

**Committees:**

House Finance Committee

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Legislative Budget &  
Audit

•  
Finance Subcommittee  
Chair of:  
Alaska Court System  
Department of Law  
University of Alaska

# ALASKA STATE LEGISLATURE



*Serving Midtown,  
University, and  
East Anchorage  
neighborhoods*

## REPRESENTATIVE ANDY JOSEPHSON

### MEMORANDUM

**TO:** Representative Chris Tuck, Chair, Legislative Budget and Audit Committee

**FROM:** Representative Andy Josephson 

**DATE:** October 28, 2020

**RE:** Special Audit Request/ Department of Law Spending on Contract Relating to *Janus*

I write today to request a special audit be conducted of the Department of Law, Civil Division's expenditures on outside counsel thus far in FY 2021 for matters relating to the US Supreme Court's *Janus v AFSME* decision (hereafter, *Janus*).

### Background

As Chair of the Department of Law Budget Subcommittee in the House, I engaged in extensive conversations with staff from the Department of Law (DOL) relating to my concerns about their spending on outside counsel. We also held hearings on this matter during the FY 2021 subcommittee budget process. Specifically, I was most troubled that a contract was entered into in January 2020 by the DOL with an outside law firm, Consovoy McCarthy, PLLC, to handle "matters related to *Janus* decision" which allowed for the expenditure of up to \$600,000 in state funds.<sup>1</sup> (The opinion in the *Janus* case from the Supreme Court was issued on June 27<sup>th</sup> 2018 and it should have been disposed of for all time.) The DOL had also previously entered into a \$50,000 contract with this same firm for work relating to the same topic in August of 2019.<sup>2</sup>

In drafting the FY 2021 budget for this department, our subcommittee expressly segregated spending on *Janus* matters into a separate appropriation item to limit the funds that DOL could expend on *Janus* related contracts.<sup>3</sup> For reasons unclear to me, Governor Dunleavy chose to veto the \$20,000 allocated by the legislature specifically allowed to be spent on *Janus* related items.<sup>4</sup>

<sup>1</sup> See Appendix A, Consovoy Contracts.

<sup>2</sup> See Appendix A, Consovoy Contracts.

<sup>3</sup> See Appendix B, excerpt from HB 205 as enrolled, page 23 line 29 through page 25 line 9.

<sup>4</sup> See Appendix C, excerpt from HB 205 with partial vetoes and reductions, page 25 line 4 through line 9.

This choice on the part of the Governor leaves the DOL with no legal ability to spend any of their civil division appropriation for FY 2021 on contracts related to this matter.

It has come to my attention that Consovoy McCarthy, PLLC filed an amicus brief on October 12<sup>th</sup> 2020 on behalf of the State of Alaska, in a *Janus* related lawsuit against the governor of Washington, *Belgau v Inslee*.<sup>5</sup> Though I have made multiple inquiries to Attorney General Designee Ed Sniffen and DOL staff about how this recent amicus brief was funded, I have not received a timely or adequate response.<sup>6</sup>

If the DOL has continued to spend on contracts related to *Janus* in FY 2021 this would be an active effort on their part to circumvent the legislature's power of appropriation and I assert this would be a violation of AS 37.07.080(a) and Article IX, Section 13 of the Alaska Constitution which prohibit state agencies from transferring money from one appropriation to another. I hope that committee members consider this request carefully, regardless of their views on the *Janus* decision itself, and recognize the importance of protecting the legislature's legal role as the appropriators.

### **Purpose of Audit**

To assess contracts and spending on outside counsel by DOL's Civil Division for matters relating to the *Janus* decision in FY 2021. I ask that the audit include the following objectives over a time frame determined appropriate by the legislative auditor:

- Determine whether any funds were expended on *Janus* related contracts (concerning public employees' union membership, union dues, or related matters) since the beginning of FY 2021 or whether any new contracts relating to *Janus* were entered into.
- Determine whether and how the state financially supported the work of Consovoy McCarthy, PLLC's filing of the October 2020 amicus brief on behalf of the State of Alaska in *Belgau v Inslee*.
- Determine whether the DOL, through expenditures on contracts related to *Janus*, violated AS 37.07.080(a), Article IX, Section 13 of the Alaska Constitution or any other state law.
- Follow up on any other related concerns the Legislative Auditor identifies during the audit.

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<sup>5</sup> See Appendix D, "Brief for the State of Alaska as *Amicus Curiae* in Support of Petition for Rehearing en Banc," 12 October 2020, *Belgau v Inslee*, Case 19-35137, *Janus* is specifically mentioned over 40 times in this brief.

<sup>6</sup> See Appendix E, Communications with Department of Law, Re: *Belgau* Amicus.

# ALASKA STATE LEGISLATURE

## LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P.O. Box 113300  
Juneau, AK 99811-3300  
(907) 465-3830  
FAX (907) 465-2347  
legaudit@akleg.gov

### Audit Request Addendum

At its November 6<sup>th</sup> 2020, meeting, the Legislative Budget and Audit Committee approved an audit request dated October 28, 2020, regarding Department of Law Spending on Contracts Relating to *Janus* with the following amendment:

2<sup>nd</sup> bullet under “Purpose of Audit” on Page 2 is amended to read:

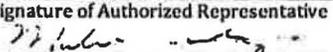
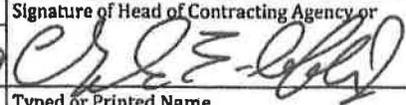
- Determine whether and how the state financially supported the work of Consovoy McCarthy, PLLC’s filing of the October 2020 amicus brief on behalf of the State of Alaska in *Belgau v Inslee*, or other filing in Alaska Superior Court, Alaska Federal District Court or any other courts.

