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

BRIEF OF APPELLEE ALASKA STATE EMPLOYEES ASSOCIATION/ AFSCME LOCAL 52, AFL-CIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

AUTHORITIES PRINCIPALLY RELIED UPON xiii

STATEMENT OF ISSUES 1

INTRODUCTION 1

STATEMENT OF THE CASE 5

A. ASEA is the bargaining representative for thousands of state employees 5

B. The State agreed to honor ASEA members' dues deduction authorizations and not to interfere with ASEA's relationship with unit employees 5

C. After *Janus*, the State and ASEA revised the CBA to eliminate agency fees and reaffirmed the State's obligation to honor employees' dues authorizations 8

D. Beginning in August 2019, the State unilaterally announced and implemented a new policy of refusing to honor ASEA dues authorization agreements 10

1. Attorney General Clarkson's August 27, 2019 Opinion 10

2. The Governor's September 26, 2019 Administrative Order 12

E. ASEA suffered substantial harm as a result of the State's actions 13

F. Procedural Background 14

1. State Court Litigation 14

2. Federal Court Litigation 14

ARGUMENT 16

I. Standard of Review 16

II. The State is collaterally estopped from relitigating the *Janus* issue 16

III. *Janus* does not require the State to change its practices for processing voluntary union member dues deductions 17

A. *Janus* does not address voluntary union membership agreements 17

B. The State's policies already require public employees to "affirmatively consent" before paying membership dues 22

C. The State's public policy arguments are meritless 24

IV. The State breached its contract with ASEA 26

A. The plain language of the CBA prohibited the State's actions 26

B. The longstanding past practice confirms that the State breached the CBA 29

V. The State breached the covenant of good faith and fair dealing 30

VI. The State violated separation of powers and PERA 34

A. The State violated PERA by making unilateral changes to conditions of employment and failing to bargain in good faith over mandatory subjects 35

B. The State violated PERA by unilaterally terminating dues deductions for employees who had authorized those deductions in writing 40

C. The State violated PERA by interfering with employees' rights, interfering with ASEA's internal administration, and discouraging union membership 41

VII. The State violated the APA 46

VIII. The Superior Court properly granted judgment to ASEA on the parties' declaratory judgment claims 50

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Abood v. Detroit Board of Ed.,
431 U.S. 209 (1977) 9

Aetna Ins. Co. v. Kennedy,
301 U.S. 389 (1937) 21

AFSCME v. Woodward,
406 F.2d 137 (8th Cir. 1969) 25

Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME,
2020 WL 1322051 (S.D. Ohio Mar. 20, 2020), *appeal dismissed*,
2020 WL 4194952 (6th Cir. July 20, 2020) 2

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(9th Cir. 2021), *cert. denied*, 142 S.Ct. 764 (2022) 2

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301 U.S. 103 (1937) 45

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378 F.Supp.3d 857 (C.D. Cal. 2019), *aff'd*, 2022 WL 262144
(9th Cir. Jan. 26, 2022) 3

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2021 WL 4743621 (M.D. Pa. Oct. 12, 2021) 24

Belgau v. Inslee,
975 F.3d 940 (9th Cir. 2020), *cert. denied* 141 S.Ct. 2795 (2021) 2, 15, 19, 20

Bennett v. AFSCME Council 31,
991 F.3d 724 (7th Cir. 2021), *cert. denied*, 142 S.Ct. 424 (2021) 2, 19, 20, 23

Boykin v. Alabama,
395 U.S. 238 (1969) 21

Brady v. United States,
397 U.S. 742 (1970) 21, 23

Cal. Acrylic Indus., Inc. v. NLRB,
150 F.3d 1095 (9th Cir. 1998) 42

Cohen v. Cowles Media,
501 U.S. 663, 672 (1991) 19, 20

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 18

Comer v. Schriro,
480 F.3d 960 (9th Cir. 2007) 21

Cooley v. Cal. Statewide Law Enf't Ass'n,
2019 WL 331170 (E.D. Cal. Jan. 25, 2019) 3

Creed v. Alaska State Emps. Ass'n,
472 F.Supp.3d 518 (D. Alaska 2020), *aff'd*, 2021 WL 3674742
(9th Cir. Aug. 16, 2021), *cert. denied*, __ S.Ct. __, 2022 WL 515883
(U.S. Feb. 22, 2022) 2, 15, 22, 23, 25

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367 F.Supp.3d 996 (D. Alaska 2019), *aff'd*, 854 F.App'x 785
(9th Cir. 2021) 25

Crouthamel v. Walla Walla Public Schools,
535 F.Supp.3d 1025 (E.D. Wash. 2021) 24

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967) 21, 23

Dingle v. Stevenson,
840 F.3d 171 (4th Cir. 2016) 23

Dish Network Corp. v. NLRB,
953 F.3d 370 (5th Cir. 2020) 39

Durst v. Or. Educ. Ass'n,
450 F.Supp.3d 1085 (D. Or. 2020), *aff'd*, 854 F.App'x 916
(9th Cir. 2021), *cert. denied sub nom. Anderson v. SEIU Local 503*,
142 S.Ct. 764 (2022) 2

Erie Telecomms., Inc. v. City of Erie,
853 F.2d 1084 (3d Cir. 1988) 21

Fid. & Cas. Co. of New York v. Fed. Exp.,
136 F.2d 35 (6th Cir. 1943) 16, 17

Fischer v. Governor of N.J.,
842 F.App'x 741 (3d Cir. 2021), *cert. denied*, 142 S.Ct. 426 (2021) 2, 20, 26

Fisk v. Inslee,
2017 WL 4619223 (W.D. Wash. Oct. 16, 2017), *aff'd* 759 F.App'x 632
(9th Cir. Jan. 9, 2019) 7

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407 U.S. 67 (1972) 21

Grossman v. Hawaii Gov't Emps. Ass'n,
854 F.App'x 911 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 591 (2021) 2

Gulf States Mfrs., Inc. v. NLRB,
579 F.2d 1298 (5th Cir. 1978) 39, 40

Hendrickson v. AFSCME Council 18,
992 F.3d 950 (10th Cir. 2021), *cert. denied*, 142 S.Ct. 423 (2021) 2, 19, 25

Hernandez v. AFSCME Cal.,
424 F.Supp.3d 912 (E.D. Cal. 2019), *aff'd*, 854 F.App'x 923
(9th Cir. 2021) 2, 3

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519 F.Supp.3d 497 (D. Minn. 2021) 2

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138 S.Ct. 2448 (2018) ..... *passim*

Johnson v. Zerbst,
304 U.S. 458 (1938) 18

Kidwell v. Transp. Commc'ns Int'l Union,
946 F.2d 283 (4th Cir. 1991) 25

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567 U.S. 298 (2012) 21

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493 F.Supp.3d 964 (S.D. Cal. 2020), *aff'd*, 2022 WL 260868
(9th Cir. Jan. 27, 2022) 2

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985 F.3d 278 (3d Cir. 2021) 2

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501 U.S. 190 (1991) 36

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2020 WL 4339880 (E.D. Cal. July 28, 2020) 24

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419 F.Supp.3d 1182 (N.D. Cal. 2020), *aff'd*, 854 F.App'x 920
(9th Cir. 2021), *cert. denied sub nom. Anderson v. SEIU Local 503*,
142 S.Ct. 764 (2022) 2

Molina v. Pa. Soc. Serv. Union,
2020 WL 2306650 (M.D. Pa. May 8, 2020) 2, 24

Montague v. NLRB,
698 F.3d 307 (6th Cir. 2012) 43

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 21

NLRB v. Erie Resistor Corp.,
373 U.S. 221 (1963) 45

NLRB v. Peninsula Gen. Hosp. Med. Ctr.,
36 F.3d 1262 (4th Cir. 1994) 43. 44

Ahearn ex rel. NLRB v. Remington Lodging and Hospitality,
842 F.Supp.2d 1186 (D. Alaska 2012) 39

O'Callaghan v. Regents of Univ. of Cal.,
2019 WL 2635585 (C.D. Cal. June 10, 2019) 3

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301 U.S. 292 (1937) 18

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830 F.App'x 76 (3d Cir. 2020) 2

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930 F.3d 215 (4th Cir. 2019) 21

Patterson v. Illinois,
487 U.S. 285 (1988) 21

Pleasantview Nursing Home, Inc. v. NLRB,
351 F.3d 747 (6th Cir. 2003) 38

Polk v. Yee,
481 F.Supp.3d 1060 (E.D. Cal. 2020) 2

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438 F.Supp.3d 1108 (S.D. Cal. 2020) 2

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412 U.S. 218 (1973) 19

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2019 WL 3822001 (C.D. Cal. Aug. 14, 2019), *aff'd*, 854 F.App'x 927
(9th Cir. July 29, 2021), *cert. denied sub nom. Anderson v. SEIU Local 503*, 142 S.Ct. 764 (2022) 3

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2018 WL 6072806 (N.D. Cal. Nov. 16, 2018), *aff'd sub nom.*,
Smith v. Bieker, 854 F.App'x 937 (9th Cir. 2021), *cert. denied*,
142 S.Ct. 593 (2021) 2, 22

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480 U.S. 386 (1987) 24, 25

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522 F.Supp.3d 425 (N.D. Ill. 2021), *aff'd*, 2021 WL 2587783
(7th Cir. Apr. 15, 2021), *cert. denied*, 142 S.Ct. 425 (2021) 2

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533 U.S. 405 (2001) 21

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2020 WL 5520947 (W.D. Wash. Sept. 11, 2020) 2, 24

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2021 WL 4994888 (9th Cir. Sept. 16, 2021), *cert. denied sub nom.*,
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496 F.Supp.3d 1365 (D. Alaska 2020), *aff'd*, 2021 WL 3746816
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(U.S. Feb. 22, 2022) 2, 15, 16, 25

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2020 WL 6146564 (D. Or. Oct. 19, 2020), *aff'd*, 2021 WL 477010
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(U.S. Mar. 7, 2022) 2

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Alaska Community Colleges' Fed'n of Teachers, Local 2404 v. Univ. of Alaska, 669 P.2d 1299 (Alaska 1983) 35, 36, 42, 45

Alaska Marine Pilots v. Hendsch,
950 P.2d 98 (Alaska 1997) 34

Alaska Pub. Emps. Ass'n v. State,
831 P.2d 1245 (Alaska 1992) 35

Anderson v. Alaska Housing Finance Corp.,
462 P.3d 19 (Alaska 2020) 21, 24

Brandner v. Providence Health & Servs.,
394 P.3d 581 (Alaska 2017) 21

Bush v. Elkins,
342 P.3d 1245 (Alaska 2015) 16

Chevron U.S.A., Inc. v. *State Dep't of Revenue*,
387 P.3d 25 (Alaska 2016) 46, 47, 48

Chijide v. Maniilaq Ass'n of Kotzebue, Alaska,
972 P.2d 167 (Alaska 1999) 30

Crowley v. State, Dept. of Health and Soc. Servs.,
253 P.3d 1226 (Alaska 2011) 30

DeNardo v. Municipality of Anchorage,
775 P.2d 515 (Alaska 1989) 16

Era Aviation, Inc. v. Seekins,
973 P.2d 1137 (Alaska 1999) 30

Graham v. Municipality of Anchorage,
446 P.3d 349 (Alaska 2019)..... 26

IBEW Local 1547 v. City of Ketchikan,
805 P.2d 340 (Alaska 1991)..... 5

Int'l Ass'n of Firefighters, Local 1264 v. Municipality of Anchorage,
971 P.2d 156 (Alaska 1999)..... 35, 36

Jerrel v. State Dep't of Nat. Resources,
999 P.2d 138 (Alaska 2000)..... 49

Kachemak Bay Watch, Inc. v. Noah,
935 P.2d 816 (Alaska 1997)..... 49

Luedtke v. Nabors Alaska Drilling, Inc.,
834 P.2d 1220 (Alaska 1992)..... 33

McConnell v. State Dep't of Health and Soc. Servs.,
991 P.2d 178 (Alaska 1999)..... 34

Mitford v. de Lasala,
666 P.2d 1000 (Alaska 1983)..... 30, 32

O'Callaghan v. Coghill,
888 P.2d 1302 (Alaska 1995)..... 35

Peterson v. State,
280 P.3d 559 (Alaska 2012)..... 43

PIC Assocs. v. Greenwich Place GL Acquisition,
128 Conn. App. 151 (2011) 34

Pitka v. Interior Reg. Hous. Auth.,
54 P.3d 785 (Alaska 2002)..... 34

Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins., 171 P.3d 1110 (Alaska 2007)..... 41

Ramsey v. City of Sand Point,
936 P.2d 126 (Alaska 1997)..... 30

State v. Fairbanks N. Star Borough,
736 P.2d 1140 (Alaska 1987)..... 35

State v. Nondalton Tribal Council,
268 P.3d 293 (Alaska 2012) 48

State v. Pub. Safety Employees Ass'n,
323 P.3d 670 (Alaska 2014) 29

State v. United Cook Inlet Drift Ass'n,
895 P.2d 947 (Alaska 1995) 17

Totemoff v. State,
905 P.2d 954 (Alaska 1995) 17

Univ. of Alaska v. Alaska Cmty. Colls. Fed. of Tchrs.,
64 P.3d 823 (Alaska 2003) 28

