IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Governor Michael J. Dunleavy, Attorney General Treg R. Taylor, Commissioner of the Department of Administration Paula Vrana, and Department of Administration, Appellants, v. Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO, Appellee.	)	Supreme Court No.: **S-18172**
Trial Court Case No.: **3AN-19-09971CI**		

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE GREGORY A. MILLER, JUDGE

APPELLANTS' OPENING BRIEF

Filed in the Supreme Court
of the State of Alaska
on January ___, 2022

MEREDITH MONTGOMERY, CLERK
Appellate Courts

By: _____
Deputy Clerk

TREG R. TAYLOR
ATTORNEY GENERAL

/s/ Jessica M. Alloway
Jessica M. Alloway (1205045)
Solicitor General, Civil Appeals
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Alaska Statutes

Federal Statutes

Court Rules

Other Authorities

AUTHORITIES PRINCIPALLY RELIED UPON

Constitutional provisions:

U.S. Const., art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Alaska Statutes:

§ 23.40.110. Unfair labor practices

(a) A public employer or an agent of a public employer may not

> (1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080;
>
> (2) dominate or interfere with the formation, existence, or administration of an organization;
>
> (3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization;
>
> (4) discharge or discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given testimony under AS 23.40.070 - 23.40.260;
>
> (5) refuse to bargain collectively in good faith with an organization that is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

* * *

§ 23.40.210. Agreement; cost-of-living differential

(a) Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a pay plan designed to provide for a cost-of-living differential between the salaries paid employees residing in the state and employees residing outside the state. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the state shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the state reflects the difference between the cost of living in Alaska and living in Seattle, Washington. The agreement shall include a grievance procedure which shall have binding

arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

* * *

§ 23.40.220. Labor or employee organization dues and employees benefits, deduction and authorization

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.

§ 44.62.640. Definitions for AS 44.62.010–44.62.630

(a) In AS 44.62.010–44.62.319, unless the context otherwise requires,

* * *

(3) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation on a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

* * *

JURISDICTIONAL STATEMENT

The superior court entered final judgment on August 4, 2021 disposing of all claims by all parties in this case. [Exc. 781-85] This Court has jurisdiction over this appeal pursuant to AS 22.05.010(b) and Alaska Rule of Appellate Procedure 202(a).

PARTIES

The appellants are Governor Michael J. Dunleavy, Attorney General Treg R. Taylor, and Commissioner Paula Vrana,[1] in their official capacities, and the State of Alaska Department of Administration. The appellee is the Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO (ASEA).

ISSUES PRESENTED

1. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court held that the First Amendment bars states and public sector unions from compelling public employees to subsidize union speech through agency fees.[2] The Court directed that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."[3] That consent waives First Amendment rights and thus, to be valid, "must be freely

---

[1] Paula Vrana is substituted for her predecessor, Amanda Holland. Alaska Appellate R. 517(b).

[2] 138 S. Ct. 2448 (2018).

[3] *Id.* at 2486.

given and shown by 'clear and compelling' evidence."[4] Did the superior court err in concluding that no First Amendment waiver is needed for the State to seize dues over employees' express objections merely because employees had signed dues-authorization forms—with no disclosure of their rights or the union's intended speech?

2. In 2019, the Attorney General issued an opinion concluding that the State's payroll deduction process did not satisfy *Janus*. The Governor then issued an administrative order directing the Department of Administration to adopt the Attorney General's recommendations and work with the union to implement additional constitutional protections. Even if the Court disagrees with the State's interpretation of *Janus*, did the superior court err in concluding that the State's actions breached the collective bargaining agreement, breached the implied covenant of good faith and fair dealing, and violated the separation of powers, the Public Employment Relations Act, and the Administrative Procedures Act?

INTRODUCTION

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court held that state employees have a First Amendment right not to be compelled to subsidize union speech.[5] Public sector unions engage in numerous forms of speech, including collective bargaining, political advocacy, and lobbying that have "powerful political and civic consequences."[6] Forcing state employees to subsidize

---

4 *Id.* at 2486 (citation omitted).

5 138 S. Ct. 2448 (2018).

6 *Id.* at 2464 (citation omitted).

unions' speech with which they disagree violates the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."[7] This does not mean that states can never deduct money from state employees who want to support a union. To be sure, First Amendment rights, like most constitutional rights, can be waived. "Such a waiver cannot be presumed" and it requires "'clear and compelling' evidence."[8]

This case is about the State's continued practice, contrary to *Janus*, of taking union dues from employees for the duration of dues-authorization periods even when the employees have resigned from the union and informed the State that they do not want to subsidize union speech. Under this practice—ordered by the superior court to remain in place—the State must presume that public employees support the political speech of ASEA based only on authorizations that fail to inform the employees of ASEA's ideological positions. [*See* Exc. 131, 427, 442-45] Then, even when employees tell the State that they want to leave the union, the State must continue deducting dues from their paychecks for the remainder of the authorization period. [Exc. 133] That is because the union grants employees only a ten-day period each year to withdraw their dues authorization; if the employee does not act within that escape period, the authorization automatically renews for another year. [*Id.*] Under the current practice, there is no

---

[7] *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

[8] *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

evidence that state employees are ever informed of—let alone waive—their First Amendment rights.

The superior court declined to address whether state employees had validly waived their First Amendment rights. [*See* Exc. 20-42; 777-80] Instead, it concluded incorrectly that the Supreme Court's First Amendment discussion in *Janus* constrained only a union's practice of collecting agency fees from nonmembers. [Exc. 29-31] The superior court granted declaratory judgment in favor of ASEA, sanctioning the current practice of seizing dues and permanently enjoining the State from taking steps to comply with *Janus.* [Exc. 778-79] The court further held that the State's pre-injunction actions breached the collective bargaining agreement and the implied covenant of good faith and fair dealing, and violated the separation of powers, the Public Employment Relations Act, and the Administrative Procedures Act. [Exc. 778]

Janus was a landmark decision protecting the First Amendment rights of public union members and nonmembers alike. It requires the State to ensure that it does not continue to take dues from employees' wages over their objection and without evidence that the employees waived their First Amendment rights. The superior court misread *Janus* and incorrectly granted summary judgment in favor of ASEA on all claims.

STATEMENT OF THE CASE

I. The Supreme Court recognized state employees have a First Amendment right to decline to support public unions.

The State has approximately 15,000 employees and has entered collective bargaining agreements with Alaska's eleven public sector unions. [Exc. 124-25] ASEA is

the exclusive bargaining representative of a unit of approximately 8,000 employees (the "General Government Unit" or "GGU"). [Exc. 125] Since around 1989, the State has negotiated collective bargaining agreements with ASEA. [Exc. 127]

Along with collective bargaining, ASEA engages in many activities implicating the First Amendment. It lobbies for legislation and administrative actions on issues like wages, pensions, and employee benefits. [Exc. 126] And it speaks on issues of public concern, including the State's budget and administrative priorities, healthcare, education, race, gender, sexual orientation, and labor relations. [Exc. 126-27]

Prior to *Janus*, state law allowed unions to collect "agency fees" (or "service fees") from individuals who were not union members. [Exc. 127-28] The State's contract with ASEA required all GGU employees "as a condition of continued employment, either [to] become a member of the Union or become an agency fee payor." [Exc. 127, 292] If a GGU employee did not become a member or agree to pay agency fees within 30 days of being hired, the State was required to fire the employee. [Exc. 127, 293]

Janus was a landmark decision because the Court recognized and protected the First Amendment rights of all public employees vis-à-vis public sector unions. It overruled *Abood v. Detroit Board of Education*,[9] which had allowed states to compel public employees to subsidize union speech on matters of substantial public concern.[10] In

---

9 431 U.S. 209 (1977).

10 *Janus*, 138 S. Ct. 2464-65.

Janus, the Court recognized that *all* employees—not just nonmembers—had a First Amendment right not be forced to subsidize union speech.[11]

Going forward, the Court warned, public employees must "affirmatively consent[] to pay."[12] The Court stressed that employees must waive their First Amendment rights, and "such a waiver cannot be presumed."[13] "[T]o be effective, the waiver must be freely given and shown by 'clear and compelling' evidence."[14] Accordingly, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met."[15]

II. The State responded to *Janus*, but did not do enough to protect First Amendment rights.

After *Janus*, the State immediately stopped deducting agency fees from nonmembers' paychecks. [Exc. 128] The State's actions did not go through notice and comment under the Administrative Procedure Act. [*Id.*] A few months later, the then-Attorney General prepared an internal memorandum to State officials. [*Id.*; *see also* Exc. 300-03] The memorandum recognized that *Janus* had invalidated the statute allowing unions to collect agency fees, but concluded, without substantive analysis, that the State must continue to honor existing dues authorizations. [Exc. 301-02]

---

11 *Id.*

12 *Id.* at 2486.

13 *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Knox v. Serv. Emps.' Int'l Union, Local 1000*, 567 U.S. 298, 312-13 (2012)).

14 *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967)).

15 *Id.*

III. The State's current payroll practices and its agreement with ASEA do not ensure employees are informed of and waive their First Amendment rights.

