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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.

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 COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

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Defendant/counterclaimant/third-party plaintiff Alaska State Employees Association / AFSCME Local 52, AFL-CIO ("ASEA") asserts the following counterclaims against plaintiff/counterclaim defendant State of Alaska (the "State"), and hereby files a third-party complaint against third-party defendants Alaska Governor Michael J. Dunleavy, Alaska Attorney General Kevin G. Clarkson, Alaska Department of Administration Commissioner Kelly Tshibaka, and the State of Alaska, Department of Administration, alleging as follows:

INTRODUCTION

1. ASEA seeks judicial relief to invalidate, and prevent the State and third-party defendants from implementing, unilateral changes to the State's longstanding practices for deducting union membership dues for thousands of State employees who voluntarily authorized those payroll deductions to support their unions.

2. On August 27, 2019, the third-party defendants announced that they will implement a new policy by making radical changes to the State's union member dues deduction practices. The third-party defendants' implementation of these changes exceeds their authority under the Alaska Constitution, conflicts with statutes adopted by the Alaska Legislature, and abrogates legally binding contracts between the State and labor unions that represent State employees. The third-party defendants' implementation of their new policy will interfere with the relationship between unions and their members,

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deprive unions of resources needed to fund their operations, and undermine the ability of unions to effectively represent their members and bargaining units.

3. The State and third-party defendants claim that they must implement their new union dues deduction policy to comply with a U.S Supreme Court decision that issued almost 15 months ago and did not involve the deduction of union membership dues for employees who voluntarily joined unions and authorized the deductions. The State and third-party defendants' claim of necessity is meritless. The Attorney General's office already concluded, correctly, that the Supreme Court decision does *not* require any changes to the State's policies or practices for deducting union membership dues. The third-party defendants' new policy is an illegal effort to use the authority of the State to retaliate against labor unions that have criticized the Governor's actions.

PARTIES

4. Counterclaimant and third-party plaintiff ASEA is a labor organization that serves as the democratically chosen collective bargaining representative of a General Government Bargaining Unit consisting of approximately 8,000 State employees.

5. Counterclaim defendant STATE OF ALASKA is a public employer.

6. Third-party defendant MICHAEL J. DUNLEAVY is the Governor of Alaska. He is sued in his official capacity.

7. Third-party defendant KEVIN G. CLARKSON is the Attorney General of Alaska. He is sued in his official capacity.

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8. Third-party defendant KELLY TSHIBAKA is the Commissioner of the State of Alaska Department of Administration. She is sued in her official capacity.

9. Third-party defendant STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION is the agency responsible for administering payroll for State of Alaska employees. Through its agents, the State has entered into a collective bargaining agreement with ASEA. The agency is bound, under this agreement, to honor voluntary union dues deduction requests submitted by employees.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this state law dispute against the State of Alaska, an executive branch department, and executive branch officers.[1]

11. Venue is proper in this Judicial District.[2]

BACKGROUND

Alaska's Public Employment Relations Act

12. Alaska's Public Employment Relations Act ("PERA"),[3] establishes a democratic system of union representation for State employees. Under PERA, a majority of employees in a bargaining unit may, if they choose, select a union representative to

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1 AS 09.05.010, 09.05.015, 22.10.020.

2 AS 22.10.030; Alaska R. of Civ. P. 3(c), 4(d)(7), (8).

3 AS 23.40.070-.230.

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negotiate and administer a collective bargaining agreement to cover their unit.[4] If the employees 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."[5] The Legislature reviews "[t]he complete monetary and nonmonetary terms of a tentative agreement" reached as the result of such negotiations, and implicitly ratifies such an agreement by appropriating funds to cover the agreement's monetary terms.[6] The resulting written collective bargaining agreement is binding on the State employer.[7]

13. PERA requires that public employers must deduct union dues from a public employee's pay when the employee has authorized those deductions in writing:

> 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.[8]

14. PERA also requires that public employers must bargain in good faith with certified employee representatives about the terms of member dues deductions. "PERA specifically requires public employers to 'negotiate with and enter into written

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4 AS 23.40.080-.100.

