IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff/Counterclaim Defendant,

vs.

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

Defendant/Counterclaimant.

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

Case No. 3AN-19-09971 CI

ASEA'S REQUEST FOR JUDICIAL NOTICE

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Pursuant to Alaska Rule of Court 203, Alaska State Employees Association / AFSCME Local 52 ("ASEA") respectfully requests that the Court take judicial notice of the following documents, which are a publicly available arbitration decision (Exhibit A) and three publicly available filings from a lawsuit in the federal district court for the District of Alaska (Exhibits B, C, and D):

Exhibit A: *Fairfield City Sch. Dist.*, 2020 BL 349050, 2020 BNA LA 1210 (Heekin, Aug. 27, 2020)

Exhibit B: Complaint, *Creed v. ASEA*, No. 3:20-cv-0065-HRH, Dkt. 1 (D. Alaska)

Exhibit C: State's Response Re: Plaintiff's Motion for Summary Judgment, *Creed v. ASEA*, No. 3:20-cv-0065-HRH, Dkt. 32 (D. Alaska)

Exhibit D: Judgement, *Creed v. ASEA*, No. 3:20-cv-0065-HRH, Dkt. 41 (D. Alaska)

DATED this 23rd day of October 2020.

DILLON & FINDLEY, P.C.
Attorneys Alaska State Employees
Association / AFSCME Local 52, AFL-CIO

By: /s/ Molly C. Brown
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CERTIFICATE OF SERVICE

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

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

on the following attorneys of record:

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/s/ Lisa Kusmider
Lisa Kusmider

EXHIBIT A

Labor Arbitration Decision, Fairfield City Sch. Dist., 2020 BL 349050, 2020 BNA LA 1210

Pagination

Decision of Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN FAIRFIELD CITY SCHOOL DISTRICT BOARD OF EDUCATION AND OAPSE/AFSCME LOCAL 4 AFL-CIO LOCAL 205

August 27, 2020

John H. Clemmons, Attorney, OAPSE Director of Legal Services, for the Board.

Thomas C. Drabick, Jr., OAPSE Director of Legal Services, for OAPSE.
WILLIAM C. HEEKIN, Arbitrator.

CESSATION OF UNION DUES COLLECTION GRIEVANCE

ADMINISTRATION

By way of a letter dated February 7, 2020, from the Federal Mediation and Conciliation Service, the undersigned was informed of his designation to serve as arbitrator regarding a matter which was then in dispute between the Parties. Accordingly, on May 27, 2020, an arbitration hearing went forward where testimony as well as document evidence was presented. Therefore, upon receipt of post-hearing briefs, the record was closed and the matter is now ready for final resolution.

BACKGROUND

Prior to the start of the arbitration hearing, the Parties agreed to the following "*STIPULATIONS OF FACT*" ("the Stipulations"):

* * *

1. The Ohio Association of Public School Employees ("OAPSE") is the "deemed certified" representative of non-instructional school employees (i.e., building and maintenance; school bus drivers; custodian; aides; full time cooks; and, secretaries), employed by the Fairfield City School District Board of Education (hereafter "Board", "Board of Education", or "Employer"). As specific to this grievance/arbitration and Local 205, the bargaining unit is comprised of school bus drivers and chauffeurs.

2. The relationship between OAPSE and the Board is controlled by the terms and conditions of a collective bargaining agreement effective July 1, 2017 through June 30, 2020. (A copy of the collective bargaining agreement. See, Joint Exhibit 1).

3. In this labor grievance arbitration, OAPSE challenges the Board's cessation of dues collection and remittance to Union of dues collected from the payroll earnings of school bus driver Clifford Heckler ("Heckler").

4. Heckler signed an OAPSE Membership Application on August 12, 2018. That application contains the following language: "I hereby authorize the Ohio Association of Public School Employees as bargaining agent on matters of wages, hours, working conditions or other matters that may affect my employment. I further authorize and direct the Employer to deduct OAPSE State dues and Local dues as set forth herein or as increased from my salary or wages and remit the same to the OAPSE State Treasurer. The authorization shall remain in effect during my employment unless withdrawn by me in the manner provided in the Collective Bargaining Agreement between the Employer and OAPSE or, where there is no provision for withdrawal in the Agreement, only during a 10-day period from August 22 through August 31. I agree that any withdrawal of dues deduction authorization shall be in writing, executed and delivered during the revocation period by written notice served upon the Chief Fiscal Officer of the Employer and the OAPSE State Treasurer." (See, Joint Exhibit 2, attached hereto.)

5. With respect to dues collections by the Board, the collective bargaining agreement between OAPSE and the Board provides, in relevant part at Article 38, as follows: "A. OAPSE shall have the sole and exclusive right **[*2]** to have membership dues deducted for employees in the bargaining unit by the Board of Education. ... B. Payroll membership dues deductions shall be continuous and shall be revocable once during the term of this Agreement by written notice to the School District Treasurer, delivered during the ten (10) day period prior to August 31, 2019. Payroll membership dues deductions for which the Treasurer has received written notice of revocation during the ten (10) days prior to August 31, 2019, shall be terminated effective September 1, 2019. ... D. Individual authorization forms shall be furnished by OAPSE and, when executed, shall be filed by the local Chapter Treasurer with the Board Treasurer. ... G. All dues collected by the Treasurer of the Board will be forwarded to State OAPSE each month accompanied by a list of dues-paying members." (attached hereto as Joint Exhibit 1, page 26, Article 38, paragraphs A, B, D, & G

6. By letter dated, September 12, 2019, and received by the Board Treasurer on September 17, 2019, Heckler notified the Board Treasurer that he no longer wanted to pay dues to OAPSE. (See Joint Exhibit 3, attached hereto.)

7. The timing of Heckler's notice was not in compliance with the collective bargaining agreement or the OAPSE Membership Application. (See Joint Exhibits 1, 2, and 3, attached hereto.)

8. The Board Treasurer stopped collection of OAPSE dues from Heckler's payroll earnings. There have been no dues collections and remittance to OAPSE by the Board Treasurer on Heckler's during the 2019-2020 school year (See, Joint Exhibit 4, OAPSE Dues Accounting for Clifford Heckler, attached hereto.)

9. On October 2, 2019, the Board Treasurer notified Local 205 that Heckler had requested revocation of his dues deduction authorization. (See, Letter from Board Treasurer to OAPSE Local 205, October 2, 2019, Joint Exhibit 5.)

10. During the month of October, 2019, informal discussions were conducted by OAPSE Field Representative John Horn and the Board Treasurer about Heckler's attempted dues deduction revocation. (See, e-mail correspondence between OAPSE Field Representative John Horn and Board Treasurer Nancy Lane, attached hereto as Joint Exhibit 6.)