In December 2018, ASEA and the State entered a new collective bargaining agreement ("CBA"), effective from July 1, 2019, through June 20, 2022. [Exc. 129] Several provisions of the CBA are relevant here. First, the CBA provides that when the State receives an authorization signed and dated by an employee, the State will deduct union dues from the employee's wages each pay period and transmit that amount to the union. [Exc. 129; 313] Second, the CBA provides that employees may authorize payroll deductions in writing on a form provided by the union. [Exc. 313] The only substantive requirement of the form is that it include the amount of the voluntary contribution and the employee's identification number. [*Id.*] Third, by entering into the CBA, the State agreed not to "interfere" with ASEA by restraining membership or discriminating against members. [Exc. 312]

The State's general practice—ordered to stay in place by the superior court—is to deduct union dues after it receives employees' dues authorization cards from the union. [Exc. 133] Over the years, ASEA has used several different dues authorization forms. [Exc. 131] ASEA prepares the forms without any involvement from the State. [Exc. 133] Importantly, the forms do not explain the employees' First Amendment rights, nor do they provide any information about the positions the union will take during collective bargaining or its intended political or ideological speech. [Exc. 426-27, 441–47]

The union also drafts authorization forms to limit employees' ability to exercise their First Amendment right to stop subsidizing union speech. First, the authorization

requires employees to commit to pay dues for one year. [Exc. 133] Second, the authorization purports to prohibit employees from cancelling their recurring dues deductions except during short escape periods—in this case ten days each year. [Exc. 131-32, 427, 442, 446-47] This ten-day window is determined by the date each employee signed an authorization form and thus is not the same for every employee. [Exc. 136] And third, the authorizations have no expiration date. [Exc. 133] Since 2017, the authorizations have included evergreen clauses allowing them to automatically renew and lock in employees for even longer periods. [*Id.*] As a result of these provisions, the State has continuously deducted dues from some employees who signed their dues authorization forms many years ago, including before *Janus*. [Exc. 131–32]

ASEA offers employees little to no guidance on its website about how to resign membership or end dues deduction. [Exc. 136] ASEA members sometimes contact the State to request that the State stop deducting union dues.[16] [*Id.*] Following the terms of

[16] Three employees who asked the State to stop deducting dues sued the State in two federal cases after the superior court issued the injunction in this case. *Woods v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 3:20-cv-0074 (D. Alaska); *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, 3:20-cv-0065 (D. Alaska). The district court dismissed one suit and granted ASEA summary judgment in the other. The Ninth Circuit summarily affirmed both, relying on its decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied* 141 S. Ct. 2795 (2021). *Woods v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 20-25954 (9th Cir. Aug. 11, 2021); *Creed v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 20-35743 (9th Cir. 2021). The employees petitioned for certiorari in October 2021, and the State filed a brief in support. ASEA opposed in January 2022, and the Court has not yet ruled on the petition. *See Woods v. Alaska State Emps. Ass'n / AFSCME Local 52*, No. 21-615.

the CBA, and despite employees' requests, the State nevertheless continues with the dues deduction and forwards the request to ASEA. [*Id.*]

ASEA has since changed some of its practices as a result of the disputes that followed the State's later understanding of *Janus*. Before, objecting employees could stop dues deduction only if they determined the dates of their annual ten-day escape period and made their request to ASEA precisely during that narrow window. [Exc. 135-36] But as of July 2020, even if an employee submits a resignation request outside of the ten-day window, ASEA will hold the request and then ask the State to stop deductions on the first day of the member's escape period. [Exc. 135] ASEA has not, however, changed its dues authorization forms to reflect its new policy. [Exc. 136, 442] Nor has it codified this change in its constitution or policies and procedures. [*See* Exc. 125, 154-240]

IV. The State attempted to comply with *Janus* through an Attorney General Opinion and an Administrative Order.

In August 2019, then-Attorney General Kevin Clarkson recognized that the State's current "payroll deduction process is constitutionally untenable under *Janus*." [Exc. 430] *Janus*'s application of the First Amendment reaches beyond agency fees and "prohibits public employers from forcing their employees to subsidize a union." [*Id.*]

To be constitutionally valid, the Attorney General concluded, consent to deduct union dues must be "free from coercion or improper inducement"; "knowing, intelligent . . . [and] done with sufficient awareness of the relevant circumstances and likely consequences"; and "reasonably contemporaneous." [Exc. 435-36] The Attorney General recommended an overhaul of the State's payroll process so that employees give consent

to the State, rather than just to the union, and that they be allowed to have regular opportunities to opt-in or opt-out of paying dues. [Exc. 439-40]

The State notified all state employees of the legal opinion via email. [Exc. 137, 449] The email attached the opinion and provided a list of frequently asked questions. [*Id.*] When the State takes action that affects all state employees, as it did here, it is not unusual for the Commissioner of Administration to send a statewide email. [Exc. 138; 464-83]

In the month after the Commissioner's email, 12 GGU employees asked the State to stop deducting dues from their paychecks. [Exc. 141] Nine of the employees were paying dues to ASEA. [*Id.*] Seven of the nine had signed dues authorization forms that prohibited them from stopping dues deduction except during the narrow escape period. [*Id.*] In compliance with the Attorney General Opinion and *Janus*, the State complied with the employees' requests and stopped deducting dues. [Exc. 142] It notified ASEA and ASEA objected to the State's actions. [Exc. 138, 142]

In late September 2019, the Governor implemented the Attorney General's recommendations via an administrative order. [Exc. 138, 485-88] The order required the Department of Administration to develop new payroll procedures, including an opt-in form that tells 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" and an opt-out form that allows employees to stop payroll deduction within thirty days. [Exc. 486] To "minimize the risk of undue pressure or coercion and to make the process simple and convenient for employees," the order required the Department to develop an online

system for employees to submit the authorization forms directly to the State. [*Id.*] Prior to implementing the new forms and processes, the State was to provide 30 days' notice to all affected unions and "offer to meet with each union to discuss any additions or modifications" the unions believe were needed to comply with *Janus* or Alaska law. [Exc. 487] The State was also instructed to "work and engage with" the unions to address any remaining issues described in the Attorney General Opinion, including "developing appropriate contract language for other procedures and forms and determining the frequency of 'opt-in' authorizations for state employees." [*Id.*]

Later that day, the Commissioner informed state employees of the administrative order via email, and the State posted additional information online. [Exc. 138-39]

V. The superior court enjoins the State from taking action to comply with *Janus*.

In September 2019, the parties filed the underlying action to resolve disputes over the State's payroll system and the requirements of *Janus*. In its amended complaint, the State sought, among other things, a declaratory judgment that (1) an employee's consent requires clear and compelling evidence that the consent is free from coercion or improper inducement, and knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences; (2) that the State's current payroll deduction process violates the First Amendment; and (3) that the First Amendment prohibits the State from deducting dues unless the State receives consent directly from the employee and the form provides language acknowledging that the employee is waiving his or her First Amendment rights. [Exc. 15-17]

ASEA answered, counterclaimed, and filed a third-party complaint against the Governor, Attorney General, Commissioner, and Department of Administration. [Exc. 43-62, 65-102] ASEA challenged the State's assertion that *Janus* required a change in the payroll process, but also alleged that the State's actions violated the Public Employees Relations Act, the Alaska Contract Clause, and the Administrative Procedures Act. [Exc. 89-100] ASEA sought a temporary restraining order and a preliminary injunction, asking the superior court to enjoin the State from making any changes to the State's dues deduction process pending resolution of this litigation. [*See* Exc. 20-42]

The superior court granted ASEA a temporary restraining order in October 2019 [*Id.*] and converted it into a preliminary injunction a month later. [Exc. 63-64] The court rejected the State's argument that *Janus* required more than the current dues authorization forms. [Exc. 33-34] It read *Janus* narrowly, finding that the decision applied only to nonmembers and agency fees. [*Id.*] It also distinguished the Supreme Court's decision in *Knox v. Service Employees International Union*,[17] stating that the Court only rejected opt-out arrangements for union dues when union members were being required to pay unexpected fees not used for "ordinary union expenses." [Exc. 35-36] Last, the superior court rejected the State's reliance on *Miranda v. Arizona* for the proposition that a consent to support speech may grow stale.[18] The court reasoned that *Miranda*, and the

---

17 567 U.S. 298 (2012).

18 384 U.S. 436 (1966).

post-*Miranda* cases cited by the State, were criminal cases and "not applicable or instructive in the context of union membership." [Exc. 36-37]

Regarding the modifications required by the opinion and the administrative order, the court agreed with ASEA that the State's new procedures "seem[ed] likely to discourage union membership" and it believed that the State had not shown that the existing dues authorization form's annual opt-out period was not sufficient. [Exc. 37] In doing so, the superior court equated political speech with an employee's decision to purchase employer-sponsored health insurance. [*Id.*]

In March 2020, ASEA amended its complaint to abandon its contract clause claim and add claims for breach of contract and violation of good faith and fair dealing. [Exc. 65–102] After the parties completed discovery, they filed stipulated facts and cross-motions for summary judgment. [Exc. 123-556] In February 2021, the superior court denied the State's motion and entered summary judgment in favor of ASEA on all claims. [Exc. 777-80] The court incorporated its analysis from its prior orders on the temporary restraining order and preliminary injunction, and relied on ASEA's reasoning to conclude that the State breached the CBA and the implied covenant of good faith and fair dealing, and violated the separation of powers doctrine, the Public Employees Relations Act, and the Administrative Procedures Act. [Exc. 778] In addition to awarding ASEA declaratory judgment and a permanent injunction, the court awarded ASEA damages in the stipulated amount of $186,020.64. [Exc. 779] The court subsequently awarded ASEA $210,000 in attorney's fees.

