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

STATE OF ALASKA,

Plaintiff/Counterclaim Defendant,

v.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Defendant/Counterclaimant,

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Third-Party Plaintiff,

v.

MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; CLYDE "ED" SNIFFEN, in his official capacity as Acting Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Third-Party Defendants,

Case No. 3AN-19-09971CI

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OPPOSITION OF THE STATE OF ALASKA AND THIRD-PARTY DEFENDANTS TO ASEA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As explained in their motion for summary judgment, the State of Alaska and Third-Party Defendants (collectively, "the State") are entitled to summary judgment on the State's declaratory judgment claims and on ASEA's counterclaims and third-party claims. None of the State's actions breached the parties' collective bargaining agreement ("CBA"), the implied covenant of good faith and fair dealing, the Public Employment Relations Act ("PERA"), or the Administrative Procedure Act ("APA"). To the contrary, the State's actions were required by *Janus* and the First Amendment. Finally, ASEA cannot satisfy the requirements to invoke collateral estoppel. The Court should reject ASEA's attempt to prevent this Court from resolving these important Constitutional issues. The State is entitled to summary judgment, and ASEA's motion for summary judgment should be denied.

ARGUMENT

I. ASEA Is Not Entitled to Summary Judgment on Its Breach of Contract Claim.

Section 3.04. ASEA argues that the State violated Section 3.04 by "dealing directly with bargaining unit employees about ASEA membership and dues authorization rather than referring them to ASEA" and by sending "mass emails to GGU bargaining unit members" on August 27, 2019 and September 26, 2019. ASEA Mem. 15. But Section 3.04 requires the State to deduct dues "[u]pon receipt . . . of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member." Section 3.04 says nothing at all about whether the State may

respond to employees' requests to cease dues deduction or send "mass emails" to State employees. Even if it did, these actions were in no way improper, as explained below.

ASEA also claims that the State violated Section 3.04 of the CBA by "ceasing dues deductions for employees in contravention of their ASEA dues authorization agreements." ASEA Mem. 15. But because these nine employees informed the State that they did not consent to dues deduction, the State was required under the First Amendment to halt their dues deduction. *See* Stipulated Facts ("SF") ¶¶ 84-85; State Mem. 38-47, 48-49. Similarly, the State cannot be liable for "announcing," *see* ASEA Mem. 15, that it would no longer accept prior dues deduction forms after it had completed the new procedures and forms required by Administrative Order No. 312, *see* State Mem. 22-23; SF, Ex. X, because the old forms did not provide "clear and compelling" evidence of consent to dues deduction, State Mem. 38-47, 48-49.

Section 3.01. ASEA next contends that the State violated Section 3.01 of the CBA by "ceasing dues deductions for employees in contravention of their ASEA dues authorization agreements" and by "dealing directly with bargaining unit employees" to stop their dues deduction rather than referring the employees to ASEA. ASEA Mem. 15. The State, however, did not "interfere between any bargaining unit member and the Union." CBA § 3.01. These employees voluntarily reached out to the State. SF ¶¶ 84-85. The State simply honored their requests to cease dues deduction. The State does not "interfere" with bargaining unit members when it complies with such voluntary, unsolicited requests. State Mem. 49; *see Interfere*, Oxford English Dictionary (2020) ("interfere" means to "[t]ake part or intervene in an activity *without invitation* or

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necessity") (emphasis added). Regardless, the State cannot be liable for these actions because the First Amendment required the State to cease the dues deductions for these nine individuals. State Mem. 38-47, 50.

ASEA also argues that the State violated Section 3.01 by sending the August 27, 2019 and September 26, 2019 emails to State employees. ASEA Mem. 15. This is wrong. In both emails, the Commissioner merely wrote to inform all State employees about actions that State officials recently took that could affect them—namely, releasing the Attorney General Opinion and issuing Administrative Order No. 312. The State should—indeed, must—keep its employees informed about State actions that could affect them. To that end, the Commissioner regularly sends emails to state employees when the State adopts policies that impact state employees. SF ¶ 67, Exs. U, V, W.

