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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff/Counterclaim Defendant,

vs.

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

Defendant/Counterclaimant.

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

Third-Party Plaintiff,

vs.

MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official capacity as Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; and STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Third-Party Defendants.



Case No. 3AN-19-09971 CI

**ASEA'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION; MEMORANDUM IN SUPPORT**

**RELIEF REQUESTED BY OCTOBER 2, 2019**

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## MOTION

Defendant/Counterclaimant/Third-Party Plaintiff Alaska State Employees Association / AFSCME Local 52, AFL-CIO ("ASEA" or the "Union") hereby moves the Court for a temporary restraining order and preliminary injunction enjoining the State of Alaska and third-party defendants Governor Michael J. Dunleavy, Attorney General Kevin G. Clarkson, Department of Administration Commissioner Kelly Tshibaka, and the State of Alaska, Department of Administration from changing the State's longstanding practices for deducting union dues for State employees until the Court can decide this lawsuit on the merits. To prevent irreparable harm, ASEA requests relief by no later than **October 2, 2019**.

## MEMORANDUM IN SUPPORT

The State of Alaska has long deducted union membership dues for thousands of State employees who voluntarily join the unions that represent their bargaining units and authorize dues deductions. The Alaska Public Employment Relations Act requires public employers to process these 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."[1] The State's binding contracts with unions also require the State to process authorized dues deductions. The

[1] AS 23.40.220.

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State's contract with ASEA, covering the State's largest bargaining unit, provides that "[b]argaining unit members 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."[2]

Nonetheless, on August 27, 2019, the Alaska Department of Administration notified all State employees that the State will be no longer be honoring the dues deduction authorizations signed by thousands of State employees and instead will be implementing new procedures that violate state law and the State's binding contract with ASEA. According to the third-party defendants, their actions are required by *Janus v. AFSCME, Council 31*.[3] But they are wrong. *Janus* does not affect the dues deduction authorizations voluntarily signed by ASEA members as part of their membership agreements. The Supreme Court held in *Janus* that public employers may not "force nonmembers" to pay for their share of the costs of union collective bargaining representation but that, otherwise, "States can keep their labor-relations systems exactly as they are."[4]

Indeed, Alaska's then-Attorney General Jahna Lindemuth issued a legal opinion recognizing that *Janus* "does not require existing union members to take any action;

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2 Metcalfe Decl., Sept. 25, 2019, Exhibit B at 9 (Art. 3.04.C).

3 138 S.Ct. 2448 (June 27, 2018).

4 *Id.* at 2485 n.27.

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existing membership cards and payroll deduction authorizations by union members should continue to be honored."[5] And the *Janus* decision already had issued *before* the State entered into a contract with ASEA that requires the State to process dues deductions as authorized by ASEA members. Post-*Janus* federal court decisions have all concluded that *Janus* does not affect dues deductions authorized by union members. Other attorneys general, state courts, labor relations boards, and labor arbitrators have reached the same conclusion.

The third-party defendants' new dues deduction policy is an unconstitutional effort to cripple the effectiveness of ASEA and other public employee unions in Alaska by cutting off their funding, interfering with their relationships with their own members, and encouraging those members to withdraw their membership and authorizations of continued dues deductions. ASEA is entitled to a temporary restraining order/preliminary injunction maintaining the status quo by preventing the implementation of a new dues deduction policy pending resolution of this litigation for three independently sufficient reasons: (1) The Union is overwhelmingly likely to succeed on the merits; (2) the Union will suffer irreparable harm in the absence of interim relief while the State and third-party defendants will suffer no harm if relief is granted; and (3) injunctive relief is necessary to

[5] Brown Decl., Sept. 25, 2019, Exhibit A at 3.

vindicate Alaska's statutory policy favoring the binding arbitration of grievances under the State's collective bargaining agreements.

## BACKGROUND

### A. The Union serves as the democratically chosen collective bargaining representative for thousands of State employees.

Under Alaska's Public Employment Relations Act ("PERA"), AS 23.40.070-.230, if a majority of employees in a bargaining unit choose to be represented by a union, the public employer must "negotiate in good faith" with the union "with respect to wages, hours, and other terms and conditions of employment."[6] A written agreement reached as the result of such negotiations is binding on the State employer.[7]

ASEA is the democratically chosen collective bargaining representative of the largest bargaining unit of Alaska State employees, consisting of approximately 8,000 State employees.[8] Under PERA, these bargaining unit employees are not required to become union members.[9]

Approximately 7,000 of those bargaining unit employees have chosen to be dues-paying members of the Union.[10] Each of those members voluntarily signed a written

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6 AS 23.40.250(1); *see* AS 23.40.070, .110(a)(5).

7 AS 23.40.210(a).

8 Metcalfe Decl. ¶ 2.

9 AS 23.40.080, .110; Metcalfe Decl. ¶ 3.

10 Metcalfe Decl. ¶ 4.

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membership agreement authorizing and requesting the State to remit to the Union their dues through payroll deductions, in exchange for union membership and access to members-only rights and benefits.[11] PERA prohibits any public employer or union from coercing an employee into signing such a dues authorization.[12]

**B. State employers must honor union members' voluntary, written authorizations for dues deductions.**

PERA requires that public employers must deduct union dues from a public employee's pay when the employee voluntarily authorizes those deductions:

> 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.[13]

PERA also requires that State employers must bargain in good faith with certified employee representatives about the processing of dues deductions. "PERA specifically requires public employers to 'negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment.' AS 23.40.070(2). Such matters are 'mandatory subjects of bargaining.'"[14]

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11 Metcalfe Decl. ¶ 5.

12 AS 23.40.110(a)(1)-(3), (c)(1)(A).

13 AS 23.40.220.

14 *Alaska Pub. Emps. Ass'n v. State*, 831 P.2d 1245, 1248 (Alaska 1992) (quoting *Alaska Cmty. Colleges' Fed'n of Teachers, Local 2404 v. Univ. of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983) ("*Fed'n of Teachers*")).

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PERA prohibits the State from making unilateral changes to mandatory subjects of bargaining.[15] Deduction of union dues is a mandatory subject of bargaining.[16] PERA thus prohibits the State from changing how it processes union dues deductions without first bargaining in good faith with the Union.

The Union's collective bargaining agreement ("CBA") with the State requires the State to deduct and remit member dues to the Union if an employee signs a written authorization. The CBA provides that, "[u]pon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member … the Employer shall" deduct union dues each pay period and forward those dues to the Union.[17] The CBA further provides 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."[18] The CBA also

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15 *Fed'n of Teachers*, 669 P.2d at 1305.

16 *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 and citations omitted); *see also* 8 AAC 97.450(b) ("Relevant decisions of the National Labor Relations Board 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 National Labor Relations Act to determine whether subject was a mandatory or permissive subject of bargaining under PERA).