STANDARDS OF REVIEW

A matter of constitutional interpretation is a question of law to which this Court applies its independent judgment.[19] This Court "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[20]

ARGUMENT

I. The superior court improperly limited the First Amendment's protections and denied the State's requests for declaratory judgment.

Recognizing the important constitutional interests at stake and the dispute between the parties on what the First Amendment requires, the State sought a declaratory judgment to remove the uncertainty surrounding its dues deduction process. [Exc. 15-17] The State asked for five declarations: (1) that it cannot deduct dues unless it has "clear and compelling evidence" that an employee has freely consented to subsidize the union's speech; (2) that an employee's consent is not constitutionally valid unless the State has clear and compelling evidence that it is knowing, intelligent, done with awareness of the circumstances and likely consequences, and free from coercion or improper inducement; (3) that the dues collection mechanisms in the CBA with ASEA violate the First Amendment; (4) that the First Amendment requires that an employee's consent (a) be transmitted by the employee to the State, rather than the union, and (b) expressly acknowledge the employee is waiving First Amendment rights against compelled speech;

---

19 *Turney v. State*, 963 P.2d 533, 538 (Alaska 1997).

20 *BP Pipelines (Alaska) Inc. v. State, Dep't of Revenue*, 325 P.3d 478, 482 (Alaska 2014); *see also Tesoro Corp. v. State, Dep't of Revenue*, 312 P.3d 830, 837 (Alaska 2013) (stating that "[d]etermining the constitutionality of a given statute presents a question of law that [is] review[ed] de novo").

and (5) that the State must timely stop deducting dues when employees tell it they no longer wish to subsidize the union. [*Id.*]

In denying the State's requests for declaratory judgment, the superior court ignored the Supreme Court's clear instruction to public-sector unions and states: No employee can be forced to subsidize union speech—through "an agency fee [or] any other payment"—unless the employee has waived his or her First Amendment rights.[21] This Court should reverse the superior court's decision because it leaves state employees powerless to timely stop subsidizing speech with which they disagree.

A. The State cannot deduct union dues unless it has "clear and compelling evidence" that the employee has freely consented.

The First Amendment protects "'both the right to speak freely and the right to refrain from speaking at all.'"[22] The right to "eschew association for expressive purposes is likewise protected."[23] Forcing individuals to "mouth support for views they find objectionable violates [these] cardinal constitutional command[s]."[24]

"Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."[25] As Thomas Jefferson put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and

---

21 *Janus*, 138 S. Ct. at 2486.

22 *Id.* at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

23 *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association … plainly presupposes a freedom not to associate.")).

24 *Janus*, 138 S. Ct. at 2463.

25 *Id.* at 2464.

abhors is sinful and tyrannical."[26] The Supreme Court has repeatedly 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.'"[27]

Given these serious First Amendment concerns, any state action compelling subsidies to unions must receive strict scrutiny.[28] At a minimum, however, such state action must be subject to "'exacting' [First Amendment] scrutiny."[29]

Of course, this does not mean that states can never deduct union dues from employees who want to financially support a union. And employees can waive their First Amendment right to be free from compelled subsidization of union speech, binding themselves to financially support unions for fixed periods. But "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights."[30] That is because courts "'do not presume acquiescence in the loss of fundamental rights.'"[31] This is especially true when it comes to the waiver of First Amendment freedoms. Courts will

---

26 *Id.* (internal quotation omitted).

27 *Id*. (quoting *Knox*, 567 U.S. at 310-11 (internal quotations omitted)).

28 *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.,* 487 U.S. 781, 800 (1988).

29 *Janus*, 138 S. Ct. at 2465 (finding it unnecessary to decide whether strict scrutiny applies to compulsory subsidization of union speech because state action failed exacting scrutiny); *Knox*, 567 U.S. at 309-10, 321-22 (same); *Harris*, 573 U.S. at 647 (same).

30 *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999).

31 *Knox*, 567 U.S. at 312 (quoting *Coll. Sav. Bank*, 527 U.S. at 682).

not find a waiver of First Amendment rights "in circumstances which fall short of being clear and compelling" because the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'"[32]

In *Janus*, the Supreme Court recognized that these longstanding waiver rules apply in the context of compelled subsidies to public sector unions.[33] Going forward, the Court warned, public employers, like the State, may not deduct "an agency fee nor any other payment" unless "the employee affirmatively consents to pay."[34] The Court stressed that employees must waive their First Amendment rights, and "such a waiver cannot be presumed."[35] Rather, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence."[36] Thus, the Court explained, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met."[37]

Adhering to this direction, the Attorney General Opinion concluded that the State must not deduct union dues from state employees unless it has this "clear and compelling" evidence. [Exc. 431] ASEA, however, has claimed that the State can deduct union dues even without "clear and compelling" evidence that the employee has waived

---

32 *Curtis Publ'g Co.*, 388 U.S. at 145 (citation omitted).

33 *Janus*, 138 S. Ct. at 2486.

34 *Id.*

35 *Id.* (citing *Zerbst*, 304 U.S. at 464); *Knox*, 567 U.S. at 312-13).

36 *Id.* (quoting *Curtis Publ'g Co.*, 388 U.S. at 145).

37 *Id.*

his or her First Amendment rights. [Exc. 712-17]. According to ASEA, the Court in *Janus* narrowly limited its holding and corresponding constitutional protections to only "nonmembers" who were forced to pay "agency fees." [Exc. 714] Union dues, ASEA believes, are different. [*Id.*] ASEA contends that the State must deduct these payments as long as it has some evidence that the employee has provided "affirmative consent" at some point in time. [Exc. 715] This argument fails.

While *Janus* involved a non-union-member employee, there is no reason to constrain the case to those facts. The First Amendment protects *all* state employees from compelled subsidization of speech. The Court in *Janus* placed prohibitions on public employers generally, and they apply to members and nonmembers alike. As it often does, the Supreme Court "laid down broad principles" dictating states' obligations when deducting dues and fees from *all* employees.[38] The Court recognized that state employees cannot be compelled to subsidize the speech of a union with which they disagree.[39] And although employees can waive this First Amendment right, "such a waiver cannot be presumed"—it must be shown by "'clear and compelling' evidence."[40]

The Court's reasoning in *Janus* thus has far broader implications—it acknowledges that all non-consenting employees are deserving of First Amendment protection. But ASEA's argument would "strip content from principle by confining the

---

38 *See Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir. 1989).

39 *Janus*, 138 S. Ct. at 2486.

40 *Id.* (quoting *Curtis Publ'g Co.*, 388 U.S. at 145).

Supreme Court's holdings to the precise facts before [the Court]."[41] A state simply cannot withhold funds from a non-consenting employee's wages and transfer that money to a union because doing so inherently forces that employee to speak on matters when the employee may wish to remain silent—or to vociferously object. But under ASEA's reasoning, states can deduct money from employees' paychecks—and thus subsidize a private actor's speech with whom the employees may disagree—without the employees ever knowingly and voluntarily waiving their constitutional rights. In the union's view, then, some employees may avail themselves of First Amendment protections and decline to subsidize union speech, while others may not. That directly contradicts *Janus*.[42]

But even if *Janus* were limited to "nonmembers" (it is not), that does not resolve the issue. The First Amendment controls. The First Amendment forbids compelling individuals to subsidize private speech with which they disagree.[43] Although constitutional rights can be waived, courts demand "clear and compelling" evidence to

---

41 *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994) (internal quotation marks omitted).

42 In a footnote, *Janus* reads, "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." 138 S. Ct. at 2485 n.27. Contrary to ASEA's and the superior court's interpretation, [Exc. 34] this does not mean *every* state labor law and contract in the country complies with the First Amendment. It was simply a response to the dissent, which argued that *stare decisis* counseled against overturning *Abood* because doing so would "'require an extensive legislative response.'" *Id*. (quoting *id.* at 2499 (Kagan, J., dissenting)). The *Janus* majority explained that states would now "follow the model of the federal government and 28 other States" that have laws prohibiting agency fees. *Id.*; *see id*. at 2466.

43 *Knox*, 567 U.S. at 310-11; *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

protect individuals from unwittingly forfeiting fundamental freedoms.[44] This is especially true of First Amendment rights, "the 'matrix, the indispensable condition, of nearly every other form of freedom.'"[45] *Janus* simply applied these fundamental principles.