11. On October 31, 2019, OAPSE Local 205 President Robert Collas filed a grievance challenging the Board's cessation of dues collections from Heckler's payroll earnings. The grievance stated: "Violation of ART. 38 Check-off and Organizational Security, and any other Article that may pertain. Fairfield City School Treasurer refuses to deduct dues form Clifford Heckler. Remedy Requested: Make OAPSE whole $ for Clifford Heckler's Authorization of Dues, and begin deductions again." (See, Grievance, Exhibit 7.)

12. On or about November 15, 2018, the Board's Director of Business Operations responded to the grievance. The **[*3]** response stated, in relevant part: "Based on the Janus U.S. Supreme Court decision, I respectfully deny the grievance filed and the remedy requested (See Grievance Response, Exhibit 8).

13. The parties engaged in grievance mediation with FMCS, but the grievance remained unresolved. On December 20, 2019, OAPSE notified the Superintendent of schools that the grievance was being advanced to labor arbitration. (See, Joint Exhibit 9, attached hereto.)

14. Labor Arbitrator William C. Heekin was selected by parties under Article 29 of the collective bargaining agreement from a list created by the Federal Mediation and Conciliation Service. An arbitration hearing was conducted on May 27, 2020, at the Board of Education, 4641 Bach Lane, Fairfield, Ohio.

15. The Opinion of the Court is Janus is attached hereto as Joint Exhibit 10.

16. In light of the Janus decision, the issues for resolution in this labor arbitration are, in addition to any issues the parties' wish to raise in the briefs, as follows: i) does Janus interfere with or supersede the withdraw window contained in the collective bargaining Agreement; ii) does Janus interfere with the membership agreement between OAPSE and Heckler which provides for a dues deduction authorization and revocation of that authorization; ii) did Heckler properly revoke his dues deduction authorization under the OAPSE membership application and the collective bargaining agreement between OAPSE and the Board; iii) by ceasing collection of dues from Heckler's payroll earnings, has the Board violated its collective bargaining agreement with OAPSE, and if so, what shall the remedy be?

17. The parties stipulate that the grievance is timely and properly before the Arbitrator for resolution.

18. The parties stipulate to the following exhibits for use at hearing and in briefs:

1. Collective Bargaining Agreement, July 1, 2017 through June 30, 2020;

2. Clifford Heckler OAPSE Membership Application, August 12, 2018;

3. Withdraw/revocation letter of Clifford Heckler, September 12, 2019;

4. OAPSE Membership Accounting Detail for Clifford Heckler;

5. Treasurer Notice Letter to Local 205, October 2, 2019;

6. E-mail correspondence OAPSE FR John Horn and Board Treasurer;

7. OAPSE Grievance, October 31, 2019;

8. Grievance Response from Director Penney, November 15, 2019;

9. OAPSE Notice of Arbitration, December 20, 2019;

10. Opinion of the Court Janus v. AFSCME.

* * *

DISCUSSION AND FINDINGS

A question arises concerning the Board having acted in light of the US Supreme Court's Janus decision to immediately stop deducting union membership dues from the payroll account of employee Clifford Heckler, at his request, outside of the "ten (10) day" window period requirements of Article 38 of the CBA. OAPSE contends that the Board violated Article 38, Paragraphs A, B, D, G, of the CBA when it ceased deducting union membership dues from the payroll earnings of Mr. Heckler. OAPSE argues that since Janus only addressed the Constitutionality of an **[*4]** involuntary agency fee payroll deduction, while what is at issue in this matter is a voluntary union membership dues payroll deduction, it did not interfere with or supersede the "Payroll membership dues deductions"/"revocation"/"ten (10) day period" requirements of Article 38, Paragraphs A, B, D, G. OAPSE points out that the Federal District Courts which have addressed Janus have declined to expand it beyond agency fee cases. OAPSE asserts that the Board, in accepting Mr. Heckler's untimely revocation of his membership dues payroll deduction authorization, violated the CBA and harmed the collective bargaining relationship of the parties. It urges that the issue concerning Local 205 President Robert Collas having allegedly "messed up" delivering the revocation message in this matter from Mr. Heckler should not be considered, since it was raised by the Board for the first time at the arbitration hearing and neither Collas nor Heckler were present at the hearing to testify.

The Board contends that, in light of the US Supreme Court's Janus decision and the First Amendment of the US Constitution, it did not violate Article 38, Paragraphs A, B, D, G of the CBA when it honored the request of employee Clifford Heckler to immediately cease deducting his union membership dues. The Board, while greatly emphasizing that as a public employer it has a clear legal duty to ensure that an employee's Constitutional rights are protected, takes the position that Janus supersedes or interferes with the union membership dues check off, revocation of authorization, window period requirements of Article 38, Paragraphs A, B, D, G. The Board asserts that under Janus it cannot, without " ... 'clear and compelling evidence' ..." of the "affirmative consent" of Mr. Heckler to waive his First Amendment right of Free Speech, continue seizing union membership dues payments from his paycheck. It submits that Mr. Heckler could not have knowingly, intelligently, and voluntarily waived his First Amendment right to not subsidize union speech since he signed his Membership Application on August 12, 2018, (Joint Exhibits-4 and 18), which was not long after the Supreme Court issued its Janus decision on June 27, 2018. It emphasizes the fact that Article 38 became effective when the CBA was adopted on July 1, 2018, which was a year before the Janus decision was issued. The Board urges that Janus essentially allowed Mr. Heckler to freely withdraw his prior authorization in order to immediately bring about the discontinuation of his OAPSE membership dues, payroll deduction. The Board counters the contention of OAPSE that Janus is limited to only agency fee/payroll deduction questions and does not encompass union membership dues cases such as here by citing wording contained in the Janus majority opinion: "... any other payment to the union . . and such a waiver cannot be presumed ... The waiver must be freely given and shown by **[*5]** 'clear and compelling' evidence ... any money". The Board argues that this wording makes Janus herein applicable, since it involves the taking of union membership dues payments, and thus falls within "... any other payment to the union ...". The Board stresses the fact that under Article 38, Paragraph B, during the entire three year term of the CBA an employee could revoke his/her membership dues payroll deduction authorization just once, and only during the ten-day period which immediately preceded August 31, 2019. It suggests that Article 38 was not able to be fairly enforced in this matter where Clifford Heckler acted to notify Robert Collas, the President of Local 205, in August of 2019 that he no longer wished to be a member of the Union.

