

dues or fees. Union members who signed such agreements could not have freely waived their right to not join or pay a union because the Supreme Court had not yet recognized that right.

3. Plaintiffs in this case never provided knowing affirmative consent. When given the opportunity, they communicated their non-consent to Defendant Commissioner Tshibaka's agency, and saw their dues ended. The union filed a claim against the Commissioner's administration and secured a state court order forcing the resumption of their dues, and now dues are again being withdrawn without Plaintiffs' consent.

4. Because Plaintiffs have not provided affirmative consent to waive their First Amendment right to not join or pay money to a union, Defendants have violated Plaintiffs' First Amendment rights by continuing to withhold union dues from their paychecks.

5. Therefore, Plaintiffs bring this suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) seeking declaratory and injunctive relief, as well as damages in the amount of the dues previously deducted from their paychecks.

PARTIES

6. Plaintiffs are employees of the State of Alaska. Plaintiff Linda Creed is an Environmental Health Technician for the State's Department of Environmental

Conservation. She resides in Anchorage, Alaska. She joined the union on July 19, 2017.

7. Plaintiff Tyler Riberio is an Environmental Impact Analyst for the State's Department of Transportation. He resides in Juneau, Alaska. He joined ASEA on February 12, 2018.

8. Defendant Alaska State Employees Association (ASEA)/AFSCME Local 52 is a labor union affiliated with the American Federation of State, County, and Municipal Employees (AFSCME). Its headquarters are in Anchorage, Alaska. It is certified by the Alaska Labor Relations Agency as the exclusive representative for the general government bargaining unit. *See* AK Stat § 23.40.100.

9. Defendant Kelly Tshibaka is Commissioner of Administration for the State of Alaska and is sued in her official capacity. Her agency, the Department of Administration, is responsible for finance, payroll, personnel, and labor relations for the State. She is the lead signatory for the State on the collective bargaining agreement between the State of Alaska and ASEA (Exhibit A at 88). Her office is located in Juneau, Alaska.

JURISDICTION AND VENUE

10. This case raises claims under the First and Fourteenth Amendments of the United State Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

11. Venue is appropriate under 28 U.S.C. § 1391(b) because the Plaintiffs and Defendants live in and a substantial portion of the events giving rise to the claims occurred in the District of Alaska.

FACTS

Defendants are acting under color of state law.

12. Acting in concert under color of state law, Defendant Commissioner Tshibaka and Defendant ASEA entered into a collective bargaining agreement (“Agreement”), effective July 1, 2019, to June 30, 2022. Exhibit A.

13. The Agreement contains a “Union Security” article which binds the State to implement a payroll deduction authorization provided by ASEA:

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.

Exhibit A, § 3.04(A). *See id.* at § 3.04(C).

14. The Agreement's maintenance of membership requirement follows the Public Employment Relations Act (PERA), which states:

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

AK Stat § 23.40.220.

15. The dues authorization form used by ASEA limits a member's ability to end their dues deduction, stating:

This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period.

Creed Union Membership Card, **Exhibit B**.

Plaintiffs seek to resign from and stop paying dues to the union.

16. Plaintiff Linda Creed is an Environmental Health Technician in the Alaska Department of Environmental Conservation.

17. Plaintiff Tyler Riberio is an Environmental Impact Analyst with the Alaska Department of Transportation.

18. At the time Plaintiff Creed joined the union, had she been given the option to pay no money to the union as a non-member. At the time, however, she was forced to either join and pay dues or not join and pay fees, so she chose to join.

19. At the time Plaintiff Riberio joined the union, he believed that membership would provide value to him and his colleagues. He learned through experience within the union that its priorities and values did not comport with his views on important topics. He wrote to the union on July 31, 2019, to resign his

position as a union steward and to cancel his membership and dues authorization, and sent a carbon copy to Commissioner Tshibaka's agency.

20. On August 27, 2019, Alaska Attorney General Kevin Clarkson issued a formal opinion stating that the State had to secure the affirmative consent of all state employees to take union dues in light of the Supreme Court's holdings in *Janus*. Alas. A.G. K. Clarkson, "First Amendment rights and union due deductions and fees," 2019 ALAS. AG LEXIS 5 (Aug. 27, 2019) (Exhibit C).

21. The very next day, August 28, 2019, Plaintiff Creed wrote to ASEA to cancel her membership and dues authorization; ASEA replied one day later, August 29, to say that she was obligated to continue paying dues until her opt-out window ten months in the future.

22. Also on August 28, 2019, Plaintiff Riberio wrote a letter to Commissioner Tshibaka's agency to end continued deduction of union dues from his paycheck and including a copy of his letter of July 31, 2019.

23. On September 20, 2019, Plaintiff Riberio completed a standard State of Alaska payroll form to cease his union dues deductions.

24. Pursuant to the Attorney General's opinion, Governor Mike Dunleavy issued Administrative Order 312 on September 26, 2019 (Exhibit D). The order mandated that Commissioner Tshibaka respect the right of all State employees to decide for themselves whether they provide affirmative consent to union

membership or whether they wish not to pay anything to the union as *Janus* now permits.

25. Pursuant to this order, Plaintiffs Linda Creed and Tyler Riberio exercised their right and refused to provide affirmative consent to continued union dues deductions. The State honored their decisions and stopped deducting dues from their paychecks.