In addition, there is no practical way for the State to limit *Janus* to nonmembers. When employees resign their membership, ASEA requires them to keep paying dues until they reach narrow escape periods. The State does not have access to ASEA's membership rolls, and the State is not always informed when individuals resign. [Exc. 134-35] And more, ASEA's argument would require the State to disregard *Janus*'s waiver standard even when the State *knew* that state employees *were no longer members* of the union.

ASEA has also argued that *Janus*'s protections do not apply to current or former members of ASEA because they already "affirmatively consent[ed]" to dues deduction by signing the union's dues authorization form. [Exc. 718-21] But this reasoning is circular. In *Janus*, the Court did not hold that agency fees could be deducted as long as there is an indication that the employee agreed to it at some earlier point in time. To the contrary, the Court held that employees must "waiv[e] their First Amendment rights," such a waiver "cannot be presumed," and the waiver must be "shown by 'clear and compelling' evidence."[46] "Affirmative consent" requires a First Amendment waiver.[47]

---

44 *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972).

45 *Curtis Publ'g Co.*, 388 U.S. at 145.

46 *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g Co.*, 388 U.S. at 145).

47 *Id.*

ASEA noted below that various courts and attorneys general have interpreted *Janus*'s "clear and compelling" standard as applying only to employees who never joined a union.[48] [*See* Exc. 31 n.22] None of these decisions are binding. And this Court has repeatedly cautioned against reflexively following other courts' decisions.[49]

In any event, Alaska is *not* the lone voice on this issue. After the Attorney General issued his opinion, the Texas Attorney General issued a legal opinion reaching similar conclusions.[50] According to the Texas Attorney General, after *Janus*, "a governmental entity may not deduct funds from an employee's wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees."[51] He recommended that the State create a system by which "employee[s], and not an employee organization, directly transmit to an employer authorization of the withholding" to ensure the "employee['s] consent . . . is collected in a

---

48 ASEA may argue, as it did in the superior court, that the State's First Amendment argument is collaterally estopped by the federal district court's decision in *Creed v. ASEA*, No. 3:20-cv-65-HRH, 2020 WL 4004794 (D. Alaska July 15, 2020). [Exc. 667-68] 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 (Alaska 1995). Because the reach of the First Amendment is a "pure question of law," *Creed* has no collateral estoppel effect here. *Id.* The superior court did not discuss this issue in its summary judgment order, [Exc. 777-80] so the State does not address it further. However, the State reserves the right to expand on the issue in its reply if ASEA raises collateral estoppel in its appellee brief.

49 *See Wassillie v. State*, 411 P.3d 595, 613 (Alaska 2018) ("[W]e do not follow other courts blindly, but rather because we find their opinions persuasive 'in light of precedent, reason, and policy.'" (citation omitted)); *Young v. State*, 374 P.3d 395, 404 (Alaska 2016) ("We apply our independent judgment to any questions of law . . . .").

50 *See* Texas Op. Att'y Gen. No. KP-0310, 2020 WL 7237859 (May 31, 2020).

51 *Id.* at *2.

way that ensures voluntariness."[52] The Texas Attorney General also recommended that the employer notify employees of the "nature and scope" of their First Amendment rights to ensure each employee's waiver was "knowing and voluntary."[53]

The following month, the Indiana Attorney General released a similar opinion.[54] He concluded that to deduct union dues after *Janus*, Indiana agencies "must provide adequate notice of their employees' First Amendment rights against compelled speech in line with the requirements of *Janus*."[55] The notice "must advise employees of their First Amendment rights against compelled speech and must show, by clear and compelling evidence, that an employee has voluntarily, knowingly, and intelligently waived his or her First Amendment rights and consented to a deduction from his or her wages."[56] "[T]o be constitutionally valid, a waiver, or opt-in procedure, must be obtained from an employee annually."[57]

At bottom, freedoms of speech and association are critical to our democratic form of government, the search for truth, and the "individual freedom of mind."[58] Individuals should not be deprived of these rights unless there is clear and compelling evidence that

---

52 *Id.*

53 *Id.*

54 *See* Ind. Op. Att'y Gen. No. 2020-5, 2020 WL 4209604 (June 17, 2020).

55 *Id.* at *1.

56 *Id.*

57 *Id.*

58 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34, 637 (1943); *see also Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982).

they have waived them.[59] ASEA's position disregards these principles. Because a declaratory judgment on this issue would "clarify and settle legal relations" between ASEA and the State,[60] the Court should declare that the State cannot deduct union dues from an employee's paycheck unless the State has "clear and compelling evidence" that the employee has freely given his or her consent to subsidize the union's speech.

B. Consent to subsidize union speech is not constitutionally valid unless it is knowing, intelligent, done with sufficient awareness, and free from coercion or improper inducement.

The "clear and compelling" waiver standard in *Janus* was not a new invention. The Supreme Court has long cautioned that courts must "'indulge every reasonable presumption against waiver'" because "we 'do not presume acquiescence in the loss of fundamental rights.'"[61] In *Janus*, the Court explicitly relied on a long list of Supreme Court decisions to define the contours of the "clear and compelling" standard.[62] This precedent confirms that a state employee cannot waive his or her First Amendment rights unless at least three requirements are met.

First, "a waiver of constitutional rights in any context must, at the very least, be clear."[63] Waiver cannot be presumed.[64] And waiver must overcome "every reasonable

---

59 *Curtis Publ'g Co.*, 388 U.S. at 145.

60 *Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005).

61 *Zerbst*, 304 U.S. at 464 (citation omitted).

62 *See Janus*, 138 S. Ct. at 2486 (listing cases).

63 *Fuentes*, 407 U.S. at 94-96. "Courts do not presume acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 312 (citation omitted); *see Janus*, 138 S. Ct. at 2486.

64 *Knox*, 567 U.S. at 312 (citation omitted); *see Janus*, 138 S. Ct. at 2486.

presumption" against it.[65] This applies in civil cases just as it does in criminal cases. "In the civil area, the Court has said that '(w)e do not presume acquiescence in the loss of fundamental rights.'"[66] "Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'"[67] This includes any purported waiver of rights under the First Amendment.[68]

This standard is no different when an individual's constitutional rights are purportedly waived through a contract. Courts will "find waiver via a contractual agreement only when the waiver is 'clear.'"[69] A waiver is not "clear" when it is contained in an "adhesion contract" and did not result from "'a reciprocal negotiation between forces with strengths on both sides.'"[70]

---

65 *Zerbst*, 304 U.S. at 464 (internal quotation marks omitted).

66 *Fuentes*, 407 U.S. at 94 n.31 (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937)).

67 *Id.* (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)); *see Brandner v. Providence Health & Servs.-Wash.*, 394 P.3d 581, 588 (Alaska 2017) ("[E]ven in civil cases[,] 'courts must indulge every reasonable presumption against' [the waiver of constitutional rights].") (quoting *Lynden Transp., Inc. v. State*, 532 P.2d 700, 717 (Alaska 1975)).

68 *Janus*, 138 S. Ct. at 2486; *Curtis Publ'g Co.*, 388 U.S. at 145; *see also Overbey v. Mayor of Balt.*, 930 F.3d 215, 223 (4th Cir. 2019) (a waiver of First Amendment rights in a settlement agreement is enforceable only if it "was made knowingly and voluntarily" and courts will not "presume that the waiver" is enforceable).

69 *Anderson v. Alaska Hous. Fin. Corp.,* 462 P.3d 19, 29 (Alaska 2020) (quoting *Brandner*, 394 P.3d at 588).

70 *Id.* (citation omitted); *see Fuentes*, 407 U.S. at 95 (no waiver of constitutional rights where "[t]here was no bargaining over contractual terms between the parties," the parties were not "equal in bargaining power," and the purported waiver was on a "printed part of a form sales contract and a necessary condition of the sale").

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."[71] 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.'"[72] In the context of a payroll deduction for union dues, a waiver is "knowing and intelligent" only if the employee is aware of the nature of his or her right—namely, the First Amendment right not to subsidize and thereby affiliate with the union's speech.[73]

Third, a waiver of First Amendment rights must be "voluntary."[74] A waiver of constitutional rights is voluntary if "it was the product of a free and deliberate choice rather than coercion or improper inducement."[75] In the context of payroll deductions for union dues, an employee's waiver is "voluntary" only if the employee is free from coercion or improper inducement when deciding whether to authorize the deduction.[76]

---

71 *Brady v. United States*, 397 U.S. 742, 748 (1970); *see Anderson,* 462 P.3d at 29 ("A waiver of constitutional rights must be knowing." (internal quotation marks omitted)).

72 *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

73 *Id.*

74 *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (waiver of federal rights must be "intelligent and voluntary"); *Janus*, 138 S. Ct. at 2486 (holding that "the waiver must be freely given"); *Anderson,* 462 P.3d at 29 ("A waiver of constitutional rights must be … voluntary." (internal quotation marks omitted)).

75 *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

76 *See id.*

Ignoring these established principles, ASEA has claimed that the State may deduct dues from employees even without any evidence that these waiver requirements have been met. [Exc. 717-21] All the State needs, ASEA believes, is some evidence that the employee has provided "affirmative consent." [*Id.*] As explained above, this ignores both the explicit language of *Janus* and the First Amendment principles underlying it.