At the outset, it is to be emphasized as without dispute that the action of the Board to immediately cease deducting union membership dues from the payroll account of employee Clifford Heckler, at his request, was not in accordance with Article 38 of the CBA as written. This follows since Mr. Heckler's revocation of membership dues, payroll deduction authorization did not meet the specific written requirements of Article 38, including that it took place outside of the therein required "ten (10) day" window period.

In addition, as to the argument of the Board that the membership dues, payroll deduction revocation requirements of the CBA cannot fairly be enforced in this matter since Clifford Heckler allegedly informed Robert Collas, the Local 205 president, before the Article 38, Paragraph B, August, 2019 withdrawal period that he no longer wished to be a union member and to have membership dues deducted - where the latter allegedly "messed up" the communication of Mr. Heckler's wishes - this cannot be accepted as valid. This follows where the fact of this having actually occurred lacks a sufficient evidentiary basis since neither Mr. Heckler nor Mr. Collas appeared at the arbitration hearing as a witness. Moreover, under Article 38, Paragraph B, of the CBA, it is stated that "Payroll membership dues deductions shall be continuous and shall be revocable once during the term of this Agreement by written notice to the School District Treasurer, delivered during the ten (10) day period prior to August 31, 2019". Accordingly, under this language it is found to be implicit that the individual employee is responsible for communicating the message that he/she wishes to revoke his/her payroll deduction authorization "by written notice to the School District Treasurer, delivered during the ten (10) day period prior to August 31, 2019". Without dispute, Mr. Heckler gave no such "written notice to the School District Treasurer ... during the ten (10) day period prior to August 31, 2019" as required by this provision of the CBA.

Against this backdrop, the undersigned overwhelmingly finds that OAPSE met its burden to establish that the Board violated the CBA when it ceased deducting Union membership dues from the payroll [*6] account of school employee Clifford Heckler at his request, since Mr. Heckler's action to revoke his payroll deduction authorization in this matter did not meet the requirements of Article 38, "Check-off and Organizational Security", Paragraphs A, B, D, G of the CBA. This follows upon having determined that Janus does *not* supersede or interfere with the Article 38, contractual mandate of when and how authorization for a union membership dues payroll deduction is to be revoked. In essence, the undersigned finds that Janus does not apply since it involved the separate and distinct subject of a public sector employee who chose to not become a union member and never authorized the payroll deduction of an agency fee that would be remitted to a union. Accordingly, the legal authority cited by the Board concerning the waiving of a Constitutional right is held to not apply.

More particularly, it is held that the Supreme Court in Janus did not address the instant subject of revoking a union membership dues payroll deduction that had previously been authorized by the employee. Essentially, Janus is found to have been specifically about the Constitutionality of compelling a public sector employee, Mark Janus - who, unlike Mr. Heckler, had not made the choice to become a union member - to pay an agency fee by way of an unauthorized payroll deduction that would subsequently be remitted to the union that was statutorily required to represent him in collective bargaining, which the Court majority held amounted to a denial of his First Amendment right of free speech. Simply put, Janus deals with the Constitutionality of a public sector employee who, unlike Clifford Heckler, chose to *not* become a union member and had *not* authorized the payroll deduction of an agency fee, which in accordance with his collective bargaining agreement and/or state law would be remitted to the union that represented him in collective bargaining. In other words, Janus is determined to have not addressed the subject of a public sector employee such as Clifford Heckler who, *unlike Mark Janus*, *voluntarily* chose to become a union member and *voluntarily* authorized his public sector employer to deduct union membership dues from his employee paycheck. This follows where the Supreme Court in setting out its nearly fifty-page majority opinion in Janus did not once refer to the subject of a union membership dues, payroll deduction or the relationship between an employee who voluntarily becomes a union member and his/her union. Accordingly, in finding that Janus does not apply, it is held that what controls is the Article 38, contractually mandated "ten (10) day" window period and other requirements as to when and how union membership dues payroll deduction authorization can be revoked.

With respect to the contention of the Board that Janus interferes with or supersedes the requirements of Article 38, Paragraphs A, B, D, G, which concerns union membership [*7] dues payroll deduction/authorization and a window period for withdrawing such authorization, this is understood to be mainly based on wording contained in the last

paragraph of the last page of the Janus majority opinion:

> * * *
>
> This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Johnson v. Zerbst, 304 U.S. 458 , 464 (1938); see also Knox, 567 U.S., at 312-313 . Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Curtis Publishing Co. v. Butts, 388 U.S. 130 , 145 (1967) (plurality opinion); see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 , 680, 682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.
>
> * * *

Accordingly and upon considering the entirety of the nearly fifty-page Janus majority opinion, it cannot reasonably be found that the "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages ..." wording at issue makes this Supreme Court decision applicable to the case at hand. Even here there is implicit reference to an agency fee only scenario - "a *nonmember's* wages" - which undercuts the "nor any other payment to the union" wording being reasonably seen, in the face of all of the foregoing, as a basis upon which to extend Janus to union membership dues payment questions. Moreover, that Janus is specific to the Constitutionality of a non-union member, public sector employee who has been compelled by state law and/or a collective bargaining agreement to pay an agency fee to a union is reflected in the paragraph which *immediately precedes* the aforementioned last paragraph:

> * * *
>
> For these reasons, States and public-sector unions may no longer *extract agency fees from nonconsenting employees*. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the non-member's wages. §315/6(e). No form of employee consent is required.
>
> * * *

Therefore, the undersigned cannot accept the position of the Board that, because of Janus, the "ten (10) day" window period and other requirements for an employee to meet when acting to revoke his/her membership dues, payroll deduction authorization as set forth in Article 38 of the CBA are now unenforceable.

Support for this finding is gathered from the fact that a number of Federal District Courts have dealt with the question of whether or not Janus applies to cases concerning employee membership dues payments to a union. Accordingly and as OAPSE points out, Courts **[*8]** have consistently found Janus to not have application beyond the area of a non-union member, public sector employee who has been compelled to pay an agency fee to a union. Thus, the Board was not able to counter the Federal District Court decisions which were cited by OAPSE. In the end, the undersigned finds that the "ten (10) day" "revocation" window period and other requirements of Article 38, Paragraphs A, B, D, G - concerning an employee of the Board who chooses to withdraw his/her union membership dues payroll deduction authorization - is what governs the outcome of this dispute.

To summarize and regarding "the issues for resolution in this labor arbitration" set out in Stipulation 16, the undersigned finds that Janus does *not* "interfere with or supersede the withdraw window contained in the collective bargaining Agreement" and does *not* "interfere with the membership agreement between OAPSE and Heckler which provides for a dues deduction authorization and revocation of that authorization". In addition, it is determined that Clifford Heckler did *not* "properly revoke his dues deduction authorization under the OAPSE membership application and the collective bargaining agreement between OAPSE and the Board". Finally, it is found that "by ceasing collection of dues from Heckler's payroll earnings ... the Board violated its collective bargaining agreement with OAPSE".