The State acted responsibly and truthfully by sending these emails. The emails did not encourage employees to stop paying dues or resign their membership.[1] SF, ¶¶ 65, 75, Exs. T, Z. They did not prohibit employees from taking certain actions. *Id.* They did not accuse any union, including ASEA, of acting improperly. *Id.* They did not threaten or implicitly threaten any union member or any union. *Id.* They were sent to all State employees (not just ASEA members) and did not single out ASEA or its members in any way. *Id.*

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[1] Indeed, the State made clear that "[w]hether to become a union member is a personal decision for each employee. Employees who are in a union and choose to remain a union member will . . . still be able to do so. The State only needs to ensure that it has clear and compelling evidence to confirm the employee consents to the deduction of dues form the employee's paycheck." Ex. T at 16; *see* Ex. Z at 8.

These two emails thus did not constitute improper "interference." *See, e.g.*, *Jefferson Stores, Inc.*, 201 NLRB 672, 673 (1973) (no improper "interference" when "distributed material and the manner in which it is distributed, unaccompanied by threats or promises of benefits, is not coercive"). Nor did the emails themselves "[t]ake part or intervene in an activity without invitation or necessity." *Interfere*, Oxford English Dictionary (2020). The two emails were nothing more than announcements to all State employees about actions the government had taken that could affect them.

Finally, the State cannot be liable for "announcing" that it would no longer accept prior dues deduction forms after it had completed the new procedures and forms required by Administrative Order No. 312. ASEA Mem. 15. Again, the State's actions were necessary to bring the State into belated compliance with the First Amendment, and the State cannot be liable for violating any contract provision to the contrary. State Mem. 38-47, 48-49. Regardless, simply "announcing" these intentions, through the issuance of Administrative Order No. 312, is not "interference." *See* State Mem. 49-50. The State is entitled to summary judgment on ASEA's breach of contract claim.

II. ASEA Is Not Entitled to Summary Judgment on Its Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

ASEA argues that the State violated the implied covenant of good faith and fair dealing when the State (1) responded to and ceased dues deduction for the individuals who reached out to the State; and (2) emailed all State employees on August 27, 2019 and September 26, 2019. Neither claim has merit.

ASEA argues that the State violated the implied covenant because it ceased dues

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deductions for the nine individuals without "any prior notice to ASEA." ASEA Mem. 18-19. But ASEA misstates the facts. *Before* any of these dues were stopped, ASEA received the Attorney General Opinion, which recognized that employees should have a right to stop paying dues at any time. SF ¶ 61, Ex. P at 12. The State also notified ASEA that certain employees asked the State to stop their dues deduction, that the State granted their requests, and that ASEA would not receive these employees' dues in the upcoming pay period. SF ¶¶ 84-85, 87.[2]

The State did not act in bad faith or unreasonably by not "seek[ing] any input from ASEA" before issuing the Attorney General Opinion and Administrative Order No. 312. ASEA Mem. 18. The Attorney General is the legal advisor to the governor and other state officials. *See* AS 44.23.020. The Attorney General had no obligation to meet with ASEA while conducting legal analysis. The Governor, likewise, need not meet with private parties before issuing administrative orders. Nor should the Attorney General or Governor have met with ASEA in particular. The Attorney General Opinion and Administrative Order No. 312 concerned dues deductions to *all* public sector unions, not just ASEA. *See* SF, Exs. P, X. In addition, at the time the Governor issued Administrative Order No. 312, ASEA's views were well known, as this litigation was already underway. SF ¶¶ 68-69.

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[2] That the State did not "raise any concerns to ASEA" regarding dues deduction or *Janus* during the parties' contract negotiations in the fall of 2018 under the prior administration of then-Governor Walker or when Commissioner Tshibaka signed the CBA is not surprising. ASEA Mem. 17-18. Governor Dunleavy did not ask the Attorney General to investigate the issue until after he took office in December 2018, and the Attorney General Opinion was not released until August 27, 2019. SF ¶¶ 2, 61.