All other sections of the audit request were approved as written in the October 28<sup>th</sup> memorandum from Representative Josephson.

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**Appendix A**  
**Consovoy Contracts**

**STANDARD AGREEMENT FORM**

1. Agency Contract Number <b>20-207-1092</b>	2. Billing Contact Michael Connolly, Partner mike@consvoymccarthy.com	3a. Appropriation 033040700	3b. Unit 2060	3c. Program
4. EN Doc Type and # GAE 20*	Project Constitutional Issue re: Collective Bargaining	Matter ID: 2019102869	6. AK Biz License # n/a	Vendor Number
<b>This contract is between the State of Alaska,</b>				
7. Department of Law	Division Labor and State Affairs	hereafter the State, and		
8. Contractor <b>Consvooy McCarthy, PLLC</b> Email <a href="mailto:will@consvoymccarthy.com">will@consvoymccarthy.com</a> 703-243-9423 hereafter the Contractor				
Mailing Address 1600 Wilson Boulevard, Suite 700 Arlington, VA 22209				
9. <b>ARTICLE 1. Appendices:</b> Appendices referred to in this contract and attached to it are considered part of it. <b>ARTICLE 2. Performance of Service:</b> 2.1 Appendix A (General Provisions), Articles 1 through 14, governs the performance of services under this contract. 2.2 Appendix B sets forth the liability and insurance provisions of this contract. 2.3 Appendix C sets forth the services to be performed by the contractor. <b>ARTICLE 3. Period of Performance:</b> The period of performance for this contract begins <u>July 30, 2019</u> and ends <u>with the resolution of the matter.</u> <b>ARTICLE 4. Considerations:</b> 4.1 In full consideration of the contractor's performance under this contract, the State shall pay the contractor a sum not to exceed <b>\$50,000</b> in accordance with the provisions of Appendix D. 4.2 When billing the State, the contractor shall refer to Contract #20-207-1092 and shall mail the invoice to the address below with a courtesy copy in PDF format emailed to <a href="mailto:03ContractPayments@alaska.gov">03ContractPayments@alaska.gov</a>				
10. Department of Law				
Mailing Address 1031 W. 4 <sup>th</sup> Avenue, Suite 200 Anchorage, AK 99501		Attention: Ed Sniffen <a href="mailto:ed.sniffen@alaska.gov">ed.sniffen@alaska.gov</a>		
<b>11. CONTRACTOR</b>				
Name of Firm Consvooy McCarthy, PLLC		13. <b>CERTIFICATION:</b> I certify that the facts herein and on supporting documents are correct, that this voucher constitutes a legal charge against funds and appropriations cited, that sufficient funds are encumbered to pay this obligation, or that there is a sufficient balance in the appropriation cited to cover this obligation. I am aware that to knowingly make or allow false entries or alterations on a public record, or knowingly destroy, mutilate, suppress, conceal, remove or otherwise impair the variety, legibility or availability of a public record constitutes tampering with public records punishable under AS 11.56.815-.820. Other disciplinary action may be taken up to and including dismissal.		
Signature of Authorized Representative 	Date July 31, 2019			
Typed or Printed Name of Authorized Representative Michael Connolly				
Title Partner EIN: on record				
<b>12. CONTRACTING AGENCY</b>				
Department/Division Law/Civil-Labor and State Affairs	Date 8-2-19	Signature of Head of Contracting Agency or 	Date 8-2-19	
Signature of Project Director 		Typed or Printed Name Clyde E. Sniffen		
Typed or Printed Name of Project Director Clyde E. Sniffen		Chief of Staff		
Title Chief of Staff		Authorized by 2 AAC 12.400 (b) 7		

**NOTICE: This contract has no affect until signed by the head of contracting agency or designee.**

## APPENDIX A GENERAL PROVISIONS

### Article 1. Definitions.

- 1.1 In this contract and appendices, "Project Director" or "Agency Head" or "Procurement Officer" means the person who signs this contract on behalf of the Requesting Agency and includes a successor or authorized representative.
- 1.2 "State Contracting Agency" means the department for which this contract is to be performed and for which the Commissioner or Authorized Designee acted in signing this contract.

### Article 2. Inspections and Reports.

- 2.1 The department may inspect, in the manner and at reasonable times it considers appropriate, all the contractor's facilities and activities under this contract.
- 2.2 The contractor shall make progress and other reports in the manner and at the times the department reasonably requires.

### Article 3. Disputes.

- 3.1 If the contractor has a claim in connection with the contract that it cannot resolve with the State by mutual agreement, it shall pursue the claim, if at all, in accordance with the provisions of AS 36.30.620-632.