Because a declaratory judgment on this issue would "clarify and settle legal relations" between ASEA and the State,[77] the Court should reverse the superior court's decision and grant the State's request for declaratory judgment.

C. The mechanisms for collecting union dues from state employees in the State's CBA with ASEA violate the First Amendment.

Under the Supremacy Clause, the U.S. Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[78] State courts thus "must not give effect to state laws that conflict with federal laws."[79] Under the Supremacy Clause, then, state courts cannot compel the performance of a contract that would violate federal law.[80]

---

77 *Lowell*, 117 P.3d at 755.

78 U.S. Const., art. VI, cl. 2.

79 *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 324 (2015).

80 *Id.*; *see, e.g.*, *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176-77 (1942) ("A state by applying its own law of specific performance may not compel the performance of a contract contemplating violation of the federal land laws," and "anyone sued upon a contract may set up as a defense that it is in violation of [federal law]."); *Molasky v. Principal Mut. Life Ins. Co.*, 149 F.3d 881, 884 (8th Cir. 1998) (concluding that "state law claim for breach of contract is preempted by ERISA"); *Hemphill v. Liberty Mut. Ins. Co.*, 2013 WL 12123984, at *2 (D.N.M. Mar. 28, 2013) ("This federal court, even sitting in diversity, cannot force Defendant to recompense Plaintiff for medical

Moreover, "'authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.'"[81] "'In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties.'"[82] Where a contract would violate the Constitution, the contract cannot be enforced.[83]

A contract that requires a party to violate federal law is also unenforceable under state law.[84] Alaska courts "leave parties to an illegal bargain where they find them and will grant no remedy to either party."[85] Courts have "no power, either in law or in equity, to enforce an agreement which directly contravenes a legislative enactment."[86]

The State seeks a declaratory judgment that the mechanisms for collecting union dues from state employees in the CBA with ASEA are unenforceable because they

---

expenses [for medical marijuana] that are contrary to federal law and federal policy, even if the contract generally provides for the payment of future medical expenses.").

81 *Kaiser Steel Corp v. Mullins*, 455 U.S. 72, 77 (1982) (quoting *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899)).

82 *Id.* at 77-78 (quoting *Cont'l Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909)).

83 *Id.* at 77-79 (finding promises in a collective bargaining agreement that violated federal law to be unenforceable).

84 *Pavone v. Pavone*, 860 P.2d 1228, 1231 (Alaska 1993).

85 *Id.*

86 *Id.*; *see, e.g.*, *Hemmen v. State, Dep't of Pub. Safety*, 710 P.2d 1001, 1003 (Alaska 1985) (provision of contract involving arbitration of grievances that violated state law was unenforceable); *Pavone*, 860 P.2d at 1231 (oral contract involving fishing permit was unenforceable where it directly contravened a state law).

violate the First Amendment. Section 3.04 of the CBA allows employees to "authorize payroll deductions in writing on the form provided by the Union." [Exc. 313] ASEA's forms, in turn, effectively compel public employees into subsidizing union speech and prohibit those employees from stopping their dues deduction unless they give 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." [Exc. 131, 427, 442, 446-47] Section 3.04 therefore violates the First Amendment by forcing the State to blindly deduct union dues regardless of how the union's form is designed or procured. ASEA's current form requires the State to deduct money from non-consenting employees and does not properly inform employees of their First Amendment rights. [*See* Exc. 131, 133, 442, 444, 446-47] Indeed, there are GGU employees whose dues are being deducted under forms that were signed well before *Janus*. [Exc. 131-32] These employees, in particular, could not have knowingly waived rights that were not articulated until *Janus*.[87]

As the Attorney General Opinion discussed, the First Amendment prohibits the State from following these types of provisions in collective bargaining agreements. [Exc. 439-40] The administrative order thus instructs that the State will no longer follow

---

[87] *See Curtis Publ'g Co.*, 388 U.S. at 142-45 (finding that a magazine publisher did not knowingly waive a First Amendment defense because the publisher could not have "waived a 'known right' before it was aware of the [Supreme Court] decision" recognizing the defense); *Sambo's Rests., 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)).

any collective bargaining agreement provisions imposing such invalid requirements. [Exc. 486] ASEA, however, has claimed that the State must continue these practices because ASEA's dues authorization forms are "contracts" that the State is obligated to enforce. [*See, e.g.*, Exc. 716] That is wrong.

Even assuming the forms were contracts, the State is not bound to indiscriminately enforce their terms. On the contrary, the State cannot deduct union dues without "clear and compelling" evidence that the state employee has waived his or her First Amendment rights. And, "'the question of a waiver of a federally guaranteed constitutional right is … a federal question controlled by federal law,'" not by state "contract principles."[88]

Moreover, the forms are clearly a contract of adhesion. ASEA's authorization forms are standardized forms that employees must sign in order to begin dues deduction. [Exc. 131-32] Such adhesion contracts are insufficient to waive First Amendment rights.[89] As this Court recently recognized, documents like ASEA's dues authorization forms are not enough to show a waiver of constitutional rights.[90] "[N]o provision" in ASEA's dues deduction forms "expressly waives" the employee's First Amendment rights.[91]

---

88 *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)).

89 *See Anderson*, 462 P.3d at 29; *see also Fuentes*, 407 U.S. at 95 (no waiver of constitutional rights where "[t]here was no bargaining over contractual terms between the parties," the parties were not "equal in bargaining power," and the purported waiver was on a "printed part of a form sales contract and a necessary condition of the sale").

90 *Anderson*, 462 P.3d at 29.

91 *Id.*

Even if the dues deduction forms do constitute a valid "waiver," the waivers are still unenforceable given the profound interest at stake. That is because ASEA's asserted interests in enforcing employees' waivers are "outweighed by strong policy interests that are rooted in the First Amendment and counsel against the waiver's enforcement."[92] As *Janus* recognized, compelling individuals to subsidize public unions' speech forces "free and independent individuals to endorse ideas they find objectionable," which is "always demeaning."[93] Again, because the First Amendment safeguards the "'matrix, the indispensable condition, of nearly every other form of freedom,'" courts will not uphold waivers of First Amendment rights without strong justifications for doing so.[94]

ASEA's purported interests cannot override these important constitutional rights. There is no evidence that ASEA will be unable to fund itself or operate effectively if employees are required to explicitly waive their First Amendment rights and deliver dues authorization forms directly to the State. [*See generally* Exc. 123-45] Nor is there a sufficient union interest in forcing non-consenting employees to continue paying dues. At most, ASEA relies on the one-year dues commitment "to make long-term financial investments" and to "budget its resources according to its expected income for the

---

92 *Overbey*, 930 F.3d at 223.

93 *Janus*, 138 S. Ct. at 2464.

94 *Curtis Publ'g Co.*, 388 U.S. at 145 (citation omitted); *Janus*, 138 S. Ct. at 2486.

following year." [Exc. 133] But budgetary predictability is not a significant enough interest to compel a state employee to subsidize a private speaker.[95]

The method by which ASEA enforces its one-year commitment also weighs against finding any valid waiver. Under ASEA's dues authorization forms, the authorization is irrevocable unless the employee gives the State and the union written notice of revocation during a narrow ten-day annual window.[96] [Exc. 131-32, 136] This window is different for every employee, since it is based on when the form was signed. [*Id*.] Many employees signed their forms years ago. [Exc. 131] ASEA also provides no instruction on its website as to how employees can resign their membership or stop dues deduction. [Exc. 136] There is little justification for such a system, which places onerous hurdles between public employees and their First Amendment rights.[97]

---

95 *See Overbey*, 930 F.3d at 223-26 (an interest in "using settlement agreements to reduce the time and money that it devotes to litigation" is insufficient to enforce waiver of First Amendment right to discuss the individual's claims of police misconduct).

96 As of July 2020, if an employee asks ASEA to stop dues deduction outside of the ten-day window, ASEA will hold the request and inform the State to end dues deduction on the first day of the member's window period. [Exc. 135] But ASEA neither changed its dues deduction form to reflect its new policy, [*see* Exc. 131, 442] nor codified this change in its constitution or policies and procedures, [*see* Exc. 125, 152-240]. ASEA thus is free to change its policy and continue enforcing the language of the dues authorization forms at any time.

97 *See 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"); *see also* Indiana AG Opinion, 2020 WL 4209604, at *5 (*Janus* requires that governments "must provide the ability for an employee to opt-out of a union dues system whenever she chooses").

Because a declaratory judgment on this issue would "clarify and settle legal relations" between ASEA and the State,[98] the Court should declare that the mechanisms for collecting union dues from state employees in the State's collective bargaining agreement with ASEA violate the First Amendment.

* * *

For these same reasons, the Court should also grant the State's remaining two requests for declaratory judgment. Those being that the First Amendment requires (1) that an employee's consent to dues deduction (a) be transmitted by the employee to the State to minimize the risk of coercion or improper inducement, and (b) contain an express acknowledgement that the employee is waiving his or her First Amendment right against compelled speech, and (2) that the State must timely stop deducting dues or fees from an employees' paycheck when the employee informs the State that he or she no longer wishes to subsidize the union's speech.