17 Metcalfe Decl., Exhibit B at 9 (Art. 3.04.A).

18 *Id.*

provides that "[t]he Employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any bargaining unit member and the Union."[19]

Pursuant to state statute and the CBA, thousands of State employees have chosen to join the Union and sign written authorizations for dues deductions.[20] ASEA's current membership/deduction authorization card states, above the employee's signature:

> I hereby *voluntarily authorize* and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues as certified by ASEA, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of payroll deduction, as opposed to other means of payment, *is voluntary and not a condition of my employment*.[21]

ASEA's current membership and dues authorization card also provides that the dues authorization is valid "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."[22]

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19 *Id.* at 8 (Art. 3.01).

20 Metcalfe Decl. ¶ 4.

21 Metcalfe Decl., Exhibit A.

22 *Id.*

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Dues deduction authorizations that are irrevocable for one-year periods have been signed by union members for decades to provide financial stability to labor organizations.[23] Congress authorized them for federal employees, postal employees, employees covered by the National Labor Relations Act ("NLRA"), and employees covered by the Railway Labor Act.[24] The courts have repeatedly held that they are enforceable.[25]

**C. The State re-affirmed its obligation to process authorized union dues deductions after the *Janus* decision.**

Prior to June 27, 2018, Alaska state law and U.S. Supreme Court precedent, in *Abood v. Detroit Board of Education*,[26] permitted public employers to require non-union-members to pay fair-share fees to their union representatives to cover the nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political or ideological activities.[27] In *Janus v. AFSCME, Council 31*,[28] the Supreme Court held that *Abood* "is now overruled" and that the collection of mandatory

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

24 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).

25 *See infra* at 26-27 n.92 (citing cases).

26 431 U.S. 209 (1977).

27 *See* AS 23.40.110(b)(2).

28 138 S.Ct. 2448 (June 27, 2018).

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fair-share fees from nonmembers "violates the First Amendment and cannot continue."[29] The Court in *Janus* explained, however, that its holding was narrow: "States can keep their labor-relations systems exactly as they are—only they cannot *force nonmembers* to subsidize public-sector unions."[30] The State and the Union immediately stopped collecting fair-share fees.[31]

Shortly after *Janus* was decided, Attorney General Lindemuth issued a legal memorandum explaining that the Supreme Court's decision invalidated compulsory fair-share fees but "[a]ll other provisions of the State's PERA law remain in effect. In fact, the Supreme Court in *Janus* pointed out that its decision did not require the invalidation of state labor relations laws such as PERA."[32] Attorney General Lindemuth recognized that *Janus* did not authorize public employers to make unilateral changes to existing collective bargaining agreements or affect the validity of existing dues deduction authorizations:

> Does the *Janus* decision provide that a public employer may not continue to honor existing union membership dues authorizations?

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29 *Id.* at 2486.

30 *Id.* at 2485 n.27 (emphasis added).

31 Metcalfe Decl. ¶ 8; *cf. Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1003 (D. Alaska 2019) ("[I]t is undisputed that the collection of fair-share fees ceased immediately after *Janus* ....").

32 Brown Decl., Exhibit A at 2.

> No. The Janus decision addressed the issue of payment of union dues 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.[33]

The Attorneys General or Departments of Labor in at least 13 other states and the District of Columbia issued similar opinions, all agreeing that *Janus* does not affect dues deductions for union members who have previously authorized those deductions.[34]

After *Janus*, the State entered into new agreements with public employee unions that re-affirmed its obligation to continue processing dues deductions. Third-party defendant Kelly Tshibaka, on behalf of the State, signed the current CBA with ASEA just last month, in August 2019, after the Legislature appropriated funds to implement the CBA and more than a year after *Janus*.[35] The CBA provides that "bargaining unit members may authorize payroll deductions in writing *on the form provided by the Union*" and "such payroll deductions will be transmitted to the Union."[36] The Alaska Department

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[33] *Id.* at 3.

[34] Brown Decl., Exhibits B-Q.

[35] Metcalfe Decl. ¶ 9; *see id.* Exhibit B; AS 23.40.215(a)-(b) ("monetary terms" of State CBA "are subject to funding through legislative appropriation" and "[t]he complete monetary and nonmonetary terms of a tentative agreement shall be submitted to the legislature … to receive legislative consideration ….").

[36] *Supra* at 7 n.17 (emphasis added).

of Administration's official summary of changes to the ASEA CBA states that the agreement was "[u]pdated to comply with Janus decision."[37]

**D. Third-party defendants subsequently announced a new policy that conflicts with the dues deduction rules mandated by Alaska law and the State's collective bargaining agreement.**

On August 27, 2019, apparently in response to a request from the Governor, Alaska's current Attorney General Kevin G. Clarkson issued a new legal opinion letter asserting—incorrectly—that *Janus* "goes well beyond agency fees and non-members" and "requires a significant change to the State's current practice" of deducting authorized union dues.[38] According to the Attorney General: a) every dues deduction authorization signed by every public employee in Alaska is invalid; b) public employers can only deduct union dues for union members who sign new authorizations on forms created by the government after receiving a government warning that they are "waiving" their First Amendment rights and may be agreeing to support causes with which they disagree; c) all public employees can immediately terminate their current dues deduction authorizations, even if their membership agreements provide for the authorization to remain in effect for

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[37] *Available at* http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/training/ASEASummary2019.pdf (last visited Sept. 23, 2019).

[38] Metcalfe Decl., Exhibit C at 5.

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a one-year period; and d) all union members must affirmatively renew their deduction authorizations at least every 12 months after receiving a government warning.[39]

Attorney General Clarkson's opinion letter does not acknowledge that his predecessor reached directly contrary conclusions, nor does it discuss any of the post-*Janus* federal court rulings about the validity of dues deduction authorizations signed before *Janus*—all of which disagree with the Attorney General's analysis of the *Janus* decision.[40] Attorney General Clarkson issued his letter without inviting any input from the Union.[41]

The same day that Attorney General Clarkson issued his letter, Commissioner Kelly Tshibaka sent an email to all State employees informing them that the Attorney General "concludes that the State is currently not in compliance with the U.S. Supreme Court's decision" in *Janus* and that "[t]he Department of Administration will be working with the Office of the Governor and the Department of Law on a plan to bring the State into compliance with the law, in short order …."[42] The email attached the Attorney General's erroneous August 27, 2019 opinion letter, a copy of the *Janus* opinion, and a list of "frequently asked questions" based on the Attorney General's erroneous reading of

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39 *Id.* at 12.

40 *See infra* at 26-27 n.92 (citing cases).

41 Metcalfe Decl. ¶ 11.

42 Metcalfe Decl. ¶ 12 & Exhibit D.

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*Janus.*[43] Commissioner Tshibaka sent this communication to ASEA's members without consulting the Union.[44]

The third-party defendants have already started to unilaterally change the State's longstanding practices for union dues deductions in order to implement the erroneous Attorney General opinion letter. On September 9, 2019, the Department of Administration notified ASEA that the Department is dealing directly with some ASEA members about cancelling dues deductions, which violates PERA as well as ASEA's CBA.[45] In further violation of PERA and ASEA's CBA, the Department has already stopped deducting dues for at least some employees who signed ASEA membership/dues authorization cards committing to pay dues for a one-year period that has not yet ended.[46]

When ASEA objected to these violations of state law and the State's contract with ASEA, the State filed this declaratory judgment action against ASEA seeking a ruling that the First Amendment requires the State to violate state law and the contract it just signed with ASEA approximately one month ago.[47] ASEA has now filed counterclaims

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43 Metcalfe Decl. ¶ 12 & Exhibit E.