### Article 4. Equal Employment Opportunity.

- 4.1 The contractor may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, or because of age, disability, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position(s) do not require distinction on the basis of age, disability, sex, marital status, changes in marital status, pregnancy, or parenthood. The contractor shall take affirmative action to insure that the applicants are considered for employment and that employees are treated during employment without unlawful regard to their race, color, religion, national origin, ancestry, disability, age, sex, marital status, changes in marital status, pregnancy or parenthood. This action must include, but need not be limited to, the following: employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship. The contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting out the provisions of this paragraph.
- 4.2 The contractor shall state, in all solicitations or advertisements for employees to work on State of Alaska contract jobs, that it is an equal opportunity employer and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood.
- 4.3 The contractor shall send to each labor union or representative of workers with which the contractor has a collective bargaining agreement or other contract or understanding a notice advising the labor union or workers' compensation representative of the contractor's commitments under this article and post copies of the notice in conspicuous places available to all employees and applicants for employment.
- 4.4 The contractor shall include the provisions of this article in every contract, and shall require the inclusion of these provisions in every contract entered into by any of its subcontractors, so that those provisions will be binding upon each subcontractor. For the purpose of including those provisions in any contract or subcontract, as required by this contract, "contractor" and "subcontractor" may be changed to reflect appropriately the name or designation of the parties of the contract or subcontract.
- 4.5 The contractor shall cooperate fully with State efforts which seek to deal with the problems of unlawful discrimination, and with all other State efforts to guarantee fair employment practices under this contract, and promptly comply with all requests and directions from the State Commission for Human Rights or any of its officers or agents relating to prevention of discriminatory employment practices.
- 4.6 Full cooperation in paragraph 4.5 includes, but is not limited to, being a witness in any proceeding involving questions of unlawful discrimination if that is requested by any official or agency of the State of Alaska; permitting employees of the contractor to be witnesses or complainants in any proceeding involving questions of unlawful discrimination, if that is requested by any official or agency of the State of Alaska; participating in meetings; submitting periodic reports on the equal employment aspects of present and future employment; assisting inspection of the contractor's facilities; and promptly complying with all State directives considered essential by any office or agency of the State of Alaska to insure compliance with all federal and State laws, regulations, and policies pertaining to the prevention of discriminatory employment practices.
- 4.7 Failure to perform under this article constitutes a material breach of the contract.

### Article 5. Termination.

The Project Director, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the State. In the absence of breach of contract by the contractor, the State is liable only for payment in accordance with the payment provisions of this contract for services rendered before the effective date of termination.

### Article 6. No Assignment or Delegation.

The contractor may not assign or delegate this contract, or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Project Director and the Agency Head.

### Article 7. No Additional Work or Material.

No claim for additional services, not specifically provided in this contract, performed or furnished by the contractor, will be allowed, nor may the contractor do any work or furnish any material not covered by the contract unless the work or material is ordered in writing by the Project Director and approved by the Agency Head.

### Article 8. Independent Contractor.

The contractor and any agents and employees of the contractor act in an independent capacity and are not officers or employees or agents of the State in the performance of this contract.

### Article 9. Payment of Taxes

As a condition of performance of this contract, the contractor shall pay all federal, State, and local taxes incurred by the contractor and shall require their payment by any Subcontractor or any other persons in the performance of this contract. Satisfactory performance of this paragraph is a condition precedent to payment by the State under this contract.

**Article 10. Ownership of Documents.**

All designs, drawings, specifications, notes, artwork, and other work developed in the performance of this agreement are produced for hire and remain the sole property of the State of Alaska and may be used by the State for any other purpose without additional compensation to the contractor. The contractor agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. Nevertheless, if the contractor does mark such documents with a statement suggesting they are trademarked, copyrighted, or otherwise protected against the State's unencumbered use or distribution, the contractor agrees that this paragraph supersedes any such statement and renders it void. The contractor, for a period of three years after final payment under this contract, agrees to furnish and provide access to all retained materials at the request of the Project Director. Unless otherwise directed by the Project Director, the contractor may retain copies of all the materials.

**Article 11. Governing Law; Forum Selection.**

This contract is governed by the laws of the State of Alaska. To the extent not otherwise governed by Article 3 of this Appendix, any claim concerning this contract shall be brought only in the Superior Court of the State of Alaska and not elsewhere.

**Article 12. Conflicting Provisions.**

Unless specifically amended and approved by the Department of Law, the terms of this contract supersede any provisions the contractor may seek to add. The contractor may not add additional or different terms to this contract; AS 45.02.207(b)(1). The contractor specifically acknowledges and agrees, among other things, that provisions in any documents it seeks to append hereto that purport to (1) waive the State of Alaska's sovereign immunity, (2) impose indemnification obligations on the State of Alaska, or (3) limit liability of the contractor for acts of contractor negligence, are expressly superseded by this contract and are void.

**Article 13. Officials Not to Benefit.**

Contractor must comply with all applicable federal or State laws regulating ethical conduct of public officers and employees.

**Article 14. Covenant Against Contingent Fees.**

The contractor warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee except employees or agencies maintained by the contractor for the purpose of securing business. For the breach or violation of this warranty, the State may terminate this contract without liability or in its discretion deduct from the contract price or consideration the full amount of the commission, percentage, brokerage or contingent fee.

**Article 15. Compliance.**

In the performance of this contract, the contractor must comply with all applicable federal, state, and borough regulations, codes, and laws, and be liable for all required insurance, licenses, permits and bonds.