Vaughn's Adm'r v. Louisville & N.R. Co.,
297 Ky. 309 (1944) 16

Federal Statutes

5 U.S.C. § 7115 ..... 7, 18

29 U.S.C. § 186 7

39 U.S.C. § 1205 7

45 U.S.C. § 152 7

State Constitution and Statutes

Alaska Const. art. II, § 1 34

Alaska Const. art. XII, § 11 34

AS 23.40.110(a)(1) 28, 41, 42

AS 23.40.110(a)(2) 41, 43

AS 23.40.110(a)(3) 28, 41, 44, 45

AS 23.40.110(a)(5) 35, 36, 38, 47

AS 23.40.210 ..... 38, 47

AS 23.40.220 ..... 3, 40, 41, 47, 48

AS 44.21.020 ..... 47, 48

AS 44.62.640 ..... 47, 48

AS 44.62.010–. 950 46

AS 44.62.180–.290 46

State Regulations

8 AAC 97.450 35

National Labor Relations Board Decisions

Allied-Signal, Inc.,
307 NLRB 752 (1992) 38

Contractor Servs.,
324 NLRB 1254 (1997) 45

In Re Wkyc-TV, Inc.,
359 NLRB 286 (2012) 35

Kerry Inc.,
358 NLRB 980 (2012) 38

Metalcraft of Mayville,
367 NLRB No. 116 (2019) 37

NYNY Hotel & Casino,
356 NLRB 907 (2011) 28

Shen-Mar Food Prods.,
221 NLRB 1329 (1976) 37, 38, 41

St. Joseph's Hosp.,
254 NLRB 634 (1981) 43

The Ruprecht Co.,
366 NLRB No. 179 (2018) 39

Secondary Sources

The Developing Labor Law § 8.I (ABA 2020) 43

Restatement (Second) of Judgments § 38 (1982) 16

Other Sources

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File No. 366-465-84, 1984 WL 61014 (Alaska AG Mar. 14, 1984) 40

Oxford English Dictionary (2020)..... 28

AUTHORITIES PRINCIPALLY RELIED UPON

1. Alaska Public Employment Relations Act (PERA)

AS 23.40.080. Rights of Public Employees

Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

AS 23.40.110. 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.

…

(c) A labor or employee organization or its agents may not

(1) restrain or coerce

(A) an employee in the exercise of the rights guaranteed in AS 23.40.080, or

(B) a public employer in the selection of the employer's representative for the purposes of collective bargaining or the adjustment of grievances;

(2) refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of AS 23.40.070 - 23.40.260 as the exclusive representative of employees in an appropriate unit.

AS 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.
…

AS 23.40.220. Labor or employee organization

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.

2. Relevant Collective Bargaining Agreement Provisions (Exc. 312-313)

3.01 Noninterference

The Employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union. It will not in any manner attempt to restrain any bargaining unit member from belonging to the Union or from taking an active part in Union affairs, and it will not discriminate against any bargaining unit member because of Union membership or activity, upholding Union principles, or working under the instruction of the Union or serving on a committee, provided that such activity is not contrary to this Agreement.
…

3.04 Payroll Deductions

A. Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership dues owed for that pay period. The Employer will forward the monies so deducted to the Union together with a list of bargaining unit members from whose wages such monies were deducted no later than the tenth (10^{th}) day of the following calendar month. The Employer shall deduct from a bargaining unit member's wages only that amount of money that the Union has certified in writing is the amount of semi-monthly dues.
If, for any payroll period in which the Employer is obligated to make deductions pursuant to this section, the wages owed a bargaining unit member after mandatory deductions are less than the authorized dues to be deducted pursuant to this Article, the

Employer shall make no deduction from wages owed the bargaining unit member for that payroll period. Payment of dues for that pay period shall be made by the bargaining unit member directly to the Union.

…

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

STATEMENT OF ISSUES

1. Whether the Superior Court correctly held, in accordance with the unanimous judicial consensus, that *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), does not invalidate voluntary union membership agreements or require changes to the State of Alaska's existing procedures for processing union member dues deductions.

2. Whether the Superior Court correctly held that the State and third-party defendants the Attorney General, Governor, Commissioner of Administration, and Department of Administration (collectively, "the State") violated the State's collective bargaining agreement with Alaska State Employees Association, AFSCME Local 52 ("ASEA" or "Union"), the implied covenant of good faith and fair dealing, separation of powers, the Public Employment Relations Act, and the Administrative Procedures Act when the State—unilaterally and without prior notice to ASEA—ceased union member dues deductions that employees had expressly authorized in membership agreements with ASEA; told all state employees that all current union membership and dues deduction authorization agreements were unconstitutional; and announced that the State would impose new restrictions on all union member dues deduction agreements going forward.

INTRODUCTION

The State's current executive branch officials seek to justify their blatant violations of the State's contract with ASEA and Alaska state law by asserting a radical misinterpretation of *Janus*. They contend that *Janus* voided all state employee union membership agreements and requires the State to impose a special heightened "waiver" analysis before processing public employees' voluntary affirmative dues deduction

authorizations. [Exc. 434-39] That contention has been unanimously and correctly rejected by every court to consider it.[1] The Superior Court correctly rejected the State's central

[1] *See Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 2795 (2021); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 730-33 (7th Cir. 2021), *cert. denied*, 142 S.Ct. 424 (2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir. 2021), *cert. denied*, 142 S.Ct. 423 (2021); *Fischer v. Governor of N.J.*, 842 F.App'x 741, 753 & n.18 (3d Cir. 2021), *cert. denied*, 142 S.Ct. 426 (2021); *Woods v. Alaska State Emps. Ass'n*, 496 F.Supp.3d 1365, 1372-74 (D. Alaska 2020), *aff'd*, 2021 WL 3746816 (9th Cir. Aug. 11, 2021), *cert. denied*, 2022 WL 515883 (U.S. Feb. 22, 2022); *Creed v. Alaska State Emps. Ass'n*, 472 F.Supp.3d 518, 524-31 (D. Alaska 2020), *aff'd*, 2021 WL 3674742 (9th Cir. Aug. 16, 2021), *cert denied*, 2022 WL 515883 (U.S. Feb. 22, 2022); *LaSpina v. SEIU Pa.*, 985 F.3d 278, 287 (3d Cir. 2021); *Oliver v. SEIU Local 668*, 830 F.App'x 76, 80 (3d Cir. 2020); *Grossman v. Hawaii Gov't Emps. Ass'n*, 854 F.App'x 911, 912 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 591 (2021); *Troesch v. Chicago Tchrs. Union*, 522 F.Supp.3d 425, 429 (N.D. Ill. 2021), *aff'd*, 2021 WL 2587783 (7th Cir. Apr. 15, 2021), *cert. denied*, 142 S.Ct. 425 (2021); *Wolf v. Shaw*, 2021 WL 4994888 (9th Cir. Sept. 16, 2021), *cert. denied sub nom.*, *Wolf v. UPTE-CWA Local 9199*, 142 S.Ct. 591 (2021); *Anderson v. SEIU Local 503*, 400 F.Supp.3d 1113, 1116-18 (D. Or. 2019), *aff'd*, 854 F.App'x 915 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 764 (2022); *Yates v. AFT*, 2020 WL 6146564, at *1-2 (D. Or. Oct. 19, 2020), *adopting report*, 2020 WL 7049550 (D. Or. Nov. 29, 2020), *aff'd*, 2021 WL 477010 (9th Cir. Oct. 12, 2021), *cert. denied*, 2022 WL 660649 (U.S. Mar. 7, 2022); *Smith v. Super. Ct., Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018), *aff'd sub nom.*, *Smith v. Bieker*, 854 F.App'x 937 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 593 (2021); *Mendez v. Cal. Tchrs. Ass'n*, 419 F.Supp.3d 1182, 1186 (N.D. Cal. 2020), *aff'd*, 854 F.App'x 920 (9th Cir. 2021), *cert. denied sub nom. Anderson*, 142 S.Ct. 764 (2022); *Allen v. Ohio Civil Serv. Emps. Ass'n*, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020), *appeal dismissed*, 2020 WL 4194952 (6th Cir. July 20, 2020); *Hoekman v. Educ. Minn.*, 519 F.Supp.3d 497, 508-10 (D. Minn. 2021); *Molina v. Pa. Soc. Serv. Union*, 2020 WL 2306650, at *7-8 (M.D. Pa. May 8, 2020); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Local No. 320*, 441 F.Supp.3d 762, 772-73 (D. Minn. 2020), *appeal dismissed*, 2020 WL 5525220 (8th Cir. May 15, 2020); *Wagner v. Univ. of Wash.*, 2020 WL 5520947, at *5 (W.D. Wash. Sept. 11, 2020); *Labarrere v. Univ. Prof'l & Tech. Emps., CWA 9119*, 493 F.Supp.3d 964, 971-72 (S.D. Cal. 2020), *aff'd*, 2022 WL 260868 (9th Cir. Jan. 27, 2022); *Polk v. Yee*, 481 F.Supp.3d 1060, 1071 (E.D. Cal. 2020); *Durst v. Or. Educ. Ass'n*, 450 F.Supp.3d 1085, 1090-91 (D. Or. 2020), *aff'd*, 854 F.App'x 916 (9th Cir. 2021), *cert. denied sub nom. Anderson*, 142 S.Ct. 764 (2022); *Quirarte v. United Domestic Workers*, 438 F.Supp.3d 1108, 1118-19 (S.D. Cal. 2020); *Hernandez v. AFSCME Cal.*, 424 F.Supp.3d 912, 923-24 (E.D. Cal. 2019), *aff'd*, 854 F.App'x 923 (9th Cir. 2021); *Seager v. United Tchrs. L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *aff'd*, 854 F.App'x 927 (9th Cir. July 29, 2021), *cert. denied sub nom. Anderson*, 142 S.Ct. 764 (2022);

argument, and the Superior Court's other rulings regarding the State's violation of its contract with ASEA and multiple state laws were all also correct. [Exc. 778-79]

For thirty years, the State and ASEA have negotiated collective bargaining agreements ("CBAs") governing the terms of employment for nearly 8,000 state employees. [Exc. 125, 127 ¶¶7, 18] The current CBA provides that "[b]argaining unit members" who choose to become union members and pay membership dues "may authorize payroll deductions in writing on the form provided by the Union" and "[s]uch payroll deductions will be transmitted to the Union by the state." [Exc. 313] The Alaska Public Employment Relations Act ("PERA") also requires the State to process ASEA membership dues deductions, stating that, "[u]pon written authorization of a public employee … the public employer shall deduct … the monthly amount of dues … and shall deliver it to … the exclusive bargaining representative."[2] For decades, the State complied by deducting union dues from employees' pay upon being informed by ASEA that an employee had voluntarily agreed in writing to authorize such dues deductions in exchange for union membership. [Exc. 133, 136 ¶¶46, 59]

Beginning in late August 2019, however, the State's executive branch abruptly changed course. Then-Attorney General Kevin Clarkson suddenly proclaimed that *Janus*, a decision issued more than a year earlier that concerned state-compelled payments of *non-*

O'Callaghan v. Regents of Univ. of Cal., 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Babb v. Cal. Tchrs. Ass'n*, 378 F.Supp.3d 857, 876-77 (C.D. Cal. 2019), *aff'd*, 2022 WL 262144 (9th Cir. Jan. 26, 2022); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019).

[2] AS 23.40.220.

union-member agency fees, required the State to stop honoring the thousands of existing ASEA member dues deduction authorizations. [Exc. 438-40] Without giving ASEA any prior notice, the State began implementing a new policy in direct violation of the CBA and state law. [Exc. 144-42 ¶¶81-91] Under the new policy, the State would void all existing dues authorization agreements; refuse to process dues deductions unless ASEA members sign new, revocable dues authorization forms designed by the State, after reading State warnings that by choosing to support the Union they are giving up their First Amendment rights; and require employees to repeatedly re-affirm their deduction authorizations at intervals chosen by the State. [Exc. 486-87] The State also interfered with ASEA's relationship with its approximately 7,000 members by directly and incorrectly informing them that their union membership and dues authorization agreements were unconstitutional, and that it would unilaterally cancel such agreements. [Exc. 137 ¶64, 449]

The State then brought this lawsuit against ASEA seeking a declaratory judgment endorsing its actions. [Exc. 15-18, 138 ¶68] ASEA filed counterclaims alleging that the State's actions violated the CBA, the covenant of good faith and fair dealing, separation of powers, PERA, and the Administrative Procedures Act ("APA"). [Exc. 89-101] The Superior Court granted ASEA's request for a temporary restraining order ("TRO"), thoroughly explained why the State's interpretation of *Janus* is wrong [Exc. 33-38], and subsequently converted the TRO into a preliminary injunction. [Exc. 63-64] The court then granted ASEA's motion for summary judgment based on the parties' stipulated facts and entered judgment in ASEA's favor on all claims. [Exc. 778-79]

Janus held that public employers may no longer require *nonmembers* to unwillingly

pay for their share of the costs of union collective bargaining representation, but otherwise, "[s]tates can keep their labor-relations systems exactly as they are."[3] All the Superior Court's rulings were correct, so this Court should affirm the judgment below.

