



ALASKA STATE EMPLOYEES ASSOCIATION

American Federation of State, County & Municipal Employees Local 52

September 18, 2019

Kelly Tshibaka
Commissioner
Department of Administration
State of Alaska
550 W 7th Avenue
Anchorage, Alaska 99501

Re: ASEA Class Action, Step II Grievance, ASEA Case No. A19-G-046

Dear Commissioner Tshibaka:

Pursuant to Article 16 of the collective bargaining agreement between ASEA and the State of Alaska, ASEA submits a Step II class action grievance on behalf of every single bargaining unit member employed by the State of Alaska. ASEA is more than happy to provide a list of each bargaining unit member's name if the State believes it is necessary.

This grievance stems from actions by you and Jared Goecker, the Deputy Director of Labor Relations. Both you and Mr. Goecker have violated Sections 3.01 and 3.04 of the ASEA collective bargaining agreement ("CBA"). Those provisions preclude the State of Alaska from interfering in the relationship between the ASEA and its members and require the State of Alaska to process dues deductions authorized by ASEA members. Section 3.01, titled "noninterference," states:

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.

Section 3.04, titled "Payroll Deductions," states:

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 or agency fee 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 (10th) 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 or agency fees.

* * *

C. 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.

Despite these mandatory CBA provisions, both you and Mr. Goecker contacted and interfered with ASEA members, and dictated new procedures related to dues payments. For example, you distributed statements to all State employees, including ASEA members, titled "Frequently Asked Questions – Attorney General's Opinion on Employee's First Amendment Rights" ("FAQs"). A copy of the FAQs are attached to this grievance as Exhibit "A". The FAQs were distributed via email to employees. The FAQs stem from Attorney General Kevin Clarkson's August 27, 2019 opinion, misinterpreting Janus v. American Federation of State, County and Mun. Employees, Council 31, 138 S.Ct. 2448 (2018). You also distributed the Attorney General's erroneous August 27, 2019 opinion to all State employees and stated that the State would implement the opinion. A copy of the August 27, 2019 opinion is attached to this grievance as Exhibit "B". Your FAQs improperly advise and interfere with ASEA's members, including by stating that the State will not continue to honor the dues deduction authorizations executed by ASEA members. The erroneous August 27, 2019 opinion distributed by you also erroneously advised ASEA members that they can immediately cancel dues authorizations, even though many have signed dues authorization agreements that can be cancelled only during a window period.

Mr. Goecker violated the same provisions, as evidenced by the emails to and from Jake Metcalfe. A copy of Mr. Goecker's emails to and from Mr. Metcalfe are attached to this grievance as Exhibit "C". Mr. Goecker provided Mr. Metcalfe a "courtesy notice" regarding "individuals who reached out to the State to cease their membership dues effective immediately" and advised that the State intended to unilaterally cease such deductions. *Id.* Mr. Metcalfe notified Mr. Goecker that the interaction he described violated Sections 3.01 and 3.04 of the CBA. Mr. Goecker refused to immediately cease his contact with the ASEA members about their membership dues authorizations. Additionally, some of the individuals have executed valid dues deduction authorizations that can be cancelled only during a window period but the State has now ceased collecting and remitting dues for these individuals.

The State's contact with ASEA members is intended to interfere and influence ASEA members in violation of the CBA, and has violated the covenant of good faith and fair dealing. The State's implementation of Attorney General Kevin Clarkson's erroneous August 27, 2019 opinion



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also violates the CBA. In accordance with Article 16.09 of the contract between the parties, ASEA seeks arbitration of this dispute.

Very truly yours

A handwritten signature in blue ink, appearing to read "D. Carson", with a long horizontal flourish extending to the right.

Douglas A. Carson
Business Agent

Encs: Grievance Form
Exhibits A-C



From: Commissioners Office, DOA (DOA sponsored) <doa.commissioner@alaska.gov>
Sent: Tuesday, August 27, 2019 1:49 PM
To: SOA All Employees Executive Branch <SOA.All.Employees.Executive.Branch@alaska.gov>
Subject: Attorney General Opinion on Deduction of Union Dues

Dear State of Alaska Employees:

We want to let you know that the Attorney General (AG) has released a legal opinion regarding last year's U.S. Supreme Court case concerning the deduction of union dues by public employers. This U.S. Supreme Court decision is known as the "Janus" decision.

The Alaska AG opinion concludes that the State is currently not in compliance with the U.S. Supreme Court's decision. The 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, and that plan will be rolled out in the next couple of weeks.

Attached are some frequently asked questions on the AG Opinion for your reference, along with a copy of the AG's opinion and the [Janus opinion](#). As more information is known, we will share it with you.

Thanks,
Kelly

Kelly Tshibaka
Commissioner
Department of Administration
(907) 269-6293

Frequently Asked Questions
Attorney General's Opinion on Employee's First Amendment Rights

Q: What does this AG Opinion mean for state employees?

A: In 2018, the United States Supreme Court in *Janus v. American Federation of State, County, and Municipal Employees* determined that public employees could not be mandated to pay agency fees to a union and that the employee needs to affirmatively consent in order for the State to deduct union dues—or any other payment—from an employee's paycheck. The Attorney General (AG) Opinion outlines the constitutional requirements the State must follow in order to ensure that an employee's rights are protected. It is up to each employee to choose how they exercise that right in their decision about union membership. The State has no involvement in that personal decision.

Q: What does the AG Opinion require?

A: The AG Opinion concludes that the State's current practices of collecting dues does not meet the requirements of *Janus*. In particular:

- The State currently requires employees to opt-out in order to remove themselves from the payment of dues. But under *Janus*, no payment to a union may be deducted from an employee's wages unless the employee affirmatively consents to pay (i.e., opt-in). This is because by agreeing to pay dues to a union, employees are waiving their First Amendment rights and such a waiver cannot be presumed. To be effective, a waiver must take the form of an affirmative consent that is freely given and shown by clear and compelling evidence. This means that every employee must affirmatively opt-in to union dues payments before the State may lawfully deduct any union dues or payments from an employee's wages. As the U.S. Supreme Court stated in *Janus*, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."
- Under the State's current collective bargaining agreements, the unions possess the power to elicit employees' consent to have union dues deducted by the State. But the Supreme Court announced in *Janus* that a public employer like the State cannot deduct from an employee's wages "any . . . payment to the union" unless it has "clear and compelling evidence" that an employee has "freely given" his/her consent to subsidize the union's speech. When the unions control the process of eliciting an employee's consent to payroll deductions of union dues and fees, the State has no way of fulfilling its duty of ascertaining—let alone by "clear and compelling evidence"—that those consents are knowing, intelligent, and freely given.
- To pass constitutional muster, an employee's consent must be affirmative and demonstrated by "clear and compelling evidence." Clear and compelling evidence of an affirmative waiver of First Amendment rights requires that the consent be (1) reasonably contemporaneous; (2) free from coercion; and (3) accompanied by a

clear explanation of the rights an employee is waiving. The State's current system for payroll deductions does not meet these standards.

Q: Does this have any implications for private sector unions?

A: No. The AG Opinion and the U.S. Supreme Court case only deal with public employees.

Q: What happens to employees who want to stay in or become a union member?