**Article 16. Force Majeure.**

The parties to this contract are not liable for the consequences of any failure to perform, or default in performing, any of their obligations under this Agreement, if that failure or default is caused by any unforeseeable Force Majeure, beyond the control of, and without the fault or negligence of, the respective party. For the purposes of this Agreement, Force Majeure will mean war (whether declared or not); revolution; invasion; insurrection; riot; civil commotion; sabotage; military or usurped power; lightning; explosion; fire; storm; drought; flood; earthquake; epidemic; quarantine; strikes; acts or restraints of governmental authorities affecting the project or directly or indirectly prohibiting or restricting the furnishing or use of materials or labor required; inability to secure materials, machinery, equipment or labor because of priority, allocation or other regulations of any governmental authorities.

**APPENDIX B<sup>2</sup>**  
**INDEMNITY AND INSURANCE**

**Article 1. Indemnification**

The Contractor shall indemnify, hold harmless, and defend the contracting agency from and against any claim of, or liability for error, omission or negligent act of the Contractor under this agreement. The Contractor shall not be required to indemnify the contracting agency for a claim of, or liability for, the independent negligence of the contracting agency. If there is a claim of, or liability for, the joint negligent error or omission of the Contractor and the independent negligence of the Contracting agency, the indemnification and hold harmless obligation shall be apportioned on a comparative fault basis. "Contractor" and "Contracting agency", as used within this and the following article, include the employees, agents and other contractors who are directly responsible, respectively, to each. The term "independent negligence" is negligence other than in the Contracting agency's selection, administration, monitoring, or controlling of the Contractor and in approving or accepting the Contractor's work.

**Article 2. Insurance**

Without limiting contractor's indemnification, it is agreed that contractor shall purchase at its own expense and maintain in force at all times during the performance of services under this agreement the following policies of insurance. Where specific limits are shown, it is understood that they shall be the minimum acceptable limits. If the contractor's policy contains higher limits, the state shall be entitled to coverage to the extent of such higher limits. Certificates of Insurance must be furnished to the contracting officer prior to beginning work and must provide for a notice of cancellation, non-renewal, or material change of conditions in accordance with policy provisions. Failure to furnish satisfactory evidence of insurance or lapse of the policy is a material breach of this contract and shall be grounds for termination of the contractor's services. All insurance policies shall comply with and be issued by insurers licensed to transact the business of insurance under AS 21.

**2.1 Workers' Compensation Insurance:** The Contractor shall provide and maintain, for all employees engaged in work under this contract, coverage as required by AS 23.30.045, and; where applicable, any other statutory obligations including but not limited to Federal U.S.L. & H. and Jones Act requirements. The policy must waive subrogation against the State.

**2.2 Commercial General Liability Insurance:** covering all business premises and operations used by the Contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per claim.

**2.3 Commercial Automobile Liability Insurance:** covering all vehicles used by the Contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per claim.

**2.4 Professional Liability Insurance:** covering all errors, omissions or negligent acts in the performance of professional services under this agreement. Limits required per the following schedule:

<b>Contract Amount</b>	<b>Minimum Required Limits</b>
Under \$100,000	\$300,000 per Claim / Annual Aggregate
\$100,000-\$499,999	\$500,000 per Claim / Annual Aggregate
\$500,000-\$999,999	\$1,000,000 per Claim / Annual Aggregate
\$1,000,000 or over	Refer to Risk Management

## APPENDIX C

### Article 1. Services to be performed by the Contractor

Article 1.1. At the specific direction of the Attorney General's Office, the Contractor, Consovoy McCarthy, PLLC shall provide legal services regarding possible constitutional issues concerning dues and agency fees in a bargaining unit agreement.

It is agreed between the parties that the State shall determine the scope of the services to be rendered by the Contractor. ~~It is further agreed that the State may require a separate contract on any matter which, in its judgment, may be sufficiently complicated or prolonged to justify a separate contract.~~

### Article 2. Contract Management

Article 2.1 The designated contact person for the Contractor is William S. Consovoy. The Contractor's services under this agreement shall be directed and managed from the contractor's Arlington, Virginia office. The Contractor may assign other consulting professionals to provide services under the contract after providing notice to, and obtaining approval from, the Project Director. All such individuals assigned to provide services under this Contract shall work under the direction and management of the individual listed above.

Article 2.2 The Contractor will maintain the involvement of those individuals identified in Article 2.1 above. In the event of an unforeseeable circumstance that requires substitution for any of those individuals, the Contractor shall notify the State in writing of the proposed substitution. The State reserves the right to accept or reject a proposed substitute. In addition, before substitution of any individual is effected, the State must approve the extent to which transitional time will be billed.

Article 2.3 At the discretion of the Project Director, the Contractor may be required to prepare an estimate of the time and costs necessary to complete any matter assigned under this contract.

Article 2.4 The contractor agrees to closely monitor costs incurred and fees to be charged for services provided under this agreement and to alert the Project Director *before* such costs and fees exceed the authorized contract amount. In the event the Contractor fails to notify the Project Director prior to incurring a cost overrun, the contractor shall assume liability for any excess costs and fees incurred up until the time at which the contractor notifies the project director of the overrun.

Article 2.5 The period of performance, scope, and amount of this agreement may be amended in writing at the discretion of the State. In addition, the parties to this agreement acknowledge that work may begin on the date shown in Article 3. ("Period of Performance") and that the foregoing date may precede the date of execution of this agreement because immediate performance is required to serve the best interest of the state.