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

6 AS 23.40.215(a)-(b).

7 AS 23.40.210.

8 AS 23.40.220.

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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.'"[9] As part of that duty to bargain in good faith, PERA prohibits public employers from making unilateral changes to mandatory subjects of bargaining.[10] Deduction of dues for union member employees is a mandatory subject of bargaining.[11] PERA thus prohibits public employers from changing how they process union member dues deductions without first bargaining in good faith with the union.

15. PERA further prohibits public employers from "interfer[ing] with, restrain[ing], or coerc[ing] an employee in the exercise of the employee's rights guaranteed in [PERA]," from "discriminat[ing] in regard to … a term or condition of employment to … discourage membership in a[] [labor] organization," and from "interfer[ing] with the formation, existence, or administration of a[] [labor] organization."[12] "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."[13]

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

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

11 *See In Re Wkyc-TV, Inc.*, 359 NLRB 286, 288 (2012).

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

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

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ASEA and its Members

16. ASEA is the democratically chosen collective bargaining representative of the General Government Bargaining Unit, which consists of approximately 8,000 State of Alaska employees. The General Government Bargaining Unit is the largest bargaining unit of Alaska State employees.

17. State employees in union-represented bargaining units are not required to become union members as a condition of public employment. They are free to choose to join or to not join the union.

18. Approximately 7,000 of the employees in the General Government Bargaining Unit have chosen to become members of ASEA.

19. ASEA's members have voluntarily signed written membership agreements authorizing the Union to collect dues through payroll deductions in exchange for union membership and access to members-only rights and benefits.

20. ASEA's current membership/dues authorization agreement states, above the line for 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.*[14]

[14] ASEA Membership Card (emphases added).

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21. ASEA's current membership and dues authorization card 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."[15]

22. Many union members throughout the country execute similar membership agreements that require the payment of membership dues through payroll deduction for a one-year period, even if the employee resigns membership in the interim. Such agreements provide financial stability to labor organizations and prevent employees from becoming members solely to take advantage of a particular membership right or benefit, such as to vote in a union election, only to immediately stop paying dues. Some of ASEA's members have signed such membership agreements.

ASEA's Collective Bargaining Agreement with the State

23. ASEA and the State are parties to a collective bargaining agreement ("CBA") that governs the terms and conditions of employment for bargaining unit employees. The CBA is effective July 1, 2019 to June 30, 2022.

24. The CBA is a binding contract between ASEA and the State.

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15 *Id.*

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25. The CBA explicitly 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.[16]

26. The CBA specifically 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."[17]

27. The CBA also 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."[18]

The *Janus* Decision and Nonmember Agency Fees

28. Prior to June 27, 2018, Alaska state law and U.S. Supreme Court precedent, in a case called *Abood v. Detroit Board of Education*,[19] permitted public employers to require non-union-members to pay fair-share fees (also known as agency fees) to their union representatives.[20] Under *Abood*, fair-share fees could be collected to cover the

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16 ASEA CBA Art. 3.04.A.

17 *Id.*

18 *Id.* at 3.01.

19 431 U.S. 209 (1977).

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

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nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political or ideological activities.[21]

29. In *Janus v. AFSCME, Council 31*,[22] issued on June 27, 2018, the Supreme Court held that *Abood* "is now overruled" and that, under *Janus*, the collection of mandatory fair-share fees from nonmember public employees "violates the First Amendment and cannot continue."[23] The Court in *Janus* explained, however, that its holding was limited to the collection of fair-share fees from nonmembers: "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions."[24]

30. After *Janus*, the State and ASEA immediately stopped collecting fair-share fees.[25]

Alaska's Attorney General Recognizes that *Janus* Does Not Affect Public Employers' Obligation to Deduct Authorized Union Dues

31. After *Janus* was decided, Alaska's Attorney General Jahna Lindemuth issued a legal memorandum explaining that *Janus* invalidated agency fee requirements but otherwise "[a]ll other provisions of the State's PERA law remain in effect. In fact, the

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21 431 U.S. at 235-36.

22 138 S.Ct. 2448 (2018).

23 *Id.* at 2486.

24 *Id.* at 2485 n.27.

25 *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* ....").