44 Metcalfe Decl. ¶ 12.

45 *Id.* at ¶ 14.

46 *Id.* at ¶ 15.

47 State of Alaska's Complaint (Sept. 16, 2019); Metcalfe Decl. ¶ 11.

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against the State and a third-party complaint against the third-party defendants, challenging the third-party defendants' announced new dues deduction policy.[48]

**E. The Union has filed a grievance challenging the implementation of the Attorney General's opinion letter.**

In accordance with Alaska law, the Union's CBA with the State includes provisions requiring binding arbitration of grievances challenging violations of the contract.[49] The Union has filed a grievance challenging the implementation of the Attorney General's August 27, 2019 opinion letter as a violation of the CBA.[50] An arbitrator has not yet been selected to hear the Union's grievance, and resolution of that grievance through the regular grievance arbitration process is likely to take at least several months if not longer.[51]

The Union's grievance is overwhelmingly likely to be successful, once it is finally resolved. Indeed, labor arbitrators have recently ruled in favor of unions on essentially identical grievances.[52] In one such recent decision, for example, the arbitrator concluded

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48 ASEA's Counterclaims and Third-Party Complaint (filed concurrently).

49 Metcalfe Decl., Exhibit B at 10 (Art. 16.01(A)), 12 (16.03(B)); *see* AS 23.40.210(a) (public employer CBA "shall include a grievance procedure which shall have binding arbitration as its final step").

50 Metcalfe Decl. ¶ 19 & Exhibit F.

51 Metcalfe Decl. ¶ 20.

52 *See, e.g., In re Ripley Union Lewis Huntington Sch. Dist. Bd. of Educ. and OAPSE/AFSCME Local 4, AFL-CIO Local 642*, Cessation of Union Dues Collection Grievance, AAA File No. 01-180004-6755 (Arb. W.C. Heekin, June 18, 2019) (Brown

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that a public employer violated its CBA by processing an union member's withdrawal of dues authorization outside the applicable window period to which the member had agreed and held that *Janus* did not provide a legal justification for the employer's breach of contract because "*Janus* deals with the [c]onstitutionality of a public sector employee being compelled by state law to pay an agency fee to the union … not ... the instant situation of a public sector employee who voluntarily chose to become a union member and voluntarily authorized the payroll deduction of her union membership dues [and] who later revoked this authorization" outside the "union dues revocation window period."[53]

## ARGUMENT

### I. The Union is entitled to interim relief against the implementation of the Attorney General's opinion letter until this action can be resolved on the merits.

"A plaintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard."[54] The same standards apply to a temporary restraining order.[55] Interim injunctive relief will therefore be granted when

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Decl., Exhibit U); *City of Madison (WI) and IBT, Local 695,* 48 LAIS 35, 2019 WL 3451442 (Arb. P.G. Davis, Feb. 13, 2019) (Brown Decl., Exhibit V).

[53] *In re Ripley Union Lewis Huntington Sch. Dist. Bd. of Educ.*, AAA File No. 01-180004-6755, at 8 (Brown Decl., Exhibit U).

[54] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014); *see* AS 09.40.230.

[55] *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).

moving parties "make a clear showing of probable success on the merits," even "when they do not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued."[56] An injunction is independently warranted under the "balance of hardships" standard where: "'(1) the plaintiff [is] faced with irreparable harm; (2) the opposing party [is] adequately protected; and (3) the plaintiff ... raise[s] serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.'"[57] Interim relief is justified here under both standards.

**A. The Union will succeed on the merits.**

**1. The third-party defendants' actions are contrary to statute.**

Alaska's Constitution vests the legislative power in the Legislature.[58] The Governor is "responsible for the faithful execution of the laws,"[59] and therefore has no authority to act contrary to statute.[60] Nor does the Governor or Attorney General have the

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56 *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1274 (Alaska 1992) (quotation marks omitted).

57 *Alsworth*, 323 P.3d at 54 (quoting *Kluti Kaah*, 831 P.2d at 1273).

58 Alaska Const. art. II, § 1; *id.* art. XII, § 11.

59 *Id.* art. III, § 16.

60 *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) ("The doctrine of separation of powers is implicit in the Alaska Constitution.").

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authority to declare statutes unconstitutional.[61] Implementation of the Attorney General's opinion letter exceeds the executive branch's authority because it is contrary to multiple provisions of PERA, a statute adopted by the Legislature.

*First*, PERA requires the State to deduct union dues "[u]pon written authorization of a public employee."[62] The State has consistently interpreted and applied this statute to require public employers to make member dues deductions pursuant to the terms of the authorizations on the Union's membership cards/dues deduction authorizations.[63] Indeed, the Attorney General's recent opinion acknowledges that AS 23.40.220 does not impose the limitations on employee dues deduction authorizations that the opinion letter requires.[64] As such, the implementation of the opinion letter conflicts with PERA.

*Second*, implementation of the opinion letter would require the State to violate its contract with the Union, in which the State expressly agreed to make union member dues

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61 *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 ....'") (citation omitted), *supplemental opinion*, *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), *appeal after remand*, 6 P.3d 728 (Alaska 2000).

62 AS 23.40.220.

63 *See* Brown Decl., Exhibit A at 3 (after *Janus*, "existing membership cards and payroll deduction authorizations by union members should continue to be honored"); 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.").

64 *See* Metcalfe Decl., Exhibit C at 1-2.

deductions upon written authorization of individual employees, without requiring the additional hurdles and procedures that the opinion letter states are required before making deductions.[65] 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.[66] Implementation of the opinion letter violates PERA's requirement that the State employer honor its contracts.[67]

*Third*, PERA also requires public employers to negotiate in good faith with union representatives regarding mandatory subjects of bargaining, and prohibits the State from making unilateral changes.[68] The process the State follows in making union member dues deductions is a mandatory subject of bargaining.[69] PERA therefore prohibits the State from unilaterally changing how it administers union member dues deductions. The opinion letter, and the State's communications since, provide that the State must do just that, in violation of state law.

*Fourth*, implementation of the opinion letter violates the provisions of PERA that prohibit the State from "interfer[ing] with … an employee in the exercise of the

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65 *See supra* at 11-12.

66 *See* Metcalfe Decl. ¶ 9.

67 *See* AS 23.40.110(a)(5), .210(a); *State v. Alaska Pub. Employees Ass'n, AFT, AFL-CIO*, 199 P.3d 1161, 1164 (Alaska 2008).

68 *Supra* at 6-7 & nn.14-15; *Alaska Pub. Employees Ass'n*, 831 P.2d at 1248; *Fed'n of Teachers*, 669 P.2d at 1305.

69 *Supra* at 6 & n.14; *Wkyc-TV*, 359 NLRB at 288.