ASEA claims that the State acted with an improper purpose because State officials "met with outside anti-union interest groups" that "seek to weaken unions." ASEA Mem. 8 n.48, 18-19. But no evidence supports this assertion. *See* SF ¶¶ 64, 74. ASEA tries to supplement the stipulated record with links to various websites, *see* ASEA Mem. 8 n.48, but this violates the parties' agreement "that they will not rely on or introduce additional evidence in support of or in opposition to motions for summary judgment and/or summary adjudication," SF at 1-2. Regardless, that State officials "spoke with" other individuals about *Janus* provides no evidence that the State sought to adopt policies to harm ASEA. SF ¶¶ 64, 74.

ASEA next contends that the State breached the implied covenant because "the State's conduct violated public policy" by "bypass[ing] the legislative process." ASEA Mem. 19 (citing *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139-40 (Alaska 1999)). But this caselaw derives from the employer-employee context, where the Alaska Supreme Court has held that an employer cannot terminate an employee on grounds that violate public policy. *See, e.g.*, *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123, 1130 (Alaska 1989) (implied covenant can be breached when an employee's termination violates the "public policy supporting the protection of employee privacy"). The Alaska Supreme Court has never recognized a similar "public policy" in not "bypass[ing] the legislative process," and ASEA provides no compelling reason for the Court to do so here. ASEA Mem. 19. Regardless, the State did not violate PERA. State Mem. 54-64.

ASEA asserts that "the only plausible inference from the timing of the State's actions is that the State sought to blindside ASEA and thereby to interfere with ASEA's

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relationship with bargaining unit employees *before* ASEA could obtain emergency relief in Court." ASEA Mem. 19. This is pure speculation. There is *no evidence* that the State took these actions in order to inflict harm on ASEA. Moreover, State officials "are presumed to be honest and impartial until a party shows actual bias or prejudgment." *Richards v. Univ. of Alaska*, 370 P.3d 603, 614 (Alaska 2016). The record shows that the State changed its dues deduction policies to comply with *Janus* and the First Amendment—full stop. *See* State Mem. 51-52.

Finally, even if ASEA could show a breach of the implied covenant, the State could not be liable for violating state contract law because the State's actions were required by the First Amendment. *See* State Mem. 54. The State is entitled to summary judgment on ASEA's breach of the implied covenant of good faith and fair dealing.

III. ASEA Is Not Entitled to Summary Judgment on Its Claim that the State Violated PERA and the Separation of Powers.

AS 23.40.110(a)(5), 210(a). ASEA argues that the State violated PERA because AS 23.40.110(a)(5) and AS 23.40.210(a) "require[] the State employer to honor its contracts." ASEA Mem. 20. As explained, *see* State Mem. 60-63, these requirements simply "act[] as a kind of specialized statute of frauds, under which oral agreements are not permitted," *Classified Emps. Ass'n v. Maanuska-Susitna Borough Sch. Dist.*, 204 P.3d 347, 354-55 (Alaska 2009). A breach of contract thus does not also violate PERA. State Mem. 62-63. In any event, the State did not violate the CBA and therefore did not also violate PERA. *Supra* 1-7.

AS 23.40.220. ASEA next argues that the State's actions violated PERA because

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AS 23.40.220 requires the State to "make union member dues deductions pursuant to the terms of the ASEA membership agreements and dues deduction authorizations." ASEA Mem. 20-21. But AS 23.40.220 says no such thing. *See* State Mem. 63-64. This provision does nothing more than require the State to deduct dues "[u]pon written authorization." AS 23.40.220.

ASEA mistakenly contends that the Department of Law has "consistently interpreted and applied" this provision to require the State to deduct dues pursuant to the terms of the dues deduction authorizations. ASEA Mem. 21. In the 1984 legal opinion ASEA cites, the Department of Administration asked whether it could agree to a "mandatory dues deduction provision in a collective bargaining agreement" under PERA. *Mandatory Dues Deduction*, Office of the A.G., 1984 WL 61014, at *1 (Alaska A.G. Mar. 14, 1984). The Attorney General said no, concluding that AS 23.40.220 "plainly infers that each employee must individually authorize the state to automatically deduct dues." *Id.* The opinion did *not* hold that PERA *requires* the State to deduct dues pursuant to whatever terms are on the dues deduction form. *Id.* Nor did the 2019 Attorney General Opinion, as ASEA argues, *see* ASEA Mem. 21, take this position.