STATEMENT OF THE CASE[4]

A. ASEA is the bargaining representative for thousands of state employees.

ASEA is the democratically chosen collective bargaining representative for the approximately 8,000 State employees in the General Government Unit ("GGU"). [Exc. 125 ¶7] Under PERA, union membership is voluntary. [Exc. 125 ¶11][5] Nonetheless, ASEA must represent all GGU employees, regardless of membership status, in negotiating and administering CBAs with the State. [Exc. 126 ¶14][6]

Approximately 7,000 GGU employees have voluntarily chosen to become ASEA members. [Exc. 125 ¶12] Employees join ASEA by signing membership agreements that authorize the State to deduct union dues from their pay in exchange for the rights and benefits of union membership, including rights to run for union office, vote in union officer elections, serve on bargaining committees, and otherwise participate in internal union affairs; and access to group benefits programs, including no-cost life insurance, free college courses, scholarships, and discounts on products and services. [Exc. 125, 132-33 ¶¶12, 42]

B. The State agreed to honor ASEA members' dues deduction authorizations and not to interfere with ASEA's relationship with unit employees.

The State and ASEA have entered into a series of CBAs since 1989, when GGU

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3 *Janus*, 138 S.Ct. at 2485 n.27.

4 The parties' stipulated to a Joint Statement of Facts. [Exc. 123-556]

5 AS 23.40.080.

6 *See IBEW Local 1547 v. City of Ketchikan*, 805 P.2d 340, 342 n.3 (Alaska 1991).

employees elected ASEA as their representative. [Exc. 127 ¶¶18-19] Each CBA, including the current CBA effective through June 30, 2022, contains a noninterference clause: "The Employer … will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union." [Exc. 245, 254, 262, 269, 276, 284, 292, 312]

All the CBAs have also contained a section on payroll deductions, in which the State agreed to deduct union dues from employees' wages "[u]pon receipt … of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member." [Exc. 254-55, 262-63, 269-70, 277, 285, 293, 313; *see also* Exc. 247 (slightly different wording in 1990 CBA)] Since 2004, the CBAs have further provided that "[b]argaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the State." [Exc. 262, 270, 277, 285, 293, 313]

Since June 2017, the union membership and dues deduction authorization forms signed by individual employees who choose to join ASEA have stated in pertinent part:

> Yes, I choose to be a Union member of ASEA/AFSCME Local 52. I understand my membership supports the organization advocating for my interests as a bargaining unit member and as an individual. ASEA membership and paying union dues is not a condition of employment. By submitting this form, I choose to be a union member and to pay my dues by way of payroll deduction.
> …
> This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period. [Exc. 131-

32 ¶¶37-38; Exc. 427, 442, 446][7]

The provision in ASEA's membership agreements stating that dues deductions will be irrevocable for one-year periods incorporates the same terms Congress has authorized for federal employees, postal employees, and employees covered by the National Labor Relations Act ("NLRA") and the Railway Labor Act.[8] A one-year irrevocability period "provides [the union] with financial stability by ensuring a predictable revenue stream," thereby enabling the union to "make long-term financial commitments without the possibility of a sudden loss of revenue," and also prevents individuals "from gaming the [u]nion's system of governance" by "pay[ing] dues for only a month to become eligible to vote in a [u]nion officer election" or accessing a members-only benefit "and then reneg[ing] on all future financial contributions."[9]

The State does not take part in drafting the ASEA membership and dues deduction agreements. [Exc. 132 ¶41] The State is aware of their contents, however, because the State receives a copy of every signed agreement from ASEA. [*Id.*; Exc. 130 ¶¶31-32] Consistent with the CBA and state law, the State's longstanding procedure has been to deduct union dues pursuant to the terms of ASEA's deduction agreements with GGU employees and not to interfere with ASEA's relationship with its members. [Exc. 130, 133-34, 136 ¶¶33, 46, 51, 59] The following facts describe the parties' consistent past practices up until August

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[7] The current version of the membership and dues deduction form is at Exc. 441-42.

[8] *See* 5 U.S.C. § 7115(a)–(b); 39 U.S.C. § 1205; 29 U.S.C. § 186(c)(4); 45 U.S.C. § 152, Eleventh (b).

[9] *Fisk v. Inslee*, 2017 WL 4619223, at *3 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F.App'x 632 (9th Cir. 2019).

27, 2019, and which were reinstated by the October 3, 2019 TRO. [Exc. 130 ¶33]

When an employee joins ASEA, ASEA submits a copy of the employee's dues deduction authorization to the State. [Exc. 133 ¶46] The State then initiates dues deductions in accordance with that agreement. [*Id.*] The State continues to deduct dues until ASEA notifies the State that the employee has resigned union membership and revoked the dues deduction authorization in accordance with the employee's agreement. [Exc. 132 ¶39]

If a GGU employee contacts the State regarding union membership or dues, the State directs that employee to ASEA. [Exc. 134 ¶51] When asked, ASEA staff inform GGU employees about the process for resigning their membership and revoking dues deduction authorizations. [Exc. 136 ¶57] If a GGU employee wishes to resign membership, ASEA processes that request immediately. [Exc. 134 ¶52] If the employee also requests to stop dues payments, ASEA processes the request in accordance with the terms of the employee's signed agreement. [Exc. 134-35 ¶¶53-55] As of July 2020, if an employee who signed a deduction agreement with a one-year dues commitment asks to stop deductions before the annual revocation widow, ASEA holds that request and processes it on the first day of the window. [Exc. 135 ¶56] ASEA notifies the State when to cease dues deductions, and the State only ceases dues deductions upon notice from ASEA. [Exc. 136 ¶59]

C. After *Janus*, the State and ASEA revised the CBA to eliminate agency fees and reaffirmed the State's obligation to honor employees' dues authorizations.

Prior to June 27, 2018, Alaska law and U.S. Supreme Court precedent permitted public employers to require non-union-members to pay proportional fees to their representative union to cover the nonmembers' share of union costs germane to collective

bargaining representation, but not to cover a union's political or ideological activities.[10] Consistent with this authority, the State deducted an "agency fee" from GGU employees who were not members of ASEA and remitted that fee to ASEA. [Exc. 127-28 ¶20] At all times, the chargeable portion of agency fees was less than full union member dues. [*Id.*]

The U.S. Supreme Court issued its decision in *Janus* on June 27, 2018. *Janus* overruled 40 years of Supreme Court precedent and held that public employees who had not opted to join a union and pay union dues could no longer be required to pay agency fees as a condition of public employment.[11] The Supreme Court also stated that, apart from ceasing agency fees, "[s]tates can keep their labor-relations systems exactly as they are."[12]

The State and ASEA modified the then-applicable CBA to comply with *Janus* by removing the provisions regarding agency fees. [Exc. 297] They made no changes to the portion of CBA Section 3.04 that requires the State to deduct union membership dues upon employee authorization. [*See id.*] On September 7, 2018, then-Attorney General Jahna Lindemuth issued a legal memorandum regarding *Janus* ("Lindemuth Memorandum"). [Exc. 299] The Lindemuth Memorandum concluded that "[t]he *Janus* decision addressed the issue of payment of agency fees by non-union members. It does not require existing union members to take any action; existing membership cards and payroll deduction authorizations by union members should continue to be honored." [Exc. 302]

In fall 2018, the State and ASEA negotiated a new CBA. [Exc. 129 ¶28; Exc. 304]

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10 *See* AS 23.40.110(b)(2); *Abood v. Detroit Board of Ed.*, 431 U.S. 209 (1977).

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

12 *Id.* at 2485 n.27.

The new CBA (which is the current CBA) does not include an agency fee requirement. [Exc. 312-13] The State did not propose any changes to Section 3.04, which governs payroll deductions for union membership dues. [Exc. 129 ¶28] A "Summary of Changes" created and published by the State explains that Article 3 of the CBA was "[u]pdated to comply with *Janus* decision." [Exc. 129 ¶30; Exc. 422-25]

Representatives of the State and ASEA tentatively agreed to the current CBA in November 2018. [Exc. 129 ¶29] ASEA members then voted to ratify the agreement; ASEA representatives signed it; and the Legislature approved a state operating budget that included full funding for the CBA. [*Id.*] Then-Commissioner of Administration Kelly Tshibaka formally signed the current CBA on behalf of the State on August 8, 2019. [*Id.*]

D. Beginning in August 2019, the State unilaterally announced and implemented a new policy of refusing to honor ASEA dues authorization agreements.

1. Attorney General Clarkson's August 27, 2019 Opinion.

On August 27, 2019, more than a year after the *Janus* decision and just 19 days after Commissioner Tshibaka signed the current CBA on behalf of the State, then-Attorney General Clarkson issued an opinion regarding *Janus*. [Exc. 136 ¶61; Exc. 429-40] The opinion proclaims that, under *Janus*: all existing union dues deduction agreements are invalid; the State must take control over the process for authorizing union dues by creating new forms with a warning that individuals are "waiving" their First Amendment rights by joining the Union; and each employee must repeatedly reaffirm this "waiver" at intervals chosen by the State. [Exc. 433-40; *see* Exc. 24]

Attorney General Clarkson did not give ASEA the opportunity to provide any input before issuing his opinion, but State officials in his office did consult with anti-union

advocacy groups. [Exc. 137 ¶¶63-64][13] Attorney General Clarkson's opinion was contrary to the Lindemuth Memorandum and the reasoning of at least ten federal and state court decisions published prior to August 27, 2019. [*See* Exc. 137 ¶62; Exc. 25, 31-32 & nn.22-23 (citing authorities); Exc. 793-850] Former Attorney General Clarkson was aware of these authorities, but his opinion did not discuss them. [Exc. 137 ¶62]

Although Attorney General Clarkson did not provide any advance notice to ASEA, his opinion was not a surprise to other State officials. The day the opinion was released, Commissioner Tshibaka sent a mass email to all 8,000 GGU employees, informing them that "the State is not in compliance with" *Janus*. [Exc. 137 ¶65; Exc. 428, 449] An attached "Frequently Asked Questions" document told all employees that their existing union membership and dues authorization agreements would be cancelled, and that they would need to sign the State's new forms if they still wanted to continue paying union membership dues. [Exc. 463] Commissioner Tshibaka did not consult with ASEA about the content of the email or give ASEA any advance notice of the mass communication. [Exc. 137 ¶65]

The State also began interfering with ASEA's relations with its members, communicating directly with individual bargaining unit employees and sending some ASEA members a "Cease Union Dues Deduction" form to sign that was created by the Department of Administration. [Exc. 141 ¶¶81-83] Seven of those employees had signed ASEA membership and dues deduction authorizations that contained annual dues

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[13] The Mackinac Center, Alaska Policy Forum, and Liberty Justice Center are organizations that seek to weaken the collective rights of working people, including their unions. *See* https://www.mackinac.org/labor; https://alaskapolicyforum.org/tag/unions/; https://libertyjusticecenter.org/workers-rights/; *see also* Exc. 139 ¶¶73-74.

commitments. [Exc. 141-42 ¶86] The State ceased dues deductions for those seven bargaining unit employees, even though none of them were within the revocation period in their agreements with ASEA. [Exc. 141-42 ¶¶84-86] The State did not direct these employees to contact ASEA regarding their union dues and did not inform ASEA that it had processed these dues deduction cancellations until after the fact. [Exc. 142 ¶87][14]

2. The Governor's September 26, 2019 Administrative Order.

After ASEA objected to the Attorney General's opinion and the State's emails to all GGU employees, the State filed this lawsuit against ASEA seeking a declaration endorsing former Attorney General Clarkson's interpretation of *Janus*. [Exc. 138 ¶68; Exc. 24] ASEA filed an answer, counterclaims, and motion for TRO and preliminary injunction on September 25, 2019. [Exc. 138 ¶68] The next day, Governor Dunleavy issued Administrative Order 312 ("AO 312"). [Exc. 138 ¶69; Exc. 484-88] The AO directs the Department of Administration and the Department of Law "to implement new procedures and forms for affected state employees to 'opt-in' and 'opt-out' of paying union dues and fees." [Exc. 486] The AO prescribes language to be included on the new forms that the State would create, orders that "all dues and fees deductions made under prior procedures will be immediately discontinued" once the State creates the new forms, and provides that affected unions would be notified only after "the forms and processes described above are completed." [Exc. 487] The State did not consult with ASEA or offer ASEA the opportunity to provide any input before the Governor issued AO 312, but officials in the

[14] Two other employees had signed dues deduction authorizations that contained no annual commitment or revocation period, so ASEA notified the State to cease dues for those employees. [Exc. 141-42 ¶¶86, 88-89]

Governor's office did consult with anti-union organizations. [Exc. 139 ¶¶73-74]

Then-Commissioner Tshibaka again emailed all GGU employees on the same day that AO 312 issued. [Exc. 139 ¶75; Exc. 491-98] This email told all employees that "the prior administration's response to *Janus* failed to adequately protect your First Amendment rights." [Exc. 492] The State did not consult with ASEA about the content of the mass email nor give ASEA any advance notice of the email. [Exc. 139 ¶75]