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Supreme Court in *Janus* pointed out that its decision did not require the invalidation of state labor relations laws such as PERA."[26]

32. Attorney General Lindemuth specifically recognized that *Janus* did not authorize public employers to make unilateral changes to existing collective bargaining agreements and that *Janus* does not 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?
>
> 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.[27]

33. The Attorneys General or Departments of Labor of at least 13 other states and the District of Columbia issued similar opinions, all agreeing with Attorney General Lindemuth that *Janus* does not affect dues deductions for union members who have previously authorized those deductions. *See*:

a. California Attorney General Opinion – Affirming Labor Rights and Obligations in Public Workplaces, available at https://oag.ca.gov/system/files/attachments/press_releases/AG%20Becerra%20Labor%20Rights%20Advisory%20FINAL.pdf;

b. Connecticut Attorney General Opinion – General Guidance Regarding the Rights and Duties of Public-Sector Employers and Employees in the State

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[26] Alaska AG Memorandum at 2, Sept. 7, 2018.

[27] *Id.* at 3.

of Connecticut after *Janus v. AFSCME Council 31*, available at https://portal.ct.gov/AG/General/Guidance_on_Janus;

c. Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Pennsylvania, Vermont, and Washington Attorneys General and Oregon Department of Justice Statement – Response to Liberty Justice Center letter, October 5, 2018;

d. District of Columbia Attorney General Opinion – Attorney General Advisory: Affirming Public Sector Labor Rights and Responsibilities After *Janus*, July 30, 2018 available at http://oag.dc.gov/sites/default/files/2018-07/Post_Janus_Advisory_FINAL.pdf;

e. Illinois Attorney General Opinion – Guidance Regarding Rights and Duties of Public Employees, Public Employers, and Public Employee Unions after *Janus v. AFSCME Council 31,* July 20, 2018, available at http://www.illinoisattorneygeneral.gov/rights/Janus_Advisory_72018.pdf;

f. Maryland Attorney General Opinion – General Guidance on the Rights and Duties of Public-Sector Workers and Employers After Janus, available at http://www.marylandattorneygeneral.gov/news%20documents/After_Janus.pdf;

g. Massachusetts Attorney General Opinion – Attorney General Advisory, Affirming Labor Rights and Obligations in Public Workplaces, July 3, 2018, available at https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20%287-3%29.pdf;

h. New Jersey Joint Opinion – Joint Guidance on the Rights of Public Sector Workers and Employers After Janus, August 22, 2018, available at https://nj.gov/labor/lwdhome/press/2018/20180822janus.html;

i. New Mexico Attorney General Opinion – Attorney General Advisory, Guidance for Public Sector Employers and Employees after *Janus v. AFSCME Council 31*, September 8, 2018, available at https://www.nmag.gov/attorney-general-advisory-on-janus-decision.pdf;

j. New York Attorney General Statement – Response to Liberty Justice Center letter, October 5, 2018;

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k. New York Department of Labor Guidance for Public-Sector Employers and Employees in New York State, available at https://www.labor.ny.gov/formsdocs/factsheets/pdfs/janus-guidance.pdf;

l. Oregon Attorney General Opinion – Advisory: Affirming Labor Rights and Obligations in Public Workplaces, July 20, 2018, available at https://www.doj.state.or.us/wp-content/uploads/2018/07/AG_Advisory_on_Janus_Decision.pdf;

m. Pennsylvania Attorney General Opinion – Guidance on the Rights and Responsibilities of Public Sector Employees and Employers Following the U.S. Supreme Court's *JANUS* Decision, August 3, 2018, available at https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-08-03-AG-Shapiro-Janus-Advisory-FAQ.pdf;

n. Rhode Island Attorney General Opinion – Statement on Janus, September 4, 2018;

o. Vermont Attorney General Opinion – Advisory: Public Sector Labor Rights and Obligations Following *Janus*, August 9, 2018, available at https://ago.vermont.gov/wp-content/uploads/2018/08/Janus-Advisory-8.9.2018.pdf; and

p. Washington Attorney General Opinion – Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces, July 17, 2018, available at https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-issues-advisory-affirming-labor-rights-and-obligations.