Article 2.6 The Attorney General's Office shall be the primary point of contact for all substantive dealings with the media. In the event the Contractor is contacted by media representatives concerning this or other cases being handled on behalf of the state, the Contractor should decline any comment beyond confirming factual matters that are already a matter of public record and refer the individuals to the Project Director.

Article 2.7 **FOREIGN CONTRACTING:** By signature on this Contract, the Contractor certifies that all services provided under this contract by the contractor and all subcontractors shall be performed in the United States. Failure to comply with this requirement will cause the state to reject the bid or proposal as non-responsive, or cancel the contract.

Article 2.8 **HUMAN TRAFFICKING:** By signature on this contract, the contractor certifies that:

- 1) the contractor is not established and headquartered or incorporated and headquartered, in a country recognized as Tier 3 in the most recent United States Department of State's Trafficking in Persons Report; or 2) if the contractor is established and headquartered or incorporated and headquartered, in a country recognized as Tier 3 in the most recent United States Department of State's Trafficking in Persons Report, a certified copy of the contractor's policy against human trafficking must be submitted to the State of Alaska prior to contract award.

**APPENDIX D**

**Article 1.                    Consideration**

Article 1.1        In full consideration of the Contractor's performance under this agreement, the State shall pay the Contractor the following hourly rates for the professional services of individuals below:

<u>Name/Title</u>	<u>Standard Rate</u>	<u>Alaska Discounted Rate</u>
William Consovoy, Partner	\$950 per hour	\$600 per hour
Michael Connolly, Partner	\$950 per hour	\$600 per hour
Steven Begakis, Associate	\$600 per hour	\$450 per hour

In addition, the State will reimburse the Contractor for the services of other consulting professionals or temporary personnel that may be employed to provide services under this agreement so long as the use of such additional personnel and their rates are approved in advance by the State's project director.

Article 1.2        The State agrees to reimburse the Contractor on a monthly or other periodic basis for reasonable and necessary out-of-pocket expenses incurred under this contract. No reimbursement shall be made for any administrative, surcharge, or other overhead recovery fee. **Unless otherwise noted,** reimbursement for out-of-pocket expenses shall be limited to actual costs except that reimbursement for those specific services or expenses listed below shall be limited as follows:

<u>Service or Expense</u>	<u>Charge/Rate</u>
Reproduction	\$0.10 per page
Computerized Database Research	At cost as invoiced
Courier Services	
Automobile Messenger Deliveries	At cost as invoiced
Overnight Deliveries (such as UPS, Federal Express, Express Mail, DHL)	At cost as invoiced
Postage	At cost
Telephone	At cost as invoiced
Telecopier	\$0.75(local), \$1.50(domestic), \$2.25(international)
Travel and Lodging	
Hotel Accommodations	Not to exceed \$300.00/night
Air Fare	Not to exceed coach class
Cab Fare	At cost as invoiced
Meals & Incidental Expenses	Flat rate payment of \$60.00/day for each full day (midnight to midnight) of travel.

Reimbursement for any of the above shall be limited to actual costs. No reimbursement shall be made for any administrative, surcharge, or other overhead recovery fee. Reimbursement shall not be made for the purchase or lease of office space, furnishings, equipment, or software unless approved in advance by the Deputy Attorney General. Upon conclusion of this agreement, unless the Deputy Attorney General approves other arrangements, the ownership of any furnishings, equipment, or software purchased under this contract shall revert back to the State and those items returned to the Department of Law.

Reimbursement for secretarial overtime or other temporary administrative or clerical assistance may be authorized but only if required by the nature or timing of assignments made under this contract (e.g. large projects or court imposed deadlines) and not because of other client work or firm priorities.

Unless otherwise approved by the Project Director, reimbursement for airline travel costs under this contract shall be limited to coach class fares. Contractor will not bill the State for time in travel status, except for that time during which the individual has performed work on the State's matter while in travel status; in that situation the Contractor shall adhere to billing rates provided in Article 1.1 of this appendix.

Reimbursement of hotel costs shall be limited to a maximum of \$300.00 per night unless otherwise approved by the Project Director. The Contractor shall, when possible, use moderately priced hotels comparable to those used by Department of Law employees. Reimbursement for meals and other incidental expenses shall be made at the flat rate of \$60.00 per day for each full day (midnight to midnight) of travel along with partial payment of \$45.00 for the day of departure and \$45.00 for the day of return.

Article 1.3 Unless the contract is amended in writing, the total sum expended under this agreement shall not exceed \$50,000 including all out-of-pocket expenses.

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**Article 2. Billing Procedures**

Article 2.1 The Contractor agrees to bill the State within thirty days of the end of the monthly billing period. All billing statements shall be sent directly to the state's designated Project Director with a pdf copy emailed to [03ContractPayments@alaska.gov](mailto:03ContractPayments@alaska.gov)

Article 2.2 The Contractor's billing statements shall be itemized to show the agency contract number, time spent, a task description and the date that tasks were performed by the name and hourly rate of the individual performing the work. All billing statements shall include an itemization of all costs and copies of invoices for travel and other out-of-pocket expenses.

Article 2.3 As a standard cost control practice, the State may conduct an audit of time and cost records of the Contractor, its employees and subcontractors. Any such audit may be conducted at the Contractor's offices or a place mutually agreed to by the Contractor and the Project Director.