26. On September 16, 2019, Governor Dunleavy sued ASEA for a declaratory judgment validating the Attorney General opinion (*Dunleavy v. ASEA/AFSCME Local 52*, 3AN-19-09971 CI (Miller, J.) (3rd Jud. Dist. at Anchorage). The ASEA countersued on September 25, seeking a court order barring implementation of the Governor's Administrative Order 312. On October 3, 2019, the trial court issued a temporary restraining order siding with ASEA and ordering the reinstatement of cancelled dues authorizations, including those of Plaintiffs and approximately one dozen other state employees.

27. On October 7, 2019, Defendant Commissioner Tshibaka wrote to Plaintiff Creed to inform her that pursuant to the state court's order, she was reinstating the dues deduction from Creed's paychecks. They continue to this day.

28. In January 2020, which was during the resignation window prescribed in the dues checkoff authorization he signed, Plaintiff Riberio sent a letter resigning

his membership from the union. Defendant ASEA executed his opt-out and the State stopped withholding dues from his paycheck at the next pay-period.

29. The opt-out window for Plaintiff Creed pursuant to her dues checkoff authorizations will not arise until July 2020.

COUNT I

Defendants ASEA and Commissioner Tshibaka violated Plaintiffs’ rights to free speech and freedom of association protected by the First Amendment of the United States Constitution.

30. The allegations contained in all preceding paragraphs are incorporated herein by reference.

31. Requiring a government employee to pay money to a union violates that employee’s First Amendment rights to free speech and freedom of association unless the employee “affirmatively consents” to waive his or her rights. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be “freely given and shown by ‘clear and compelling’ evidence.” *Id.*

32. Such a waiver may be withdrawn. *United States v. Mortensen*, 860 F.2d 948 (9th Cir. 1988).

33. The rights to free speech and freedom of association in the First Amendment have been incorporated to and made enforceable against the states through the Fourteenth Amendment guarantee of Due Process. *Id.* at 2463; *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gitlow v. New York*, 268 U.S. 652 (1925).

34. 42 U.S.C. § 1983 provides a cause of action for both damages and injunctive relief against any person who, under color of law of any state, subjects any person within the jurisdiction of the United States to a deprivation of any rights, privileges, or immunities secured by the Constitution.

35. 28 U.S.C. § 2201(a) allows a court of the United States, as a remedy, to declare the rights and other legal relations of interested parties.

36. Subsequent to the Supreme Court's decision in *Janus* on June 27, 2018, Plaintiffs communicated that they did not provide affirmative consent to remain members of Defendant ASEA or to having union dues withheld from their paychecks by Defendant Commissioner Tshibaka.

37. The Plaintiffs communicated their non-consent to Defendant Commissioner Tshibaka when she implemented Administrative Order 312, but they have subsequently been forced to continue paying dues because of the court order.

38. Defendant Commissioner Tshibaka is a state actor who is deducting dues from Plaintiff Creed's paychecks under color of state law, and was similarly deducting dues from Plaintiff Riberio's paychecks until he resigned his membership during the period designated in the dues checkoff authorization.

39. Acting pursuant to the Agreement and PERA, Defendant ASEA is or was acting in concert with Defendant Commissioner Tshibaka to collect union dues from Plaintiffs' paycheck without their affirmative consent.

40. The actions of Defendants constitute a violation of Plaintiffs' First Amendment rights to free speech and freedom of association to not financially support a union without their affirmative consent.

41. From when they joined the union until June 27, 2018 (the date the *Janus* decision was issued), because they were not given the option of paying nothing to the union as a non-member of the union, Plaintiffs could not have provided affirmative consent to Defendants to have dues deducted from their paychecks.

42. Plaintiffs' consent to dues collection was not "freely given" because it was given based on an unconstitutional choice of either paying the union as a member or paying the union agency fees as a non-member. *Janus* made clear that this false dichotomy is unconstitutional. *Janus*, 138 S. Ct. at 2486.

43. Plaintiffs' consent to dues deduction was not an effective waiver of their rights because they did not have and were not provided with complete information about their rights at the time they joined.

PRAYER FOR RELIEF

Plaintiffs Linda Creed and Tyler Riberio respectfully request that this Court:

- a. Declare that limiting the ability of Plaintiffs to revoke the authorization to withhold union dues from their paychecks to a window of time is unconstitutional because they did not provide affirmative consent;

- b. Declare that Plaintiffs' signing of the union card cannot provide a basis for their affirmative consent to waive their First Amendment rights upheld in *Janus* because such authorization was based on an unconstitutional choice between paying the union as a member or paying the union as a non-member, and was made without full information as to their rights;
- c. Declare that the practice by Defendant Commissioner Tshibaka of withholding union dues from Plaintiffs' paycheck was unconstitutional because Plaintiffs did not provide affirmative consent for her to do so;
- d. Enter an injunction ordering ASEA to immediately allow Plaintiff Creed to resign her union membership;
- e. Enjoin Defendant Commissioner Tshibaka from continuing to deduct, and enjoin Defendant ASEA from accepting, dues from Plaintiff Creed's paychecks;
- f. Award damages against Defendant ASEA for all union dues collected from Plaintiffs after the date of the Supreme Court's decision in *Janus*, June 27, 2018;
- g. Award damages against Defendant ASEA for Plaintiffs' dues collected before June 27, 2018;

- h. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988;
and
- i. Award any further relief to which Plaintiffs may be entitled.

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Respectfully Submitted,

LINDA CREED AND TYLER RIBERIO

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* Applications pro hac vice forthcoming