34. Every federal court that has addressed the same basic issue, including the District of Alaska, has similarly agreed that *Janus* does not affect the validity of voluntary union membership and dues deduction authorization agreements. *See*:

a. *Anderson v. SEIU Local 503*, __ F.Supp.3d ___, 2019 WL 4246688, at *3 (D. Or. Sept. 4, 2019);

b. *Seager v. United Teachers Los Angeles*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019);

c. *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*");

d. *Cooley v. Cal. Statewide Law Enforcement Ass'n*, 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019) ("*Cooley I*"), *subsequent order*, 385 F.Supp.3d 1077, 1079 (E.D. Cal. 2019) ("*Cooley II*");

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

f. *Babb v. Cal. Teachers Ass'n*, 378 F.Supp.3d 857, 877 (C.D. Cal. 2019);

g. *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Belgau I*"), *subsequent order*, 359 F.Supp.3d 1000, 1016 (W.D. Wash. 2019) ("*Belgau II*");

h. *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019); and

i. *Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1008 (D. Alaska 2019).

35. The state courts and labor relations agencies that have addressed the same basic issue have also agreed that *Janus* does not affect the validity of union membership and dues deduction authorization agreements and does not permit public employers to unilaterally cease or alter the processing of member dues deductions. *See*:

a. *Montana Fed'n of Public Emps. v. Vigness*, No. DV 19-0217, Order Granting PI (Mont. D. Ct. Apr. 11, 2019);

b. *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); and

c. *AFSCME, Local 3277 v. Rio Rancho*, PELRB No. 113-18, TRO and PI (N.M. Pub. Emps. Lab. Relations Bd. Aug. 21, 2018).

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36. Labor arbitrators have also agreed that *Janus* does not affect union members' dues authorization agreements and have sustained grievances brought by unions challenging public employers that erroneously ceased making previously authorized dues deductions based on a misreading of *Janus*. *See, e.g.*:

a. *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); and

b. *City of Madison (WI) and IBT, Local 695,* 48 LAIS 35, 2019 WL 3451442 (Arb. P.G. Davis, Feb. 13, 2019).

The State's Re-affirmation of its Obligation to Process Authorized Dues Deductions

37. The State negotiated its current collective bargaining agreement with ASEA, covering the largest bargaining unit of State employees (the General Government Bargaining Unit), after *Janus* was issued. Following legislative approval of the funding necessary to implement the CBA, Department of Administration Commissioner Kelly Tshibaka, the representative for the State of Alaska, signed the CBA on August 8, 2019—more than a year after the *Janus* opinion was issued. The CBA is effective for the period July 1, 2019 to June 30, 2022.

38. The new CBA re-affirmed the State's contractual obligation to continue processing dues deductions pursuant to the written authorizations that thousands of union members have already signed. In the new CBA, the parties removed the agency fee provisions that had been invalidated by *Janus* but otherwise obligated the State to deduct

dues in accordance with the dues authorizations contained in the membership agreements signed by ASEA's members.

39. The CBA provides: "Upon 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.[28] The CBA 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."[29] The CBA also 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."[30]

40. The Alaska Department of Administration's official summary of changes to the CBA acknowledges that the CBA was "[u]pdated to comply with *Janus* decision."[31]

The State's New and Erroneous Reading of *Janus*

41. On August 27, 2019, apparently in response to a request from Alaska's Governor, Alaska Attorney General Kevin G. Clarkson issued a new legal opinion letter concerning the *Janus* decision. Attorney General Clarkson's letter reaches the opposite

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28 ASEA CBA Art. 3.04.A.

29 *Id.*

30 *Id.* at 3.01.

31 *See* http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/training/ASEASummary2019.pdf.

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conclusion from Attorney General Lindemuth's September 7, 2018 legal memorandum and from all of the court decisions, administrative decisions, and arbitration decisions cited above.

42. Attorney General Clarkson's letter opines that *Janus* "goes well beyond agency fees and non-members,"[32] and that Alaska statutes and collective bargaining agreements that provide for public employers to deduct union dues in accordance with authorizations voluntarily executed by public employees somehow violate the First Amendment rights of those same public employees.

43. According to Attorney General Clarkson's opinion letter: a) public employers cannot continue to deduct dues based on the union membership agreements and dues deduction authorizations already signed by public employees in Alaska; 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 a one-year period; and d) all dues deduction

[32] Alaska AG Letter at 5, Aug. 27, 2019, publicly available at http://www.law.state.ak.us/pdf/opinions/opinions_2019/19-002_JANUS.pdf.