Article 2.4 Billing rates are capped for one year from date of execution of the Contract. If after one year the Contractor wishes to seek an adjustment to its billing rates, the Contractor shall:

- a. notify the Project Director and obtain approval in writing at least sixty (60) days before activating any change in billing rates;
- b. specify the impact the rate adjustment would have on the existing workplan and budget; and
- c. limit the change in any individual billing rate to an amount that does not exceed the percentage increase in the Consumer Price Index (CPI) for the locale from which the services are being rendered, or obtain the approval of the Project Director for any increase above the CPI.

If billing rates are increased under this Article, the new rates shall be capped for one year following the date of the increase.



**STANDARD AGREEMENT FORM**

1. Agency Contract Number <b>20-207-1111</b>	2. Billing Contact Michael Connolly, Partner <a href="mailto:mike@consovoymccarthy.com">mike@consovoymccarthy.com</a>	3a. Appropriation 033040700	3b. Unit 2060	3c. Program
4. EN Doc Type and # GAE 20*	Project Matters related to Janus decision	Matter ID: 2019200724	6. AK Blz License # n/a	Vendor Number VC030136
<b>This contract is between the State of Alaska.</b>				
7. Department of Law	Division Labor and State Affairs	hereafter the State, and		
8. Contractor <b>Consovoy McCarthy, PLLC</b> Email <a href="mailto:will@consovoymccarthy.com">will@consovoymccarthy.com</a> 703-243-9423 hereafter the Contractor				
Mailing Address 1600 Wilson Boulevard, Suite 700 Arlington, VA 22209				
9. <b>ARTICLE 1. Appendices:</b> Appendices referred to in this contract and attached to it are considered part of it.  <b>ARTICLE 2. Performance of Service:</b> 2.1 Appendix A (General Provisions), Articles 1 through 14, governs the performance of services under this contract. 2.2 Appendix B sets forth the liability and insurance provisions of this contract. 2.3 Appendix C sets forth the services to be performed by the contractor.  <b>ARTICLE 3. Period of Performance:</b> The period of performance for this contract begins <u>December 19, 2019</u> and ends <u>with the resolution of the matter.</u>  <b>ARTICLE 4. Considerations:</b> 4.1 In full consideration of the contractor's performance under this contract, the State shall pay the contractor a sum not to exceed <b>\$600,000</b> in accordance with the provisions of Appendix D. 4.2 When billing the State, the contractor shall refer to Contract #20-207-1111 and shall mail the invoice to the address below with a courtesy copy in PDF format emailed to <a href="mailto:03ContractPayments@alaska.gov">03ContractPayments@alaska.gov</a> .				
10. Department of Law				
Mailing Address 1031 W. 4 <sup>th</sup> Avenue, Suite 200 Anchorage, AK 99501	Attention: Ed Sniffen <a href="mailto:ed.sniffen@alaska.gov">ed.sniffen@alaska.gov</a>			
<b>11. CONTRACTOR</b>				
Name of Firm Consovoy McCarthy, PLLC		13. <b>CERTIFICATION:</b> I certify that the facts herein and on supporting documents are correct, that this voucher constitutes a legal charge against funds and appropriations cited, that sufficient funds are encumbered to pay this obligation, or that there is a sufficient balance in the appropriation cited to cover this obligation. I am aware that to knowingly make or allow false entries or alterations on a public record, or knowingly destroy, mutilate, suppress, conceal, remove or otherwise impair the variety, legibility or availability of a public record constitutes tampering with public records punishable under AS 11.56.815-.820. Other disciplinary action may be taken up to and including dismissal.		
Signature of Authorized Representative <i>Michael Connolly</i>	Date 12/29/2019			
Typed or Printed Name of Authorized Representative Michael Connolly				
Title Partner EIN: on record				
<b>12. CONTRACTING AGENCY</b>				
Department/Division Law/Civil-Labor and State Affairs	Date 1-8-20	Signature of Head of Contracting Agency or <i>Kevin G. Clarkson</i>	Date 1-8-2020	
Signature of Project Director <i>Clyde E. Sniffen</i>		Typed or Printed Name Kevin G. Clarkson		
Typed or Printed Name of Project Director Clyde E. Sniffen		Attorney General		
Title Chief of Staff		Authorized by AS 36.30.130 RFP 2020-0300-4430		

**NOTICE: This contract has no affect until signed by the head of contracting agency or designee.**

**APPENDIX A  
GENERAL PROVISIONS**

**Article 1. Definitions.**

- 1.1 In this contract and appendices, "Project Director" or "Agency Head" or "Procurement Officer" means the person who signs this contract on behalf of the Requesting Agency and includes a successor or authorized representative.
- 1.2 "State Contracting Agency" means the department for which this contract is to be performed and for which the Commissioner or Authorized Designee acted in signing this contract.

**Article 2. Inspections and Reports.**

- 2.1 The department may inspect, in the manner and at reasonable times it considers appropriate, all the contractor's facilities and activities under this contract.
- 2.2 The contractor shall make progress and other reports in the manner and at the times the department reasonably requires.

**Article 3. Disputes.**

- 3.1 If the contractor has a claim in connection with the contract that it cannot resolve with the State by mutual agreement, it shall pursue the claim, if at all, in accordance with the provisions of AS 36.30.620-632.