II. The State was entitled to summary judgment on ASEA's breach of contract claim.

In its counterclaims, ASEA alleged that the State violated CBA sections 3.04 and 3.01. [*See* Exc. 89-81] The superior court erred in granting ASEA summary judgment on this claim.

Section 3.04 requires the State to deduct dues from a state employee upon receiving a dues deduction form. [Exc. 313] The only substantive requirement of the form is that it provide the employee's employee ID number. [*Id.*] The CBA does not

---

98 *Lowell*, 117 P.3d at 755.

require the form to include any information about the employees' First Amendment rights or the type of speech the employees will be supporting. Specifically, Section 3.04 states:

> Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number, the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership dues owed for that pay period. … Bargaining unit members may authorize payroll deductions in writing on the form provided by the Union. …The amount of voluntary contribution shall be stated on the authorization form, together with the bargaining unit member's employee identification number.

[*Id.*]

As explained above, the State cannot be liable for violating Section 3.04 because complying with its terms would force the State to violate the First Amendment. First, this provision unconstitutionally requires the State to continue to deduct union dues from employees who inform the State outside of a ten-day annual window that they do not consent to dues deductions. Second, it unconstitutionally requires the State to deduct dues based solely on forms that do not ensure that the employee is knowingly waiving his or her First Amendment rights. Third, Section 3.04 unconstitutionally requires the State to deduct dues even without evidence that the employee voluntarily waived his or her First Amendment rights. Because these actions are all prohibited under the First Amendment and *Janus*, Section 3.04 is unenforceable.

In Section 3.01 of the CBA, the State agreed that it "will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union." [Exc. 312] None of the State's actions amount to "interference" between "any bargaining unit member and the Union."

The State's actions, as explained above, were taken to comply with the First Amendment, not to "interfere" with an employee and his or her union. The State's actions concerned solely the mechanisms by which the State will deduct dues from an employee's paycheck. The State never "interfered" with a state employee's efforts, for example, to form a union, to join a union, or to bargain collectively.[99] Moreover, as explained below, there is no evidence that the State's actions were motivated by any "anti-union motive," which is required to show unlawful "interference."[100]

III. The State was entitled to summary judgment on ASEA's claim for breach of implied covenant of good faith and fair dealing.

The State was entitled to summary judgment on ASEA's implied covenant of good faith and fair dealing claim because there was no evidence that the State acted in bad faith or that its actions were objectively unreasonable.

"[A]ll contracts in Alaska contain an implied covenant of good faith and fair dealing."[101] "The covenant includes subjective and objective elements, both of which must be satisfied."[102] "The subjective element 'prohibits one party from acting to deprive

---

99 *Cf.* AS 23.40.110(a); *N.Y. N.Y. Hotel & Casino*, 356 NLRB 907, 913 (2011) (employer commits improper "interference" when it "bars its employees from distributing union literature during their nonwork time in nonwork areas of its property"), *overruled in Bexar Cnty. Performing Arts Ctr. Found*, 368 NLRB 46, 2019 WL 4014845 (2019).

100 *Univ. of Alaska v. Alaska Cmty. Colls. Fed. of Tchrs.*, 64 P.3d 823, 826 n.9 (Alaska 2003).

101 *Mun. of Anchorage v. Gentile*, 922 P.2d 248, 260 (Alaska 1996).

102 *Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Motors Corp*., 221 P.3d 977, 992 (Alaska 2009).

the other of the benefit of the contract.'"[103] The subjective element requires proof of a subjectively improper motive, including that the party's actions were "actually made in bad faith."[104] The objective element requires each party to act "in a manner which a reasonable person would regard as fair."[105] ASEA cannot satisfy either requirement.

First, ASEA cannot satisfy the subjective element because there is no evidence that the State acted with a "subjectively improper motive" or acted "in bad faith." The record shows that the State changed its dues deduction policies to comply with *Janus* and the First Amendment. The State stopped dues deductions from certain employees pursuant to a comprehensive Attorney General Opinion recommending legally required changes to the State's dues deduction practices. [Exc. 142] The Governor issued the administrative order to implement the legal opinion and comply with *Janus*. [Exc. 138, 485-88] In addition, the Governor, Attorney General, and the Commissioner all made numerous public statements confirming that they took their actions to comply with *Janus* and the First Amendment. [*See, e.g.*, Exc. 137 & 485, 492, 500, 550] Moreover, Alaska officials were not the only state officials that believed *Janus* required change; the attorneys general in Texas and Indiana also took action.[106]

---

103 *Id.* (citation omitted).

104 *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1141 (Alaska 1999).

105 *Id*. at 1139 (internal quotation marks omitted).

106 *See* Ind. Op. Att'y Gen. No. 2020-5, 2020 WL 4209604 (June 17, 2020); Tex. Op. Att'y Gen. No. KP-0310, 2020 WL 7237859 (May 31, 2020).

In short, there is *no evidence* showing that *any* of the State's actions were pretextual or motivated by a desire to harm ASEA. The State therefore is entitled to summary judgment on this claim.[107]

Second, ASEA cannot satisfy the objective element because there is no evidence that the State acted in a manner that a reasonable person would regard as unfair.[108] As an initial matter, taking actions to comply with the law could never be regarded by a reasonable person as unfair.[109] But even if the Court disagrees with the State's interpretation of *Janus*, that does not mean that the State violated the covenant of good faith and fair dealing. A party does not breach this covenant merely because it has a different (or even incorrect) interpretation of applicable law.[110]

Nor is there any dispute that the State acted openly and transparently. The Attorney General published his opinion and information about the opinion online. [Exc. 136] The State emailed the opinion to all state employees and provided them with FAQs. [Exc. 137, 449] The State provided notice to ASEA that employees had asked the

---

107 *See, e.g.*, *Era Aviation*, 973 P.2d at 1142 (defendant entitled to summary judgment on good faith and fair dealing claim because plaintiff lacked sufficient evidence to show a subjectively improper motive); *Smith v. State, Dep't of Transp. & Pub. Facilities*, 253 P.3d 1233, 1239 & n.23 (Alaska 2011) (same).

108 *Era Aviation*, 973 P.2d at 1141.

109 *See, e.g.*, *McConnell v. State, Dep't of Health & Soc. Servs., Div. of Med. Assistance*, 991 P.2d 178, 185 (Alaska 1999) (agency did not "breach the covenant in an objective sense" when it investigated and sanctioned a Medicaid provider for violations).

110 *See PIC Assocs., LLC v. Greenwich Place GL Acquisition, LLC*, 17 A.3d 93, 106 (Conn. App. 2011) (stating that an "'incorrect interpretation or mere difference in the parties' interpretations of a contract does not amount to bad faith conduct without an associated dishonest purpose'") (citation omitted).

State to cease dues and that the State would comply with their requests. [Exc. 142] The State changed its policies openly through an official administrative order that was published online and which instructed the State to reach out to every public sector union to work collaboratively to implement the needed constitutional protections. [Exc. 138, 486] The State emailed all state employees to notify them of the new administrative order and provided FAQs. [Exc. 139, 492] And the State informed ASEA (and all other unions) of the change in policy and offered to work with them to address concerns. [Exc. 140, 531-48] These are not "objectively unfair" actions, but rather a party taking open and transparent steps to do what it believed was required by law.[111]

Third, even if ASEA could satisfy both the subjective and objective elements (which it cannot), the State could not be liable for violating state contract law because the State's actions were required by the First Amendment. For these reasons, too, the State was entitled to summary judgment on this claim.

IV. The State was entitled to summary judgment on ASEA's claim that it violated PERA and the separation of powers.

The superior court erred in granting ASEA summary judgment on its claims that the State violated the Public Employees Relations Act, specifically, AS 23.40.110(a), AS 23.40.210(a), and AS 23.40.220.

---

111 *See, e.g., McAdams v. Mass. Mut. Life Ins. Co.*, 391 F.3d 287, 302 (1st Cir. 2004) (defendant entitled to summary judgment on good faith and fair dealing claim because the company "was reasonably transparent about what it was doing and why" and was "not trying to hide anything").

A. The State did not violate AS 23.40.110(a).

Alaska Statute 23.40.110(a) prohibits the State from engaging in certain "unfair labor practices." ASEA claimed that the State violated parts (a)(1), (2), (3), and (5), which read:

> (a) A public employer or an agent of a public employer may not
> (1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080;
> (2) dominate or interfere with the formation, existence, or administration of an organization;
> (3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization;
> . . . [or]
> (5) refuse to bargain collectively in good faith with an organization that is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

1. The State did not violate AS 23.40.110(a) because there was no evidence the State's actions were based on anti-union motive.

To establish a violation of any provision of AS 23.40.110(a), the government's actions "generally must have been based on an anti-union motive."[112] Proof of anti-union motive is unnecessary only in "the rarest of exceptions."[113] "'Only where the employer's conduct is "inherently destructive" of important employee interests is proof of an antiunion motive unnecessary under that section.'"[114]

---

112 *Univ. of Alaska*, 64 P.3d at 826 n.9.