The Governor, Attorney General, and Commissioner also held a press conference on September 26, 2019, about the AO and posted AO 312 and "Frequently Asked Questions" for employees on the State's website. [Exc. 139-40 ¶¶76-77] At the press conference, Attorney General Clarkson erroneously stated that the revocation period for union dues deduction authorizations in ASEA membership agreements, which the State took no part in drafting, was put in place by the administration of Governor Bill Walker, and that it is "absolutely unconstitutional and violates the *Janus* decision." [Exc. 523-24] Attorney General Clarkson also said the State was not obligated to follow its CBA with ASEA because "a contract that is unconstitutional is really no contract at all." [Exc. 527]

E. ASEA suffered substantial harm as a result of the State's actions.

The parties stipulated that the State's actions caused substantial harm to ASEA. ASEA's staff were forced to divert time and resources away from their normal work of bargaining unit representation and instead address the fallout from the State's communications to GGU employees. [Exc. 143 ¶92] ASEA also experienced a drop in membership because of the State's actions. [Exc. 143 ¶93] Additionally, the State's cancellation of dues deductions for seven GGU employees in contravention of those

employees' dues deduction authorization agreements resulted in lost dues. [Exc. 142 ¶91]

F. Procedural Background.

1. State Court Litigation.

On October 3, 2019, the Superior Court granted ASEA's request for a TRO to halt implementation of the Attorney General Opinion and AO 312. [Exc. 41-42] The court found "no support for the State's argument in *Janus* or in any other U.S. Supreme Court case, in no case from any other jurisdiction, not in PERA, and not in the collective bargaining agreement," and found that the State's actions "will cause ASEA irreparable injury." [Exc. 38, 41] The court converted the TRO into a preliminary injunction on November 5, 2019. [Exc. 64]

The parties submitted a joint statement of stipulated facts [Exc. 123-556], and the Superior Court granted ASEA's motion for summary judgment. [Exc. 777-79] In its order, the court "incorporate[d] by reference and reaffirm[ed] the analysis in the Court's prior orders granting a temporary restraining order and … preliminary injunction[]" and

> further conclude[d] that, for the reasons set forth in ASEA's motion and supporting memorandum, the stipulated undisputed facts establish that the State [and] third-party defendants …, by unilaterally changing the union member dues deduction procedures … and directly dealing with General Government Unit bargaining members: (1) breached the collective bargaining agreement between ASEA and the State; (2) breached the implied covenant of good faith and fair dealing; (3) violated the separation of powers enshrined in the Alaska state constitution and violated the Public Employment Relations Act; and (4) violated the Administrative Procedures Act. [Exc. 778; *see* Exc. 636-74, 700-60]

2. Federal Court Litigation.

On March 16, 2020, two state employees sued ASEA and the Commissioner of Administration in U.S. District Court, alleging that their payment of union dues pursuant

to their own authorization agreements with ASEA violated their First Amendment rights (*Creed*).[15] On April 1, 2020, another Alaska state employee filed a separate suit in the same court alleging a substantively identical claim against the same defendants (*Woods*).[16] In both cases, the State argued for a judgment against ASEA on the same grounds it urges here.[17] The district court, in both cases, considered and rejected the State's *Janus*-based arguments and entered final judgment for ASEA.[18] The plaintiffs appealed.

While *Creed* and *Woods* were pending before the Ninth Circuit, the U.S. Supreme Court considered a petition for certiorari in *Belgau v. Inslee*, in which Washington state employees raised essentially the same claims. In *Belgau*, the Ninth Circuit had held that the state's deduction of union dues, pursuant to the employees' union membership and dues deduction agreements, did not violate the employees' First Amendment rights.[19] The State of Alaska joined an *amicus* brief in *Belgau* supporting a petition for en banc review [Exc. 998-1019] (which the Ninth Circuit denied), and also submitted an *amicus* brief to the U.S. Supreme Court in support of certiorari in *Belgau* (which the Supreme Court denied).[20]

After the denial of certiorari in *Belgau*, the Ninth Circuit affirmed the decisions in *Creed* and *Woods*.[21] The plaintiffs in those cases then filed a joint petition for certiorari.

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15 *Creed v. ASEA*, 472 F.Supp.3d 518 (D. Alaska 2020), *aff'd*, 2021 WL 3674742 (9th Cir. Aug. 16, 2021), *cert. denied*, __ S.Ct. __, 2022 WL 515883 (U.S. Feb. 22, 2022).

16 *Woods v. ASEA*, 496 F.Supp.3d 1365 (D. Alaska 2020), *aff'd*, 2021 WL 3746816 (9th Cir. Aug. 11, 2021), *cert. denied*, __ S.Ct. __, 2022 WL 515883 (U.S. Feb. 22, 2022).

17 *Woods*, 496 F.Supp.3d at 1373-74; *Creed*, 472 F.Supp.3d at 527-28.

18 *Woods*, 496 F.Supp.3d at 1372-74; *Creed*, 472 F.Supp.3d at 525-31.

19 *Belgau*, 975 F.3d at 950-52.

20 Brief for the States of Alaska, *et al.* in Support of Petitioners, No. 20-1120, *Belgau v. Inslee* (U.S. filed March 18, 2021); *Belgau v. Inslee*, 141 S.Ct. 2795 (2021).

21 *Woods*, 2021 WL 3746816; *Creed*, 2021 WL 3674742.

The State, which was a party in *Creed* and *Woods,* filed a brief in support of certiorari, arguing—as it does here—that the lower courts' reading of *Janus* and the First Amendment was "improperly limited."[22] The Supreme Court denied the petition.[23]

ARGUMENT

I. Standard of Review

This Court's review of the summary judgment order below is de novo.[24]

II. The State is collaterally estopped from relitigating the *Janus* issue.

As a threshold matter, the State is barred by collateral estoppel from relitigating its *Janus*-based arguments here. "Collateral estoppel … operates to preclude relitigation of issues when the issues have been actually litigated and determined in the first action by a valid and final judgment, and the determination must have been essential to the judgment."[25] The State already litigated and lost the same *Janus* issues in two federal lawsuits (*Creed* and *Woods*), based on the same underlying facts, against the same party (ASEA). These issues were "actually … determined" in *Creed* and *Woods* "by a valid and final judgment," and the rejection of the State's arguments regarding *Janus* was "essential to the judgment" in both cases.[26] Thus, collateral estoppel applies, and this Court should

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22 Brief of Resp. Paul Vrana, Comm'r of Admin. for the State of Alaska, No. 21-615, *Woods v. ASEA*, 2021 WL 5568051, at 11 (U.S. filed Nov. 23, 2021); *see* AOB 14.

23 *Woods v. ASEA*, 2022 WL 515883 (U.S. Feb. 22, 2022).

24 *Bush v. Elkins*, 342 P.3d 1245, 1251 (Alaska 2015).

25 *DeNardo v. Municipality of Anchorage*, 775 P.2d 515, 517 (Alaska 1989).

26 *DeNardo*, 775 P.2d at 517. Although ASEA and the State were both defendants in *Creed* and *Woods*, parties "who are not adversaries to each other under the pleadings in an action involving them and a third party" are nevertheless "bound by and entitled to the benefits of issue preclusion [collateral estoppel] with respect to issues they actually litigate fully and fairly as adversaries to each other and which are essential to the judgment rendered." RESTATEMENT (SECOND) OF JUDGMENTS § 38 (1982); *see Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 314 (1944); *Fid. & Cas. Co. of New York v. Fed. Exp.*,

affirm the Superior Court's ruling on the First Amendment issue on that threshold ground.

The State cites *Totemoff v. State*, where the Court declined to find collateral estoppel on a question of pure statutory interpretation, where the underlying facts were entirely different than in the previous case.[27] The Court relied on a narrow exception to collateral estoppel for "unmixed questions of law," which arises when there are "independent developments in the area of law" or "unanticipated factual circumstance[s]."[28] That exception does not apply here. The application of the First Amendment to Alaska public employee dues deductions is not an "unmixed" question of law and, in any event, there is no meaningful difference in the factual circumstances of this case from *Creed/Woods* for purposes of the State's *Janus* argument, nor have there been relevant legal developments.

III. *Janus* does not require the State to change its practices for processing voluntary union member dues deductions.

A. *Janus* does not address voluntary union membership agreements.

Even if not collaterally estopped, there is no merit to the State's contention that *Janus* requires changes to current practices for processing ASEA member dues deductions. AOB 14-15. Under Alaska law, union membership is voluntary, and the State only deducts dues after an employee signs a voluntary agreement expressly authorizing those deductions. [Exc. 125 ¶¶11-12] The State's arguments all rest on its contention that something more than a voluntary, binding contract is needed before a public employee can agree to join a union and pay membership dues. Every court to decide the issue—including

136 F.2d 35, 39 (6th Cir. 1943).

[27] 905 P.2d 954, 963 (Alaska 1995) (citing *State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 954 (Alaska 1995)) (AOB 21 n.48).

[28] *Cook Inlet*, 895 P.2d at 952 (quotation marks omitted).

four federal circuit courts of appeals—has rejected that contention. *Supra* n.1.

The State does not attempt to distinguish this authority.[29] Instead, the State relies on a single passage in *Janus*. AOB 17. But when read in full and in context, that passage makes clear that *Janus* addressed only *non*members who had not agreed to pay union dues:

> Neither an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, *nonmembers* are waiving their First Amendment rights, and such a waiver cannot be presumed.[30]

In this passage, the Court cited cases concerning whether a "waiver" could be found from an individual's *inaction*, thereby making clear that states cannot "presume[]" that nonmembers who take no action wish to support unions and require them to "opt out."[31] No such nonmember "opt out" system is at issue here. Indeed, *Janus* held that "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions."[32] As the Seventh Circuit has recognized, "the Court was

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[29] The State cites the opinions of two other state attorneys general (both issued after the State's actions here). AOB 21-22. Neither opinion is persuasive, given that they fail to mention any of the numerous judicial decisions that unanimously reject their position.

[30] *Janus*, 138 S.Ct. at 2486 (emphases added).

[31] *Id.*; *see Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (AOB 17, 23, 24) (whether criminal defendant waived right to counsel by failing to request counsel); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (AOB 16) (whether state "constructively waived" sovereign immunity; suggesting analysis would be different had state made "contractual commitment"); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 306-07 (1937) (AOB 24) (whether objection was waived when not raised in earlier proceedings).

[32] *Janus*, 138 S.Ct. at 2485 n.27. The State concedes that *Janus* recognized states may "follow the model of the federal government" regarding labor relations. AOB 19 n.42. Federal employees have long utilized annual union dues deduction agreements indistinguishable from ASEA's agreements. *See* 5 U.S.C. § 7115(a)–(b); *supra* at 7.

not concerned in the abstract with the deduction of money from employees' paychecks pursuant to an employment contract. Nor did it provide an unqualified constitutional right to accept the benefits of union representation without paying."[33]

The State contends that *Janus* imposes a heightened standard for voluntary union membership agreements because the word "waiver" appears in the passage quoted above. But the passage addressed only nonmembers who never affirmatively chose to join and support a union.[34] The Supreme Court also has explained that "[w]aiver is a vague term used for a great variety of purposes, good and bad, in the law"; and that the Court's decisions "do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection."[35] Rather, in most situations, affirmative consent is a valid "waiver."[36]

Thus, ordinary contract principles apply to employees' voluntary agreements to join a union and pay dues for a specified term in exchange for membership rights and benefits. In *Cohen v. Cowles Media*, the U.S. Supreme Court held that "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law."[37] Consistent with this principle, the Superior Court joined the unanimous

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33 *Bennett*, 991 F.3d at 732 (internal quotation marks, citations omitted).

34 *See Hendrickson*, 992 F.3d at 962 ("*Janus* 'in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement.'") (quoting *Belgau*, 975 F.3d at 952); *Bennett*, 991 F.3d at 732 ("In the same passage …, the Court made clear that a union may collect dues when an 'employee affirmatively consents to pay.'") (quoting *Janus*, 138 S.Ct. at 2486).

35 *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973).

36 *See id.* at 242-46.

37 501 U.S. 663, 672 (1991).

judicial consensus holding that the State's process for administering employees' voluntary, affirmative agreements to pay union dues, for which the employees receive membership rights and benefits in return, does not violate the employees' First Amendment rights.[38]

As numerous courts have held, nothing in *Janus* calls into question the Supreme Court's holding in *Cohen* that government enforcement of an affirmative, self-imposed obligation between private parties does not violate the First Amendment, without the need to apply any heightened knowing and intelligent waiver analysis. *Supra* n.1.[39] As the Ninth Circuit has explained: "The First Amendment does not support Employees' right to renege on their promise to join and support the union. This promise was made in the context of a contractual relationship between the union and its employees. When 'legal obligations are self imposed,' state law, not the First Amendment, normally governs."[40]

The State alternatively argues that, even if *Janus* is distinguishable (which it is), a heightened "waiver" standard still applies under general First Amendment principles. AOB 19-20. This argument is foreclosed by *Cohen* and the numerous decisions holding that union membership and dues deduction agreements are ordinary contracts, so their enforcement does not implicate the First Amendment. *Supra* n.1. Most of the "waiver" cases the State relies on are inapposite because they involved litigants who had not

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[38] Because the agreements do not violate the First Amendment (or any other law), the State's citations to cases involving illegal contracts are inapposite. *See* AOB 27.