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employee's rights guaranteed in [PERA]," "discourag[ing] membership in" a labor organization, or "interfer[ing] with the ... existence, or administration of" a labor organization.[70] "Implicit 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."[71] By refusing to honor state statutes and the State's CBA requiring the deduction dues for members who have authorized those deductions in writing, and by informing all the Union's members that their agreements to join the Union and authorize deductions will no longer be honored despite state law, implementation of the opinion letter directly interferes with the Union's relations with its own members, with the obvious intent to induce current members to withdraw their membership or dues authorizations. PERA prohibits this interference.

**2. Implementation of the opinion letter violates the Contract Clause.**

The third-party defendants' actions also violate the Alaska Constitution's Contract Clause by "impairing the obligation of contracts."[72] "Because the ... contract clause of the Alaska Constitution is nearly identical to ... the federal Contract Clause, [Alaska courts] apply the same two-part analysis to alleged violations of the Alaska and federal

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70 AS 23.40.110(a)(1), (2), (3).

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

72 Alaska Const. art. 1, § 15.

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contract clauses."[73] First, the court must determine "whether the change in state law has operated as a substantial impairment of a contractual relationship."[74] Second, "[i]f there is a substantial impairment, [the court must] then examine 'whether the impairment is reasonable and necessary to serve an important public purpose.'"[75] Both steps of the analysis establish a violation here.

The third-party defendants' implementation of the opinion letter substantially impairs the State's contractual relationship with the Union. In a binding CBA the State entered into post-*Janus*, the State agreed to deduct member dues upon receipt of written authorizations on union dues deduction cards.[76] The Union relies on these dues deduction provisions to collect its primary source of operating revenue—dues from the Union's own members.[77] Without those dues, the Union would not be able to function.[78] By directing the State employer to violate these core contractual commitments, third-party defendants substantially impair the State employer's contractual relationship with the Union.

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73 *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 451 (Alaska 2009) (footnotes omitted).

74 *Id.* (quotation marks omitted).

75 *Id.* (footnote omitted).

76 *Supra* at 11-12.

77 Metcalfe Decl. ¶ 16.

78 Metcalfe Decl. ¶ 17.

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Implementation of the opinion letter also substantially impairs the Union's contracts with its members. As explained above, many Union members have entered into agreements with the Union that authorize dues deductions for a one-year period, even if the member resigns in the interim.[79] Implementation of the opinion letter effectively abrogates those contracts.

These contractual impairments are neither reasonable nor necessary to serve an important public purpose. Third-party defendants assert that their actions are necessary to comply with the First Amendment, but for reasons we explain *infra* at 25-37, that is incorrect. That the third-party defendants may believe their actions are good public policy does not provide a sufficient justification for impairing contractual obligations. In *Toledo Area AFL-CIO Council v. Pizza*,[80] for example, the Sixth Circuit held that the State of Michigan was properly enjoined, on the basis of the federal Constitution's Contract Clause, from implementing a new law that would terminate the processing of deductions required by union CBAs. The Sixth Circuit explained that even if the State had a "recent epiphany" and believed that terminating the deductions would be good public policy, the State must "wait until existing contracts expire" before it can attempt to negotiate a change with the union.[81] The same is true here.

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79 *Supra* at 8 & nn.21-22.

80 154 F.3d 307 (6th Cir. 1998).

81 *Id.* at 326-27.

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### 3. Implementation of the opinion letter violates the APA.

Implementation of the opinion letter's new union dues deduction procedures also violates Alaska's APA.[82] The APA requires state agencies and departments to engage in a deliberative rulemaking process before adopting or changing regulations.[83] "Regulations that are not promulgated under APA procedures are invalid."[84] The APA applies to the Department of Administration's administration of the "statewide personnel program, including central personnel services such as … pay administration" for all State employees.[85] "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.'"[86] The Department of Administration's new rules for union member dues deductions constitute a regulation under that broad definition.

"'[T]he label placed on a particular statement by an administrative agency does not determine the applicability of the APA. Under the Alaska statute, 'regulation' encompasses many statements made by administrative agencies, including policies and

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82 AS 44.62.010-.950.

83 AS 44.62.180-.290.

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

85 AS 44.21.020(8); *see* AS 44.62.640(a)(4).

86 *Chevron*, 387 P.3d at 35 (quoting AS 44.62.640(3)).

guides to enforcement.'"[87] An "agency action" is a regulation 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.'"[88]

Here, the Department's new dues deduction procedures "implement" the dues deduction provision of PERA that the Department administers.[89] By changing the way the Department interacts with all State employees and all public sector employee representatives, the Department's change in dues deductions procedures also affects the public and is used by the Department in dealing with the public. The changed dues deduction procedures thus are "regulations" subject to the APA's rulemaking requirements.[90]

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87 *Id.* at 35-36 (footnote omitted).

88 *Id.* (brackets, footnote omitted).

89 *See* AS 23.40.220.

90 Although agency actions that are merely "'commonsense interpretations' of existing requirements are not regulations requiring compliance with APA rulemaking standards," that exception to the APA's requirements does not apply "(1) when the agency adds 'requirements of substance' and does more than just 'interpret the statute according to its own terms'; (2) when the agency interprets a statute in a way that is 'expansive or unforeseeable'; or (3) when the agency 'alters its previous interpretation of a statute.'" *Chevron*, 387 P.3d at 36-37 (brackets, ellipsis, and footnote omitted). The Department's changed dues deductions procedures are not "commonsense interpretations" of existing requirements. The procedures add a series of "requirements of substance" beyond the requirements set forth in the plain terms of AS 23.40.220. The

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**4. *Janus* does not require changes to the State's union member dues deduction rules.**

Third-party defendants justify the implementation of the Attorney General's opinion letter as necessary to comply with *Janus*. They are wrong.

**i. The courts and administrative agencies agree that *Janus* does not affect voluntarily authorized member dues deductions.**

After *Janus* was issued, a few public employers claimed that *Janus* required them to stop making previously authorized union membership dues deductions. In each case, state courts or administrative agencies rejected that contention and issued preliminary injunctive relief ordering the public employers to continue dues deductions.[91] Likewise, federal district courts hearing post-*Janus* cases brought by former union members seeking to recover dues deductions they had previously authorized have unanimously

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Department (and the Attorney General) have also "alter[ed]" their "previous interpretation" of the dues deduction statute. *Chevron*, 387 P.3d at 37; *see supra* at 12-14.