A: Whether to become a union member is a personal decision for each employee. Employees who are in a union and choose to remain a union member will be still be able to do so. The State only needs to ensure that it has clear and compelling evidence to confirm the employee consents to the deduction of dues from the employee's paycheck.

Q: If the *Janus* decision came out last year, why is the State changing its policy now?

A: Governor Michael J. Dunleavy asked Attorney General Kevin G. Clarkson to look at the State's current practices and policies of deducting dues and payments from employee's paychecks to determine if the State had properly implemented the *Janus* decision. Attorney General Clarkson concluded that although the State had implemented part of the decision, the administration must take more steps in order to fully comply with the decision. In order to come into compliance, the State will have to change its process going forward.

Q: What is the timeline for the change?

A: Given the importance of the First Amendment rights expounded by the U.S. Supreme Court, the State will act as quickly as prudently possible in order to implement the required constitutional protections for its employees.

Q: Will I have to sign a new form to maintain my union membership or will my prior consent form be sufficient?

A: New consent forms will be required. The State must be able to confirm that the consent was freely given and shown by clear and convincing evidence. According to the AG's Opinion, the State cannot rely on the prior consent forms. However, the State will provide reasonable notice and alert employees to the new process once an implementation plan has been determined.



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
Main: (907) 269-5100
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August 27, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: First Amendment rights and union due deductions and fees

Dear Governor Dunleavy:

You have asked for a legal opinion on proposed changes to the State's current process for deducting union-related dues and fees from employee paychecks in light of the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.¹ As explained further below, I have concluded that *Janus* requires a significant change to the State's current practice in order to protect state employees' First Amendment rights.

I. The U.S. Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* significantly limits the manner by which the State can deduct union dues and fees from its employees' wages.

Alaska's Public Employee Relations Act (PERA) assigns public employers the task of deducting from their employees' wages any union dues, fees, or other benefits and transmitting these funds to the union, if the employee provides written authorization to do so.² The Act does not provide any details on how an employee's authorization must be procured or provide any safeguards to ensure that the employee's authorization for the employer to withhold those funds is freely executed with full awareness of the

¹ 138 S. Ct. 2448 (2018).

² AS 23.40.220.

employee's rights.³ But the U.S. Supreme Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* places important limitations on a public employer's ability to deduct union dues and fees from employee wages under AS 23.40.220.

In *Janus*, the U.S. Supreme Court held that the First Amendment prohibits public employers from forcing their employees to subsidize a union.⁴ The *Janus* decision thus invalidated a provision of PERA, AS 23.40.110(b)(2), which previously authorized public employers to enter into agreements with unions that require every employee in a bargaining unit—whether a member of the union or not—to pay an “agency fee” to the union as a condition of employment. This agency fee, that even non-members were required to pay, was calculated by the union to compensate it for the cost of union activities ostensibly taken on the employees' behalves. But *Janus* ruled that requiring public employees to pay an agency fee to a union violates employees' First Amendment right against compelled speech, thereby invalidating laws like AS 23.40.110(b)(2).⁵ The Court further warned that going forward, public employers may not deduct “an agency fee *nor any other payment to the union*” from an employee's wages “unless the employee affirmatively consents to pay.”⁶

In response to the *Janus* decision, the State, under the administration of then-Governor Bill Walker, began discussions with state employee unions to address the effects of the decision. For example, the State immediately ceased deducting agency fees from non-member's paychecks and executed letters of agreement with a number of unions modifying the terms of the collective bargaining agreements to account for *Janus*. But the letters of agreement left largely unchanged collective bargaining agreement provisions regarding employees' consent for automatic payroll deduction of union dues, fees, or other benefits. Generally speaking, these provisions leave to the unions the power to elicit employees to authorize the State to deduct union dues and fees from their paychecks and transmit those monies to the unions.

The State's payroll deduction process is constitutionally untenable under *Janus*, and the prior administration's preliminary steps did not go far enough to implement the Court's mandate. The Court announced in *Janus* that a public employer such as the State

³ The full text of AS 23.40.220 provides: “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.”

⁴ 138 S. Ct. at 2460.

⁵ *Id.* at 2486.

⁶ *Id.* (emphasis added).

cannot deduct from an employee's wages "any . . . payment to the union" unless it has "clear and compelling evidence" that an employee has "freely given" his or her consent to subsidize the union's speech.⁷ By ceding to the unions themselves the process of eliciting public employee's consent to payroll deductions of union dues and fees, and unquestioningly accepting union-procured consent forms, the State has no way of ascertaining—let alone by "clear and compelling evidence"—that those consents are knowing, intelligent, and voluntary. The State has thus put itself at risk of unwittingly burdening the First Amendment rights of its own employees.

A course correction is required. To protect the First Amendment rights of its employees, the State must revamp its payroll deduction process for union dues and fees to ensure that it does not deduct funds from an employee's paycheck unless it has "clear and compelling evidence" of the employee's consent.

II. The *Janus* decision prohibits a public employer from deducting union dues or fees from a public employee's wages unless the employer has "clear and compelling evidence" that the employee has freely waived his or her First Amendment rights against compelled speech.

The Court's decision in *Janus* recognizes that forcing individuals to subsidize the speech of any other private speaker, including a union, burdens those individuals' First Amendment rights. The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all."⁸ "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command" and burdens the rights secured by the First Amendment.⁹ Indeed, when the government compels speech (as opposed to merely limiting speech) it inflicts unique damage: it coerces individuals "into betraying their convictions."¹⁰

"Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."¹¹ Thus "a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have

⁷ *Id.* at 2486.

⁸ *Id.* at 2463 (internal quotation marks omitted).

⁹ *Id.*

¹⁰ *Id.* at 2464.

¹¹ *Id.* (emphasis in original).

powerful political and civic consequences.”¹² The Court acknowledged that an employee’s financial support of a union will effectively subsidize union speech not just on budgetary issues, but on a range of significant and often controversial matters in collective bargaining and related activities that can include healthcare, education, climate change, sexual orientation, and child welfare.¹³

With these principles in mind, *Janus* considered an Illinois law requiring even public employees who declined to join the union that represented their bargaining unit to pay the union an “agency fee”—a sum of money, deducted from the employee’s paycheck, to compensate the union for the costs of collective bargaining.¹⁴ Because “the compelled subsidization of private speech seriously impinges on First Amendment rights,” the Supreme Court applied “exacting scrutiny” to its review of the law.¹⁵ Under exacting scrutiny, “a compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive’ of First Amendment freedoms.”¹⁶ The Court concluded that neither of the justifications proffered in support of the agency fee requirement—promoting “labor peace” and making non-members pay for the fruits of the union’s efforts on their behalf to avoid “the risk of free riders”—satisfied this standard.¹⁷ The Court therefore struck down Illinois’ agency fee statute, holding that “States and public-sector unions may no longer extract agency fees from nonconsenting employees.”¹⁸

The effect of *Janus* was, in part, to invalidate Alaska’s agency-fee provision, AS 23.40.110(b)(2). That provision authorized the State to enter into agreements with the state-employee unions and require *all* employees in a bargaining unit—even non-union members—to pay an agency fee as a condition of employment with the State. The

¹² *Id.* (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 310-11 (2012)).