113 *Alaska Cmty. Colls.' Fed'n of Tchrs., Local No. 2404 v. Univ. of Alaska*, 669 P.2d 1299, 1307-08 (Alaska 1983).

114 *Univ. of Alaska*, 64 P.3d at 829 n.9 (quoting *Alaska Cmty. Colls. Fed'n of Tchrs., Local No. 2404*, 669 P.2d at 1307).

As explained, ASEA cannot show that the State took *any* of its actions based on an "anti-union motive." To the contrary, the record shows that the State took its actions based on a genuine belief that they were legally required. Nor are the State's actions so "inherently destructive of important employee interests" that no evidence of anti-union animus is needed. Cases finding violations under this standard are "'relatively rare.'"[115] "Inherently destructive conduct requires that an employer's actions create 'far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity.'"[116] Only egregious misconduct satisfies this standard, such as "permanent discharge for participation in union activities, granting of superseniority to strike breakers, and other actions creating visible and continuing obstacles to the future exercise of employee rights."[117] The State's actions do not come close to meeting this high bar,[118] and the State was entitled to summary judgment on these claims.[119]

---

115 *NLRB v. Or. Steel Mills, Inc.*, 47 F.3d 1536, 1544 (9th Cir. 1995) (citation omitted) (Alarcon, J., concurring and dissenting).

116 *Id.* (quoting *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976) (emphasis omitted)).

117 *Portland Willamette Co.*, 534 F.2d at 1334.

118 *Id.*

119 *See May v. Shuttle, Inc.,* 129 F.3d 165, 176-77 (D.C. Cir. 1997) (defendant entitled to summary judgment because there was insufficient evidence of anti-union animus); *Conger v. Bd. of Comm'rs of Cty. of Sedgwick*, 1990 WL 112940, at *8 (D. Kan. July 11, 1990) (same).

2. The State did not take actions prohibited by AS 23.40.110(a)(1), (a)(2), (a)(3), or (a)(5).

Even if ASEA could show that the State acted with anti-union animus (which it cannot), ASEA's claim should have failed because it did not show that the State took any actions prohibited by AS 23.40.110(a)(1), (a)(2), (a)(3), or (a)(5). Neither the text of these provisions, nor decisions of the National Labor Relations Board ("NLRB") interpreting similar federal laws, support ASEA's claims.[120]

AS 23.40.110(a)(1). This section bars public employers from interfering, restraining, or coercing an employee "in the exercise of the employee's rights guaranteed in AS 23.40.080." Alaska Statute 23.40.080, in turn, guarantees state employees the right to "self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The State's actions did not "interfere" with any of the rights guaranteed by PERA. The State's actions (which were entirely transparent) concerned solely the method by which an employee authorizes the State to deduct dues from his or her paychecks. The State did not interfere with employees' rights to "self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing."[121]

---

120 *See Pub. Safety Emps. Ass'n v. State*, 799 P.2d 315, 318-19 (Alaska 1990) (noting that "[w]e have looked to decisions of the [NLRB] in interpreting Alaska's labor laws" and that AS 23.40.110 "prohibits essentially the same conduct" as Section 8(a)(1) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 29 U.S.C. § 158(a)(1)).

121 AS 23.40.080; *cf. Stabilus, Inc.*, 355 NLRB 836, 850 (2010) (employer violates Section 8(a)(1) when it "interrogate[s]" its employees about their union activities); *Pac.*

Nor did the State interfere with the employees' rights to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[122] The State did not improperly "interfere" with any employee's rights.

AS 23.40.110(a)(2). This section bars public employers from dominating or interfering with a union's "formation, existence, or administration." This reflects the Alaska legislature's recognition that "the maintenance of a 'company union,' dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining."[123] The "purpose" of this section was to "'eradicate company unionism, a practice whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions.'"[124] In other words, it was meant to protect the employees' ability to pursue outside unions, but it does not limit the State's ability to communicate with its employees or its ability to protect their rights.[125]

Coast M.S. Indus., 355 NLRB 1422, 1438-139 (2010) (employer violates 8(a)(1) when it "prohibit[s] talking about matters protected by [the NLRA] during work").

122 AS 23.40.080; *cf. Superior Travel Serv., Inc. & Susan M. White*, 342 NLRB 570, 574 (2004) (employer violated 8(a)(1) by firing employee for presenting the employer with a petition complaining about handbook provisions); *Three D, LLC*, 361 NLRB 308, 308 (2014) (employer violated Section 8(a)(1) by discharging two employees for their participation in a Facebook discussion about the employer).

123 *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1264 (4th Cir. 1994) (quoting *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 266 (1938)).

124 *Montague v. NLRB*, 698 F.3d 307, 311 (6th Cir. 2012) (quoting *Dana Corp.*, 356 NLRB 256, 259 (2010)).

125 *See id.* (quoting *Dana Corp.*, 356 NLRB at 259).

Again, the State's actions did not limit an employees' ability to join a union; its actions concerned solely the method by which employees agree to dues deduction. Because the State did not "dominate[]" or "interfere[]" with the "formation, existence, or administration of an organization,"[126] section 110(a)(2) has no application here.

AS 23.40.110(a)(3). This section bars public employers from discriminating in hiring, tenure, or employment conditions "to encourage or discourage membership in an organization." To prevail under this section, a union must show that "antiunion animus" was a "'substantial or motivating factor'" in the employer's decision to take an "adverse action" against an employee.[127] "Antiunion animus is established by showing that the employees were engaged in union activities, that the employer knew of and harbored animus toward the union activities, and there was a causal connection between the animus and the implementation of the adverse employment action."[128]

Alaska Statute 23.40.110(a)(3) is inapposite here. To begin, the State did not take an "adverse action" against any employee, as none of the State's actions discriminated

---

126 AS 23.40.110(a)(2); *cf. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d at 1264 (employer violates Section 8(a)(2) when it "assists in setting up the bargaining agency, provides the machinery by which the bargaining representatives are chosen, allows the elections to be conducted on his premises and at his expense and pays the representatives for the time devoted to bargaining"); *In re Lafarge N. Am., Inc.*, 2003 WL 21908961 (N.L.R.B. Div. of Judges 2003) (employer violates Section 8(a)(2) where it "recognizes a labor organization which does not actually have majority employee support").

127 *Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 533 (7th Cir. 2003) (citation omitted).

128 *Id.*

with regard "to hire or tenure of employment or a term or condition of employment."[129] Even if it the State's actions were "adverse actions," ASEA cannot show that "antiunion animus was a 'substantial or motivating factor'" in the State's decision to take any purported against an employee.[130] Specifically, ASEA cannot show that all state employees were "engaged in union activities," that the State "knew of and harbored animus toward the union activities," and that there was a "causal connection" between this animus and "the implementation of the adverse employment action."[131] [*See generally* Exc. 136-42].

AS 23.40.110(a)(5). This section bars public employers from refusing "to bargain collectively in good faith" with employees' exclusive representative, "including but not limited to the discussing of grievances." According to ASEA, "the procedures for the deduction of union membership dues are mandatory subjects of bargaining" under AS 23.40.110(a)(5), and so PERA "prohibits the State from making unilateral changes to those terms." [Exc. 94] This argument fails.

First, the State had no duty to "bargain collectively in good faith" over actions that it was required to take under the First Amendment. "The duty to bargain … involves the

---

129 AS 23.40.110(a)(3); *see* AS 23.40.250(9) (defining "terms and conditions of employment"); *cf. Salem Leasing Corp. v. NLRB*, 774 F.2d 85, 87-88 (4th Cir. 1985) (employer violated Section 8(a)(3) by firing employee for fear that he would continue to speak favorably about union wages and benefits to his fellow employees); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186-88 (1941) (employer violated Section 8(a)(3) by refusing to hire job applicants who were union members).

130 *Huck Store Fixture Co.*, 327 F.3d at 533 (citation omitted).

131 *Id.*

obligation to bargain in good faith concerning terms and conditions of employment *which are permitted by law*."[132] "Neither party may require that the other agree to contract provisions which are unlawful."[133] Here, the actions that ASEA is claiming should have been the subject of collective bargaining (*e.g.*, whether the State must continue deducting dues even though an employee asks it to cease dues deduction) were required by the First Amendment. The State had no duty to bargain over such issues.[134]

Second, AS 23.40.110(a)(5) has no application here because the State's actions occurred *after* the parties had completed negotiations and entered into a CBA. [*See* Exc. 129] An employer violates section 110(a)(5) when it "implements unilateral changes in the conditions of employment *during contract negotiations* without consulting the union."[135] Here, the parties already negotiated and agreed to a CBA (which is in effect until 2022) and the terms of the contract cover dues deduction. [Exc. 129; *see also* Exc. 391 (recognizing that the CBA "concludes collective bargaining for the duration of

---

132 *Meat Cutters Local 421 (Great Atlantic & Pacific Tea Co.)*, 81 NLRB 1052, 1061 (1949) (emphasis added).