[91] *See Montana Fed'n of Public Emps. v. Vigness*, No. DV 19-0217, Order Granting PI at 9-11(Mont. D. Ct. Apr. 11, 2019) (Brown Decl., Exhibit R) ("*Janus'* application is limited to nonmembers' payment of fees," and public employer's "unilateral insistence that the Union collect affirmative waivers invades the Union's authority to manage its relationship with its members and prospective members"); *In re Woodland Township Bd. of Educ., and Chatsworth Educ. Ass'n*, No. CO-2019-047, 45 NJPER ¶ 24, 2018 WL 4501733 (N.J. Pub. Emp't Relations Comm'n Aug. 31, 2018) (Brown Decl., Exhibit S) (*Janus* "does not mandate members … to authorize 'dues deductions' after having done so previously"); *AFSCME, Local 3277 v. Rio Rancho*, PELRB No. 113-18, TRO and PI ¶ 7 (N.M. Pub. Emps. Lab. Relations Bd. Aug. 21, 2018) (Brown Decl., Exhibit T) ("The *Janus* Decision is narrowly written with its effects limited to payments by non-members of an 'agency fee' or 'fair share' fee; it has no application to the payment of dues by members of the union or the use of payroll deduction of those dues.").

rejected the claim that public employers violate the First Amendment by deducting union dues that were authorized prior to *Janus*; as the District of Oregon recently held, summarizing this unanimous authority, "because [such employees] were voluntary union members, *Janus* does not apply."[92]

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[92] *Anderson v. SEIU Local* 503, __ F.Supp.3d ___, 2019 WL 4246688, at *3 (D. Or. Sept. 4, 2019) ("Plaintiffs chose to become dues-paying members of their respective unions, rather than agency fee paying non-members. In doing so, they acknowledged restrictions on when they could withdraw from membership."); *see also Seager v. United Teachers Los Angeles*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019) (following the "growing consensus of authority on the issue" in rejecting "First Amendment claim for return of dues paid pursuant to [plaintiff's] voluntary union membership agreement"); *Smith v. Superior Court, Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018) ("*Smith I*"), *subsequent order*, *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019) ("*Smith II*") ("*Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and non-members."); *Cooley v. Cal. Statewide Law Enforcement Ass'n*, 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019) ("*Cooley I*") ("Mr. Cooley knowingly agreed to become a dues-paying member of the Union, rather than an agency fee-paying nonmember .... That decision was a freely-made choice. The notion that Mr. Cooley may have made a different choice ... if he knew the Supreme Court would later invalidate public employee agency fee arrangements does not void his previous, knowing agreement."), *subsequent order*, 385 F.Supp.3d 1077, 1079 (E.D. Cal. 2019) ("*Cooley II*") ("The relationship between unions and their members was not at issue in *Janus*."); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019) ("[N]othing in *Janus*'s holding requires unions to cease deductions for individuals who have affirmatively chosen to become union members and accept the terms of a contract ...."); *Babb v. Cal. Teachers Ass'n*, 378 F.Supp.3d 857, 877 (C.D. Cal. 2019) ("Plaintiffs voluntarily chose to pay membership dues in exchange for certain benefits, and '[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced.'") (quoting *Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1008 (D. Alaska 2019)); *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Belgau I*") ("*Janus* says nothing about people [who] join a Union, agree to pay dues, and then later change their mind about paying union dues."), *subsequent order*, 359 F.Supp.3d 1000, 1016 (W.D. Wash. 2019)

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**ii. *Janus* did not address the relationship between unions and their voluntary members.**

This uniform authority is not surprising, because the relationship between unions and their members was not at issue in *Janus*. The question in *Janus* was whether Illinois could compel Mr. Janus—who had never chosen to join a union and agree to pay membership dues—to pay fees to a union as a condition of government employment.[93] The Supreme Court overruled prior precedent and held that the First Amendment prohibits Illinois from requiring Mr. Janus to pay for the costs of collective bargaining representation. The passage from *Janus* that the Attorney General quotes out-of-context in his recent opinion letter,[94] is about *non*members like Mr. Janus:

> 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.[95]

Even in the context of deductions from *non*members, moreover, the Supreme Court did not say that nonmembers must be given the equivalent of a *Miranda* warning

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("*Belgau II*") ("*Janus* does not apply here – Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here."); *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019) (plaintiffs' pre-*Janus* "decision to pay dues was not coerced and payment was a valid contractual term").

93 138 S.Ct. at 2459-60.

94 *See* Metcalfe Decl., Exhibit C at 2-3, 5-7.

95 138 S.Ct. at 2486 (emphases added).

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before they can voluntarily agree to pay money to a union. Rather, the Court held only that fees may not be deducted from a nonmember's wages "unless the employee affirmatively consents to pay."[96]

The Court cited "waiver" cases in the passage quoted above to make clear that States cannot *presume* that nonmembers wish to support unions and require them to "opt out" of such payments. Prior to *Janus*, many courts had held that opt-out systems for nonmembers were consistent with the First Amendment.[97] *Janus* addressed such opt-out systems by distinguishing the employee who "affirmatively consents to pay," as Union members have, from nonmembers who never provided affirmative consent.[98] The Court did not impose any standard beyond "affirmative consent" for nonmembers who wish to agree to pay fees to a union.[99]

In any event, whatever *Janus* requires for fees from *non*members, "*Janus* says nothing about people [who] join a Union [and] agree to pay dues ...."[100] Union members' voluntary decisions to join a union and authorize dues deductions are completely

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96 *Id.*

97 *See, e.g., Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 262-63 (9th Cir. 1992).

98 138 S.Ct. at 2486.

99 *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 229-33, 235 (1973) ("Our cases 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.").

100 *Belgau I*, 2018 WL 4931602, at *5; *see supra* at 26 n.92 (citing cases).

different from the compelled payments from nonmembers at issue in *Janus*.[101] Unlike nonmembers, union members have voluntarily chosen to exercise their First Amendment right to associate with the union.

The Attorney General's position rests entirely on his attempt to parse the language of a single paragraph in *Janus* discussing government-compelled fees for nonmembers and extrapolate that language to entirely different circumstances—dues affirmatively authorized in writing by union members—when those circumstances were not before the Court. The Supreme Court has repeatedly rejected this approach to its opinions, instructing that language in judicial opinions must be read in context and not as "referring to quite different circumstances that the Court was not then considering."[102]

*Janus* did not address union member dues that had been affirmatively authorized in writing—as noted above, Mr. Janus was not a union member, and he did not authorize any dues deductions. It is also clear that the *Janus* paragraph the Attorney General erroneously relies upon is addressed solely to government compulsion of nonmembers—

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101 *See 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. The employee is a union member voluntarily.").

102 *Illinois v. Lidster*, 540 U.S. 419, 424 (2004); *see also Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("language of an opinion" must be "read [i]n context" and not "parsed" like a statute).

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and not about setting a general standard for payroll deductions for both members and nonmembers—because the paragraph is not limited to payroll deductions. The Supreme Court stated that "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."[103] If the Supreme Court had been referring to union members in this paragraph, and setting a heightened standard for the enforceability of agreements by union members to support their unions, as the Attorney General claims, then voluntary agreements by union members to pay money to unions would be subject to a different standard than agreements to pay money to every other type of organization, even when such agreements did not involve any payroll deductions and were enforced in court proceedings. There is no indication in *Janus* that the Supreme Court intended to turn labor unions into constitutionally disfavored organizations.

To the contrary, the Court in *Janus* made clear that it was *not* invalidating union members' dues authorizations, by explaining that under its holding, "States can keep their labor-relations systems exactly as they are—only they cannot *force nonmembers* to subsidize public-sector unions."[104] Alaska law does not force employees to do anything. It simply provides that the State will honor its employees' own affirmative dues

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103 *Janus*, 138 S.Ct. at 2486 (emphasis added).

104 *Id.* at 2485 n.27 (emphasis added).