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authorizations must expire after 12 months, so union members must continuously renew them after receiving a government warning intended to discourage them from doing so.

44. The Attorney General's August 27, 2019 opinion letter is based on an egregious misreading of the *Janus* decision that has been rejected by every federal judge to consider this issue. The Attorney General's August 27, 2019 opinion letter was issued without offering public employee unions the opportunity to submit any legal briefing and ignores the legal authority that uniformly rejects the Attorney General's erroneous interpretation of *Janus*.

45. The same day that the Attorney General issued his erroneous opinion letter, Department of Administration Commissioner Kelly Tshibaka immediately notified every State employee by e-mail of the erroneous opinion letter and informed State employees that the Attorney General had "conclude[d] 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, and that plan will be rolled out in the next couple of weeks." Commissioner Tshibaka's e-mail message to State employees attached a copy of the Attorney General's opinion letter and of the *Janus* decision. The e-mail message was also accompanied by a list of "frequently asked questions" that included multiple factually and legally inaccurate statements. Commissioner Tshibaka sent the e-mail to all State employees without consulting ASEA.

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46. The purpose and effect of third-party defendants' coordinated actions to immediately distribute the Attorney General's erroneous opinion letter and accompanying erroneous information to all State employees, without any consultation with ASEA, was to interfere with ASEA's relationship with its members, encourage ASEA's members to resign their memberships, and cause ASEA to divert resources to responding to the mass distribution of the erroneous information.

47. The State and 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 Alaska Department of Administration notified ASEA that the Department is dealing directly with some ASEA members about the cancellation of dues deductions, which violates PERA as well as ASEA's CBA with the State.

48. On September 13, 2019, when the Department of Administration processed payroll for General Government Bargaining Unit members, the Department did not deduct dues for some ASEA members or former members who had signed membership/dues authorization agreements committing to pay dues through payroll deduction for a one-year period that had not yet ended. This cessation of dues deductions contrary to the authorization cards signed by ASEA members violates PERA as well as ASEA's CBA with the State.

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ASEA's Grievance

49. After Commissioner Tshibaka notified state employees on August 27, 2019 that the State would be implementing the Attorney General's erroneous opinion letter, and the State began to change its past practice regarding the processing of dues deductions, ASEA filed a grievance under its collective bargaining agreement challenging the unilateral implementation of the Attorney General's opinion letter as a violation of that agreement.

50. An arbitrator has not yet been selected to hear this grievance. Based on past experience, ASEA predicts that it is likely to take many months to a year or more to obtain an opinion from an arbitrator resolving this grievance.

Irreparable Harm Caused by the Third-Party Defendants' Actions

51. The third-party defendants' actions are already causing ASEA to suffer irreparable harm, and ASEA will continue to suffer additional irreparable harm if the State and third-party defendants are not enjoined from implementing the Attorney General's erroneous opinion letter.

52. By incorrectly instructing ASEA's members that their written authorizations of dues deductions are invalid, that they must "waive" their First Amendment rights to authorize dues deductions, and that the State must control the process of dues authorizations through imposing new, onerous, one-sided requirements that make the continued deduction of member dues far more difficult, the third-party

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defendants are discouraging prospective and current ASEA members from joining or continuing their membership with ASEA and encouraging current members to withdraw their memberships and dues deduction authorizations.

53. The State and third-party defendants' actions also seriously harm ASEA's status and authority in the eyes of ASEA's current and prospective members, causing a loss of support and strength that cannot be easily recovered. The third-party defendants are inaccurately informing State employees that ASEA is not collecting member dues in a lawful manner, impugning ASEA's status and integrity in its own members' eyes. The third-party defendants are also sending the message to all State employees that the Governor can violate with impunity the collective bargaining agreement the Union fought hard to negotiate, critically undermining ASEA's standing, authority, and support among those employees.

54. These harms are already occurring. Following the release of the Attorney General's opinion letter and the email to all State employees from the Commissioner of the Department of Administration discussing that opinion letter on August 27, 2019, ASEA has already lost members. ASEA will be required to expend substantial resources to counteract the unlawful messages sent to all State employees by the Attorney General's erroneous opinion letter and the Commissioner's email. Indeed, ASEA has already had to expend resources to counteract the third-party defendants' messages. These are all harms that will increase so long as the State and third-party defendants are

not enjoined from implementing their change in policy, and these harms cannot be monetarily quantified or easily repaired following the resolution of this litigation.