Based upon all of the foregoing, it is held that OAPSE was able to meet its burden to establish by a preponderance of the evidence that the Board violated Article 38, Paragraphs A, B, D, G, of the CBA when it ceased deducting union membership dues from the employee paycheck of Clifford Heckler. Therefore, the grievance must be, and is, sustained. Accordingly, the Board is directed to cease and desist regarding its non-adherence to Article 38, Paragraphs A, B, D, G, of the CBA and to "Make OAPSE whole $ for Clifford Heckler's Authorization of Dues, and begin deductions again" as requested in the instant grievance (Stipulation 11, Joint Exhibit-7).

AWARD

The grievance is sustained as herein provided.

August 27, 2020, Cincinnati, Ohio.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LINDA CREED and TYLER RIBERIO, Plaintiffs, v. ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52 *and* KELLY TSHIBAKA, *in her official capacity as Commissioner of Administration for the State of Alaska*, Defendants.	)	No.

COMPLAINT

1. Government employees have a First Amendment right not to be compelled by their employer to pay any fees to a union unless an employee "affirmatively consents" to waive that right. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id.*

2. Union dues checkoff authorizations signed by government employees in Alaska before the Supreme Court's decision in *Janus* cannot constitute affirmative consent by those employees to waive their First Amendment right to not pay union

dues or fees. Union members who signed such agreements could not have freely waived their right to not join or pay a union because the Supreme Court had not yet recognized that right.

3. Plaintiffs in this case never provided knowing affirmative consent. When given the opportunity, they communicated their non-consent to Defendant Commissioner Tshibaka's agency, and saw their dues ended. The union filed a claim against the Commissioner's administration and secured a state court order forcing the resumption of their dues, and now dues are again being withdrawn without Plaintiffs' consent.

4. Because Plaintiffs have not provided affirmative consent to waive their First Amendment right to not join or pay money to a union, Defendants have violated Plaintiffs' First Amendment rights by continuing to withhold union dues from their paychecks.

5. Therefore, Plaintiffs bring this suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) seeking declaratory and injunctive relief, as well as damages in the amount of the dues previously deducted from their paychecks.

PARTIES

6. Plaintiffs are employees of the State of Alaska. Plaintiff Linda Creed is an Environmental Health Technician for the State's Department of Environmental

Conservation. She resides in Anchorage, Alaska. She joined the union on July 19, 2017.

7. Plaintiff Tyler Riberio is an Environmental Impact Analyst for the State's Department of Transportation. He resides in Juneau, Alaska. He joined ASEA on February 12, 2018.

8. Defendant Alaska State Employees Association (ASEA)/AFSCME Local 52 is a labor union affiliated with the American Federation of State, County, and Municipal Employees (AFSCME). Its headquarters are in Anchorage, Alaska. It is certified by the Alaska Labor Relations Agency as the exclusive representative for the general government bargaining unit. *See* AK Stat § 23.40.100.

9. Defendant Kelly Tshibaka is Commissioner of Administration for the State of Alaska and is sued in her official capacity. Her agency, the Department of Administration, is responsible for finance, payroll, personnel, and labor relations for the State. She is the lead signatory for the State on the collective bargaining agreement between the State of Alaska and ASEA (Exhibit A at 88). Her office is located in Juneau, Alaska.

JURISDICTION AND VENUE

10. This case raises claims under the First and Fourteenth Amendments of the United State Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

11. Venue is appropriate under 28 U.S.C. § 1391(b) because the Plaintiffs and Defendants live in and a substantial portion of the events giving rise to the claims occurred in the District of Alaska.

FACTS

Defendants are acting under color of state law.

12. Acting in concert under color of state law, Defendant Commissioner Tshibaka and Defendant ASEA entered into a collective bargaining agreement ("Agreement"), effective July 1, 2019, to June 30, 2022. Exhibit A.

13. The Agreement contains a "Union Security" article which binds the State to implement a payroll deduction authorization provided by ASEA:

> 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.

Exhibit A, § 3.04(A). *See id.* at § 3.04(C).

14. The Agreement's maintenance of membership requirement follows the Public Employment Relations Act (PERA), which states:

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

AK Stat § 23.40.220.

15. The dues authorization form used by ASEA limits a member's ability to end their dues deduction, stating:

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

Creed Union Membership Card, **Exhibit B**.

Plaintiffs seek to resign from and stop paying dues to the union.

16. Plaintiff Linda Creed is an Environmental Health Technician in the Alaska Department of Environmental Conservation.

17. Plaintiff Tyler Riberio is an Environmental Impact Analyst with the Alaska Department of Transportation.

18. At the time Plaintiff Creed joined the union, had she been given the option to pay no money to the union as a non-member. At the time, however, she was forced to either join and pay dues or not join and pay fees, so she chose to join.

19. At the time Plaintiff Riberio joined the union, he believed that membership would provide value to him and his colleagues. He learned through experience within the union that its priorities and values did not comport with his views on important topics. He wrote to the union on July 31, 2019, to resign his

position as a union steward and to cancel his membership and dues authorization, and sent a carbon copy to Commissioner Tshibaka's agency.

20. On August 27, 2019, Alaska Attorney General Kevin Clarkson issued a formal opinion stating that the State had to secure the affirmative consent of all state employees to take union dues in light of the Supreme Court's holdings in *Janus*. Alas. A.G. K. Clarkson, "First Amendment rights and union due deductions and fees," 2019 ALAS. AG LEXIS 5 (Aug. 27, 2019) (Exhibit C).

21. The very next day, August 28, 2019, Plaintiff Creed wrote to ASEA to cancel her membership and dues authorization; ASEA replied one day later, August 29, to say that she was obligated to continue paying dues until her opt-out window ten months in the future.

22. Also on August 28, 2019, Plaintiff Riberio wrote a letter to Commissioner Tshibaka's agency to end continued deduction of union dues from his paycheck and including a copy of his letter of July 31, 2019.

23. On September 20, 2019, Plaintiff Riberio completed a standard State of Alaska payroll form to cease his union dues deductions.

24. Pursuant to the Attorney General's opinion, Governor Mike Dunleavey issued Administrative Order 312 on September 26, 2019 (Exhibit D). The order mandated that Commissioner Tshibaka respect the right of all State employees to decide for themselves whether they provide affirmative consent to union

membership or whether they wish not to pay anything to the union as *Janus* now permits.