[39] *Cohen*, 501 U.S. at 671-72; *see also id.* at 677 (Souter, J., dissenting, noting that majority did not apply any heightened waiver analysis).

[40] *Belgau*, 975 F.3d at 950; *see, e.g.*, *Bennett*, 991 F.3d at 731; *Fischer*, 842 F.App'x at 753 ("Plaintiffs chose to enter into membership agreements with [the union].… *Janus* does not abrogate or supersede Plaintiffs' contractual obligations ….").

affirmatively undertaken any obligations, much less executed bilateral contracts to perform those obligations in exchange for consideration.[41]

The few "waiver" cases the State cites that did involve contracts are also easily distinguished. Some involved contracts that did not clearly inform the signing parties of what they purportedly were "agreeing" to—unlike here, where the terms of ASEA's membership agreements are simple and clear.[42] In the other cases, courts analyzed whether a private party had "waived" its rights when it entered a contract *with the government*.[43]

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[41] *See United States v. United Foods*, 533 U.S. 405, 408-10 (2001) (considering challenge to mandatory assessments on producers to fund advertising); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312-13 (2012) (criticizing presumption that "nonmembers" who failed to object to non-chargeable component of agency fees impliedly consented to payment); *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988) (criminal suspect's consent after receiving *Miranda* waived his right to counsel during questioning); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-44 (1967) (libel defendant could not be deemed to have waived, through its silence, libel defense Supreme Court later recognized in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393-94 (1937) (plaintiff could not be deemed to have waived right to jury trial by merely "request[ing] peremptory instructions, and … nothing more"); *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007) (pro se prisoner litigant's waiver of further habeas proceedings).

[42] *See Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (consumer did not agree to otherwise unconstitutional collection procedure where contract itself did not make "clear" what consumer was purportedly agreeing to); *Anderson v. Alaska Housing Finance Corp.*, 462 P.3d 19, 28-29 (Alaska 2020) (plaintiff did not agree to non-judicial foreclosure process where neither his house note nor deed of trust expressly waived pre-deprivation hearing); *Brandner v. Providence Health & Servs.*, 394 P.3d 581, 588-89 (Alaska 2017) (doctor could not be deemed to have waived due process right to pre-termination hearing by agreeing to abide by hospital's policies in general).

[43] *See Brady v. United States*, 397 U.S. 742, 748 (1970) (plea agreement with prosecution); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (same); *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019) (non-disparagement clause in settlement agreement with police department); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988) (release of claims against city contained in settlement agreement); *see also Anderson*, 462 P.3d at 22 (government had purchased plaintiff's mortgage note and attempted to enforce non-judicial foreclosure process without a pre-deprivation hearing).

This case, by contrast, involves ASEA's private agreements with its own members. Private parties often enter into agreements that implicate First Amendment rights—arbitration agreements, nondisclosure agreements, annual magazine subscriptions—and the government routinely honors those agreements. The State has not cited any case in which a court held that a private contract that was binding under state law was unenforceable because it did not constitute a heightened "waiver" of First Amendment rights.

B. The State's policies already require public employees to "affirmatively consent" before paying membership dues.

Even if the State were correct that a heightened waiver standard applied (it is not), the State's policies and ASEA's member agreements would satisfy this requirement.[44] *Janus* "acknowledges" that even *non*-members "can waive their First Amendment rights by affirmatively consenting to pay union dues."[45] ASEA members execute membership agreements that affirmatively state in plain terms that the employee is voluntarily committing to dues deductions lasting for one year, and for year-to-year thereafter, unless the employee revokes that commitment during a specified period. [Exc. 442]

The State argues that "employees … could not have knowingly waived rights that were not articulated until *Janus*." AOB 28. But the courts have "routinely rejected" that same argument.[46] Union membership has always been voluntary, and the stipulated facts contain no evidence that *any* ASEA member was misled or misinformed about her rights

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44 *See Creed*, 472 F.Supp.3d at 527-31 (ASEA's agreements satisfied heightened waiver standard, assuming that standard applied).

45 *Smith*, 2018 WL 6072806, at *1; *see Janus*, 138 S.Ct. at 2486 ("By agreeing to pay, nonmembers are waiving their First Amendment rights ….").

46 *Creed*, 472 F.Supp.3d at 529 (citing cases); *see also supra* n.1.

before choosing to join ASEA. Members who joined before *Janus* were similarly free to choose not to join. [Exc. 125 ¶11] As every court to address the issue has agreed, that *Janus* changed the law regarding non-member agency fees does not invalidate pre-*Janus* voluntary union membership agreements. *Supra* n.1. The State's "reliance on" *Sambo's Restaurants* and *Curtis Publishing Co.* to argue otherwise (AOB 28) "is misplaced as neither case involved a situation where there is an agreement which is binding as a matter of state contract law," and these cases "do[] not stand for the proposition that newly recognized First Amendment rights can vitiate a preexisting contract."[47]

Even in cases involving plea agreements—contracts that waive constitutional rights—the fact that a defendant may have accepted a plea in part to avoid an alternative later deemed unconstitutional does not provide a basis for avoiding enforcement of that agreement.[48] Thus, as the Seventh Circuit has explained, an employee (Bennett) who opted to join a union and commit to pay annual dues before *Janus* and later resigned after *Janus*

> is not a nonmember as the term was used in *Janus*. Read as a whole, *Janus* distinguished between those who consented to join a union—as Bennett did—and those who did not…. Having consented to pay dues to the union, regardless of the status of her membership, Bennett does not fall within the sweep of *Janus*'s waiver requirement … [and] did not suffer a violation of her First Amendment rights….[49]

The State also relies on *Anderson v. Alaska Housing Finance Corp.*, but in *Anderson*

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47 *Creed*, 472 F.Supp.3d at 529 (rejecting same argument made by the State here).

48 *See Brady*, 397 U.S. at 757 ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."); *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016); *Creed*, 472 F.Supp.3d at 530.

49 *Bennett*, 991 F.3d at 732-33.

the government was acting to intentionally deprive the plaintiff of his property through non-judicial foreclosure, and the Due Process Clause required a pre-deprivation hearing.[50] The Court's analysis addressed whether the plaintiff had waived his due process right to that hearing by signing a note on his house.[51] The State does not argue here that the existing procedures for processing employee-authorized union member dues deductions violate due process, nor could it. Where, as here, a public employer processes *voluntary* dues deductions, the employer does not engage in any intentional deprivation of liberty or property interests triggering due process protections.[52] Rather, the employer merely effectuates its employee's own voluntary choices. There is no due process right to "waive."

C. The State's public policy arguments are meritless.

The State also contends that ASEA's membership agreements are unenforceable as a matter of some First Amendment-based public policy. AOB 26-32. The argument fails. First, the State seeks to put the First Amendment on the scale twice: first in determining whether employees validly "waived" a First Amendment right by agreeing to pay dues, and then again by arguing that the First Amendment precludes enforcement of all such agreements. The U.S. Supreme Court has rejected precisely this reasoning.[53]

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50 *Anderson*, 462 P.3d at 23-25.

51 *Id.* at 28-29.

52 *See, e.g.*, *Wagner*, 2020 WL 5520947, at *5 (employee "did not suffer the deprivation of a liberty or property interest as she voluntarily assented to Union membership and deduction of Union dues"); *Barlow v. SEIU, Local 668*, 2021 WL 4743621, at *11-12 (M.D. Pa. Oct. 12, 2021); *Crouthamel v. Walla Walla Public Schools*, 535 F.Supp.3d 1025, 1035-36 (E.D. Wash. 2021); *Marsh v. AFSCME Local 3299*, 2020 WL 4339880, at *10 (E.D. Cal. July 28, 2020), *subsequent order*, 2021 WL 164443, at *6 (E.D. Cal. Jan. 19, 2021); *Molina*, 2020 WL 2306650, at *11.

53 *See Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987) ("Because Rumery voluntarily waived his right to sue under § 1983, the public interest opposing involuntary

Second, nothing in the First Amendment prohibits employees from agreeing to join and support a union; to the contrary, the First Amendment *protects* this individual choice.[54] In addition to the increased bargaining strength that comes from collective advocacy, employees who join ASEA receive tangible individual rights and benefits in exchange for their dues deduction commitments. [Exc. 132-33 ¶42][55] Union membership in the State of Alaska is entirely voluntary, and there are no personal consequences to an employee for refraining to join: all bargaining unit employees receive equal representative services from ASEA regardless of union membership; Alaska law prohibits ASEA from coercing employees in their decisions regarding union membership and dues; and there are no pending or recently concluded unfair labor practice charges asserting that a bargaining unit employee was pressured or coerced to join the Union. [Exc. 125-26, 131, 134 ¶¶11, 14, 49-50] As the Superior Court correctly found, ASEA's dues deduction agreements are "clearly written and easily understood" and "not confusing, ambiguous, or coercive." [Exc. 35][56]

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waiver of constitutional rights is no reason to hold this agreement invalid.").

[54] *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("Union membership is protected by the right of association under the First and Fourteenth Amendments.").

[55] *See Creed*, 472 F.Supp.3d at 525 (ASEA payroll dues deduction forms that employees signed "created a contract between [those employees] and ASEA"); *Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1008 (D. Alaska 2019) (similar union membership agreement "created a contract" between employees and union), *aff'd*, 854 F.App'x 785 (9th Cir. 2021); *Hendrickson*, 992 F.3d at 960 (same). As these authorities demonstrate, nothing about these voluntary membership contracts is "illegal." AOB 27.

[56] *See also Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991) ("Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced."); *Woods*, 496 F.Supp.3d at 1373-74 (enforcing ASEA's dues deduction authorization contracts); *Creed*, 472 F.Supp.3d at 531 (same); *cf. Hendrickson*, 992 F.3d at 962 ("Regretting a prior decision to join the Union … does not render a knowing and voluntary choice to join nonconsensual.").

Finally, the State argues that ASEA members' contractual dues commitments should not be honored because they can only be revoked during a "ten-day annual window." AOB 31. The stipulated facts establish, however, that an employee who has signed an ASEA dues deduction agreement with a yearly dues commitment may submit a request to end deductions at any time, and ASEA will hold and then process that request at the end of the employee's one-year commitment period. [Exc. 135 ¶56] In any event, indistinguishable contracts with similar annual revocation periods have been upheld by every court to consider them. *Supra* n.1. The State cites *Smith v. N.J. Educ. Ass'n* (AOB 31), but the court there also held that union dues deduction authorization agreements with annual revocation window periods remained enforceable contracts after *Janus*.[57]

IV. The State breached its contract with ASEA.

A. The plain language of the CBA prohibited the State's actions.

The CBA is a contract between the State and ASEA. [Exc. 127 ¶18][58] In Section 3.04, the State agreed to deduct authorized dues "[u]pon receipt … of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member," and "[b]argaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the State." [Exc. 313] In Section 3.01, the State agreed that it will not "in any manner, directly

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[57] 425 F.Supp.3d 366, 375 (D.N.J. 2019). The language in *Smith* quoted by the State (AOB 31) is dicta—as the Third Circuit recognized on appeal. *Fischer*, 842 F.App'x at 747 n.7. Moreover, the dicta addressed a statute that set terms for revocation of dues deductions, *not a contract*. *Smith*, 425 F.Supp.3d at 375. The Third Circuit criticized the district court for "opin[ing]" on the statute without jurisdiction. *Fischer*, 842 F.App'x at 752 n.14.