AS 23.40.110(a)(5). ASEA next contends that the State violated AS 23.40.110(a)(5) because it "did not negotiate with the Union before changing the process for the deduction of union dues." ASEA Mem. 21-22. As explained, *see* State Mem. 55-56, the State did not violate this provision because it had no "anti-union motive." *Univ. of Alaska v. Alaska Cmty. Colls. Fed of Tchrs.*, 64 P.3d 823, 826 n.9 (Alaska 2003). Even if it did, the State did not "refuse to bargain collectively,"

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AS 23.40.110(a)(5), because the State had no duty to bargain over actions the State was required to take under the Constitution, the State's actions occurred *after* the parties had completed negotiations and entered into the CBA, and the State did, in fact, offer to bargain with ASEA over certain issues. *See* ASEA Mem. 60-62.

AS 23.40.110(a)(1), (2), (3). ASEA finally argues that the State violated AS 23.40.110(a)(1), (2), and (3) by ceasing dues deductions for the nine employees who requested it and by sending the August 27, 2019 and September 26, 2019 emails to state employees. ASEA Mem. 22. As explained, *see* State Mem. 56-60, the State did not violate these provisions because it had no "anti-union motive." *Univ. of Alaska*, 64 P.3d at 826 n.9. Even if did, the State's actions did not "interfere" with ASEA or "discriminate" against a union member. *See* State Mem. 56-60.

Finally, even if the State violated PERA, the State still is entitled to summary judgment because the State's actions were required by the First Amendment, and state law cannot override the U.S. Constitution. *See* State Mem. 64. The State is entitled to summary judgment on ASEA's PERA claim.

IV. ASEA Is Not Entitled to Summary Judgment on Its Administrative Procedure Act Claim.

ASEA argues that the "implementation of the Attorney General's August 27, 2019 opinion and AO 312" violated the APA because the State's "new rules for union member dues deductions" are a "regulation" that required notice and comment. ASEA Mem 22-24. This argument fails.

ASEA first contends that the State's new dues deduction procedures are a

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"regulation" because they "implement" the "dues deduction and anti-interference provisions of PERA that the Department administers." ASEA Mem. 23; *see* AS 44.62.640(a)(3). Not so. The State made these dues deduction changes to avoid violating *Janus* and the First Amendment through its collective bargaining agreements. State Mem. 65. The State never claimed to be "implementing" any state law. *Id.*

Moreover, ASEA ignores the APA's definition of "regulation." A government action is not a "regulation" if it "relates only to the internal management of a state agency." AS 44.62.640(a)(3). The State's changes were *inward*-facing—they concern solely dues deductions from state employee paychecks. State Mem. 65-66.[3] A "regulation" also "does not include a form prescribed by a state agency or instructions relating to the use of the form." AS 44.62.640(a)(3). Thus, the dues deduction forms it used (and would use under Administrative Order No. 312) are not a "regulation."

As ASEA recognizes, the State does not engage in notice and comment when it "negotiate[s] with the chosen union representative about subjects of bargaining" and "enter[s] into binding collective bargaining agreements containing the agreed-upon terms." ASEA Mem. 24. Nor did the State, under the prior administration, undertake notice and comment when it made changes in immediate response to *Janus*. SF ¶ 25. This further confirms that the State's actions were not subject to notice and comment. *See* State Mem. 67.

Finally, even if the State violated the APA (which it did not), state law cannot

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[3] For the same reasons, the State's actions do not "affect[] the public." AS 44.62.640(a)(3); *see* State Mem. 66.

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prohibit the State from taking actions that are required by the Constitution. *Id.*

V. Collateral Estoppel Does Not Preclude This Court's Resolution of the First Amendment Issues Presented in This Case.

ASEA argues that the Court should not even entertain the First Amendment issues presented in this case because a recent federal district court opinion, through principles of collateral estoppel, prevents the State from litigating "whether the First Amendment precludes the State from honoring ASEA membership agreements." ASEA 24-25 (citing *Creed v. ASEA*, No. 3:20-cv-65-HRH, 2020 WL 4004794 (D. Alaska July 15, 2020)). That is incorrect for at least three reasons, as explained below.