25. Pursuant to this order, Plaintiffs Linda Creed and Tyler Riberio exercised their right and refused to provide affirmative consent to continued union dues deductions. The State honored their decisions and stopped deducting dues from their paychecks.

26. On September 16, 2019, Governor Dunleavy sued ASEA for a declaratory judgment validating the Attorney General opinion (*Dunleavy v. ASEA/AFSCME Local 52*, 3AN-19-09971 CI (Miller, J.) (3rd Jud. Dist. at Anchorage). The ASEA countersued on September 25, seeking a court order barring implementation of the Governor's Administrative Order 312. On October 3, 2019, the trial court issued a temporary restraining order siding with ASEA and ordering the reinstatement of cancelled dues authorizations, including those of Plaintiffs and approximately one dozen other state employees.

27. On October 7, 2019, Defendant Commissioner Tshibaka wrote to Plaintiff Creed to inform her that pursuant to the state court's order, she was reinstating the dues deduction from Creed's paychecks. They continue to this day.

28. In January 2020, which was during the resignation window prescribed in the dues checkoff authorization he signed, Plaintiff Riberio sent a letter resigning

his membership from the union. Defendant ASEA executed his opt-out and the State stopped withholding dues from his paycheck at the next pay-period.

29. The opt-out window for Plaintiff Creed pursuant to her dues checkoff authorizations will not arise until July 2020.

COUNT I
Defendants ASEA and Commissioner Tshibaka violated Plaintiffs' rights to free speech and freedom of association protected by the First Amendment of the United States Constitution.

30. The allegations contained in all preceding paragraphs are incorporated herein by reference.

31. Requiring a government employee to pay money to a union violates that employee's First Amendment rights to free speech and freedom of association unless the employee "affirmatively consents" to waive his or her rights. *Janus v. AFSCME,* 138 S. Ct. 2448, 2486 (2018). Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id.*

32. Such a waiver may be withdrawn. *United States v. Mortensen*, 860 F.2d 948 (9th Cir. 1988).

33. The rights to free speech and freedom of association in the First Amendment have been incorporated to and made enforceable against the states through the Fourteenth Amendment guarantee of Due Process. *Id.* at 2463; *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gitlow v. New York*, 268 U.S. 652 (1925).

34. 42 U.S.C. § 1983 provides a cause of action for both damages and injunctive relief against any person who, under color of law of any state, subjects any person within the jurisdiction of the United States to a deprivation of any rights, privileges, or immunities secured by the Constitution.

35. 28 U.S.C. § 2201(a) allows a court of the United States, as a remedy, to declare the rights and other legal relations of interested parties.

36. Subsequent to the Supreme Court's decision in *Janus* on June 27, 2018, Plaintiffs communicated that they did not provide affirmative consent to remain members of Defendant ASEA or to having union dues withheld from their paychecks by Defendant Commissioner Tshibaka.

37. The Plaintiffs communicated their non-consent to Defendant Commissioner Tshibaka when she implemented Administrative Order 312, but they have subsequently been forced to continue paying dues because of the court order.

38. Defendant Commissioner Tshibaka is a state actor who is deducting dues from Plaintiff Creed's paychecks under color of state law, and was similarly deducting dues from Plaintiff Riberio's paychecks until he resigned his membership during the period designated in the dues checkoff authorization.

39. Acting pursuant to the Agreement and PERA, Defendant ASEA is or was acting in concert with Defendant Commissioner Tshibaka to collect union dues from Plaintiffs' paycheck without their affirmative consent.

40. The actions of Defendants constitute a violation of Plaintiffs' First Amendment rights to free speech and freedom of association to not financially support a union without their affirmative consent.

41. From when they joined the union until June 27, 2018 (the date the *Janus* decision was issued), because they were not given the option of paying nothing to the union as a non-member of the union, Plaintiffs could not have provided affirmative consent to Defendants to have dues deducted from their paychecks.

42. Plaintiffs' consent to dues collection was not "freely given" because it was given based on an unconstitutional choice of either paying the union as a member or paying the union agency fees as a non-member. *Janus* made clear that this false dichotomy is unconstitutional. *Janus*, 138 S. Ct. at 2486.

43. Plaintiffs' consent to dues deduction was not an effective waiver of their rights because they did not have and were not provided with complete information about their rights at the time they joined.

PRAYER FOR RELIEF

Plaintiffs Linda Creed and Tyler Riberio respectfully request that this Court:

a. Declare that limiting the ability of Plaintiffs to revoke the authorization to withhold union dues from their paychecks to a window of time is unconstitutional because they did not provide affirmative consent;

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

c. Declare that the practice by Defendant Commissioner Tshibaka of withholding union dues from Plaintiffs' paycheck was unconstitutional because Plaintiffs did not provide affirmative consent for her to do so;

d. Enter an injunction ordering ASEA to immediately allow Plaintiff Creed to resign her union membership;

e. Enjoin Defendant Commissioner Tshibaka from continuing to deduct, and enjoin Defendant ASEA from accepting, dues from Plaintiff Creed's paychecks;

f. Award damages against Defendant ASEA for all union dues collected from Plaintiffs after the date of the Supreme Court's decision in *Janus*, June 27, 2018;

g. Award damages against Defendant ASEA for Plaintiffs' dues collected before June 27, 2018;

h. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988; and

i. Award any further relief to which Plaintiffs may be entitled.

Dated: March 11, 2020

Respectfully Submitted,

LINDA CREED AND TYLER RIBERIO

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LINDA CREED; TYLER RIBERIO, Plaintiffs, v. ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52; KELLY TSHIBAKA, *in her official capacity as Commissioner of the Department of Administration for the State of Alaska,* Defendants.	Case No. 3:20-cv-00065-HRH

RESPONSE OF DEFENDANT KELLY TSHIBAKA
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

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

Since *Janus* was issued, the State of Alaska has been at the forefront in its efforts to protect the First Amendment rights of state employees. On August 27, 2019, Alaska Attorney General Kevin Clarkson issued a legal opinion in which he concluded that the State's payroll deduction process was constitutionally untenable under *Janus* and recommended actions the State should take to bring the State into compliance. The following month, Governor Mike Dunleavy issued Administrative Order No. 312, which instructed the Department of Administration to establish new procedures to protect state employees' First Amendment right to choose whether to pay union dues and fees. The validity of the State's actions is currently being litigated in state court. *See State of Alaska v. ASEA*, No. 3AN-19-9971CI.