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authorizations.[105] *Janus* does not require more of union *members* who have voluntarily and affirmatively authorized dues deductions.

It also bears emphasis that reading *Janus* as the Attorney General insists would invalidate every pre-*Janus* dues authorization in the United States and conflict with unions' and their members' own First Amendment rights to associate. By joining ASEA, the Union's members *affirmatively* exercised the constitutional right guaranteed under the First Amendment to join and associate with a labor union.[106] Private associations, including labor unions, have a First Amendment right to associate with their members on their own agreed-upon terms.[107] The Attorney General's contention that the State can unilaterally void voluntary, affirmative agreements between a union and its members based on standards not applicable to other private contracts is incompatible with the First Amendment rights of public employees to associate with one another and their unions on their own agreed-upon terms.

**iii. Adopting the third-party defendants' position would conflict with basic principles of state action.**

The Attorney General's position is not only inconsistent with *Janus*, but it is also premised on a basic misunderstanding of state action principles. The First Amendment

105 *See* AS 23.40.220.

106 *See 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.").

107 *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

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prohibits the government from compelling speech (or subsidies for speech).[108] Alaska law provides for the deduction of union dues only if workers authorize the deductions.[109] And Alaska law makes it illegal for public employers (and unions) to coerce workers to make such authorizations.[110] As such, Alaska law is consistent with the First Amendment.

Attorney General Clarkson's letter asserts that the State would "unwittingly" be violating the First Amendment by processing deductions if it turned out that, in a particular instance, a union member was coerced to sign an authorization, or did not have a full understanding of her rights when authorizing the deductions.[111] And, from that premise, the Attorney General's letter concludes that the State is constitutionally obligated to establish safeguards to protect against these "unwitting" First Amendment violations.[112]

But the premise is incorrect. The government is not responsible for private conduct, even when the government adjusts its actions in response to that private

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108 *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1926, 1928 (2019); *Janus*, 138 S.Ct. at 2479 & n.24 ("[A] very different First Amendment question arises when a State *requires* its employees to pay agency fees.") (emphasis in original).

109 AS 23.40.220.

110 AS 23.40.110(a), (c).

111 Metcalfe Decl., Exhibit C at 3, 5.

112 *Id.* at 12.

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conduct.[113] The hypothetical union member coerced by a union to authorize dues deductions would have a state law claim against the union, not a First Amendment claim against the government.[114] Likewise, a private party who has the option to join a union and authorize dues deductions need not receive an admonition that the government cannot compel such choices, any more than the government must provide such admonitions to other parties who choose to engage in or refrain from expressive activity. Many public employers, for example, allow employees to authorize payroll deductions to make contributions to charity. An employee who authorizes such a deduction while misunderstanding the terms of the authorization form has not suffered a violation of her First Amendment rights. The same is true here. In the absence of government compulsion or restraint, the First Amendment is not implicated.

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[113] *See, e.g.*, *Blum v. Yaretsky,* 457 U.S. 991, 1004-05 (1982) (no state action where State responded to private decisions by changing benefits; "[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.") (emphasis in original); *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 844 (9th Cir. 2017) (no state action where State enforced private arbitration agreement); *Ohno v. Yasuma*, 723 F.3d 984, 997 (9th Cir. 2013) (no state action where State enforced foreign judgment); *Belgau II*, 359 F.Supp.3d at 1012-15 (no state action where public employer honored employees' dues deduction agreements); *Bronner v. Duggan*, 249 F.Supp.3d 27, 41 (D.D.C. 2017) ("[W]hen a court merely enforces obligations explicitly assumed by the parties, there is no state action. … To hold otherwise would mean that courts could never enforce non-disclosure agreements."); *Bain v. Cal. Teachers Ass'n*, 156 F.Supp.3d 1142, 1152 & n.10 (C.D. Cal. 2015) ("*Bain I*") (voluntary union membership agreements are not state action).

[114] *See Collins v. Womancare*, 878 F.2d 1145, 1152 (9th Cir. 1989) ("'[P]rivate misuse of a state statute'" or other private conduct that violates state law "'does not describe conduct that can be attributed to the State.'") (citation omitted).

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**iv. Even if a "waiver" analysis applied, the third-party defendants' new rules would not be justified.**

Even if *Janus* applied to dues deductions authorized by union *members* in private agreements with their unions, the third-party defendants' arguments would still fail, because the Union's members did "clearly and affirmatively consent before any money [wa]s taken from them."[115] Union members sign written agreements authorizing the State to deduct dues.[116] ASEA's current card provides: "I hereby *voluntarily authorize* and direct my Employer to deduct from my pay each pay period … the amount of dues as certified by ASEA," and "I further authorize my Employer to remit such amount monthly to ASEA. My decision to pay my dues by way of payroll deduction … *is voluntary and not a condition of my employment.*"[117]

*Janus* "acknowledges in its concluding paragraph" that even *non*members "can waive their First Amendment rights by affirmatively consenting to pay union dues."[118] Although *Janus* did not address the relationship between unions and their *members*, by signing the Union's membership and dues authorization cards, each Union member "affirmatively consent[ed]"[119] to pay membership dues, so the *Janus* test would be

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115 138 S.Ct. at 2486.

116 Metcalfe Decl. ¶ 5.

117 Metcalfe Decl., Exhibit A (emphases added).

118 *Smith I*, 2018 WL 6072806, at *1.

119 138 S.Ct. at 2486.

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satisfied in any event.

Even if a "waiver" analysis were relevant, moreover, none of the restrictions on union member dues deduction agreements contained in the Attorney General's opinion letter would be required by the First Amendment. The opinion letter contends that union members must be able to end dues deductions at any time, no matter what terms they have accepted in their membership agreements with their unions, and that members must be forced to re-authorize dues deductions every year.[120] Every court to have addressed the issue, however, has rejected the Attorney General's reasoning and held that voluntary contractual union member dues commitments—including one-year deduction commitments that remain in effect regardless of whether the employee resigns union membership in the interim—remain valid and enforceable after *Janus*.[121]

As the Ninth Circuit recently explained, a public employer's "deduction of union dues in accordance with the membership cards' dues irrevocability provision does not violate [the employees'] First Amendment rights. Although Appellants resigned their membership in the union and objected to providing continued financial support, the First Amendment does not preclude the enforcement of 'legal obligations' that are bargained for and 'self-imposed' under state contract law."[122] The First Amendment thus neither

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120 *See* Metcalfe Decl., Exhibit C at 12.

121 *See supra* at 26-27 n.92 (citing numerous cases).

122 *Fisk v. Inslee*, 759 F.App'x 632, 633 (9th Cir. 2019).

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requires that union members must be able to renege on their contractual commitments to their unions, nor requires that states refuse to honor voluntary, affirmative dues deduction authorizations unless a union member repeatedly re-authorizes those deductions every year.