¹³ *Id.* at 2475 (“[U]nions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few.”); *id.* at 2476 (“Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound value and concern to the public.” (internal footnotes and quotation marks omitted)).

¹⁴ *Id.* at 2464.

¹⁵ *Id.* at 2464, 2477.

¹⁶ *Id.* at 2465 (quoting *Knox*, 567 U.S. at 310).

¹⁷ *Id.* at 2465-69 (internal quotation omitted).

¹⁸ *Id.* at 2486.

collective bargaining agreement provisions that implemented the agency-fee requirement were invalidated too.

The principle of the Court's ruling, however, goes well beyond agency fees and non-members. The Court stated that "[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay."¹⁹ Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented). Thus the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's. In either case, the State can only deduct monies from an employee's wages if the employee provides affirmative consent. Thus, the Court in *Janus* did not distinguish between members and non-members of a union when holding that "[u]nless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."²⁰

Accordingly, before a public employer may lawfully deduct union dues or fees from any employee's paycheck, the employee must waive his or her First Amendment rights against compelled speech.²¹ And because a waiver of First Amendment rights will not be presumed, the employer must have "clear and compelling evidence" that waiver of this right was "freely given" by the employee.²²

Janus therefore significantly limits the State's power under AS 23.40.220 to make any union-related deduction from its employees' paychecks. The statute provides that "[u]pon 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" certified by the union representing that bargaining unit and shall transmit those funds to the union. But in the wake of *Janus*, the State needs "clear and compelling evidence" that this written authorization was "freely given." Without such consent, the State is unwittingly burdening its employees' First Amendment rights by deducting union dues from any number of employees who have not "clearly and affirmatively" consented.²³ The standard announced in *Janus* for

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ *Id.*

²² *Id.* (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-82 (1999)).

²³ *Id.* at 2486.

ascertaining that consent mandates changes to the way the State processes payroll deductions.

III. The State’s existing system for payroll deductions of union dues and fees does not ensure “clear and compelling evidence” that every employee has “freely given” consent to the State to withhold those funds.

Alaska Statute 23.40.220 requires the State, as a public employer, to deduct union dues, fees, and other benefits from an employee’s paycheck and transmit those funds to the union “[u]pon written authorization of the employee.” The statute does not describe in any detail the process for executing this authorization, and up until now the State has largely deferred and defaulted to a union-sponsored system of obtaining employee consent.

But the *Janus* decision requires the State to have “clear and compelling evidence” that the authorization to deduct dues and fees—which represents a waiver of the employee’s rights against compelled speech—is “freely given.”²⁴ And because the system of payroll deductions for union dues and fees is a state law-created, State-facilitated process—a process that has the potential to violate employees’ First Amendment rights—the process must survive exacting constitutional scrutiny.²⁵ The State must therefore strive for a payroll deduction system that creates the least possible risk of deducting union dues or fees from an employee who does not truly consent to subsidizing the union’s speech.

A. For an employee’s consent to be valid, it must be reasonably contemporaneous, free from coercion, and be accompanied by a clear explanation of the rights an employee is waiving.

In articulating the “clear and compelling evidence” standard, the Court in *Janus* cited to a long line of decisions fleshing out what is required for a valid waiver of constitutional rights.²⁶ These decisions dictate the contours of a system of payroll deductions for union dues and fees that can pass constitutional muster.

²⁴ *Id.*

²⁵ *Id.* at 2465.

²⁶ *Id.* at 2486 (citing *Knox*, 567 U.S. at 312-13; *College Sav. Bank*, 527 U.S. at 682; *Curtis Publ’g Co.*, 388 U.S. at 145; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

At the outset, it must be recognized that a waiver of the First Amendment right against compelled speech “cannot be presumed.”²⁷ To the contrary, courts “indulge every reasonable presumption against waiver of fundamental constitutional rights.”²⁸

For a waiver of a constitutional right to be valid, it must first be voluntary.²⁹ A waiver of constitutional rights is voluntary if “it was the product of a free and deliberate choice rather than coercion or improper inducement.”³⁰ In the context of payroll deductions for union-related dues and fees, an employee’s waiver is voluntary if the employee is free from coercion or improper inducement in deciding whether to authorize the deduction.

A valid waiver of First Amendment rights must also be a “knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.”³¹ An individual’s waiver is knowing and intelligent when the individual has “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”³² In the context of a payroll deduction for union dues and fees, a knowing and intelligent waiver requires the employee be aware of the nature of the right—to elect to retain one’s First Amendment rights, or to financially support a union and thereby affiliate with and promote a union’s speech and platform. In other words, the employee must be aware that there is a choice presented, and that consenting to having the employee’s wages reduced to pay union dues is not a condition of state employment. The employee would also have to be aware of the consequences of waiving that right—*i.e.* that the union could use his money to fund union speech on a broad swath of politically significant issues, from state fiscal issues to civil rights and environmental issues, including speech with which the employee disagrees.

It is not enough that some individuals *might* be generally aware of the scope of their First Amendment rights and the kinds of speech a union might undertake with the use of their wages. The U.S. Supreme Court has declined to find a waiver of First Amendment rights based on extra-record information about the “special legal

²⁷ *Janus*, 138 S. Ct. at 2486 (citing *Zerbst*, 304 U.S. at 464); *accord Knox*, 567 U.S. at 312 (“Courts ‘do not presume acquiescence in the loss of fundamental rights.’”) (quoting *College Sav. Bank*, 527 U.S. at 682).

²⁸ *Zerbst*, 304 U.S. at 464.

²⁹ *See Janus*, 138 S. Ct. at 2486 (“the waiver must be freely given”); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

³⁰ *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

³¹ *Brady v. United States*, 397 U.S. 742, 748 (1970).

³² *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

knowledge” of particular individuals.³³ Because the First Amendment is “the matrix, the indispensable condition, of nearly every other form of freedom,” a purported waiver of that right is not effective “in circumstances which fall short of being clear and compelling.”³⁴ And without actual evidence that a waiver of First Amendment rights was knowing and voluntary, a purported waiver cannot be credited.

To be truly voluntary, an individual’s consent to waive their rights must also be reasonably contemporaneous. This is because circumstances change over time, and waivers of constitutional rights may eventually grow stale. Courts have thus recognized that timeliness is an important consideration in determining whether a waiver of fundamental rights is valid. For example, in *Knox v Service Employees International Union, Local 1000*, the U.S. Supreme Court ruled that a public employee union could not levy a special assessment for election-related speech without giving non-members a new opportunity to opt out of subsidizing that effort.³⁵ While acknowledging that nonmembers were given a choice once per year about whether to subsidize the union’s political speech, the Court reasoned that nonmembers “cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent.”³⁶ And because “the factors influencing a nonmember’s choice may change” with the passage of time and changes in the content of the union’s speech, the First Amendment requires that nonmembers be given an opportunity to opt out of subsidizing this speech.³⁷

The Supreme Court also recognized that the invocation or waiver of a constitutional right has temporal limits in *Maryland v. Shatzer*.³⁸ In that case a suspect invoked his right to have an attorney present during an investigatory interview.³⁹ The government honored that right and terminated the interview. The government later reinitiated the investigation, but this time, the suspect waived his *Miranda* rights and consented to a polygraph test, after which he made several inculpatory statements.⁴⁰ Upon being charged with the crime he confessed to, the defendant then sought to exclude

³³ *Curtis Publ’g Co.*, 388 U.S. at 144.