**Article 4. Equal Employment Opportunity.**

- 4.1 The contractor may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, or because of age, disability, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position(s) do not require distinction on the basis of age, disability, sex, marital status, changes in marital status, pregnancy, or parenthood. The contractor shall take affirmative action to insure that the applicants are considered for employment and that employees are treated during employment without unlawful regard to their race, color, religion, national origin, ancestry, disability, age, sex, marital status, changes in marital status, pregnancy or parenthood. This action must include, but need not be limited to, the following: employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship. The contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting out the provisions of this paragraph.
- 4.2 The contractor shall state, in all solicitations or advertisements for employees to work on State of Alaska contract jobs, that it is an equal opportunity employer and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, disability, sex, marital status, changes in marital status, pregnancy or parenthood.
- 4.3 The contractor shall send to each labor union or representative of workers with which the contractor has a collective bargaining agreement or other contract or understanding a notice advising the labor union or workers' compensation representative of the contractor's commitments under this article and post copies of the notice in conspicuous places available to all employees and applicants for employment.
- 4.4 The contractor shall include the provisions of this article in every contract, and shall require the inclusion of these provisions in every contract entered into by any of its subcontractors, so that those provisions will be binding upon each subcontractor. For the purpose of including those provisions in any contract or subcontract, as required by this contract, "contractor" and "subcontractor" may be changed to reflect appropriately the name or designation of the parties of the contract or subcontract.
- 4.5 The contractor shall cooperate fully with State efforts which seek to deal with the problems of unlawful discrimination, and with all other State efforts to guarantee fair employment practices under this contract, and promptly comply with all requests and directions from the State Commission for Human Rights or any of its officers or agents relating to prevention of discriminatory employment practices.
- 4.6 Full cooperation in paragraph 4.5 includes, but is not limited to, being a witness in any proceeding involving questions of unlawful discrimination if that is requested by any official or agency of the State of Alaska; permitting employees of the contractor to be witnesses or complainants in any proceeding involving questions of unlawful discrimination, if that is requested by any official or agency of the State of Alaska; participating in meetings; submitting periodic reports on the equal employment aspects of present and future employment; assisting inspection of the contractor's facilities; and promptly complying with all State directives considered essential by any office or agency of the State of Alaska to insure compliance with all federal and State laws, regulations, and policies pertaining to the prevention of discriminatory employment practices.
- 4.7 Failure to perform under this article constitutes a material breach of the contract.

**Article 5. Termination.**

The Project Director, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the State. In the absence of breach of contract by the contractor, the State is liable only for payment in accordance with the payment provisions of this contract for services rendered before the effective date of termination.

**Article 6. No Assignment or Delegation.**

The contractor may not assign or delegate this contract, or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Project Director and the Agency Head.

**Article 7. No Additional Work or Material.**

No claim for additional services, not specifically provided in this contract, performed or furnished by the contractor, will be allowed, nor may the contractor do any work or furnish any material not covered by the contract unless the work or material is ordered in writing by the Project Director and approved by the Agency Head.

**Article 8. Independent Contractor.**

The contractor and any agents and employees of the contractor act in an independent capacity and are not officers or employees or agents of the State in the performance of this contract.

**Article 9. Payment of Taxes**

As a condition of performance of this contract, the contractor shall pay all federal, State, and local taxes incurred by the contractor and shall require their payment by an Subcontractor or any other persons in the performance of this contract. Satisfactory performance of this paragraph is a condition precedent to payment by the State under this contract.

**Article 10. Ownership of Documents.**

All designs, drawings, specifications, notes, artwork, and other work developed in the performance of this agreement are produced for hire and remain the sole property of the State of Alaska and may be used by the State for any other purpose without additional compensation to the contractor. The contractor agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. Nevertheless, if the contractor does mark such documents with a statement suggesting they are trademarked, copyrighted, or otherwise protected against the State's unencumbered use or distribution, the contractor agrees that this paragraph supersedes any such statement and renders it void. The contractor, for a period of three years after final payment under this contract, agrees to furnish and provide access to all retained materials at the request of the Project Director. Unless otherwise directed by the Project Director, the contractor may retain copies of all the materials.

**Article 11. Governing Law; Forum Selection.**

This contract is governed by the laws of the State of Alaska. To the extent not otherwise governed by Article 3 of this Appendix, any claim concerning this contract shall be brought only in the Superior Court of the State of Alaska and not elsewhere.

**Article 12. Conflicting Provisions.**

Unless specifically amended and approved by the Department of Law, the terms of this contract supersede any provisions the contractor may seek to add. The contractor may not add additional or different terms to this contract; AS 45.02.207(b)(1). The contractor specifically acknowledges and agrees, among other things, that provisions in any documents it seeks to append hereto that purport to (1) waive the State of Alaska's sovereign immunity, (2) impose indemnification obligations on the State of Alaska, or (3) limit liability of the contractor for acts of contractor negligence, are expressly superseded by this contract and are void.

**Article 13. Officials Not to Benefit.**

Contractor must comply with all applicable federal or State laws regulating ethical conduct of public officers and employees.

**Article 14. Covenant Against Contingent Fees.**

The contractor warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee except employees or agencies maintained by the contractor for the purpose of securing business. For the breach or violation of this warranty, the State may terminate this contract without liability or in its discretion deduct from the contract price or consideration the full amount of the commission, percentage, brokerage or contingent fee.