The Attorney General's opinion letter also insists that a public employee cannot validly authorize union dues deductions unless the State first warns the employee that doing so would involve "waiving" the employee's First Amendment rights and might lead to the employee supporting positions with which the employee disagrees.[123] Supreme Court precedent disposes of this contention; outside the context of criminal defendants in custody or guilty pleas, there is no such warning requirement.[124]

Other authorities confirm that there is no requirement that contracts that touch on expressive activity must include particular magic words or disclaimers that are not required in ordinary private agreements to pay money in exchange for consideration. Even "assum[ing] ... an agreement between private parties to restrict speech implicates the first amendment," a voluntary "agreement [that] clearly sets forth the restrictions" is

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123 *See* Metcalfe Decl. at 11-12.

124 *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) ("[T]he First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law," regardless of whether an agreement contains express warnings or disclaimers); *cf. Schneckloth*, 412 U.S. at 229-34 (voluntary consent to a search waives Fourth Amendment rights regardless of whether the individual was advised of his right to refuse, or even knew of that right, before giving consent).

enforceable without the need for "the talismanic recital of the words 'first amendment.'"[125] Even contracts with the government (which the Union's members' dues authorization agreements are not) are valid waivers of constitutional rights without such disclaimers.[126] Likewise, private nondisclosure agreements are enforceable when they are voluntary and clearly impose the restriction.[127]

**B. The Union is independently entitled to interim injunctive relief under the "balance of hardships" standard.**

ASEA's probable success on the merits justifies injunctive relief without any showing of irreparable harm.[128] An injunction is independently justified under the "balance of the hardships" standard. The Union has at least "raise[d] serious and substantial questions going to the merits of the case," because the Union's claims are not "frivolous or obviously without merit."[129] Injunctive relief is thus appropriate because the

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125 *Perricone v. Perricone*, 292 Conn. 187, 210 & nn.21-22 (2009) (collecting cases).

126 *See, e.g., Charter Commc'ns, Inc. v. County of Santa Cruz*, 304 F.3d 927, 935 (9th Cir. 2002) (plaintiff "voluntarily entered into an agreement under which the County had to approve any transfer of the franchise," and "thus, to that extent, waived its right to claim that a denial of transfer violated its First Amendment rights"); *Leonard v. Clark*, 12 F.3d 885, 886, 889-90 (9th Cir. 1994) (CBA with government waived union's First Amendment rights, despite no express reference to "First Amendment" or other warning).

127 *See, e.g., Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 685 F. App'x 623, 626 (9th Cir. 2017) (party "waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements"), *cert. denied*, 138 S.Ct. 1438 (2018).

128 *Alsworth*, 323 P.3d at 54.

129 *Id.* (quotation marks omitted).

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Union will suffer irreparable harm without relief that outweighs any harm such relief would cause to the State or the third-party defendants.[130]

**1. The Union will suffer irreparable harm without preliminary relief.**

The Union will suffer irreparable harm if the third-party defendants are not enjoined from changing the State's dues deduction rules. As authorities addressing materially indistinguishable circumstances have consistently concluded, unions suffer irreparable harm to their relationships with their members and their status and authority to fulfill their statutory representation functions when a public employer insists that current members must re-authorize union dues after being told that by doing so they will be "waiving" their First Amendment rights.[131]

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130 *Id.*

131 *See Montana Fed'n of Public Emps.*, Order Granting PI at 11 (Brown Decl., Exhibit R) (public employer's insistence that current members sign "waiver" of First Amendment rights for dues deductions to continue "discourages both new and ongoing members by inaccurately claiming that membership dues are a waiver of First Amendment rights" and "[s]uch discouragement cannot be monetarily quantified or easily repaired following final litigation"); *Woodland Township*, 2018 WL 4501733 (Brown Decl., Exhibit S) (public employer's cessation of dues until members sign waivers causes irreparable harm through "[d]iscouragement of membership, revocations of authorization, loss of membership, diminished capacity to serve effectively as majority representative in administering and negotiating collective negotiation agreements"); *Rio Rancho*, TRO and PI ¶¶ 22, 23 (Brown Decl., Exhibit T) (public employer's unilateral cessation of member dues deductions causes irreparable harm that "is ongoing" and will recur each pay period, and the resulting "harm to the union's status as exclusive representative and abrogation of the contract strike at the heart of [the state public employment labor relations statute]").

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The Union will suffer all these same forms of irreparable harm without an injunction. The third-party defendants are encouraging members to withdraw their membership or authorization of dues deductions, discouraging prospective members from joining, and undermining current and prospective members' perceptions of the Union's authority by sending the message that the Governor can violate with impunity the CBA the Union fought hard to negotiate.[132] The Union has already expended, and will be forced to continue to expend, substantial resources to counteract these unlawful messages.[133] The third-party defendants' actions have already impacted the Union's relationships with its members, leading to some membership withdrawals.[134] And the immediate cut-off of the Union's primary source of revenue—which will occur if the Attorney General's opinion letter is implemented—will seriously impede the Union's ability to continue its day-to-day operations, preventing it from effectively negotiating contracts, processing grievances, and otherwise representing bargaining unit members.[135]

This undermining of the Union's ability to function and the Union's strength and status with its current and prospective members will only be exacerbated if the third-party

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132 Metcalfe Decl. ¶ 18.

133 *Id.* at ¶13.

134 *Id.*

135 *Id.* at ¶ 17.

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defendants are permitted to change the status quo. These harms cannot be remedied following the resolution of this litigation.

**2. The State and third-party defendants will not be harmed by interim injunctive relief.**

Granting interim relief will cause no similar harms to the State or third-party defendants. Interim relief will simply maintain the status quo that has existed for more than a year since the Supreme Court's decision in *Janus.* Thus, "[t]here is no certain threat of harm to the public or to the [State] if the injunction issues."[136] Moreover, "an injunction may save the [State] money, as an unlawful refusal to collect dues is typically remedied by an order requiring the employer to pay the lost dues to the union with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), and without recouping the money owed for past dues from employees. *Id.* at 5; *Space Needle LLC*, 362 NLRB No. 11 (Jan. 30, 2015)."[137]

And in the highly unlikely circumstance that ASEA were ultimately not to succeed in this litigation, interim relief would still cause the State and third-party defendants no harm, because the Union's CBA with the State contains a provision through which the

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136 *Rio Rancho*, TRO and PI ¶ 23 (Brown Decl., Exhibit T).

137 *Id.*

Union has agreed to indemnify the State for claims based on improper union dues deductions.[138]

## II. The Union is also entitled to preliminary relief to maintain the status quo pending arbitration of its grievance under the CBA.

In addition to the bases for relief discussed above, courts may also issue preliminary relief to preserve the status quo pending the arbitration of a labor dispute under a CBA grievance procedure.[139] The availability of such an injunction—often called a "reverse *Boys Market* injunction" after the Supreme Court case—is well-recognized in state and federal courts—including in the context of public sector labor disputes governed by state public employment labor relations statutes analogous to PERA.[140] Alaska courts generally follow the NLRA when interpreting and applying PERA.[141] The availability of

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138 Metcalfe Decl., Exhibit B at 9 (Art. 3.06).

139 *See Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970); *Aluminum Workers Int'l Union v. Consol. Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982).