³⁴ *Id.* at 145.

³⁵ 567 U.S. at 314-17.

³⁶ *Id.* at 315.

³⁷ *Id.* at 315-16 (“There were undoubtedly nonmembers who, for one reason or another, chose not to opt out . . . when the standard *Hudson* notice was sent but who took strong exception to the [union’s] political objectives and did not want to subsidize those efforts”).

³⁸ 559 U.S. 98 (2010).

³⁹ *Id.* at 100-01.

⁴⁰ *Id.* at 101-02.

the statements, arguing that his original invocation of the right to counsel should have prevented investigators from later approaching him. The Court rejected his defense and the implicit assumption that the invocation of a constitutional right might exist in perpetuity despite any change in circumstances. Writing for the Court, Justice Scalia determined that a fourteen-day break in custody was sufficient for the defendant's prior invocation of his right to counsel to have expired.⁴¹ If the invocation of a constitutional right can expire with time, so can the waiver of a constitutional right.

Indeed, courts have recognized that a waiver of one's *Miranda* rights may expire with the passage of time. In *Miranda v. Arizona*, the Supreme Court imposed a set of prophylactic rules designed to protect an individual's Fifth Amendment right against self-incrimination.⁴² Decisions applying *Miranda* recognize that the passage of time can be an important factor in evaluating whether an initial waiver of those rights has become stale, requiring the government to re-advise suspects of their rights.⁴³

⁴¹ *Id.* at 110.

⁴² 384 U.S. 436, 467-72 (1966).

⁴³ See, e.g., *United States v. Garcia-Haro*, 2000 WL 1471750, *2 (9th Cir. 2000) (unpublished) (holding that "[r]epeat *Miranda* warnings are not required . . . unless an 'appreciable time' elapses between interrogations" (quoting *United States v. Nordling*, 804 F.2d 1466, 1471 (9th Cir. 1986))); *Nordling*, 804 F.2d at 1471 (inquiring into totality of circumstances and concluding additional *Miranda* warnings not required where "[n]o appreciable time" elapsed between interrogations); *State v. Ransom*, 207 P.3d 208, 217 (Kan. 2009) (explaining that whether waiver of *Miranda* rights has expired requires considering totality of circumstances, including the passage of time); *Commonwealth v. Dixon*, 380 A.2d 765, 767-68 (Pa. 1977) (concluding police were required to re-advise individual of his rights because enough time had passed and circumstances had changed since suspect's waiver) (citation omitted); *State v. DuPont*, 659 So. 2d 405, 407-08 (Fla. Dist. Ct. App. 1995) (determining renewed warning required where polygraph exam conducted more than 12 hours after suspect first read *Miranda*); *United States v. Jones*, 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001) (concluding where circumstances changed over time, warnings became "stale" and suspect entitled to receive new warnings and reconsider earlier decision to waive *Miranda* rights); cf. *Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau, Alaska*, 356 F. Supp. 3d 831, 849 (D. Alaska 2018) (noting that constitutional rights may only be waived if clear and convincing evidence establishes that waiver was "voluntary, knowing, and intelligent" and finding no evidence that, despite allegations of waiver, plaintiffs in that case "voluntarily waived *for all time in the future* any possible constitutional or legal challenge" to city's assessment of fees (emphasis added)).

This makes sense because as the Supreme Court recognized in *Knox*, the circumstances that lead an individual to waive a fundamental right may change, as may an individual's beliefs or opinions, and cause the individual to rethink that waiver.⁴⁴ Because the right to be free from compelled speech is a "fixed star in our constitutional constellation,"⁴⁵ *Janus*'s requirement of clear and compelling evidence of a waiver thus demands some periodic inquiry into whether a public employee wishes to continue to waive—or reclaim—his or her First Amendment rights.

B. The State's current payroll deduction system fails to satisfy constitutional standards.

The State's current system for employee payroll deductions cannot ensure that these constitutional standards are met. Through its collective bargaining agreements, the State has effectively ceded to the unions widespread power to elicit employees' consent to payroll deductions of dues and fees. After *Janus*, this arrangement is no longer tenable. The union-directed process utilized to date fails to yield "clear and compelling evidence" that state employees have "freely given" their consent to deducting union dues and fees from their wages. And yet without that consent, the State is constitutionally barred from making those deductions.

First, having ceded the power to collect payroll deduction authorizations to the unions themselves, the State has no way to ensure that its employees are being told exactly what their First Amendment rights are before being asked to waive them. The current system allows the unions to design the form by which an employee gives written authorization for payroll deductions. But there is no guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech. The same is true for information about the consequences of the employee's decision to waive his or her First Amendment rights. And there is no guarantee that the employee will be told what kinds of speech a particular union will engage in—what positions the union will take—with the benefit of his or her wages. Without that knowledge, a waiver of the employee's rights against compelled speech can hardly be considered knowing and intelligent.

Second, because the unions control the environment in which the employee is asked to authorize a payroll deduction, there is no guarantee that an employee's authorization is "freely given." For example, some collective bargaining agreements

⁴⁴ See *Knox*, 567 U.S. at 315 (noting that a non-union member's choice to support a union's political activities, through electing to pay dues or a special assessment, may change "as a result of unexpected developments" in the union's political advocacy).

⁴⁵ *Janus*, 138 S. Ct. at 2463 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

require new employees to report to the union office within a certain period of time, where a union representative presents the new hire with the payroll deduction form. The State thus has no awareness of what information is (or is not) conveyed to an employee at the critical moment the employee is confronted with the decision whether to waive his or her First Amendment rights. Because this process is essentially a black box the State cannot peer inside of to see what occurs at a venue the State is not invited to, the State has no way of knowing whether the signed form is “the product of a free and deliberate choice rather than coercion or improper inducement.”⁴⁶ And without knowing that, the State lacks “clear and compelling evidence” that the employee’s consent to have union dues and fees deducted from his or her paycheck was “freely given.”⁴⁷

The importance of assuring that an employee gives knowing consent, and the risk of obtaining uninformed waivers under the current state payroll deduction system, is all the more apparent when unions add specific terms to an employee’s payroll deduction authorization, like making the payroll deduction irrevocable for up to twelve months. A new employee might not have any idea what the union is going to say with his or her money or what platform or candidates a union might promote during that time. But if he or she becomes unhappy with the union’s message, they are powerless to revoke the waiver of their right against compelled speech, forced instead to see their wages docked each pay period for the rest of the year to subsidize a message they do not support. A system that permits unions to set the terms by which a public employee waives his or her First Amendment rights and to control the environment in which that waiver is elicited does not satisfy the standards announced in *Janus*. Instead it induces the State to unknowingly burden the First Amendment rights of untold numbers of its own employees. This situation is untenable and must be rectified.

IV. The State must implement a new process for ensuring that an employee’s consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary.

A system of payroll deductions for union dues and fees that comports with the standards articulated in *Janus* must have certain essential features informed by the preceding analysis. In order to implement *Janus*’s requirements, the Governor may determine to exercise his executive authority under Article III, Sections 1 and 24 of the Alaska Constitution and issue an administrative order to establish a procedure to ensure the State honors the First Amendment rights of its employees.