Here, Plaintiffs are two state employees who argue that Defendants have withdrawn union dues from their paychecks without their consent. The relevant facts are not in dispute.[1] Plaintiffs informed the State that they did not consent to continued union dues deductions

[1] Defendant Tshibaka has filed herewith an answer to Plaintiffs' complaint.

and asked the State to stop deducting dues from their paychecks. Compl. ¶ 25; Answer ¶ 25. The State honored their decisions and stopped their dues deduction. *Id.* A few weeks later, however, the State, in compliance with a state court temporary restraining order, once again began deducting dues from Plaintiffs' paychecks. Compl. ¶ 26; Answer ¶ 26. In their motion for summary judgment ("Pls. Mot."), Plaintiffs argue that these forced dues deductions violated their First Amendment rights. Pls. Mot. 10-18.

Defendant agrees that Plaintiffs' First Amendment rights were violated. Under *Janus*, public employers may not deduct "an agency fee nor any other payment" unless "the employee affirmatively consents to pay." 138 S. Ct. at 2486. Simply put, if employees do not consent to paying dues to a public-sector union, neither the State nor the union can force them to do so. Here, once the State was told that Plaintiffs were "refus[ing] to provide affirmative consent to continued union dues deductions," Compl. ¶ 25, Answer ¶ 25, the State could not, consistent with the First Amendment, continue to deduct union dues from their paychecks.

In its motion to dismiss ("ASEA Mot."), the Alaska State Employees Association ("ASEA") provides Plaintiffs' dues deduction forms and argues that these documents prove that Plaintiffs waived their First Amendment rights. This argument fails. Under *Janus*, state employees do not waive their First Amendment rights unless there is "clear and compelling evidence" that the waiver was knowing, voluntary, and reasonably contemporaneous. ASEA's dues deduction form does not satisfy this standard. Most obvious, the form fails to make clear that employees are waiving a First Amendment right not to associate with ASEA, and the form requires employees to subsidize the union for an entire year, regardless of whether the employee withdraws his or her consent. This form thus is not a valid waiver of Constitutional

rights. Nor can Plaintiffs avoid these waiver requirements by calling the dues deduction form a "contract" and relying on state contract law.

State employees have a First Amendment right not to subsidize a public-sector union—full stop. Plaintiffs' First Amendment rights were violated through forced union dues deductions.[2]

BACKGROUND

A. 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, 309 (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, 52-53 (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 Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796-98 (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

[2] The State limits this Response to the First Amendment issues raised in the motions. The State takes no position at this time on the other issues ASEA has raised in its filings.

matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. 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 636-37. 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).

B. 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.*

C. The Attorney General Opinion

On August 27, 2019, Alaska Attorney General Kevin Clarkson issued a legal opinion in which he concluded that "the State's payroll deduction process is constitutionally untenable under *Janus*." *First Amendment Rights and Union Due Deductions and Fees*, Office of the Attorney General, 2019 WL 4134284, at *2 (Alaska A.G. Aug. 27, 2019) ("AG Opinion"). 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 *5-6 (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 could not "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 *7. 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 could not ensure that an employee's authorization is "freely given." *Id.* at *7. 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 had 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.*

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.* at *8. 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.* 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. *Id.* at *8-9. 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.*[3]

[3] The Texas Attorney General recently issued a similar opinion, concluding, among other things, that "the State must ensure that employee consent to a payroll deduction for membership fees or dues in a union or employee organization is collected in a way that ensures voluntariness," and that a "one-time, perpetual authorization [to deduct union dues] is inconsistent with the Court's conclusion in *Janus* that consent must be knowingly and freely given." *Application of the United States Supreme Court's Janus Decision to Public Employee Payroll Deductions for Employee Organization Membership Fees and Dues*, Attorney General of Texas, Opinion No. KP-0310 (Texas A.G. May 31, 2020), https://bit.ly/3cqdcYk.

D. 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." *See* Administrative Order No. 312 (Sept. 26, 2019), https://gov.alaska.gov/admin-orders/administrative-order-no-312/. 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.*

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 that they are waiving their First Amendment right not to pay union dues or fees and thereby not to associate with the union's speech." *Id.* 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.* This new opt-in system would be "simple and convenient for employees." *Id.* 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.*

E. The State Court Litigation

On September 14, 2019, the State of Alaska brought an action against ASEA in Alaska state court, seeking, among other things, 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. *See State of Alaska v. ASEA*, No. 3AN-19-09971CI. In response, ASEA filed counterclaims and a third-party complaint against certain government officials, including Defendant Tshibaka, seeking to enjoin the State from implementing the Attorney General's August 27, 2019 Opinion and Administrative Order 312. On October 3, 2019, Judge Gregory Miller issued a temporary restraining order enjoining the State from implementing the Attorney General's August 27, 2019 Opinion and the Governor's Administrative Order 312. *See* Doc. 24-2. This state court litigation is ongoing.

F. Plaintiffs' Dues Deductions

Plaintiffs Creed and Riberio are employed by the State of Alaska. Compl. ¶¶ 6-7; Answer ¶¶ 6-7. In its motion to dismiss, ASEA contends that Plaintiff Creed signed a dues deduction form in July 2017 containing the following language:

> I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA . . . . This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution . . . and for year to year thereafter, unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period.

ASEA Mot. 7. ASEA states that Plaintiff Riberio signed a similar document in February 2018. *Id.* at 6-7. Plaintiffs do not dispute that they signed these documents.

Following the release of the Attorney General's August 27, 2019 Opinion, Plaintiffs informed the State that they did not consent to continued union dues deductions and asked the State to stop deducting dues from Plaintiffs' paychecks. Compl. ¶ 25; Answer ¶ 25. The State honored their decisions and stopped deducting dues from their paychecks. *Id.*

Subsequently, the State, in compliance with the state court temporary restraining order, once again began deducting dues from Plaintiffs' paychecks. Compl. ¶ 26; Answer ¶ 26. The State deducted these dues despite the fact that Plaintiffs had "refused to provide affirmative consent to continued union dues deductions." Compl. ¶ 25; Answer ¶ 25. According to Plaintiff Riberio and ASEA, in January 2020, during his ten-day window for ending dues deduction provided by ASEA's dues deduction form, Riberio sent a letter to ASEA resigning his membership. Compl. ¶ 28; ASEA Mot. 9. ASEA executed his opt-out request and the State stopped withholding dues from his paycheck at the next period. Compl. ¶ 28; Answer ¶ 28. According to Creed and ASEA, the opt-out window for Plaintiff Creed pursuant to her dues deduction authorization form will not arise until June 30, 2020. Compl. ¶ 29; ASEA Mot. 9.