On March 16, 2020, two state employees, Linda Creed and Tyler Riberio, filed a lawsuit against ASEA and Commissioner Tshibaka in the U.S. District Court for the District of Alaska. Plaintiffs' complaint alleged that dues were deducted from their paychecks even though they had expressly stated that they did not consent to dues deduction. ASEA Req. Jud. Not., Ex. B (Doc.1), ¶¶ 21-29. 37. The plaintiffs sought damages against ASEA (and not the State) "for all union dues collected from Plaintiffs after the date of the Supreme Court's decision in *Janus*." *Id.*, Prayer for Relief. Because dues were still being deducted from Creed's paychecks, the complaint also asked the Court to "[e]njoin Commissioner Tshibaka from continuing to deduct, and enjoin Defendant ASEA from accepting, dues from Plaintiff Creed's paychecks." *Id.*, ¶¶ 27, 29, 38 & Prayer for Relief.

ASEA moved to dismiss the complaint. *See* State Req. Jud. Not., Ex. A (Doc. 24). The plaintiffs opposed ASEA's motion to dismiss and filed a motion for summary

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judgment. *Id.*, Exs. B, C (Docs. 27-28). Commissioner Tshibaka did not file a motion to dismiss or an opposition to ASEA's motion to dismiss, but instead filed a "response" to the plaintiffs' motion for summary judgment. ASEA Req. Jud. Not., Ex. C (Doc. 32).

On July 15, 2020, the district court granted ASEA's motion to dismiss. The court first dismissed the plaintiffs' claims against ASEA for prospective relief as moot. The court found that "Plaintiffs' claims for prospective relief are moot because the State is no longer deducting union dues from their paychecks." *Creed*, 2020 WL 4004794, at *4. "Thus, plaintiffs' claims for prospective relief as to ASEA are dismissed." *Id.* The court then dismissed the plaintiffs' § 1983 claims against ASEA. The court found that the plaintiffs had not "stated a plausible violation of their First Amendment rights" because dues deduction forms are "binding contracts that remain enforceable even after *Janus*" and the plaintiffs "voluntarily agreed to join the union." *Id.* at *10.

The district court did not, however, dismiss the plaintiffs' claims against Commissioner Tshibaka. *See id.* at *10. The following day, the Court issued an order instructing the plaintiffs and Commissioner Tshibaka to meet and confer and file a proposed scheduling order for further litigation. *See* State Req. Jud. Not., Ex. E (Doc. 38). A week later, the plaintiffs in *Creed* asked the district court to dismiss the claims against Commissioner Tshibaka *sua sponte*. *Id.*, Ex. F (Doc. 39). The district court granted the request without explanation. *Id.*, Ex. G (Doc. 40). The case is now on appeal at the Ninth Circuit. *See Creed v. ASEA*, No. 20-35743 (9th Cir.).

Collateral estoppel "'renders an issue of fact or law which has already been decided by a court of competent jurisdiction conclusive in a subsequent action between

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the same parties.'" *Smith v. Stafford*, 189 P.3d 1065, 1075 (2008). The party asserting collateral estoppel must, at a minimum, show "(1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action; (2) the issue precluded from relitigation is identical to the issue decided in the first action; (3) the issue was resolved in the first action by a final judgment on the merits; and (4) the determination of the issue was essential to the final judgment." *Id.* "The burden of pleading and proving these elements rests on the party asserting estoppel." *Id.*

As an initial matter, ASEA is improperly seeking to bind this Court to a federal district court's interpretation of the First Amendment in an unrelated action. Collateral estoppel does not apply because no party may "bar the State [of Alaska] from relitigating 'unmixed questions of law' through the use of collateral estoppel." *State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 952-54 (Alaska 1995). And this Court is "not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law." *Totemoff v. State*, 905 P.2d 954, 963 (1995). The State thus "is not collaterally estopped here as to the issues decided in [*Creed*] because the applicability of" the First Amendment to union dues deductions is a "pure question of law." *Id.*