This procedure will implement the constitutional directives set forth in the *Janus* decision. To ensure that the State does not deduct union dues or fees from an employee without “clear and compelling evidence” that the employee freely consents to the

⁴⁶ *Comer*, 480 F.3d at 965.

⁴⁷ *Janus*, 138 S. Ct. at 2486.

deduction, the State must require that the employee provide that consent directly to the State. Rather than permitting the union to control the conditions in which the employee provides consent to a payroll deduction from their state-paid wages, the State may implement and maintain an online system and new written consent forms through which employees wishing to authorize payroll deductions for union dues and fees may provide consent. This process allows the State to ensure that all waivers are knowing, intelligent, and voluntary.

And to ensure that an employee's consent is up-to-date, as required for it to be a valid waiver of the employee's First Amendment rights, the State should require that an employee regularly has the opportunity to (1) opt-in to the dues check-off system and provide their consent to waive their First Amendment rights by providing funds to support union speech; and (2) opt-out of the dues check-off system where the employee determines, for example, that he or she no longer supports the speech being promoted or shares the views of the speaker. When such a procedure is implemented, employees would be asked to "opt-in" to payroll deductions for union dues or fees. Were it otherwise, the risk of error—in this case, unwitting violation of an employee's First Amendment right—would be shifted onto the State, at the expense of the individual employee. Indeed, the Supreme Court already acknowledged in *Knox v. Service Employees International Union, Local 1000* that there are real risks inherent to any opt-out system and that "the difference between opt-out and opt-in schemes is important."⁴⁸

In order to secure clear and compelling evidence of a knowing waiver, the State should also provide for a regular "opt-in" period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages. By Administrative Order the Governor may identify a period of one year as the appropriate amount of time for an employee's waiver of his or her First Amendment rights to remain in effect. Requiring consent to be renewed on an annual basis would ensure that consents do not become stale (due to intervening events, including developments in the union's speech that may cause employees to reassess their desire to subsidize that speech) and promotes administrative and employee convenience by integrating the payroll deduction process with other benefits-elections employees are asked to make at the end of every calendar year.

Sincerely,

Kevin G. Clarkson
Attorney General

⁴⁸ *Knox*, 567 U.S. at 312 (recognizing that in the context of agency shop dues, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree").



THE STATE
of ALASKA

GOVERNOR MICHAEL J. DUNLEAVY

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August 27, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: First Amendment rights and union due deductions and fees

Dear Governor Dunleavy:

You have asked for a legal opinion on proposed changes to the State's current process for deducting union-related dues and fees from employee paychecks in light of the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.¹ As explained further below, I have concluded that *Janus* requires a significant change to the State's current practice in order to protect state employees' First Amendment rights.

- I. **The U.S. Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* significantly limits the manner by which the State can deduct union dues and fees from its employees' wages.**

Alaska's Public Employee Relations Act (PERA) assigns public employers the task of deducting from their employees' wages any union dues, fees, or other benefits and transmitting these funds to the union, if the employee provides written authorization to do so.² The Act does not provide any details on how an employee's authorization must be procured or provide any safeguards to ensure that the employee's authorization for the employer to withhold those funds is freely executed with full awareness of the

¹ 138 S. Ct. 2448 (2018).

² AS 23.40.220.

employee's rights.³ But the U.S. Supreme Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* places important limitations on a public employer's ability to deduct union dues and fees from employee wages under AS 23.40.220.

In *Janus*, the U.S. Supreme Court held that the First Amendment prohibits public employers from forcing their employees to subsidize a union.⁴ The *Janus* decision thus invalidated a provision of PERA, AS 23.40.110(b)(2), which previously authorized public employers to enter into agreements with unions that require every employee in a bargaining unit—whether a member of the union or not—to pay an “agency fee” to the union as a condition of employment. This agency fee, that even non-members were required to pay, was calculated by the union to compensate it for the cost of union activities ostensibly taken on the employees' behalves. But *Janus* ruled that requiring public employees to pay an agency fee to a union violates employees' First Amendment right against compelled speech, thereby invalidating laws like AS 23.40.110(b)(2).⁵ The Court further warned that going forward, public employers may not deduct “an agency fee nor any other payment to the union” from an employee's wages “unless the employee affirmatively consents to pay.”⁶

In response to the *Janus* decision, the State, under the administration of then-Governor Bill Walker, began discussions with state employee unions to address the effects of the decision. For example, the State immediately ceased deducting agency fees from non-member's paychecks and executed letters of agreement with a number of unions modifying the terms of the collective bargaining agreements to account for *Janus*. But the letters of agreement left largely unchanged collective bargaining agreement provisions regarding employees' consent for automatic payroll deduction of union dues, fees, or other benefits. Generally speaking, these provisions leave to the unions the power to elicit employees to authorize the State to deduct union dues and fees from their paychecks and transmit those monies to the unions.

The State's payroll deduction process is constitutionally untenable under *Janus*, and the prior administration's preliminary steps did not go far enough to implement the Court's mandate. The Court announced in *Janus* that a public employer such as the State

³ The full text of AS 23.40.220 provides: “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.”

⁴ 138 S. Ct. at 2460.

⁵ *Id.* at 2486.

⁶ *Id.* (emphasis added).

cannot deduct from an employee's wages "any . . . payment to the union" unless it has "clear and compelling evidence" that an employee has "freely given" his or her consent to subsidize the union's speech.⁷ By ceding to the unions themselves the process of eliciting public employee's consent to payroll deductions of union dues and fees, and unquestioningly accepting union-procured consent forms, the State has no way of ascertaining—let alone by "clear and compelling evidence"—that those consents are knowing, intelligent, and voluntary. The State has thus put itself at risk of unwittingly burdening the First Amendment rights of its own employees.

A course correction is required. To protect the First Amendment rights of its employees, the State must revamp its payroll deduction process for union dues and fees to ensure that it does not deduct funds from an employee's paycheck unless it has "clear and compelling evidence" of the employee's consent.

II. The *Janus* decision prohibits a public employer from deducting union dues or fees from a public employee's wages unless the employer has "clear and compelling evidence" that the employee has freely waived his or her First Amendment rights against compelled speech.

The Court's decision in *Janus* recognizes that forcing individuals to subsidize the speech of any other private speaker, including a union, burdens those individuals' First Amendment rights. The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all."⁸ "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command" and burdens the rights secured by the First Amendment.⁹ Indeed, when the government compels speech (as opposed to merely limiting speech) it inflicts unique damage: it coerces individuals "into betraying their convictions."¹⁰

"Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."¹¹ Thus "a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have

⁷ *Id.* at 2486.

⁸ *Id.* at 2463 (internal quotation marks omitted).

⁹ *Id.*

¹⁰ *Id.* at 2464.