55. In addition, by implementing their new policy the State and third-party defendants will cut off ASEA's primary source of revenue—dues from its own members—harming ASEA's ability to operate on a day-to-day basis and to fulfill its statutory representational duties. Implementation of the State and third-party defendants' new policy will deprive ASEA of the operating funds that ASEA needs to keep functioning at its current level. If ASEA is not able to provide the full representational services that it currently provides to all bargaining unit members while this litigation remains pending, it will not be able to negotiate the same collective bargaining agreements and will not be able to enforce its current collective bargaining agreements to the same extent as it would be able to do if its own members' dues payments are not cut off. The resulting loss of collective bargaining strength and ability to enforce current contracts on a day-to-day basis are harms that could not be monetarily quantified or easily remedied following resolution of this litigation.

56. The purpose and effect of the State and third-party defendants' new dues deduction policy is to cause all these harms to ASEA and other public employee unions across Alaska that have been critical of the Governor's policies—unlawfully attacking their status and negotiating strength, their standing with their current and prospective members, and their basic ability to function.

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COUNT I
Violation of Separation of Powers and Public Employment Relations Act (Alaska Const. art. II, §§ 1, 16, art. XII, § 11; AS 23.40.070-.230)

57. ASEA realleges and incorporates by reference all previous paragraphs.

58. Alaska's Constitution vests the legislative power in the Legislature, not the Governor.[33] The Governor is "responsible for the faithful execution of the laws,"[34] and has no authority to act contrary to state statute.[35]

59. PERA requires that public employers must deduct union dues from a public employee's pay when the employee has authorized 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.[36]

60. PERA also requires that public employers must comply with the collective bargaining agreements they have reached with public employee unions. Under PERA, "[u]pon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an

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[33] Alaska Const. art. II, § 1; *id.* art. XII, § 11 ("law-making powers" are "assigned to the legislature").

[34] *Id.* art. III, § 16.

[35] *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.").

[36] AS 23.40.220.

agreement."[37] The Legislature implicitly ratifies each State collective bargaining agreement by appropriating funds to cover the State's contractual commitments made in the agreement after the "complete monetary and nonmonetary terms" of the agreement are "submitted to the legislature ... to receive legislative consideration ...."[38] ASEA's collective bargaining agreement with the State, which was signed by representatives of the State and implicitly ratified by the Legislature, requires the State to deduct dues that have been authorized in writing by union members.

61. PERA requires that public employers must bargain in good faith with certified employee representatives. Even if the issue of dues deductions were not already covered by a binding contract (which it is), the procedures for the deduction of union membership dues are mandatory subjects of bargaining, so PERA prohibits the State from making unilateral changes to those terms.[39]

62. PERA also prohibits the State from "interfer[ing] with, restrain[ing], or coerc[ing] an employee in the exercise of the employee's rights guaranteed in [PERA]," from "discriminat[ing] in regard to ... a term or condition of employment to ... discourage membership in a[] [labor] organization," and from "interfer[ing] with the

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37 AS 23.40.210(a).

38 AS 23.40.215(a)-(b).

39 AS 23.40.070(2), .110(a)(5).

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formation, existence, or administration of a[] [labor] organization."[40] "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."[41]

63. The State and third-party defendants' implementation of the Attorney General's erroneous August 27, 2019 opinion letter exceeds the executive branch's authority in violation of the separation of powers enshrined in Alaska's Constitution because implementation of that opinion letter: a) abrogates State employers' statutory obligation to make dues deductions that have been authorized by members of public employee unions; b) abrogates State employers' statutory obligation to comply with the terms of the State's collective bargaining agreements; c) abrogates State employers' statutory duty to bargain about dues deduction procedures; and d) abrogates the State's statutory duty not to interfere with ASEA's and other public employee unions' relationships with their members.

64. The State and third-party defendants assert that their new policy is necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state attorney general that has addressed the issue has agreed. None of the violations of state law and the CBA that

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

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

implementation of the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

65. The State and third-party defendants' actions are therefore illegal, invalid, and have no lawful effect, and ASEA is entitled to injunctive and declaratory relief prohibiting them from implementing a new union dues deduction policy.