In addition, ASEA cannot satisfy the requirements for collateral estoppel. *First*, the State and the Third-Party Defendants were not a "party to the first action." *Smith*, 189 P.3d at 1075 (citation omitted). The "action" in which the First Amendment issue was decided was between the plaintiffs and ASEA. ASEA moved to dismiss plaintiffs' claims against the union and the district court granted the motion. *See Creed*, 2020 WL

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4004794, at *10. The plaintiffs' claims against Commissioner Tshibaka were dismissed in a two-sentence order without explanation. Moreover, even if the Court had adopted the reasoning of the *Creed* opinion when granting summary judgment for the Commissioner—which it did not—it would not have reached the First Amendment issue. The plaintiffs' sole claims against the Commissioner were for prospective relief, and those claims became moot before the district court issued its judgment. *See Creed*, 2020 WL 4004794, at *4. The court's First Amendment holding in *Creed* only concerned the plaintiffs' § 1983 claims for damages against ASEA. *Id.* at *4-10. The State and Third-Party Defendants cannot be bound by a decision on a different claim that was resolved solely in an action between different parties. *See State, Dep't of Health & Soc. Servs., Office of Children's Servs. v. Doherty*, 167 P.3d 64, 73 (Alaska 2007) (collateral estoppel cannot bind "a litigant to the adverse determinations of a case to which he or she was not a party").

Second, the issues before this Court are not "identical to the issue decided" in *Creed*. *Smith*, 189 P.3d at 1075 (citation omitted). The claims in this case "go beyond the scope of the issues litigated" in *Creed*. *Powercorp Alaska LLC v. Alaska Energy Auth.*, 290 P.3d 1173, 1182 (Alaska 2012). This case implicates, *inter alia*, whether the State's dues deduction policies and practices ensure that the State has "clear and compelling" evidence that its employees are consenting to dues deductions and whether the State's efforts, including Administrative Order No. 312, are required to bring the State into compliance with *Janus* and the First Amendment. *See* State Mem. 18-24, 26-48. *Creed*, by contrast, was limited to whether two state employees had plausibly

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alleged that they were entitled to damages against ASEA because the union had collected dues from their paychecks without their consent. *Creed*, 2020 WL 4004794, at *5. Simply put, because "the scope of this suit is much broader than the issues addressed in [*Creed*], collateral estoppel is not appropriate here." *Powercorp Alaska*, 290 P.3d at 1183.

Third, the First Amendment issue on which ASEA seeks preclusion was not "resolved in the first action by a final judgment on the merits" and was not "essential to the final judgment." *Smith*, 189 P.3d at 1075 (citation omitted). Again, the court dismissed the plaintiffs' claims against the Commissioner in a two-sentence order without explanation. Moreover, even if the Court had adopted the reasoning of *Creed* when granting summary judgment for the Commissioner, the First Amendment issue would not have been "essential to the final judgment" because the claims against the Commissioner would have been dismissed on mootness grounds. *Creed*, 2020 WL 4004794, at *4; *see, e.g.*, *Powercorp Alaska*, 290 P.3d at 1183 (no collateral estoppel where the judgment in the prior case "was justified on the alternative ground that Powercorp lacked standing to protest the procurement").

Finally, applying collateral estoppel would not be appropriate as a matter of equity and fairness. Collateral estoppel is an "equitable doctrine." 46 Am. Jur. 2d *Judgments* § 469 (2018). It is "founded on principles of fundamental fairness, and fairness is its overriding concern." *Id.* Consequently, "even where the threshold elements for application of the defense are met, a court must analyze each case on its facts." *Id.* Courts should "not apply the doctrine mechanically" in situations that would