[58] *Graham v. Municipality of Anchorage*, 446 P.3d 349, 353 (Alaska 2019).

or indirectly, attempt to interfere between any bargaining unit member and the union," and the State "will not in any manner attempt to restrain any bargaining unit member from belonging to the Union or from taking an active part in Union affairs." [Exc. 312]

The State violated these contract provisions by announcing that it would refuse to honor ASEA's dues deduction authorization forms, by ceasing dues deductions for employees in contravention of their dues authorization agreements with ASEA, and by dealing directly with bargaining unit employees about union membership and dues authorization rather than referring them to ASEA. [Exc. 141-42 ¶83-87; Exc. 497-98][59]

The State concedes that it breached Section 3.04 by announcing that it would no longer deduct dues under that provision. AOB 33. The State also violated its promise in Section 3.01 not to "interfere between any bargaining unit member and the union" "in any manner, directly or indirectly." [Exc. 312] Former Commissioner Tshibaka twice emailed all 8,000 bargaining unit employees that ASEA represents—including 7,000 ASEA members—and told them that their union dues deduction agreements violated their constitutional rights, were void, and that the State would no longer honor them. [Exc. 137, 139 ¶¶65, 75; Exc. 448-63, 491-98][60] The State further dealt directly with individual bargaining unit employees and unilaterally ceased dues deductions for seven of them without prior notice to ASEA and without first referring those employees to ASEA, as was

[59] State courts, administrative agencies, and arbitrators have held that public employers violated similar CBA provisions when they unilaterally changed union member dues deductions procedures purportedly in response to *Janus*. [*See* Exc. 786-92, 851-913]

[60] Commissioner Tshibaka's emails to employees on other occasions had nothing to do with ASEA's relationship with bargaining unit employees. [Exc. 465-83]

the parties' longstanding practice. [Exc. 134, 136, 141-42 ¶¶51, 59, 84-87] The State's direct communications with all bargaining unit employees caused ASEA to lose members. [Exc. 143 ¶93] Under any reasonable understanding of the word "interfere," the State interfered with the relationship between ASEA and bargaining unit members.[61]

The State contends that, to establish a breach of Section 3.01, ASEA must prove that the State interfered with employees' efforts to *form* or *join* the Union and that the State acted with anti-union animus. AOB 34. The State relies entirely on irrelevant cases that interpret distinct statutory provisions of PERA and the NLRA, not the contract terms relevant here.[62] The CBA imposes a much broader prohibition. The plain language of Section 3.01 prohibits the State from "attempt[ing] to interfere between any bargaining unit member and the Union" "*in any manner*." [Exc. 312] (emphases added). It contains no limiting scienter requirement. In ordinarily parlance, a party "interferes" when it intrudes into a relationship regardless of the party's assertedly benign motivation.

The State further argues that its breach of Sections 3.04 and 3.01 was justified

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61 *See Interfere*, Oxford English Dictionary (2020) ("1. Take part or intervene in an activity without invitation or necessity."), https://www.lexico.com/en/definition/interfere (last visited Feb. 23, 2022).

62 AOB 34 (citing AS 23.40.110(a); *NYNY Hotel & Casino*, 356 NLRB 907, 913 (2011)). None of these cases support the State's contention in any event. As we explain below, proof of anti-union motive is *not* required to establish that an employer violated AS 23.40.110(a)(1)'s prohibition against "interfer[ing]" with employees "in the exercise of the rights guaranteed in" PERA. *Infra* at 41-43. The State also cites *Univ. of Alaska v. Alaska Cmty. Colls. Fed. of Tchrs.*, 64 P.3d 823, 826 n.9 (Alaska 2003), but that case addressed claims that an employer had violated a CBA provision prohibiting the employer from "discriminat[ing]" on the basis of "union-related activity," and the court in a footnote discussed the prohibition in AS 23.40.110(a)(3) against discouraging union membership or activity. The court said nothing about "interference."

because "complying with [those] terms would force the State to violate the First Amendment." AOB 33-34. As demonstrated above, that is incorrect. Moreover, even if the State's interpretation of *Janus* were correct, the State still would have violated the CBA by unilaterally directly dealing with bargaining unit members, rather than negotiating with ASEA regarding any necessary adjustments to deduction procedures—as the State did when it agreed with ASEA on how to come into compliance with *Janus*'s requirements regarding agency fees shortly after *Janus* was issued. [Exc. 128 ¶23; Exc. 297-98]

B. The longstanding past practice confirms that the State breached the CBA.

Even if the CBA language were ambiguous (and it is not), consideration of the parties' longstanding past practice confirms that the State's actions breached the CBA. Here, the Court is interpreting an agreement that is part of a three-decades-long bargaining relationship between the parties. [Exc. 127 ¶18] Moreover, labor law principles make the past practices of the parties of special importance when interpreting and applying CBAs.[63]

Before the parties signed the current CBA, the State considered ASEA's dues deduction forms sufficient, honored those forms in accordance with their terms, and did not deal directly with bargaining unit workers regarding ASEA membership and dues. [Exc. 127 ¶¶18-19; Exc. 312-13] The State would begin deducting dues for a bargaining unit employee upon receipt from ASEA of a copy of the employee's signed dues deduction authorization form. [Exc. 133 ¶46] The State would only cease those deductions in accordance with the terms of those deduction authorization agreements—including

63 *See State v. Pub. Safety Employees Ass'n*, 323 P.3d 670, 684 (Alaska 2014) ("[T]he industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.").

agreements that included annual commitments—and upon instruction by ASEA. [Exc. 136 ¶59] It is implausible that the parties intended the relevant provisions of the CBA to permit the State unilaterally to alter these practices on an issue so vital to ASEA.

V. The State breached the covenant of good faith and fair dealing.

The State also breached the covenant of good faith and fair dealing that is implied in the CBA. "[E]very contract is subject to an implied covenant of good faith and fair dealing."[64] A defendant breaches this covenant if it acts with the purpose of depriving plaintiff of a benefit of the contract,[65] *or* if the defendant fails to "act in a manner which a reasonable person would regard as fair."[66] The State breached the covenant under either inquiry, by (1) acting with the purpose of depriving ASEA of its benefits under the CBA and (2) failing to act in a manner that a reasonable person would regard as fair.

Subjective component. *Janus* was decided on June 27, 2018, and the State and ASEA immediately implemented changes to comply. [Exc. 128-29 ¶¶23-24] When the parties negotiated the current CBA in the fall of 2018, the State did not propose further changes to the provisions regarding membership dues. [Exc. 129 ¶28] The Dunleavy administration took office in December 2018, and Commissioner Tshibaka signed the CBA for the State in August 2019, more than one year after *Janus*. [Exc. 129 ¶29] When the State negotiated and Commissioner Tshibaka signed the current CBA, the State was aware of the union membership and dues deduction agreements that ASEA used. [Exc. 130 ¶31]

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64 *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999).

65 *Id.*; *see also Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983).

66 *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997); *Seekins*, 973 P.2d at 1139-40; *Crowley v. State, Dept. of Health and Soc. Servs.*, 253 P.3d 1226, 1230 (Alaska 2011); *Chijide v. Maniilaq Ass'n of Kotzebue, Alaska*, 972 P.2d 167, 172 (Alaska 1999).

Those agreements included an annual dues commitment. [Exc. 427] Although the third-party defendants had already begun developing their new policy when Commissioner Tshibaka signed the current CBA, at no time did the State suggest to ASEA that the State intended not to comply with the CBA it was signing. [Exc. 129, 136 ¶¶28-29, 61]

At no point prior to release of former Attorney General Clarkson's August 27, 2019 opinion did the State raise any concerns to ASEA regarding the dues deduction authorizations, the CBA, or the *Janus* decision. [Exc. 128-30, 136-37 ¶¶23-24, 28-32, 59-60, 63] Nor did former Attorney General Clarkson seek any input from ASEA before issuing his opinion even though he or his staff met with outside anti-union interest groups. [Exc. 137 ¶¶63-64] When the August 27, 2019 opinion issued, the State was aware that it was contrary to the legal opinion of his predecessor, Attorney General Lindemuth, and contrary to every post-*Janus* court decision. [Exc. 137, 138 ¶¶62, 71]

Nonetheless, the State immediately began implementing the Clarkson opinion without any prior notice to ASEA. That very day, the State began communicating directly with bargaining unit employees and ceasing employees' dues deductions without regard to ASEA's rights under the CBA or ASEA's dues deduction agreements with individual employees. [Exc. 141-42 ¶¶81-87] The State did not inform ASEA that the State had processed dues deduction revocations until after the fact. [Exc. 142 ¶87] Even after ASEA filed a motion for a TRO, the State issued AO 312 and again emailed all bargaining unit employees without notice to ASEA. [Exc. 138-39 ¶¶68-69, 75] The State did not consult with ASEA or offer ASEA the opportunity to comment on AO 312, but the third-party defendants did meet with outside advocacy groups opposed to unions. [Exc. 139 ¶¶73-74]

The State could have sought input from ASEA or at least given some advance notice to ASEA before implementing its new policy. There was no emergency. After all, more than a year already had passed since the *Janus* decision, and the State found time to meet with representatives from anti-union groups [Exc. 137, 139 ¶¶64, 74], and to develop, draft, and announce its new policy in several documents that it emailed to all State employees. [Exc. 449] The State concedes that it knew its interpretation had been rejected by every court to address the issue. [Exc. 137, 138 ¶¶62, 71] The only plausible inference from the timing of the State's actions is that the State sought to blindside ASEA and thereby to interfere with ASEA's relationship with GGU employees *before* ASEA could obtain emergency relief in court (as ASEA subsequently did).[67] Predictably, ASEA's staff would be forced to divert time and resources away from regular representational work to respond. [Exc. 143 ¶92] The State's communications to all employees spread inaccurate information about the dues deduction forms and union membership, and ASEA lost members as a result. [Exc. 143 ¶93] The State thus acted for the purpose of denying to ASEA the benefits of the CBA—which required the State to honor ASEA dues authorizations and prohibited the State from interfering with ASEA's relationship with GGU employees.

The State argues that "there is no evidence" that its actions were "pretextual or motivated by a desire to harm ASEA." AOB 36. To the contrary, as discussed above, there is overwhelming evidence to support that conclusion. But even if there were not, ASEA

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[67] *See, e.g.*, *Mitford*, 666 P.2d at 1007 (evidence employee was fired shortly after he got into dispute with employer over profit-sharing agreement supported inference that he was fired for purpose of denying him the profit-sharing benefit in his contract).

may establish the subjective component of this claim by showing that the State acted "to deprive [ASEA] of the economic benefits of the contract," which is "per se … bad faith."[68] The State has conceded that it intentionally deprived ASEA of the benefits of CBA Section 3.04, which requires the State to deduct union dues upon receipt of written authorization from an employee on the form provided by ASEA. AOB 33. As a result, ASEA did not receive dues that it was entitled to under the contract and suffered substantial financial harm. [Exc. 142-43 ¶¶91-93] That alone is enough to prove a breach of the covenant.

Objective component. At a minimum, the undisputed facts demonstrate that the State acted in a manner that was objectively unfair, and that is independently sufficient to affirm the Superior Court's ruling on the good faith and fair dealing claim. Given the parties' decades-long bargaining relationship, objective fairness required the State, at the very least, to notify ASEA about its planned change in position and give ASEA a chance to contact Union members or seek relief in court *before* the State mass emailed all bargaining unit employees and unilaterally implemented its new dues deductions procedures.[69] Moreover, conduct that violates public policy is objectively unreasonable and thus breaches the covenant.[70] As the Superior Court held, the State's conduct violated public policy because "it bypasses the legislative process set up under Title 23 of the Alaska Statutes" and directly violated PERA and the APA. [Exc. 38; Exc. 778]; *infra* at 34-50.

Additionally, the State's announced new payroll deductions policy unfairly targeted

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68 *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1224 (Alaska 1992).

69 *See id.* at 1223-26 (employer breached covenant by newly implementing drug testing policy without notice to employees, and then firing employee for failing the test).

70 *Seekins*, 973 P.2d at 1139-40.

only union dues deductions. [Exc. 140 ¶80] The State made no changes to other non-union-related payroll deduction agreements (e.g., for charitable donations) that would implicate employees' speech and associative rights if the State's interpretation of *Janus* had any merit (which it does not). [Exc. 140 ¶80; Exc. 554] This disparate treatment breached the objective component of the covenant of good faith and fair dealing as well.[71]

The State's chief defense is that its officials purportedly believed that *Janus* and the First Amendment required it to take the steps that it did. AOB 35. Even if that were true, the State still breached the implied covenant of good faith and fair dealing by the *manner* in which third-party defendants implemented the State's new policy.[72] The State did not, as it claims, "act[] openly and transparently." AOB 36. Rather, the State blindsided ASEA by sending mass emails to all bargaining unit employees and unilaterally implementing its dues cancellation policy without any prior notice to the Union. There was no emergency. The State could have, and in fairness should have, given ASEA notice of its plans.

VI. The State violated separation of powers and PERA.

Alaska's Constitution vests the legislative power in the Legislature.[73] The

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[71] *See Pitka v. Interior Reg. Hous. Auth.*, 54 P.3d 785, 789 (Alaska 2002) ("[d]isparate employee treatment … may violate the objective aspect of the implied covenant").

[72] *See Alaska Marine Pilots v. Hendsch*, 950 P.2d 98, 109 (Alaska 1997) ("[I]t is possible for an employer to rightfully terminate an employee but to do so in a way that violates the covenant of good faith and fair dealing."). The State cites *McConnell v. State Dep't of Health and Soc. Servs.*, 991 P.2d 178 (Alaska 1999) (AOB 36). That case is inapposite. There, following a settlement agreement with a medical provider for unlawful Medicaid overpayments, an agency uncovered and investigated separate and further violations, and the Court rejected the provider's argument that the agency's investigation breached the settlement. *Id.* at 185. *PIC Assocs. v. Greenwich Place GL Acquisition*, 128 Conn. App. 151 (2011) (AOB 36), is even farther off the mark. It involves the Connecticut common law standard for "equitable nonforfeiture for nonpayment of rent." *Id.* at 159.

[73] Alaska Const. art. II, § 1; *id.* art. XII, § 11.