PROCEDURAL HISTORY

On March 16, 2020, Plaintiffs filed a complaint against ASEA and Kelly Tshibaka, in her official capacity as Commissioner of the Department of Administration. *See* Doc. 1. Plaintiffs alleged that Defendants violated Plaintiffs' First Amendment rights by deducting union dues from their paychecks without their consent. Plaintiffs seek a declaratory judgment that their First Amendment rights were violated, injunctive relief allowing Plaintiff Creed to resign her membership in ASEA and stop paying dues to ASEA, and a refund of Plaintiffs' dues paid to ASEA. Compl. at 10-12.

On April 22, 2020, ASEA filed a motion to dismiss Plaintiffs' complaint, arguing that Plaintiffs' complaint should be dismissed because (1) Plaintiffs lack standing to seek prospective relief; (2) Plaintiffs suffered no First Amendment violation because they agreed to pay union dues pursuant to a contract; (3) Plaintiffs' claims against ASEA fail for lack of state action; and (4) Plaintiffs' damages claims against ASEA are barred by the Union's "good faith" defense. On May 13, 2020, Plaintiffs responded to ASEA's motion to dismiss and also filed a motion for summary judgment, arguing that summary judgment was proper because the relevant facts were not in dispute and Plaintiffs were entitled to judgment as a matter of law.

STANDARD OF REVIEW

"Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 644 (9th Cir. 2020). "A genuine issue of fact is one that could reasonably be resolved in favor of either party." *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

ARGUMENT

I. *Janus* prohibits the State from deducting union dues unless it has "clear and compelling evidence" that the employee has waived his or her First Amendment rights.

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 requiring this "clear and compelling evidence," the Court in *Janus* relied on a long line of Supreme Court decisions articulating the standard for determining a valid waiver of constitutional rights. *See id.* (citing *Knox*, 567 U.S. at 312-13; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-82 (1999); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Under this precedent, a waiver of Constitutional rights "cannot be presumed." *Id.* (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. These same principles apply in the First Amendment context. *Janus*, 138 S. Ct. at 2486; *see also Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (evaluating whether waiver of First Amendment rights was "knowing, voluntary, and intelligent").

In light of these principles, the Supreme Court in *Janus* made clear that a state employee cannot waive his or her First Amendment rights unless three requirements are met. 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 v. Alabama*, 395 U.S. 238, 242 (1969) (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, 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 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."); *United States v. Farrar*, No. 14-cv-707, 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)). 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. *See Janus*, 138 S. Ct. at 2486.

II. Plaintiffs had a First Amendment right to stop paying union dues when they informed the State that they did not consent to dues deduction.

Here, Plaintiffs told the State that they did not consent to having union dues deducted from their paychecks and asked the State to stop their dues deduction. Compl. ¶ 25; Answer ¶ 25. Despite their lack of consent, however, the State (pursuant to the state court's temporary restraining order) continued deducting union dues from their paycheck. Compl. ¶¶ 26-27; Answer ¶¶ 26-27. Plaintiffs have shown that their First Amendment rights were violated.[4]

As explained, *supra* 12-15, under *Janus*, 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 state employee must "clearly and affirmatively consent before any money is taken from them." *Id.* Simply put, if employees do not consent to paying dues to a public-sector union, neither the State nor the union can force them to do so. *Id.*; *see* AG Opinion, 2019 WL 4134284 at *7-9. Here, once the State was aware that Plaintiffs had "refused to provide

[4] Although ASEA argues that Plaintiff Creed's claims for prospective relief will soon be moot, there is no dispute that Creed has standing to seek such relief until June 30, 2020. Pls. Mot. 11; ASEA Reply in Support of Motion to Dismiss 2 ("ASEA Reply").

affirmative consent to continued union dues deductions," Compl. ¶ 25, Answer ¶ 25, the State was required to stop deducting union dues from their paychecks, *Janus*, 138 S. Ct. at 2486. Plaintiffs' First Amendment rights therefore were violated when dues were deducted from their paychecks without their consent.

III. Plaintiffs did not irrevocably waive their First Amendment rights.

ASEA does not dispute that Plaintiffs informed the State that they did not consent to having union dues deducted from their paychecks. Nevertheless, ASEA argues that Plaintiffs were required to continue paying dues to ASEA because (1) Plaintiffs waived their First Amendment rights through ASEA's dues deduction form; and (2) the dues deduction form is a contract that requires Plaintiffs to continue subsidizing the union despite their lack of consent. Neither argument has merit.[5]

A. Plaintiffs did not waive their First Amendment rights through ASEA's dues deduction form.

According to ASEA, Plaintiffs waived their First Amendment rights because they signed a dues deduction form that stated: "I choose to be a union member"; "I . . . direct my

[5] In support of its arguments, ASEA relies heavily on the decisions of other district courts. As an initial matter, these cases do not uniformly "reject[] materially indistinguishable claims." ASEA Reply 1; *see, e.g., Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019) (Plaintiffs did not dispute the existence of an enforceable contract); *Anderson v. SEIU Local 503*, 400 F. Supp. 3d 1113, 1116-17 (D. Or. 2019) (same). Regardless, none of these decisions are binding on this Court and the Ninth Circuit has repeatedly cautioned against reflexively following other courts' decisions. *See Woods v. Carey*, 722 F.3d 1177, 1183 n.8 (9th Cir. 2013) ("[A]lthough a circuit split is not desirable, we are not required to follow the initial circuit to decide an issue if our own careful analysis of the legal question leads us to [a different result]."); *see, e.g., Leavitt v. Arave*, 383 F.3d 809, 825 (9th Cir. 2004) (disagreeing with six circuits to create a circuit split); *In re Penrod*, 611 F.3d 1158, 1160-61 (9th Cir. 2010) (disagreeing with eight circuits to create a circuit split).

Employer to deduct from my pay each pay period"; and "[m]y decision to pay my dues by way of payroll deduction . . . is voluntary and not a condition of my employment." ASEA Mot. 16; Metcalfe Decl. 1-2 (Doc. 24-1); Metcalfe Exs. C & D (Docs. 24-4, 24-5). This argument fails.

As explained, a waiver of First Amendment rights must be "freely given and shown by 'clear and compelling' evidence," and such a waiver "cannot be presumed." *Janus*, 138 S. Ct. at 2486. This means that the State must have evidence that the employee's waiver was knowing, voluntary, and reasonably contemporaneous. *Supra* 12-15; AG Opinion, 2019 WL 4134284 at *7-9. ASEA's union dues deduction form does not satisfy this "clear and compelling" standard.