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lead to "inequitable results." *Id.*; *see Rapoport v. Tesora Alaska Petroleum Co.*, 794 P.2d 949, 952 (Alaska 1990) (collateral estoppel not appropriate if party had no "opportunity to fully and fairly litigate an issue"). Similarly, the "requirement of mutuality must still be applied" if the "particular circumstances of the prior adjudication would make it unfair to allow a person who was not a party to the first judgment to invoke . . . collateral estoppel." *United Cook Inlet Drift Ass'n*, 895 P.2d at 951 (quoting *Pennington v. Snow*, 471 P.2d 370, 377 (Alaska 1970)).[4]

Here, applying collateral estoppel against the State would be inequitable and unfair because it would deprive the State of its only opportunity to fully and fairly present its arguments, defend its actions, and have those arguments squarely addressed. The State did not file the lawsuit in *Creed* and it was not in an adversarial posture against ASEA. As a consequence, the State could not bring its own claims or present its own evidence—it could merely file a "response" agreeing with the plaintiffs. Indeed, ASEA urged the court to *ignore* the Commissioner's arguments because the plaintiffs had never raised them, the claims against the Commissioner were moot, and this Court had entered a TRO. *See* State Req. Jud. Not., Ex. D (Doc. 34-1), 1-4, 7. Having urged the federal court to cast aside the Commissioner's limited response on the (distinct) claims in *Creed*, ASEA cannot now argue that the Commissioner had a fair opportunity

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[4] The required "mutuality" is lacking here because in *Creed* the Commissioner and ASEA were both defendants and were not adversaries. *See, e.g.*, *Pierce v. Morrison Mahoney LLP*, 452 Mass. 718, 729-30 (2008) ("Because the current plaintiffs and Morrison Mahoney were both defendants in the original suit, rather than adversaries, the judgment for Miller is not conclusive as to the rights and liabilities of the codefendants to each other" under "traditional collateral estoppel." (alteration omitted)).

to be heard. And because judgment was entered for the Commissioner, the State has no control over any appellate review. If the plaintiffs fail to make certain arguments, drop their appeal to the Ninth Circuit, or (if applicable) decline to file a petition for certiorari to the Supreme Court of the United States, the State would have no recourse.

Applying collateral estoppel in this unique situation thus would be inequitable and not further the doctrine's purposes. *See, e.g.*, *Smith*, 189 P.3d at 1075 (collateral estoppel serves to "protect[] litigants from the burden of relitigating an identical issue *with the same party* or his privy" (emphasis added) (citation omitted)); *Pennington*, 471 P.2d at 378 (collateral estoppel not appropriate where the party in the first case had "less time to prepare her case and less incentive to adjudicate all of the issues to the fullest extent"). The State is entitled to a "full and fair adjudication of [its] claims against [ASEA]." *Pennington*, 471 P.2d at 378. Collateral estoppel does not apply.

VI. The State's Actions Were Required by *Janus* and the First Amendment, and ASEA Is Not Entitled to Summary Judgment on the State's Declaratory Judgment Claim.

ASEA argues that the State's actions were not required by the First Amendment because *Janus* was "a case about mandatory agency fees for non-members, not voluntary union dues." ASEA Mem. 25-26. ASEA also asserts (in one sentence) that it is "entitled to summary judgment on the State's meritless declaratory judgment claim." ASEA Mem. 27. This is wrong.

As explained, ASEA's interpretation of *Janus* and the First Amendment is incorrect. *See* State Mem. 26-48. The First Amendment required the State to stop deducting dues from the nine State employees who told the State that they did not

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consent to dues deduction. *Id.* The First Amendment also required the State to take steps to ensure that it had "clear and compelling evidence" that State employees have freely given their consent to subsidize union speech through dues deductions. *Id.* The State is entitled to summary judgment on its declaratory judgment claims. *Id.*

VII. ASEA Is Not Entitled to the Remedies It Seeks.

As explained above, ASEA is not entitled to summary judgment and thus is not entitled to declaratory relief, injunctive relief, or damages. To the extent the Court disagrees, however, ASEA still is not entitled to the relief it demands.