Governor is "responsible for the faithful execution of the laws,"[74] and has no authority to act contrary to statute.[75] Nor do the Governor or Attorney General or Commissioner have the authority to declare statutes unconstitutional.[76] As the Superior Court correctly recognized, the Department of Administration's new policy, articulated in the Attorney General's August 27, 2019 opinion and AO 312, exceeds the executive branch's authority because it is contrary to multiple provisions of PERA. [Exc. 38][77]

A. The State violated PERA by making unilateral changes to conditions of employment and failing to bargain in good faith over mandatory subjects.

AS 23.40.110(a)(5). PERA requires the State employer to honor its contracts and negotiate in good faith with union representatives regarding mandatory subjects of bargaining.[78] The deduction of union dues is a mandatory subject of bargaining.[79]

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74 *Id.* art. III, § 16.

75 *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987).

76 *O'Callaghan v. Coghill*, 888 P.2d 1302, 1303 (Alaska 1995) ("'For an attorney general to stipulate that an act of the legislature is unconstitutional is a clear confusion of the three branches of government; it is the judicial branch, not the executive, that may reject legislation ....'").

77 Moreover, the Legislature reviewed the State's current CBA with ASEA and implicitly ratified it by appropriating money to fund the contract's monetary terms pursuant to AS 23.40.215. [Exc. 129 ¶29] As demonstrated above, the Department's new policy violated the CBA. *Supra* at 26-30.

78 Under AS 23.40.110(a)(5), it is an unfair labor practice for a public employer to "refuse to bargain collectively in good faith with an organization that is the exclusive representative of employees in an appropriate unit …." *See Alaska Pub. Emps. Ass'n v. State*, 831 P.2d 1245, 1248 (Alaska 1992); *Alaska Community Colleges' Fed'n of Teachers, Local 2404 v. Univ. of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983).

79 *See In Re Wkyc-TV, Inc.*, 359 NLRB 286, 288 (2012) ("Under settled Board law, widely accepted by reviewing courts, dues checkoff is ... a mandatory subject of bargaining.") (footnote omitted); *see also* 8 AAC 97.450(b) ("Relevant decisions of the National Labor Relations Board [('NLRB')] and federal courts will be given great weight in the decisions and orders made under this chapter and AS 23.40.070-23.40.260 …."); *Int'l Ass'n of Firefighters, Local 1264 v. Municipality of Anchorage*, 971 P.2d 156, 157 (Alaska 1999) (following federal courts' application of NLRA to determine whether

Accordingly, the State may not make unilateral changes to the deduction of union dues without first bargaining with ASEA.[80] The Superior Court correctly held that the State violated this duty to bargain in good faith. [Exc. 778; Exc. 664-65].

The State argues that it "had no duty to bargain collectively in good faith" because its actions were required under the First Amendment. AOB 43 (quotation marks omitted). This argument fails as already explained above. Moreover, even if the State's interpretation of *Janus* were correct (it is not), that would not absolve the State from its state-law duty to bargain in good faith with ASEA regarding how to implement that interpretation. The State implicitly recognized as much when it bargained with ASEA to remove the CBA's agency fees provisions shortly after *Janus* was decided. [Exc. 128 ¶23; Exc. 297-98]

The State also argues that the AS 23.40.110(a)(5) duty to bargain in good faith only applies during contract negotiation, not during a contract term. AOB 44-45. It is well-established, however, that unilateral modification of a contract during the contract's term is an unfair labor practice under PERA's federal analogue, the NLRA.[81] Any other conclusion would render ASEA's contract illusory. The State's argument also overlooks the plain language of section 110(a)(5), which requires the employer "to bargain collectively in good faith with … the exclusive representative of employees," without a temporal exception. Moreover, the section 110(a)(5) duty to bargain in good faith includes

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subject was a mandatory or permissive subject of bargaining under PERA).

80 *Alaska Community Colleges*, 669 P.2d at 1305.

81 *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.").

a duty to "discuss[] grievances with the exclusive representative," which would be meaningless if the duty did not apply during the term of a contract, when grievances arise.

The State cites the NLRB's decision in *Metalcraft of Mayville* that an employer had not committed an unfair labor practice by ceasing dues deductions after the state had passed a right to work law.[82] That case, however, was based on the language of the particular CBA at issue, which the NLRB interpreted to provide a "sound arguable basis" for the employer to stop dues deductions to conform to a newly adopted state right to work law (which was subsequently struck down).[83] Implicit in the *Metalcraft* decision is that the employer's duty to bargain with the union over any changes to any terms of employment covered by the CBA is ongoing for the contract's duration, unless the contract allows the change.

Here, the CBA requires deductions when authorized on ASEA's forms, with no caveat similar to the CBA language at issue in *Metalcraft* limiting the State's obligation. [Exc. 313] Therefore, the State could not have had a "sound arguable basis" for interpreting the CBA to permit its conduct. Indeed, the State concedes that its refusal to deduct dues authorized by ASEA members on the union forms *violated* the terms of the CBA. AOB 33. Thus, the reasoning of the *Metalcraft* majority would not excuse the State's conduct here.

Rather, the relevant precedent is the NLRB's 46-year-old decision in *Shen-Mar Food Products*, which holds that an employer's failure to deduct and remit union dues in line with a collective-bargaining agreement and employees' dues-checkoff authorizations is an unfair labor practice: "[W]here … an employer ceases to deduct and remit dues in

82 367 NLRB No. 116 (2019) (AOB 45).

83 *Id.* at *5, *7 n.9.

derogation of an existing contract, it is in effect unilaterally changing the terms and conditions of employment of its employees and thus violates Section 8(a)(5) of the Act."[84] For all the same reasons, the State violated the duty to bargain in AS 23.40.110(a)(5) by unilaterally terminating employees' union dues deductions.[85]

The State also separately violated its duty to bargain in good faith by engaging in direct dealing with bargaining unit employees about their dues deductions. When an employer communicates directly with employees to change terms or conditions of employment without the union's knowledge or input ("direct dealing"), that is an unfair labor practice because such conduct has "the potential [to] harm … the union's effectiveness" as the employees' representative.[86] "[T]he criteria for determining whether an employer has engaged in [unlawful] direct dealing" are: "(1) the employer was communicating directly with union represented employees, (2) … for the purpose of

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84 *Shen-Mar Food Prods.*, 221 NLRB 1329, 1329 (1976); *see Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 753 (6th Cir. 2003) ("It is well established that the duty to bargain includes a duty to check off and remit union dues if there is a contractual basis for doing so. A failure to do so is a violation of § 8(a)(5)."") (internal citation omitted).

85 The State argues that it did not violate AS 23.40.*210(a)*, because that section only acts as "a kind of specialized statute of frauds." AOB 46. AS 23.40.210(a) provides that, "[u]pon 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…. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency." The State's argument says nothing about AS 23.40.*110(a)(5)*, however, which prohibits the State from failing to bargain in good faith. As the NLRB concluded in *Shen-Mar* with respect to the NLRA, section (a)(5) is violated by the precise conduct at issue here. Moreover, that AS 23.40.*210(a)* prevents parties from altering the written terms of collective bargaining agreements through oral side-agreements only emphasizes the statutory duty to honor the terms of those written contracts.

86 *Kerry Inc.*, 358 NLRB 980, 1002 (2012); *see Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992) ("Direct dealing need not take the form of actual bargaining.").

establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining, and (3) such communication was made to the exclusion of the union."[87] The stipulated facts establish that the State repeatedly communicated directly with all bargaining unit employees, to the exclusion of the Union, for the purpose of changing the terms of employment regarding union member dues deductions set forth in the CBA. [Exc. 137, 139, 141-42 ¶¶65, 75, 83-87]

The State finally argues that it did not violate PERA because it "did offer to bargain." AOB 45 (emphasis omitted). The State only "offered" to discuss dues deductions with ASEA, however, well after the State already had announced and implemented its unilateral changes, and well after the State already had engaged in direct dealing with bargaining unit employees. [Exc. 137, 139, 141-42 ¶¶65, 75, 83-87] Indeed, the State's "offer to bargain" came 11 days after it filed this lawsuit against ASEA. [Exc. 138, 140 ¶¶68, 78] An employer violates the duty to bargain in good faith when it fails to give notice *before* implementing unilateral changes to the terms of employment that are mandatory subjects of bargaining—such as union dues deductions.[88] The State cites two Fifth Circuit cases, but both are inapposite because the question in those cases was whether the duty to bargain in good faith had been discharged because the parties had *already bargained* to impasse.[89] Here, the State made unilateral changes without any notice or bargaining.

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87 *The Ruprecht Co.*, 366 NLRB No. 179, at *10 (2018).

88 *Ahearn ex rel. NLRB v. Remington Lodging and Hospitality*, 842 F.Supp.2d 1186, 1197 (D. Alaska 2012) (duty to bargain in good faith requires "notice before implementing … changes to a collective bargaining agreement").

89 *See Dish Network Corp. v. NLRB*, 953 F.3d 370, (5th Cir. 2020) (AOB 45) (considering whether parties had bargained to impasse); *Gulf States Mfrs., Inc. v. NLRB*,

B. The State violated PERA by unilaterally terminating dues deductions for employees who had authorized those deductions in writing.

AS 23.40.220. PERA also requires public employers to deduct union dues "[u]pon written authorization of a public employee."[90] The State's new policy violated PERA by ignoring employees' written authorizations. The State argues that it did not violate AS 23.40.220 because the statute does not prescribe when the State may cease dues deductions, the form of the "written authorization," or how the "written authorization" is received. AOB 46-47. This post-hoc litigation position does not withstand even cursory scrutiny.

Before the State implemented its new policy on August 27, 2019, the State consistently interpreted and applied AS 23.40.220 as requiring the State to honor the terms of the written dues deduction agreements signed by bargaining unit employees. [Exc. 429-31; Exc. 133-36 ¶¶47-59][91] Indeed, Attorney General Clarkson's opinion argued that *Janus* "places important limitations on a public employer's ability to deduct union dues and fees from employee wages under AS 23.40.220" [Exc. 430], and, therefore, that the State going forward should no longer comply with AS 23.40.220's requirement that the State honor the terms of employees' dues deduction authorization agreements. [Exc. 434]

Moreover, the State's cramped new interpretation of AS 23.40.220 would lead to absurd results, as the provision would be rendered a nullity if the State could refuse to honor perfectly lawful dues authorization agreements or could terminate dues deductions

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579 F.2d 1298, 1317 (5th Cir. 1978) (AOB 45) (hard bargaining during first contract leading to economic pressure tactics on both sides).

90 AS 23.40.220.

91 *See also* Attorney General Opinion, File No. 366-465-84, 1984 WL 61014, at *1 (Alaska AG Mar. 14, 1984) ("On its face, ... AS 23.40.220 plainly infers that each employee must individually authorize the state to automatically deduct dues.").

at any time irrespective of the terms of an employee's "written authorization."[92] The sum of the matter is that the State has not offered any reason for refusing to honor ASEA dues authorization agreements other than the State's erroneous interpretation of *Janus.* The Court should reject the State's proposed interpretation of AS 23.40.220 as allowing the State unilaterally to reject a "written authorization" without good cause.

C. The State violated PERA by interfering with employees' rights, interfering with ASEA's internal administration, and discouraging union membership.

PERA (through AS 23.40.110(a)) also prohibits the State from "interfer[ing] with … an employee in the exercise of the employee's rights guaranteed in [PERA]" (.110(a)(1)); "interfer[ing] with the … existence, or administration of" a labor organization (.110(a)(2)); and "discourag[ing] membership" in a labor organization (.110(a)(3)). The State violated each of these prohibitions, too.

AS 23.40.110(a)(1). It is well-established that an employer unlawfully "interfere[s]" with employees' rights when it violates a collective bargaining agreement's requirement to process employees' dues-checkoff authorizations, as the State did here. As explained above, such employer action "by necessity interferes in the relationship of employees and their representative and constitutes an unlawful infringement upon the … rights of employees protected by law from employer interference. Accordingly, ... by such conduct [the employer] engage[s] in unlawful interference …."[93]

The State argues that a violation of AS 23.40.110(a) only occurs if an employer acts

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92 *See Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1120 (Alaska 2007) ("We generally disfavor statutory constructions that reach absurd results.").

93 *Shen-Mar Food Prods.*, 221 NLRB at 1329 (discussing NLRA); *see supra* at 37-38.

with anti-union motive or if the action was "inherently destructive of important employee interests." AOB 38 (quotation marks omitted). But that is not the law. The State relies on *Alaska Community Colleges' Federation of Teachers v. University of Alaska*, but in that case this Court stated that anti-union motive is *not* required to establish a violation of AS 23.30.110(a)(1). Discussing PERA's federal law analogues, the Court explained:

> To establish a violation of section 8(a)***(3)*** …, the employer's action generally must have been based on an antiunion motive…. [But t]he requirements for establishing a violation of section 8(a)***(1)*** …—interference with, restraint or coercion in the exercise of rights to organize—are less exacting, and focus more upon the effects of the employer's conduct than upon its motivation. The test under that section is *whether the employer's conduct reasonably tends to interfere with the free exercise of employees' rights*.[94]

ASEA thus did not need to show anti-union animus to prevail on its claim that the State violated AS 23.40.110(a)(1), only that the State's conduct "reasonably tends to interfere with the free exercise of employees' rights" to join and support a union.[95] Contrary to the State's contention that its "actions … concerned solely the method" of dues deduction authorizations (AOB 40), the State's conduct of unilaterally changing the dues deduction process, incorrectly telling ASEA's bargaining unit members that their dues agreements violated their constitutional rights, and directly dealing with ASEA's members all meet this standard, for all the same reasons that those actions breached the CBA's noninterference provision. [Exc. 448-63, 491-98] *Supra* at 27-29. This Court has squarely

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94 669 P.2d at 1307-08 (emphases added); *see also, e.g.*, *Cal. Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998) ("The NLRB and the courts have long recognized that employers violate section 8(a)(1) by engaging in activity that tends to chill an employee's freedom to exercise his section 7 rights").

