its issuance." Mot. 42-43 (quoting *AFSCME, Council 31 v. Schwartz*, 343 Ill. App. 3d 553, 561 (Ill. 2003)); *id.* (asserting that it "need only prove one" of these factors).

This is not the approach followed by the vast majority of courts. In these courts, a plaintiff must "prove not only that the underlying disputes are arbitrable, but that the traditional requirements of injunctive relief—probability of success on the merits, irreparable injury, and a balance of hardships—support the award.'" *Health Professionals & Allied Employees AFT/AFL-CIO v. MHA, LLC*, 2017 WL 6550488, at *2 (D.N.J. Dec. 21, 2017) (quoting *Nursing Home & Hosp. Union No. 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094, 1098 (3d Cir. 1985)). Courts agree that *all* of these traditional requirements of injunctive relief must be satisfied. *See, e.g.*, *Niagara Hooker Employees Union v. Occidental Chem. Corp.*, 935 F.2d 1370, 1377 (2d Cir. 1991) (listing cases); *Fresco Sys. USA, Inc. v. Hawkins*, 690 F. App'x. 72, 75 (3d Cir. 2017) (same); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO, Local 2-286 v. Amoco Oil Co. (Salt Lake City Refinery)*, 885 F.2d 697, 703 (10th Cir. 1989) (same); *Port Auth. of Allegheny Cty. v. Amalgamated Transit Union, Div. 85*, 431 A.2d 1173, 1175 (Pa. 1981) (same).

Importantly, a reverse *Boys Market* injunction is available only when "necessary to prevent arbitration from being rendered a meaningless ritual." *Niagara Hooker Employees Union*, 935 F.2d at 1377 (citation omitted). And the arbitration process is rendered meaningless only if "any arbitral award in favor of the union would

substantially fail to undo the harm occasioned by the lack of a status quo injunction." *Id.* at 1378. "The arbitral process is not rendered 'meaningless,' however, by the inability of an arbitrator to completely restore the status quo ante or by the existence of some interim damage that is irremediable." *Id.*; *see Int'l Bhd. of Elec. Workers Sys. Council U-4 v. Fla. Power & Light Co.*, 784 F. Supp. 854, 856-57 (S.D. Fla. 1991) (injunction is warranted only if it is "obvious that the employer action, if allowed to go forward, would scuttle the arbitral process, by obviating the arbitrator's ability to grant meaningful relief"). "Injunctions of this sort are, quite appropriately, a rarity." *Independent Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F. 2d 927, 929 (1st Cir. 1988).

The Union cannot satisfy these requirements. First, the Union's grievance is not arbitrable. A grievance is not arbitrable when its "resolution 'ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute'" or the U.S. Constitution. *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 983 (Alaska 2002) (quoting *Wright v. Universal Maritime Serv. Co.*, 525 U.S. 70, 78-79 (1998)). Here, the grievance's resolution ultimately turns on constitutional questions that are outside a grievance arbitrator's authority—namely, the requirements of the First Amendment, as articulated by the U.S. Supreme Court in *Janus*. An arbitrator thus has no authority to resolve this issue.

Second, the Union will not suffer irreparable harm without an injunction. Even assuming that the dispute is arbitrable (which it is not), the arbitration will not be rendered a "meaningless ritual" if the Court does not issue a TRO. The Union's sole fear

is that without a TRO its "relationships with its members" and its "reputation and support within the bargaining unit" will suffer. Mot. 44-45. The State, of course, disputes that allowing nonconsenting employees to stop subsidizing the Union and preparing to adopt a new system of dues deduction will cause these harms. But even if these harms would occur, they are not the type of rare harms that would present the Union with a "*fait accompli*, rendering arbitration a hollow formality." Mot. 45 (citation omitted). Reverse *Boys Market* injunctions are reserved for extraordinary cases. *See, e.g., Independent Oil & Chem. Workers of Quincy, Inc.*, 864 F.2d at 928 (preliminary injunction in aid of arbitration not warranted to prevent an employer from "implementing changes in rules governing work shifts, safety, and employee dress").

Finally, the balance of hardships and the public interest weigh in the State's favor. The Union will suffer no harm if an injunction is not issued, the State will be harmed if it is prevented from implementing Administrative Order No. 312, and nonconsenting state employees will be harmed if they are compelled to subsidize speech with which they disagree. *Supra* 24-26, 34-36. Accordingly, the Union has not come close to satisfying the high criteria for a reverse *Boys Market* injunction.

CONCLUSION

For the foregoing reasons, the Court should deny the Union's request for a temporary restraining order.

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KEVIN G. CLARKSON
ATTORNEY GENERAL

By:

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

William S. Consovoy (*pro hac vice*)
J. Michael Connolly (*pro hac vice*)
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 and the Third-Party Defendants