140 *See, e.g., AFSCME, Council 31 v. Schwartz*, 343 Ill.App.3d 553, 560 (2003) (collecting federal cases); *Local 998, Int'l Assoc. of Fire Fighters, AFL-CIO v. Town of Stratford*, 1992 WL 174751, at *3 (Super. Ct. Conn. July 17, 1992) (applying federal law of reverse *Boys Market* injunction to grievance against public employer); *Port Auth. of Allegheny Cty. v. Amalgamated Transit Union, Div. 85*, 60 Pa. Commonwealth 468, 472 (1981) (affirming lower court's issuance of reverse *Boys Market* injunction in context of dispute with public employer).

141 *See* 8 AAC 97.450(b); *Alaska Pub. Emp'ees Ass'n v. State Dept. of Admin.*, 776 P.2d 1030, 1032 (Alaska 1989) ("We have followed federal decisions interpreting the NLRA when the provisions of the NLRA are similar to state statutes."); *Fed'n of Teachers*, 669 P.2d at 1302 & n.1 (relying on federal authority regarding NLRA to interpret PERA).

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a reverse *Boys Market* injunction is based on the NLRA's policy favoring arbitration of labor disputes.[142] PERA expressly adopts that same policy under Alaska law.[143] A reverse *Boys Market* injunction to effectuate that policy is thus available under PERA.

Moreover, in *Fairbanks Fire Fighters Association, Local 1342 v. City of Fairbanks*, the Alaska Supreme Court discussed the superior court's grant of a preliminary injunction to a union to preserve the status quo pending arbitration of a grievance filed under the CBA.[144] The superior court granted the injunction after finding that "the City's action poses the threat of grave and serious harm to the public and to the fire fighters, [and] that the [City's action] is a mandatory subject of collective bargaining which may not be unilaterally imposed by the [City]."[145] These factors closely track the established test to determine when a reverse *Boys Market* injunction should issue:

> (1) The underlying grievance is one that the parties are contractually bound to arbitrate and (2) one of the traditional bases for equitable injunctive relief exists: (a) the employer's breach of the collective bargaining agreement is of an ongoing nature, (b) the union will suffer irreparable harm from the

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142 *See Aluminum Workers Int'l Union*, 696 F.2d at 441 ("There is no more fundamental policy in our national labor laws than that which favors peaceful resolution of labor disputes through voluntary arbitration.").

143 *See* AS 23.40.210(a) (CBA between union and public employer "shall include a grievance procedure which shall have binding arbitration as its final step").

144 934 P.2d 759, 760-61 (Alaska 1997).

145 *Id.* (internal quotation marks omitted, last alteration in original).

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employer's breach, or (c) the union will suffer more from the denial of the injunction than the employer will from its issuance.[146]

Applying those factors here, the Union is entitled to injunctive relief to protect the arbitration process and maintain the status quo while the Union's grievance challenging the implementation of the Attorney General's opinion letter is arbitrated.

First, the underlying grievance is one that the State is bound to arbitrate.[147] The Union's CBA with the State provides for arbitration of disputes regarding the terms of the contract—which includes the State employer's contractual duty to honor employees' dues deduction authorizations.[148] As stated above, labor arbitrators have ruled in favor of unions on essentially identical post-*Janus* grievances.[149]

Second, each of the traditional bases for equitable relief are present. Since the Union need only prove one,[150] each provides a separate basis to grant this motion.

The State employer's breach of the CBA is of an ongoing nature because the State intends to violate the CBA and cease deducting dues, even if members have voluntarily

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146 *Schwartz*, 343 Ill.App.3d at 561 (citing *Aluminum Workers Int'l Union*, 696 F.2d at 442).

147 *Supra* at 15 n.49.

148 *Id.*

149 *Supra* at 15-16 & nn.52-53; *In re Ripley Union Lewis Huntington Sch. Dist. Bd. of Educ.*, AAA File No. 01-180004-6755 (Brown Decl., Exhibit U); *City of Madison (WI) and IBT, Local 695,* 48 LAIS 35, 2019 WL 3451442 (Brown Decl., Exhibit V).

150 *Schwartz*, 343 Ill.App.3d at 561.

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authorized such deductions—indeed, the State has already committed such a breach.[151] The violations are ongoing because the CBA provides that dues deductions are to occur on a regular basis. Unless the third-party defendants are enjoined, the State will violate the Union's CBA every pay period going forward.

The Union will also suffer irreparable harm if an injunction is not granted to protect the arbitration process. For purposes of a reverse *Boys Market* injunction, the "irreparable harm" sought to be avoided is harm that would "prevent an arbitrator from granting meaningful relief."[152] Here, the Attorney General's August 27, 2019 letter has harmed the Union by discouraging membership and erecting one-sided, onerous barriers to members' ability to voluntarily agree to pay dues, harming the Union's relationships with its members and damaging the Union's reputation and support within the bargaining unit.[153] Once lost, membership, support, and morale are difficult to rebuild, and rebuilding requires a great deal of resources. Because the Union will be forced to divert resources to those efforts, fewer resources will be available to serve the Union's core mission of representing State workers. Indeed, the Union already has been forced to divert resources since the August 27 Attorney General Opinion was released and sent to

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151 *Supra* at 14.

152 *Int'l Bh'd of Elec. Workers System Council U-4 v. Fla. Power & Light Co.*, 784 F.Supp. 854, 856 (S.D. Fla. 1991).

153 *Supra* at 38-40.

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all State employees.[154] These cascading harms caused by the third-party defendants' actions cannot be remedied even by a final order providing for reimbursement of lost dues. In *Port Authority of Allegheny County*, for example, the court affirmed the issuance of a preliminary injunction where allowing the employer's action to go forward would result in cascade effects, rendering it impossible to return to the status quo ante.[155]

The purpose of the reverse *Boys Market* injunction is to prevent employers from "presenting the union with a *fait accompli*," rendering arbitration "a hollow formality."[156] Waiting for months or years to arbitrate the Union's grievance while dues deductions have stopped would cause non-monetary harms that could not be compensated through arbitration and could so substantially alter the Union's relations with its own members to threaten the Union's basic ability to continue to function. Injunctive relief is necessary to preserve the integrity of the arbitration procedure required by Alaska law.[157]

Finally, the balancing of the harms also justifies an injunction to preserve the status quo. As explained in detail above, the Union will suffer far more from the denial of

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154 *Supra* at 39.

155 60 Pa. Commonwealth at 473-75. *See also Teamsters Local Union 299 v. Truck Co. Holdings, Inc.*, 87 F.Supp.2d 726, 736 (E.D. Mich. 2000) (company's inability to pay if arbitrator ordered backpay for employees demonstrated irreparable harm justified injunction).

156 *Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 931 (1st Cir. 1988).

157 *See* AS 23.40.210(a).

the injunction than the employer will from its issuance; indeed, the State and third-party defendants will suffer no harm at all from the issuance of an injunction.[158]

## CONCLUSION

The Court should grant a temporary restraining order and preliminary injunction halting implementation of the Attorney General's August 27, 2019 opinion letter and enjoining any changes to the State's dues deduction procedures pending the resolution of this litigation.

DATED this 25th day of September 2019, at Anchorage, Alaska.

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158 *Supra* at 40-41.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 25, 2019, a true and correct copy of the foregoing document was served by:

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