¹¹ *Id.* (emphasis in original).

powerful political and civic consequences.”¹² The Court acknowledged that an employee’s financial support of a union will effectively subsidize union speech not just on budgetary issues, but on a range of significant and often controversial matters in collective bargaining and related activities that can include healthcare, education, climate change, sexual orientation, and child welfare.¹³

With these principles in mind, *Janus* considered an Illinois law requiring even public employees who declined to join the union that represented their bargaining unit to pay the union an “agency fee”—a sum of money, deducted from the employee’s paycheck, to compensate the union for the costs of collective bargaining.¹⁴ Because “the compelled subsidization of private speech seriously impinges on First Amendment rights,” the Supreme Court applied “exacting scrutiny” to its review of the law.¹⁵ Under exacting scrutiny, “a compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive’ of First Amendment freedoms.”¹⁶ The Court concluded that neither of the justifications proffered in support of the agency fee requirement—promoting “labor peace” and making non-members pay for the fruits of the union’s efforts on their behalf to avoid “the risk of free riders”—satisfied this standard.¹⁷ The Court therefore struck down Illinois’ agency fee statute, holding that “States and public-sector unions may no longer extract agency fees from nonconsenting employees.”¹⁸

The effect of *Janus* was, in part, to invalidate Alaska’s agency-fee provision, AS 23.40.110(b)(2). That provision authorized the State to enter into agreements with the state-employee unions and require *all* employees in a bargaining unit—even non-union members—to pay an agency fee as a condition of employment with the State. The

¹² *Id.* (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 310-11 (2012)).

¹³ *Id.* at 2475 (“[U]nions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few.”); *id.* at 2476 (“Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound value and concern to the public.” (internal footnotes and quotation marks omitted)).

¹⁴ *Id.* at 2464.

¹⁵ *Id.* at 2464, 2477.

¹⁶ *Id.* at 2465 (quoting *Knox*, 567 U.S. at 310).

¹⁷ *Id.* at 2465-69 (internal quotation omitted).

¹⁸ *Id.* at 2486.

collective bargaining agreement provisions that implemented the agency-fee requirement were invalidated too.

The principle of the Court's ruling, however, goes well beyond agency fees and non-members. The Court stated that "[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay."¹⁹ Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented). Thus the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's. In either case, the State can only deduct monies from an employee's wages if the employee provides affirmative consent. Thus, the Court in *Janus* did not distinguish between members and non-members of a union when holding that "[u]nless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met."²⁰

Accordingly, before a public employer may lawfully deduct union dues or fees from any employee's paycheck, the employee must waive his or her First Amendment rights against compelled speech.²¹ And because a waiver of First Amendment rights will not be presumed, the employer must have "clear and compelling evidence" that waiver of this right was "freely given" by the employee.²²

Janus therefore significantly limits the State's power under AS 23.40.220 to make any union-related deduction from its employees' paychecks. The statute provides that "[u]pon 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" certified by the union representing that bargaining unit and shall transmit those funds to the union. But in the wake of *Janus*, the State needs "clear and compelling evidence" that this written authorization was "freely given." Without such consent, the State is unwittingly burdening its employees' First Amendment rights by deducting union dues from any number of employees who have not "clearly and affirmatively" consented.²³ The standard announced in *Janus* for

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ *Id.*

²² *Id.* (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-82 (1999)).

²³ *Id.* at 2486.

ascertaining that consent mandates changes to the way the State processes payroll deductions.

III. The State’s existing system for payroll deductions of union dues and fees does not ensure “clear and compelling evidence” that every employee has “freely given” consent to the State to withhold those funds.

Alaska Statute 23.40.220 requires the State, as a public employer, to deduct union dues, fees, and other benefits from an employee’s paycheck and transmit those funds to the union “[u]pon written authorization of the employee.” The statute does not describe in any detail the process for executing this authorization, and up until now the State has largely deferred and defaulted to a union-sponsored system of obtaining employee consent.

But the *Janus* decision requires the State to have “clear and compelling evidence” that the authorization to deduct dues and fees—which represents a waiver of the employee’s rights against compelled speech—is “freely given.”²⁴ And because the system of payroll deductions for union dues and fees is a state law-created, State-facilitated process—a process that has the potential to violate employees’ First Amendment rights—the process must survive exacting constitutional scrutiny.²⁵ The State must therefore strive for a payroll deduction system that creates the least possible risk of deducting union dues or fees from an employee who does not truly consent to subsidizing the union’s speech.

A. For an employee’s consent to be valid, it must be reasonably contemporaneous, free from coercion, and be accompanied by a clear explanation of the rights an employee is waiving.

In articulating the “clear and compelling evidence” standard, the Court in *Janus* cited to a long line of decisions fleshing out what is required for a valid waiver of constitutional rights.²⁶ These decisions dictate the contours of a system of payroll deductions for union dues and fees that can pass constitutional muster.

²⁴ *Id.*

²⁵ *Id.* at 2465.

²⁶ *Id.* at 2486 (citing *Knox*, 567 U.S. at 312-13; *College Sav. Bank*, 527 U.S. at 682; *Curtis Publ’g Co.*, 388 U.S. at 145; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

At the outset, it must be recognized that a waiver of the First Amendment right against compelled speech “cannot be presumed.”²⁷ To the contrary, courts “indulge every reasonable presumption against waiver of fundamental constitutional rights.”²⁸

For a waiver of a constitutional right to be valid, it must first be voluntary.²⁹ A waiver of constitutional rights is voluntary if “it was the product of a free and deliberate choice rather than coercion or improper inducement.”³⁰ In the context of payroll deductions for union-related dues and fees, an employee’s waiver is voluntary if the employee is free from coercion or improper inducement in deciding whether to authorize the deduction.

A valid waiver of First Amendment rights must also be a “knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.”³¹ An individual’s waiver is knowing and intelligent when the individual has “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”³² In the context of a payroll deduction for union dues and fees, a knowing and intelligent waiver requires the employee be aware of the nature of the right—to elect to retain one’s First Amendment rights, or to financially support a union and thereby affiliate with and promote a union’s speech and platform. In other words, the employee must be aware that there is a choice presented, and that consenting to having the employee’s wages reduced to pay union dues is not a condition of state employment. The employee would also have to be aware of the consequences of waiving that right—*i.e.* that the union could use his money to fund union speech on a broad swath of politically significant issues, from state fiscal issues to civil rights and environmental issues, including speech with which the employee disagrees.

It is not enough that some individuals *might* be generally aware of the scope of their First Amendment rights and the kinds of speech a union might undertake with the use of their wages. The U.S. Supreme Court has declined to find a waiver of First Amendment rights based on extra-record information about the “special legal

²⁷ *Janus*, 138 S. Ct. at 2486 (citing *Zerbst*, 304 U.S. at 464); *accord Knox*, 567 U.S. at 312 (“Courts ‘do not presume acquiescence in the loss of fundamental rights.’”) (quoting *College Sav. Bank*, 527 U.S. at 682).

²⁸ *Zerbst*, 304 U.S. at 464.

²⁹ *See Janus*, 138 S. Ct. at 2486 (“the waiver must be freely given”); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

³⁰ *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

³¹ *Brady v. United States*, 397 U.S. 742, 748 (1970).

³² *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

knowledge” of particular individuals.³³ Because the First Amendment is “the matrix, the indispensable condition, of nearly every other form of freedom,” a purported waiver of that right is not effective “in circumstances which fall short of being clear and compelling.”³⁴ And without actual evidence that a waiver of First Amendment rights was knowing and voluntary, a purported waiver cannot be credited.