COUNT II
Violation of Contract Clause
(Alaska Const. art. 1, § 15)

66. ASEA realleges and incorporates by reference all previous paragraphs.

67. The Contract Clause of the Alaska Constitution prohibits the State from "impairing the obligation of contract."[42]

68. The State violates the Contract Clause where a "change in state law has operated as a substantial impairment of a contractual relationship" and that impairment is not "reasonable and necessary to serve an important public purpose."[43]

69. The State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter substantially impairs the State's contractual relationship with ASEA by abrogating provisions of the CBA that require dues deductions based on ASEA authorization cards. The State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter also

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42 Alaska Const. art. 1, § 15.

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

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substantially impairs the State's contractual relationship with ASEA by abrogating provisions of the CBA that prohibit interference with the Union's relationship with its members. The State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter also substantially impairs the contractual relationship between ASEA and bargaining unit employees who have signed membership agreements that authorize the deduction of union dues in exchange for the rights and benefits of union membership.

70. These substantial impairments of the State's contractual relationship with ASEA and of ASEA's contractual relationships with bargaining unit employees are not reasonable and necessary to serve an important public purpose. As explained above, the State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter is contrary to multiple state laws and the important public policies advanced by those laws.

71. The State and third-party defendants assert that their implementation of the August 27, 2019 opinion letter is necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state attorney general that has addressed the issue has agreed. None of the violations of state law and the State's contract with the Union that implementation of the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

72. Because the State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter violates the Alaska Constitution's Contract Clause, ASEA is entitled to injunctive and declaratory relief prohibiting that implementation.

COUNT III
Violation of Administrative Procedure Act
(AS 44.62.010-.950)

73. ASEA realleges and incorporates by reference all previous paragraphs.

74. Commissioner Tshibaka and the Department of Administration's implementation of new union member dues deduction procedures violates Alaska's Administrative Procedure Act ("APA").[44]

75. The APA requires state agencies and departments to engage in a deliberative rulemaking process that includes notice and public comment before adopting or changing state regulation.[45] "Regulations that are not promulgated under APA procedures are invalid."[46]

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44 AS 44.62.010-.950.

45 AS 44.62.180-.290.

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

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76. 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.[47]

77. "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.'"[48] Commissioner Tshibaka and the Department of Administration's new rules for union member dues deductions constitute a regulation under that broad definition.

78. Even if the State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter did not violate state statute (which it does) or the Contract Clause (which it does), Commissioner Tshibaka and the Department of Administration would still have to comply with the procedural requirements for rulemaking under the APA, including but not limited to notice and public comment periods before the implementation of new regulations.

79. The State and third-party defendants assert that their implementation of the August 27, 2019 opinion letter is necessary to comply with the First Amendment, but they are wrong, as every federal court, state court or labor relations board, and other state

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

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

attorney general that has addressed the issue has agreed. None of the violations of state law and the State's contract with ASEA that implementation of the Attorney General's August 27, 2019 opinion letter entails are necessary to comply with the First Amendment.

80. Because the State and third-party defendants' implementation of the Attorney General's August 27, 2019 opinion letter violates the APA, ASEA is entitled to injunctive and declaratory relief prohibiting that implementation.

COUNT IV
Injunction in Aid of Arbitration
(AS 23.40.070-.230)

81. ASEA realleges and incorporates by reference all previous paragraphs.

82. Under established law, courts may issue a temporary restraining order or preliminary injunction to preserve the status quo and to protect the arbitration process pending the arbitration of a labor dispute under a collective bargaining agreement requiring arbitration of grievances.[49] Such a temporary injunction to preserve the status quo pending arbitration is available under PERA.[50]

83. ASEA is entitled to injunctive relief to preserve the status quo because (1) its collective bargaining agreement with the State requires the State to arbitrate

[49] *See, e.g., Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970); *Aluminum Workers v. Consol. Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982); *Lever Brothers Co. v. Int'l Chem. Workers Union, Local 217*, 554 F.2d 115, 120 (4th Cir. 1976).