First, the dues deduction form provides no evidence that Plaintiffs' waiver was "voluntary" and "free from coercion." Because unions "control 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, 2019 WL 4134284 at *7-9 (quoting *Comer*, 480 F.3d at 965). Second, ASEA's dues deduction form does not ensure that Plaintiffs' waiver was "knowing and intelligent," as the form nowhere states that the employee has a *First Amendment* right not to associate with the union. *Compare* Metcalfe Exs. C & D *with* Administrative Order No. 312, *supra*. Indeed, Plaintiffs claim that their dues were deducted from their paychecks under an authorization form that was signed *before Janus* was issued in June 2018, Compl. ¶¶ 42-43; Plaintiffs could not have knowingly waived rights that were not articulated until *Janus*, *see Curtis Pub. Co.*, 388 U.S. at 142-45 (finding that a magazine publisher did not knowingly waive a First Amendment defense because the Supreme Court did not recognize the defense until after the

trial); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 692-93 (6th Cir. 1981) (holding that a restaurant owner did not waive his First Amendment right to engage in commercial speech before 1972 because the Supreme Court did not recognize such rights until 1976) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Finally, ASEA's dues deduction form does not ensure that Plaintiffs' waiver was "reasonably contemporaneous," as the form purports to prohibit an employee from stopping his or her support of the union except in a narrow 10-day window during the year. *Supra* 10; *see also Smith v. N.J. Educ. Ass'n*, 425 F. Supp. 3d 366, 375 (D.N.J. 2019) (restricting union members "to one opt-out date per year, with a draconian requirement that employees can only do so by submitting written notice in a very specific 10-day window (which would be unique to each employee)" would "unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union").

ASEA nevertheless contends that its dues deduction form is sufficient by itself to show a waiver of First Amendment rights because *Janus*'s "clear and compelling" standard applies only to *non*members, not members like Plaintiffs. ASEA Mot. 21-24. But *Janus* is not so limited. *Supra* 12-15. The Supreme Court in *Janus* "laid down broad principles" dictating States' obligations when deducting dues and fees from *all* employees. *Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir. 1989). 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.[6]

[6] ASEA puzzlingly argues that the Supreme Court did not intend to incorporate the waiver standard from cases like *Johnson*, *Knox*, *Curtis Publishing Co.*, and *College Savings Bank*. ASEA Reply 6 n.3. But the Supreme Court in *Janus* specifically relied on these cases when it articulated the standard for waiver. *See Janus*, 138 S. Ct. at 2486.

After all, 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."). 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: the First Amendment protects *all* state employees—members and nonmembers alike.[7]

B. Even if Plaintiffs waived their First Amendment rights, their waivers are not irrevocable.

ASEA next argues that Plaintiffs are contractually required to continue paying dues to ASEA because Plaintiffs signed the union's dues deduction form. ASEA Mot. 15-19. According to ASEA, its dues deduction form requires members to pay union dues for an entire year from the date of their signature, regardless of whether the state employee subsequently revokes his or her consent. If the state employee does not revoke his or her consent during a specific ten-day window ("not less than ten (10) days and not more than twenty (20) days before the end of any yearly period"), the payment obligation automatically renews and the

[7] Even if *Janus* were limited to nonmembers (which it is not), its "clear and compelling" standard would still apply here because ASEA concedes that it deducted fees from Plaintiffs even after they resigned their membership in the union. *See* ASEA Mot. 8-9, 21.

employee must pay dues to ASEA for another year. *See* Metcalfe Decl. Exs. C & D. Because Plaintiffs did not revoke their authorization during their yearly ten-day window, ASEA argues, they were required to pay dues to ASEA for an entire year, regardless of their decisions to subsequently revoke their consent. ASEA Mot. 15-19.

ASEA's argument fails for multiple reasons. First, the dues deduction form is not a "contract" under Alaska law. There is no other party to the dues deduction form, and it 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. *See Dick Fischer Dev. No. 2, Inc. v. Dep't of Admin.*, 838 P.2d 263, 268 (Alaska 1992).[8]

Second, even if the dues deduction form is a contract, it still does not show that Plaintiffs validly waived their First Amendment rights. "'[T]he question of a waiver of a federally guaranteed constitutional right is . . . a federal question controlled by federal law'" and not by state "contract principles." *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988) (quoting *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)). As explained, the dues deduction form does not satisfy Constitutional requirements to show waiver. *Supra* 17-18.

Finally, even if Plaintiffs did waive their First Amendment rights through the dues

[8] *N.L.R.B. v. U.S. Postal Service*, 827 F.2d 548 (9th Cir. 1987), is not to the contrary. The Ninth Circuit did not hold that any dues deduction form (even those without consideration) will create a binding contract between a union and an employee. *See id.* at 553.

deduction form, the Supreme Court has never held that an employee cannot revoke his waiver of these rights when he or she no longer wishes to associate with or subsidize the speech of a union. *See Janus*, 138 S. Ct. at 2486; *see also McCahon v. Pa. 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*, No. 98-cv-503, 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 required him to continue paying union dues 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." *Debont*, 1998 WL 415844, 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.

ASEA contends that private parties engage in similar contracts and the union needs to enforce these terms to ensure a stable revenue stream. ASEA Mot. 17-18. To be sure, private parties are generally 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, 668-69 (1991). The Court did *not* hold that state contract law overrides the First Amendment. *Id.*; *see also Leonard*, 12 F.3d at 889. ASEA thus could not force Plaintiffs to continue subsidizing the union's speech if Plaintiffs provided no such consent, notwithstanding the language on the dues-deduction form.[9]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be granted.

[9] There is no support for ASEA's argument that allowing Plaintiffs to stop subsidizing ASEA would violate the union's First Amendment rights. *See* ASEA Mot. 24. Unlike *Boy Scouts of America v. Dale*, where a State was attempting to force a group "to accept members it does not desire," 530 U.S. 640, 648 (2000) (citation omitted), Plaintiffs here are seeking *not* to associate with ASEA.

DATED: June 3, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 3, 2020, a true and correct copy of the foregoing document was served by electronic means through the ECF system as indicated on the Notice of Electronic Filing.

/s/ Kevin Higgins

EXHIBIT D

UNITED STATES DISTRICT COURT

for the

District of Alaska

LINDA CREED, et al.
Plaintiff
v.

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

Civil Action No. 3:20-cv-00065-HRH

JUDGMENT IN A CIVIL ACTION

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

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

IT IS ORDERED AND ADJUDGED:

THAT the Plaintiffs recover nothing, the action be dismissed on the merits.

APPROVED:

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

Date: August 13, 2020

Brian D. Karth
Brian D. Karth
Clerk of Court

Note: Award of prejudgment interest, costs and attorney's fees are governed by D.Ak. LR 54.1, 54.2, and 58.1.

Exhibit D
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