To be truly voluntary, an individual’s consent to waive their rights must also be reasonably contemporaneous. This is because circumstances change over time, and waivers of constitutional rights may eventually grow stale. Courts have thus recognized that timeliness is an important consideration in determining whether a waiver of fundamental rights is valid. For example, in *Knox v Service Employees International Union, Local 1000*, the U.S. Supreme Court ruled that a public employee union could not levy a special assessment for election-related speech without giving non-members a new opportunity to opt out of subsidizing that effort.³⁵ While acknowledging that nonmembers were given a choice once per year about whether to subsidize the union’s political speech, the Court reasoned that nonmembers “cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent.”³⁶ And because “the factors influencing a nonmember’s choice may change” with the passage of time and changes in the content of the union’s speech, the First Amendment requires that nonmembers be given an opportunity to opt out of subsidizing this speech.³⁷

The Supreme Court also recognized that the invocation or waiver of a constitutional right has temporal limits in *Maryland v. Shatzer*.³⁸ In that case a suspect invoked his right to have an attorney present during an investigatory interview.³⁹ The government honored that right and terminated the interview. The government later reinitiated the investigation, but this time, the suspect waived his *Miranda* rights and consented to a polygraph test, after which he made several inculpatory statements.⁴⁰ Upon being charged with the crime he confessed to, the defendant then sought to exclude

³³ *Curtis Publ’g Co.*, 388 U.S. at 144.

³⁴ *Id.* at 145.

³⁵ 567 U.S. at 314-17.

³⁶ *Id.* at 315.

³⁷ *Id.* at 315-16 (“There were undoubtedly nonmembers who, for one reason or another, chose not to opt out . . . when the standard *Hudson* notice was sent but who took strong exception to the [union’s] political objectives and did not want to subsidize those efforts”).

³⁸ 559 U.S. 98 (2010).

³⁹ *Id.* at 100-01.

⁴⁰ *Id.* at 101-02.

the statements, arguing that his original invocation of the right to counsel should have prevented investigators from later approaching him. The Court rejected his defense and the implicit assumption that the invocation of a constitutional right might exist in perpetuity despite any change in circumstances. Writing for the Court, Justice Scalia determined that a fourteen-day break in custody was sufficient for the defendant's prior invocation of his right to counsel to have expired.⁴¹ If the invocation of a constitutional right can expire with time, so can the waiver of a constitutional right.

Indeed, courts have recognized that a waiver of one's *Miranda* rights may expire with the passage of time. In *Miranda v. Arizona*, the Supreme Court imposed a set of prophylactic rules designed to protect an individual's Fifth Amendment right against self-incrimination.⁴² Decisions applying *Miranda* recognize that the passage of time can be an important factor in evaluating whether an initial waiver of those rights has become stale, requiring the government to re-advise suspects of their rights.⁴³

⁴¹ *Id.* at 110.

⁴² 384 U.S. 436, 467-72 (1966).

⁴³ See, e.g., *United States v. Garcia-Haro*, 2000 WL 1471750, *2 (9th Cir. 2000) (unpublished) (holding that "[r]epeat *Miranda* warnings are not required . . . unless an 'appreciable time' elapses between interrogations" (quoting *United States v. Nordling*, 804 F.2d 1466, 1471 (9th Cir. 1986))); *Nordling*, 804 F.2d at 1471 (inquiring into totality of circumstances and concluding additional *Miranda* warnings not required where "[n]o appreciable time" elapsed between interrogations); *State v. Ransom*, 207 P.3d 208, 217 (Kan. 2009) (explaining that whether waiver of *Miranda* rights has expired requires considering totality of circumstances, including the passage of time); *Commonwealth v. Dixon*, 380 A.2d 765, 767-68 (Pa. 1977) (concluding police were required to re-advise individual of his rights because enough time had passed and circumstances had changed since suspect's waiver) (citation omitted); *State v. DuPont*, 659 So. 2d 405, 407-08 (Fla. Dist. Ct. App. 1995) (determining renewed warning required where polygraph exam conducted more than 12 hours after suspect first read *Miranda*); *United States v. Jones*, 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001) (concluding where circumstances changed over time, warnings became "stale" and suspect entitled to receive new warnings and reconsider earlier decision to waive *Miranda* rights); cf. *Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau, Alaska*, 356 F. Supp. 3d 831, 849 (D. Alaska 2018) (noting that constitutional rights may only be waived if clear and convincing evidence establishes that waiver was "voluntary, knowing, and intelligent" and finding no evidence that, despite allegations of waiver, plaintiffs in that case "voluntarily waived *for all time in the future* any possible constitutional or legal challenge" to city's assessment of fees (emphasis added)).

This makes sense because as the Supreme Court recognized in *Knox*, the circumstances that lead an individual to waive a fundamental right may change, as may an individual's beliefs or opinions, and cause the individual to rethink that waiver.⁴⁴ Because the right to be free from compelled speech is a "fixed star in our constitutional constellation,"⁴⁵ *Janus*'s requirement of clear and compelling evidence of a waiver thus demands some periodic inquiry into whether a public employee wishes to continue to waive—or reclaim—his or her First Amendment rights.

B. The State's current payroll deduction system fails to satisfy constitutional standards.

The State's current system for employee payroll deductions cannot ensure that these constitutional standards are met. Through its collective bargaining agreements, the State has effectively ceded to the unions widespread power to elicit employees' consent to payroll deductions of dues and fees. After *Janus*, this arrangement is no longer tenable. The union-directed process utilized to date fails to yield "clear and compelling evidence" that state employees have "freely given" their consent to deducting union dues and fees from their wages. And yet without that consent, the State is constitutionally barred from making those deductions.

First, having ceded the power to collect payroll deduction authorizations to the unions themselves, the State has no way to ensure that its employees are being told exactly what their First Amendment rights are before being asked to waive them. The current system allows the unions to design the form by which an employee gives written authorization for payroll deductions. But there is no guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech. The same is true for information about the consequences of the employee's decision to waive his or her First Amendment rights. And there is no guarantee that the employee will be told what kinds of speech a particular union will engage in—what positions the union will take—with the benefit of his or her wages. Without that knowledge, a waiver of the employee's rights against compelled speech can hardly be considered knowing and intelligent.

Second, because the unions control the environment in which the employee is asked to authorize a payroll deduction, there is no guarantee that an employee's authorization is "freely given." For example, some collective bargaining agreements

⁴⁴ See *Knox*, 567 U.S. at 315 (noting that a non-union member's choice to support a union's political activities, through electing to pay dues or a special assessment, may change "as a result of unexpected developments" in the union's political advocacy).