First, ASEA seeks a sweeping permanent injunction that prohibits the State from "implementing the Attorney General's August 27, 2019 opinion" and "otherwise unilaterally changing the union dues deduction practices in place prior to August 27, 2019." ASEA Mem. 27. These requested injunctions are too vague and overbroad to be issued. Under Alaska Rule 65, "[e]very order granting an injunction . . . shall be specific in terms" and "shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Alaska R. Civ. P. 65(d). These are no mere "'technical requirements.'" *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 n.60 (Alaska 2015) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)). The Rule is "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Id.* (citation omitted); *see Kohl v. Legoullon*, 936 P.2d 514, 519 (Alaska 1997) (injunctions must be precise and not "impose on the defendant any greater restriction than is necessary to

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protect the plaintiff from the injury of which he complains" (citation omitted)).

The Attorney General Opinion does not direct the State or any State employee to do anything. It is a 12-page legal opinion analyzing a question posed by the Governor. Enjoining the State from "implementing" the Opinion would violate Rule 65 because it would not "describe in reasonable detail . . . the act or acts sought to be restrained." Alaska R. Civ. P. 65(d). It also could prevent the State from "undertaking innocent or even desirable conduct because of concern about the possibility of being held in contempt." Wright & Miller, Federal Prac. & Proc. § 2955. For example, a public sector union in the future could ask the State to create an online system under which its members could submit their dues deduction forms. The broad injunction ASEA seeks arguably would prohibit such actions. *See* SF, Ex. P at 12 (Attorney General recommending that the State create an online system to collect dues deductions forms).

Enjoining the State from "changing the union dues deduction practices in place prior to August 27, 2019," ASEA Mem. 27, also would violate Rule 65. This injunction would provide little guidance to the State as to what conduct is and is not prohibited. This injunction also could improperly bind the State during future contract negotiations if the State (or even ASEA) sought to implement new practices not in effect prior to August 27, 2019. *See* SF, Ex. N (detailing past changes from contract to contract).

If the Court does grant injunctive relief, it must tailor the injunction to avoid these problems. Enjoining the State and Third-Party Defendants from implementing Administrative Order No. 312, SF ¶ 69, and from stopping a GGU employee's dues deductions until ASEA "informs the Department of Administration, Payroll Services to

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cease the employee's dues deductions," SF ¶¶ 53-56, would be sufficient "to protect [ASEA] from the injury of which [it] complains," *Kohl*, 936 P.2d at 519. Importantly, any injunction the Court issues must not extend past June 30, 2020, when the current CBA expires. *See* SF ¶ 27.

Finally, the parties did not stipulate, as ASEA implies, *see* ASEA Mem. 27, that ASEA is entitled to $186,020.64 in damages as long as ASEA shows some violation of a breach of contract or the implied covenant of good faith and fair dealing. *See* SF ¶¶ 91-93. The Court must tailor any damages it awards to the specific breach of contract or violation of the implied covenant (if any). *See Nickels v. Napolilli*, 29 P.3d 242, 250 (Alaska 2001) ("The purpose of awarding damages for a breach of contract is to put the injured party in as good a position as that party would have been had the contract been fully performed."); *see, e.g.*, *Luedtke v. Nabors Alaska Drilling*, 834 P.2d 1220, 1227 (Alaska 1992) ("[Plaintiff] may not recover for damages not caused by [Defendant's] breach of the covenant of good faith and fair dealing."). For example, if the Court determines that the State violated the CBA when it stopped deducting dues for the nine GGU employees and it rejects ASEA's other arguments, then ASEA would be entitled only to $299.01. *See* SF ¶ 91.

CONCLUSION

For the foregoing reasons, the Court should deny ASEA's motion for summary judgment and grant the State's motion for summary judgment.

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DATED: November 24, 2020.

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

STATE OF ALASKA,

Plaintiff/Counterclaim Defendant,

v.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Defendant/Counterclaimant,

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Third-Party Plaintiff,

v.

MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; CLYDE "ED" SNIFFEN, in his official capacity as Acting Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Third-Party Defendants,

Case No. 3AN-19-09971CI

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CERTIFICATE OF SERVICE

I hereby certify, that on this date, true and correct copies of the **Opposition of the State of Alaska and Third-Party Defendants to ASEA's Motion for Summary Judgment** and this **Certificate of Service** were served via electronic mail on the following:

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