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grievances arising out of disputes over the terms of the agreement, including the terms governing dues deductions; and (2) at least one of the traditional equitable bases for injunctive relief is satisfied here.[51]

84. The traditional equitable bases for injunctive relief are met because, as alleged above, the State and third-party defendants' implementation of the Attorneys General's August 27, 2019 opinion letter requires ongoing breaches of the State's collective bargaining agreement with ASEA; if that implementation is not enjoined, ASEA will suffer irreparable harm from loss of membership, good will, and the ability to function on a day-to-day basis, which cannot be remedied by an arbitration award; and ASEA will suffer more from the denial of an injunction than the State or third-party defendants will from its issuance.

85. Because implementation of the Attorneys General's August 27, 2019 opinion letter before the resolution of the pending grievance would make arbitration of that grievance a hollow exercise, ASEA is entitled to injunctive relief prohibiting that implementation pending the resolution of arbitration of that grievance.

COUNT V
Declaratory Judgment Pursuant to the Declaratory Judgment Act
(AS 22.10.020(g))

86. ASEA realleges and incorporates by reference all previous paragraphs.

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[50] *See Fairbanks Fire Fighters Ass'n, Local 1342 v. City of Fairbanks*, 934 P.2d 759, 760-61 (Alaska 1997); AS 23.40.210(a).

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87. Alaska's Declaratory Judgment Act, codified at AS 22.10.020(g), provides in relevant part: "[i]n case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration .... Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment."

88. An actual controversy exists between ASEA and the State and third-party defendants because the third-party defendants have already taken unilateral action to alter the State's practice of administering employees' voluntary union membership dues deductions.

89. The State and the third-party defendants' actions have already caused injury to ASEA, and these injuries are ongoing.

90. ASEA has notified the State that its actions violate Alaska state law and the State's CBA with ASEA.

91. The Alaska Supreme Court has recognized that disputes over statutory requirements are suitable for declaratory judgment.[52]

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[51] *See AFSCME, Council 31 v. Schwartz*, 343 Ill.App.3d 553, 561 (2003).

[52] *Jefferson v. Asplund*, 458 P.2d 995, 999 (Alaska 1969) (declaratory judgment appropriate "to determine ... construction of statutes and public acts").

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92. The parties' dispute involves the rights and legal relations of the State and ASEA, and a grant of declaratory judgment "would … terminate the controversy [and] the uncertainty which gave rise to the declaratory proceeding."[53]

93. Accordingly, ASEA is entitled to declaratory judgment that the State and third-party defendants, by implementing the change in policy regarding union membership dues deductions and other unilateral actions, have violated the Alaska State Constitution's separation of powers clauses and contract clause,[54] PERA,[55] and the APA.[56]

94. ASEA is further entitled to declaratory judgment that implementing the Attorney General's opinion letter violates the Alaska State Constitution's separation of powers clauses and contract clause, PERA, and the APA.

95. ASEA is further entitled to declaratory judgment that honoring employees' voluntary written dues deduction authorizations does not infringe any rights under the First Amendment to the U.S. Constitution, and that "the First Amendment does not

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53 *Jefferson v. Asplund*, 458 P.2d 995, 998 (Alaska 1969).

54 Alaska Const. art. 11, §§ 1, 16, art. XII, § 11 (separation of powers); *id.* art. I, § 15 (contract clause).

55 AS 23.40.070-.230.

56 AS 44.62.010-.950.

confer … a constitutional right to disregard promises that would otherwise be enforced under state law."[57]

96. ASEA is also entitled to declaratory judgment that the Supreme Court's decision in *Janus v. AFSCME Local 31*—wherein the Court stated that public employers may not require *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"[58]—does not require changes to Alaska's payroll dues deduction procedures for voluntary union members.

PRAYER FOR RELIEF

ASEA respectfully requests the following relief:

1. A temporary, preliminary, and permanent injunction restraining the State of Alaska and the third-party defendants from taking any actions to implement the Attorney General's August 27, 2019 opinion letter and from making any changes to the State employee union dues deduction processes that were in place before that opinion letter was issued.

2. A declaratory judgment that implementation of the Attorney General's August 27, 2019 opinion letter is unlawful.

3. Such other and further relief as is equitable, just, and proper.

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57 *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

58 138 S.Ct. 2448, 2485 n.27 (2018).

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

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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:

[✓] hand delivery
[✓] first class mail
[✓] email

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