⁴⁵ *Janus*, 138 S. Ct. at 2463 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

require new employees to report to the union office within a certain period of time, where a union representative presents the new hire with the payroll deduction form. The State thus has no awareness of what information is (or is not) conveyed to an employee at the critical moment the employee is confronted with the decision whether to waive his or her First Amendment rights. Because this process is essentially a black box the State cannot peer inside of to see what occurs at a venue the State is not invited to, the State has no way of knowing whether the signed form is “the product of a free and deliberate choice rather than coercion or improper inducement.”⁴⁶ And without knowing that, the State lacks “clear and compelling evidence” that the employee’s consent to have union dues and fees deducted from his or her paycheck was “freely given.”⁴⁷

The importance of assuring that an employee gives knowing consent, and the risk of obtaining uninformed waivers under the current state payroll deduction system, is all the more apparent when unions add specific terms to an employee’s payroll deduction authorization, like making the payroll deduction irrevocable for up to twelve months. A new employee might not have any idea what the union is going to say with his or her money or what platform or candidates a union might promote during that time. But if he or she becomes unhappy with the union’s message, they are powerless to revoke the waiver of their right against compelled speech, forced instead to see their wages docked each pay period for the rest of the year to subsidize a message they do not support. A system that permits unions to set the terms by which a public employee waives his or her First Amendment rights and to control the environment in which that waiver is elicited does not satisfy the standards announced in *Janus*. Instead it induces the State to unknowingly burden the First Amendment rights of untold numbers of its own employees. This situation is untenable and must be rectified.

IV. The State must implement a new process for ensuring that an employee’s consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary.

A system of payroll deductions for union dues and fees that comports with the standards articulated in *Janus* must have certain essential features informed by the preceding analysis. In order to implement *Janus*’s requirements, the Governor may determine to exercise his executive authority under Article III, Sections 1 and 24 of the Alaska Constitution and issue an administrative order to establish a procedure to ensure the State honors the First Amendment rights of its employees.

This procedure will implement the constitutional directives set forth in the *Janus* decision. To ensure that the State does not deduct union dues or fees from an employee without “clear and compelling evidence” that the employee freely consents to the

⁴⁶ *Comer*, 480 F.3d at 965.

⁴⁷ *Janus*, 138 S. Ct. at 2486.

deduction, the State must require that the employee provide that consent directly to the State. Rather than permitting the union to control the conditions in which the employee provides consent to a payroll deduction from their state-paid wages, the State may implement and maintain an online system and new written consent forms through which employees wishing to authorize payroll deductions for union dues and fees may provide consent. This process allows the State to ensure that all waivers are knowing, intelligent, and voluntary.

And to ensure that an employee's consent is up-to-date, as required for it to be a valid waiver of the employee's First Amendment rights, the State should require that an employee regularly has the opportunity to (1) opt-in to the dues check-off system and provide their consent to waive their First Amendment rights by providing funds to support union speech; and (2) opt-out of the dues check-off system where the employee determines, for example, that he or she no longer supports the speech being promoted or shares the views of the speaker. When such a procedure is implemented, employees would be asked to "opt-in" to payroll deductions for union dues or fees. Were it otherwise, the risk of error—in this case, unwitting violation of an employee's First Amendment right—would be shifted onto the State, at the expense of the individual employee. Indeed, the Supreme Court already acknowledged in *Knox v. Service Employees International Union, Local 1000* that there are real risks inherent to any opt-out system and that "the difference between opt-out and opt-in schemes is important."⁴⁸

In order to secure clear and compelling evidence of a knowing waiver, the State should also provide for a regular "opt-in" period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages. By Administrative Order the Governor may identify a period of one year as the appropriate amount of time for an employee's waiver of his or her First Amendment rights to remain in effect. Requiring consent to be renewed on an annual basis would ensure that consents do not become stale (due to intervening events, including developments in the union's speech that may cause employees to reassess their desire to subsidize that speech) and promotes administrative and employee convenience by integrating the payroll deduction process with other benefits-elections employees are asked to make at the end of every calendar year.

Sincerely,

Kevin G. Clarkson
Attorney General

⁴⁸ *Knox*, 567 U.S. at 312 (recognizing that in the context of agency shop dues, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree").

From: "Goecker, Jared D (DOA)" <jared.goecker@alaska.gov>
Date: September 9, 2019 at 3:43:11 PM AKDT
To: Jake Metcalfe <JakeM@afscmelocal52.org>
Cc: "Sheehan, Kate E (DOA)" <kate.sheehan@alaska.gov>
Subject: Membership Deduction Cancellations

Hi Jake,

I am writing to give you a courtesy notice that the following individuals have reached out to the State to cease their membership dues deductions effective immediately:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

We have processed their requests and it should reflect on this next payroll. Please feel free to reach out to us if you have any questions.

Best wishes,
Jared

Jared Goecker
Deputy Director of Labor Relations
Division of Personnel & Labor Relations
Dept. of Administration, State of Alaska
907-465-4429 (office)

Exhibit C
ASEA A 2019-G-046
Page 1 Of 3

Doug Carson

From: Jake Metcalfe
Sent: Tuesday, September 10, 2019 11:00 AM
To: Goecker, Jared D (DOA)
Cc: Sheehan, Kate E (DOA); ASEA Business Agents
Subject: RE: Membership Deduction Cancellations

Hi Jared:

Thanks for your email. If you cease dues deduction from our members, as you outline below, you are violating our CBA. Furthermore, as your email indicates, you are directly dealing with our members. This is a violation of state law. Please see sections 3.01 and 3.04 of the collective bargaining agreement (CBA) between the SOA and the Alaska State Employees Association, AFSCME Local 52. I attached these provisions below. Please also review AS 23.40.110, also provided below. Please also review the Alaska Labor Relations Agency online unfair labor practice decisions interpreting that statute, particularly those decisions addressing employers that directly deal with union members.

If you do not immediately notify me that you have ceased and desisted the action described in your email, we will notify our attorney and initiate legal action against the SOA.

Please call or write me if you have any questions.

Sincerely,

Jake Metcalfe
Executive Director
ASEA/AFSCME Local 52

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 (10th) 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.

Sec. 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 which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

From: Goecker, Jared D (DOA) [mailto:jared.goecker@alaska.gov]
Sent: Monday, September 09, 2019 3:43 PM
To: Jake Metcalfe <JakeM@afscmelocal52.org>
Cc: Sheehan, Kate E (DOA) <kate.sheehan@alaska.gov>
Subject: Membership Deduction Cancellations

Hi Jake,

I am writing to give you a courtesy notice that the following individuals have reached out to the State to cease their membership dues deductions effective immediately:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

We have processed their requests and it should reflect on this next payroll. Please feel free to reach out to us if you have any questions.

Best wishes,
Jared

Jared Goecker
Deputy Director of Labor Relations
Division of Personnel & Labor Relations
Dept. of Administration, State of Alaska
907-465-4429 (office)



Step II
State Case # _____
Union Case # A19-G-046

**STATE OF ALASKA
GRIEVANCE FORM**
(Attach copies of previous step forms)
BARGAINING UNIT GGU
CONTRACT YEAR (S) 2019-22

1. Name of Grievant ASEA for all GGU members 2. Employee ID # All GGU
3. Mailing Address c/o ASEA, 2601 Denali Street, Anchorage, AK 99503
4. Job Class All GGU Job Classes 5. Location Statewide
6. Department/Division/Vessel/Crew All
7. Discussed with supervisor on _____
8. Does grievance stem from contract violation? Yes

If so, what provision(s) 3.01, 3.04, covenant of good faith and fair dealing.

9. Nature of Grievance

See cover letter.

When did this occur? Ongoing

10. Relief Sought

See cover letter.

9/18/19
Date

[Signature]
Authorized Submitter Signature (refer to contract)

11. Name and Title of Respondent _____

12. Date Received _____ 13. Remarks _____

14. Decision _____

Date

Respondent Signature