133 *Id.*

134 *See Meat Cutters Local 421*, 81 NLRB at 1061; *see also NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854 (5th Cir. 1986) ("[It] is inescapably correct … that no employer may be required to bargain over or engage in illegal activity even if that activity is necessary to comply with the terms of the bargaining agreement.").

135 *APEA v. State, Dep't of Admin., Div. of Labor Rels.*, 776 P.2d 1030, 1033 (Alaska 1989) (emphasis added).

this Agreement")] If ASEA believes the State violated the CBA, then its remedy lies in breach of contract—not in a "refus[al] to bargain" under section .110(a)(5).[136]

Third, regardless whether bargaining was required, the State *did* offer to bargain with ASEA (and other unions) over the implementation of the Attorney General Opinion. The administrative order required the Department of Administration to "work and engage with the unions, through the collective bargaining process, with guidance and assistance from the Department of Law, to address any remaining issues described in the [Attorney General] Opinion." [Exc. 487] And the State reached out to ASEA (as well as the other ten public sector unions) asking the union to contact the State so that the parties could "work together to implement the constitutional protections for all State employees required by the U.S. Supreme Court." [Exc. 140, 531-48] The State cannot be liable for refusing to bargain in good faith over any changes on which ASEA refused to bargain.[137]

B. The State Did Not Violate AS 23.40.210(a).

Alaska Statute 23.40.210(a) states: "Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall

---

136 *See Metalcraft of Mayville*, 367 NLRB No. 116, at *9 (2019) (employer who changed dues deduction policy in response to Wisconsin right-to-work law did not violate Section 8(a)(5) of the NLRA because it had "no continuing duty to bargain with respect to dues checkoff" since the employer and union "had already bargained over dues checkoff and entered into a CBA that memorialized their bargain").

137 *See Gulf States Mfrs., Inc. v. NLRB.*, 579 F.2d 1298, 1317 (5th Cir. 1978) (employer not liable under Section 8(a)(5) of the NLRA because it "'was willing to meet frequently and for adequate lengths of time' with representatives of the Union" (citation omitted)); *see also Dish Network Corp. v. NLRB*, 953 F.3d 370, 379 (5th Cir. 2020) (Section 8(a)(5) does not require parties "'to engage in fruitless marathon discussions'" (quoting *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952))).

reduce it to writing in the form of an agreement." According to ASEA, this provision requires the State to "comply with the collective bargaining agreements they have reached with public employee unions," [Exc. 93] and, therefore, any violation of the CBA is also a violation of AS 23.40.210. That is incorrect.

Alaska Statute 23.40.210(a) does *not* state that a violation of the CBA is *also* a violation of PERA. It simply "acts as a kind of specialized statute of frauds, under which oral agreements are not permitted."[138] If a public employer breaches a CBA, it is a violation of the contract—nothing more. In any event, as explained above, the State did not violate the CBA, and therefore did not also violate PERA.

C. The State Did Not Violate AS 23.40.220.

Alaska Statute 23.40.220 states:

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

None of the State's actions violated this provision.

First, the State did not violate AS 23.40.220 by stopping dues when the employees made their requests directly to the State. The statute requires the State to deduct union dues from an employee's wages when it receives "written authorization of a public employee." This provision, however, does not require the State to *reject* an employee's

---

138 *Classified Emps. Ass'n v. Matanuska-Susitna Borough Sch. Dist.*, 204 P.3d 347, 354-55 (Alaska 2009).

written request to stop deducting dues.[139] Here, the State received written authorizations from GGU employees telling the State to stop deducting dues from their paychecks. [Exc. 141] Nothing in PERA prohibits the State from honoring these requests.

Second, the State did not violate the statute by making clear, through Administrative Order No. 312, that it would not accept forms that do not include language identifying the employees' First Amendment rights. This provision does not dictate *the form* the written authorization must take.

Third, the State did not violate AS 23.40.220 by requiring employees to deliver the forms directly to the State. Section .220 does not dictate *how* the State should receive the written authorization (*e.g.*, directly from the employee, from the union, or otherwise).

V. The State was entitled to summary judgment on the union's Administrative Procedure Act claim.

Under the Alaska Administrative Procedure Act, every "regulation" must be promulgated under the APA procedures to be valid.[140] ASEA incorrectly contends that the State's "implementation of new union member dues deduction procedures" is a "regulation" that had to go through notice and comment under the Administrative Procedure Act. [Exc. 96]

First, the State's actions were not "regulations" because they did not "implement, interpret, or make specific the law enforced or administered by [the agency]."[141] The

---

139 AS 23.40.220.

140 *Chevron USA, Inc. v. State Dep't of Revenue*, 387 P.3d 25, 35-36 (Alaska 2016).

141 AS 44.62.640(a)(3); *see Chevron USA*, 387 P.3d at 35-36.

State made commonsense changes in order to comply with federal case law. [Exc. 139-40, 449, 492, 500, 523-29] The State made these changes because it was a party to "collective bargaining agreement provisions" that were unconstitutional in light of *Janus*. [Exc. 430] Indeed, the State has *never* claimed to be implementing, interpreting, or making specific any provision of state law. [*See generally* Exc. 137, 139-40][142]

Second, even if the State's actions did implement, interpret, or make specific a state law, the State's actions still are not "regulations" because they "relate[] only to the internal management of a state agency."[143] Here, the State's actions concerned dues deductions from state employee paychecks and relate solely to state agencies' internal management of state employees. They thus did not require notice and comment.[144]

Third, the State's actions were not "regulations" because they do not "affect[] the public" and are not "used by the agency in dealing with the public."[145] This Court has recognized that "the APA is meant to reduce the risk of arbitrary application and to inform the public of regulations."[146] But here, the State's actions deal solely with dues deductions from state employee paychecks. They apply equally to each public employee (regardless of what union that employee may elect to be a member of or the amount of

---

142 *Cf. Alaska Ass'n of Naturopathic Physicians v. State Dep't of Com.*, 414 P.3d 630, 631-33 (Alaska 2018) (describing Alaska regulations designed to implement a state statute governing the practice of naturopathy).

143 AS 44.62.640(a)(3).

144 *Id.*

145 AS 44.62.640(a)(3).

146 *Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 335 (Alaska 2009).

dues deducted) and do not affect the broader public. This is wholly different from the typical regulation in which an agency deals with the general public.[147]

Fourth, the State's modification to the payroll process was not a "regulation" pursuant to the APA because that term "does not include a form prescribed by a state agency or instructions relating to the use of the form."[148] Here, the State prescribed the use of and instructions relating to dues deduction forms. [*See* Exc. 141 485-88, 556] Under AS 44.62.640(a)(3), the State's newly proposed forms and corresponding modifications to how the State processed those forms are not "regulations."

Fifth, the history of the State's dues deduction policies demonstrates that none of the actions were "regulations." When the State made initial changes to its dues-deduction processes following *Janus*, none of the changes went through notice and comment. [Exc. 128] This is further evidence that the State's actions here were not "regulations."[149]

Finally, even if the State violated the APA (which it did not), this state law cannot override the First Amendment. Under the Supremacy Clause, the State has no authority to violate the Constitution on the basis that a state law governing the procedure for

---

147 *See, e.g.*, *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 396-97 (Alaska 1990) (agency action that imposed limits on Alaskans seeking to harvest salmon in the Stepovak fishery "affect[ed] the public") (citation omitted).

148 AS 44.62.640(a)(3); *see Squires*, 205 P.3d at 333.

149 *See Planned Parenthood of Wis., Inc. v. Azar*, 316 F. Supp. 3d 291, 306 (D.D.C. 2018), *vacated on other grounds*, 942 F.3d 512 (D.C. Cir. 2019) (noting that if similar agency actions occurred "without notice-and-comment in the past, it is difficult to see why they must be subject to that procedure now"); *Dorbest Ltd. v. United States*, 30 C.I.T. 1671, 1709 (2006) (notice-and-comment rulemaking not required when "past practice" shows that the agency took similar actions "without resorting to notice and comment rulemaking").

administrative agencies requires it to continue its unconstitutional policies.[150] The State was entitled to summary judgment on this claim.

VI. The State was entitled to summary judgment on the union's declaratory judgment claim.

The superior court awarded ASEA declaratory judgment stating that (1) the State's actions violated the CBA, the Alaska Constitution's separation of powers clauses, PERA, and the APA; (2) honoring employees' voluntary written dues deduction authorizations does not infringe any rights under the First Amendment; and (3) the Supreme Court's decision in *Janus* did not require changes to Alaska's payroll procedures. For the reasons previously explained, the State did not violate the CBA, the Alaska Constitution, or any state law and *Janus* did require the State to act. Accordingly, the superior court erred in granting summary judgment to ASEA.

CONCLUSION

For these reasons, the Court should vacate the judgment of the superior court and remand for entry of judgment in favor of the State.

---

150 *See, e.g.*, *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004) (enjoining enforcement of state agency policy that violated First Amendment); *Dorbest Ltd.*, 30 C.I.T. at 1709-10 ("[I]t is fundamental administrative law that when a regulation is unlawful" the agency "must change its practice or conclusion" and "may not continue to unlawfully apply a regulation … to a party.").