95 *Alaska Community Colleges*, 669 P.2d at 1307-08.

held that "[i]mplicit in Alaska's public union statutory rights is the right of the union and its members to function free of harassment and undue interference from the State."[96] The State's actions here constitute exactly that.

AS 23.40.110(a)(2). ASEA similarly did not need to establish anti-union motive to prove that the State "interfere[d] with the … existence, or administration of" the union in violation of AS 23.40.110(a)(2). The State's conduct interfered with ASEA's operations and relations with its own members by denying ASEA the membership dues to which it was entitled and on which ASEA's operation relies, causing membership and financial losses, and forcing ASEA's employees to divert time away from their representational duties and towards responding to the State's actions. [Exc. 126, 142-43 ¶¶13, 91-93]

The State cites cases recognizing that NLRA Section 8(a)(2) (which is similar to AS 23.40.110(a)(2)) prohibits the "maintenance of a 'company union,' dominated by the employer,"[97] and then asserts that company unions are *all* the statute prohibits. AOB 41. To the contrary, "Section 8(a)(2) is not limited to cases in which an employer dominates a labor organization, because it is also an unfair labor practice for an employer to 'interfere with' … a labor organization."[98] The State's own cited cases recognize that the "purpose" of NLRA Section 8(a)(2) "is to prohibit *anything* which will enable the employer to exert influence on the representatives of the employees in the collective bargaining which it is

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96 *Peterson v. State*, 280 P.3d 559, 565 (Alaska 2012).

97 *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1264 (4th Cir. 1994); *Montague v. NLRB*, 698 F.3d 307, 311 (6th Cir. 2012) (AOB 41).

98 THE DEVELOPING LABOR LAW § 8.I (ABA 2020); *see also St. Joseph's Hosp.*, 254 NLRB 634, 638 (1981) (while conduct did not amount to employer domination of union, employer violated Section 8(a)(2) by unlawfully interfering with administration of union).

the purpose of the Act to promote."[99] Interfering with ASEA's relations with its members and unilaterally altering the administration of ASEA's dues payment practices would allow the State to exert substantial influence over the Union, in violation of AS 23.40.110(a)(2).

AS 23.40.110(a)(3). The State's actions also unlawfully "discourage[d] union membership."[100] As the Superior Court found, "the State's insistence that the State control the authorization forms for union dues seems likely to discourage union membership"; the third-party defendants' conduct was "not neutral"; and "[t]here is no guarantee under the State's proposed system that the State's method and/or language would not discourage employees from joining unions." [Exc. 37-38] Moreover, but for the Superior Court's TRO, it is undisputed that the State would have ceased union dues deductions for all members who had signed union membership and dues deduction authorization agreements, while not affecting any other payroll deductions. [Exc. 140 ¶80; Exc. 554]. The State's actions would thus "discriminate" against union members with respect to a "term or condition of employment"—employee-authorized payroll deductions.

The State incorrectly argues that it did not violate AS 23.40.110(a)(3) because it did not take any "adverse actions" and did not act with "antiunion animus." AOB 42-43. First, but for the TRO, the State would have unilaterally ceased union dues deductions for all union members. [*See* Exc. 487 (AO 312 directs that "all dues and fees deductions made under prior procedures will be immediately discontinued….")] Deduction of union dues is

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99 *Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d at 1264 (emphasis added).

100 AS 23.40.110(a)(3) prohibits "discriminat[ion] in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization…."

a "term or condition of employment."[101] Second, regardless of the third-party defendants' purported motives, their intentional conduct in refusing to honor valid dues deduction authorizations, insisting that the State take over (and the Union be excluded from) the dues deduction authorization process, and emailing all employees to tell them (incorrectly) that their union membership agreements violated their constitutional rights and were void, was all inherently discouraging of union membership in violation of PERA. [Exc.139-42 ¶¶75-87; Exc. 485-87] No further intent evidence is needed.[102]

Additionally, as the State concedes (AOB 39), no further proof is necessary if (as ASEA has shown here) the State's conduct is "inherently destructive" of employees' rights to join and support a union of their choice.[103] For example, an employer's application form that required individuals to disclose their union affiliation was "coercive on [its] face" and, thus, "inherently destructive of employee[s'] rights" to organize.[104] The State's conduct here was similarly inherently destructive of employees' rights.

In any event, the only reasonable inference from the undisputed facts is that the third-party defendants did act with an anti-union motive: ASEA is a political opponent of Governor Dunleavy; the State consulted with anti-union groups in formulating the new

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101 AS 23.40.110(a)(3); *supra* at 38 & n.84.

102 By contrast, to prove that an employer unlawfully "discourage[d] union membership" in violation of AS 23.40.110(a)(3) *by refusing to hire or terminating an employee*, it is necessary to show that the employer acted with an anti-union motive to establish that the decision was driven by unlawful discrimination rather than lawful business judgement. *Cf. Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (noting that, in an employee discharge case, the employer's motive is determinative); *Alaska Community Colleges*, 669 P.2d at 1307-09.

103 *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-28 (1963).

104 *Contractor Servs.*, 324 NLRB 1254, 1255 & n.4 (1997).

policy, but not with ASEA; the third-party defendants emailed all bargaining unit employees represented by ASEA and dealt directly with ASEA's members without notice to ASEA—breaking with past practice, with the inevitable result that ASEA would be harmed before it had any opportunity to protect itself in court; the State made changes only to union dues deduction procedures, not other employee wage deductions; and the third-party defendants held a press conference where they made intentionally misleading and unsubstantiated claims regarding union membership, dues deduction agreements, and ASEA's lawsuit. [Exc. 126-27, 137, 139-40 ¶¶17, 63-65, 73-75, 77, 80; Exc. 523-29, 554] For example, at the press conference, former Attorney General Clarkson falsely asserted that ASEA had filed its countersuit to "argu[e] [that] employees who want to opt out of the union are not allowed to do so," when (as the Attorney General knew) ASEA actually allows anyone to drop union membership immediately upon request. [Exc. 524; Exc. 134 ¶52] Against these facts, the State asserts no justification other than its wholly unsupported interpretation of *Janus* and the First Amendment. The only reasonable inference is that the third-party defendants acted with anti-union intent.

VII. The State violated the APA.

The Department of Administration's implementation of Clarkson's August 27, 2019 opinion and AO 312 also violated Alaska's APA.[105] The APA requires state agencies to engage in a deliberative rulemaking process before adopting or changing regulations.[106] "Regulations that are not promulgated under APA procedures are invalid."[107]

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105 AS 44.62.010-.950.

106 AS 44.62.180-.290.

107 *Chevron U.S.A., Inc.* v. *State Dep't of Revenue*, 387 P.3d 25, 35 (Alaska 2016).

The APA applies to the Department's management of the "statewide personnel program, including central personnel services such as … pay administration" for all State employees.[108] "The APA defines a regulation as '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.'"[109] "[T]he label placed on a particular statement by an administrative agency does not determine the applicability of the APA."[110] An "agency action" is subject to APA rulemaking requirements if "(1) 'the agency action implements, interprets, or makes specific the law enforced or administered by the agency'; and (2) 'the agency action affects the public or is used by the agency in dealing with the public.'"[111]

The Department's new rules for union member dues deductions constitute a regulation under that broad definition, because those procedures would (1) "implement" the dues deduction and anti-interference provisions of PERA that the Department administers,[112] and (2) "affect[] the public" by changing the way the Department interacts with bargaining unit employees and private organizations like ASEA.

PERA provides an implicit exception to the APA by directing the State to negotiate with the chosen union representative about subjects of bargaining and to enter into binding collective bargaining agreements containing the agreed-upon terms.[113] But the State's new

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108 AS 44.21.020(8); *see* AS 44.62.640(a)(4).
109 *Chevron*, 387 P.3d at 35 (quoting AS 44.62.640(3)(a)).
110 *Id.* (footnote omitted).
111 *Id.* at 36 (brackets, footnote omitted).
112 *See* AS 23.40.220.
113 *See* AS 23.40.110(a)(5), .210(a).

policy was not part of a CBA or other PERA negotiations. Rather, it was a unilateral policy that affects private organizations like ASEA. As such, it was subject to APA requirements.

The State makes six counterarguments, all meritless. First, the State argues that its new policy was not a "regulation" because it was applying federal law, not implementing state law. AOB 47-48. To the contrary, the State's policy would implement the Department's state statutory duties to administer a "statewide personnel program, including central personnel services such as … pay administration" for state employees,[114] and to make dues deductions "[u]pon written authorization of a public employee."[115] Indeed, the State's new policy was premised on the Attorney General's findings that PERA "does not provide any details on how an employee's authorization must be procured" [Exc. 429], and that the State should establish further requirements for when the State will deduct union dues "[u]pon written authorization" of the employee. [Exc. 434 (quoting AS 23.40.220)] Where agency action "add[s] specific criteria or values that clarif[y] the existing statutory or regulatory standard and require[s] the public to comport with precise criteria not specified in existing rules," that action is a "regulation" under the APA.[116] The practical impact on the public, not the agency's subjective motive, is determinative.[117] Thus, it is irrelevant whether the Department believed it was merely interpreting *Janus*.

Second and third, the Department argues that its policy was not a regulation but only the "internal management of a state agency" that did not affect the "general public." AOB

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114 AS 44.21.020(8); *see* AS 44.62.640(a)(4).
115 AS 23.40.220.
116 *Chevron*, 387 P.3d at 37.
117 *See State v. Nondalton Tribal Council*, 268 P.3d 293, 300-01 (Alaska 2012).

48-49. To the contrary, the new policy is not solely internal to the State and would directly affect the rights and interests of private parties—specifically, ASEA and other public employee unions in Alaska.[118] An agency requirement that, like the State's new union dues deduction policy, adds specificity to a statutory requirement and serves as the basis for agency action impacting the government's contracts with a private party is a regulation and not merely an "internal guideline."[119] The cases cited by the State do not support a contrary result. AOB 49. *Gilbert v. Dep't of Fish and Game* only demonstrates why the State's policy is a "regulation."[120] There, the Court held that a policy establishing "principles of salmon fishery management" was a regulation because it "makes [more] specific the law enforced or administered and … affects the public, insofar as it has been used to modify commercial fishery limits."[121] As just explained, "both of the aforementioned indicia of a 'regulation' are implicated here[.]"[122] By contrast, *Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors* involved a requirement that prospective registered engineers have their professional experience verified by third parties.[123] The Court held that the third-party verification requirement was not a "regulation" because it was just a "common sense" interpretation of the statutory phrase "satisfactory evidence."[124] The State's new dues authorization policy was not just "common sense" statutory interpretation.

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118 *Cf. Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 825 (Alaska 1997) ("[M]any merely internal agency practices affect parties outside the agency").

119 *Jerrel v. State Dep't of Nat. Resources*, 999 P.2d 138, 143-44 (Alaska 2000).

120 803 P.2d 391, 396-97 (Alaska 1990).

121 *Id.* at 396.

122 *Id.*

123 205 P.3d 326, 330-31 (Alaska 2009) (AOB 48).

124 *Id.* at 335-36.

Fourth, the State argues that it did not violate the APA because a "regulation" "does not include a form prescribed by a state agency or instructions relating to the use of the form." AOB 49. The State's policy here, though, was much broader than the creation of a "form." Administrative Order 312 also addressed substance by, among other things, cancelling pre-existing dues authorizations; prohibiting annual authorization periods; and requiring renewals on a specific schedule. [Exc. 486-87]

Fifth, the State argues that it was not required to use notice-and-comment rulemaking because the prior administration did not use notice-and-comment rulemaking when it agreed with ASEA to make changes to the CBA's agency fee provisions following *Janus*. AOB 49. But state law, through PERA, authorizes such mutually negotiated changes to individual collective bargaining agreements. Neither PERA nor the APA permits the State's unilateral implementation of a new, broad policy affecting all labor organizations representing state employees without notice-and-comment rulemaking. Moreover, the elimination of agency fees *was* required by *Janus*, and the APA could not prevent compliance with the First Amendment. The State's sixth argument, that its actions here were required by the First Amendment, lacks merit for the reasons already explained.

VIII. The Superior Court properly granted judgment to ASEA on the parties' declaratory judgment claims.

The State seeks reversal of the declaratory judgment based on the same arguments made throughout its brief. AOB 50. For the reasons above, those arguments are meritless.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

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Respectfully submitted,

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