**Article 15. Compliance.**

In the performance of this contract, the contractor must comply with all applicable federal, state, and borough regulations, codes, and laws, and be liable for all required insurance, licenses, permits and bonds.

**Article 16. Force Majeure.**

The parties to this contract are not liable for the consequences of any failure to perform, or default in performing, any of their obligations under this Agreement, if that failure or default is caused by any unforeseeable Force Majeure, beyond the control of, and without the fault or negligence of, the respective party. For the purposes of this Agreement, Force Majeure will mean war (whether declared or not); revolution; invasion; insurrection; riot; civil commotion; sabotage; military or usurped power; lightning; explosion; fire; storm; drought; flood; earthquake; epidemic; quarantine; strikes; acts or restraints of governmental authorities affecting the project or directly or indirectly prohibiting or restricting the furnishing or use of materials or labor required; inability to secure materials, machinery, equipment or labor because of priority, allocation or other regulations of any governmental authorities.

**APPENDIX B<sup>2</sup>**  
**INDEMNITY AND INSURANCE**

**Article 1. Indemnification**

The Contractor shall indemnify, hold harmless, and defend the contracting agency from and against any claim of, or liability for error, omission or negligent act of the Contractor under this agreement. The Contractor shall not be required to indemnify the contracting agency for a claim of, or liability for, the independent negligence of the contracting agency. If there is a claim of, or liability for, the joint negligent error or omission of the Contractor and the independent negligence of the Contracting agency, the indemnification and hold harmless obligation shall be apportioned on a comparative fault basis. "Contractor" and "Contracting agency", as used within this and the following article, include the employees, agents and other contractors who are directly responsible, respectively, to each. The term "independent negligence" is negligence other than in the Contracting agency's selection, administration, monitoring, or controlling of the Contractor and in approving or accepting the Contractor's work.

**Article 2. Insurance**

Without limiting contractor's indemnification, it is agreed that contractor shall purchase at its own expense and maintain in force at all times during the performance of services under this agreement the following policies of insurance. Where specific limits are shown, it is understood that they shall be the minimum acceptable limits. If the contractor's policy contains higher limits, the state shall be entitled to coverage to the extent of such higher limits. Certificates of Insurance must be furnished to the contracting officer prior to beginning work and must provide for a notice of cancellation, non-renewal, or material change of conditions in accordance with policy provisions. Failure to furnish satisfactory evidence of insurance or lapse of the policy is a material breach of this contract and shall be grounds for termination of the contractor's services. All insurance policies shall comply with and be issued by insurers licensed to transact the business of insurance under AS 21.

**2.1 Workers' Compensation Insurance:** The Contractor shall provide and maintain, for all employees engaged in work under this contract, coverage as required by AS 23.30.045, and; where applicable, any other statutory obligations including but not limited to Federal U.S.L. & H. and Jones Act requirements. The policy must waive subrogation against the State.

**2.2 Commercial General Liability Insurance:** covering all business premises and operations used by the Contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per claim.

**2.3 Commercial Automobile Liability Insurance:** covering all vehicles used by the Contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per claim.

**2.4 Professional Liability Insurance:** covering all errors, omissions or negligent acts in the performance of professional services under this agreement. Limits required per the following schedule:

<b>Contract Amount</b>	<b>Minimum Required Limits</b>
Under \$100,000	\$300,000 per Claim / Annual Aggregate
\$100,000-\$499,999	\$500,000 per Claim / Annual Aggregate
\$500,000-\$999,999	\$1,000,000 per Claim / Annual Aggregate
\$1,000,000 or over	Refer to Risk Management

## APPENDIX C

### Article 1. Services to be performed by the Contractor

Article 1.1. At the specific direction of the Attorney General's Office, the Contractor, Consovoy McCarthy, PLLC, shall represent the State in its litigation efforts to defend the Attorney General's opinion concerning interpretation of the *Janus V AFSCME* decision and the Governor's administrative order implementing the decision.

It is agreed between the parties that the State shall determine the scope of the services to be rendered by the Contractor. It is further agreed that the State may require a separate contract on any matter which, in its judgment, may be sufficiently complicated or prolonged to justify a separate contract.

### Article 2. Contract Management

Article 2.1 The designated contact person for the Contractor is William S. Consovoy. The Contractor's services under this agreement shall be directed and managed from the contractor's Arlington, Virginia office. The Contractor may assign other consulting professionals to provide services under the contract after providing notice to, and obtaining approval from, the Project Director. All such individuals assigned to provide services under this Contract shall work under the direction and management of the individual listed above.

Article 2.2 The Contractor will maintain the involvement of those individuals identified in Article 2.1 above. In the event of an unforeseeable circumstance that requires substitution for any of those individuals, the Contractor shall notify the State in writing of the proposed substitution. The State reserves the right to accept or reject a proposed substitute. In addition, before substitution of any individual is effected, the State must approve the extent to which transitional time will be billed.

Article 2.3 At the discretion of the Project Director, the Contractor may be required to prepare an estimate of the time and costs necessary to complete any matter assigned under this contract.

Article 2.4 The contractor agrees to closely monitor costs incurred and fees to be charged for services provided under this agreement and to alert the Project Director before such costs and fees exceed the authorized contract amount. In the event the Contractor fails to notify the Project Director prior to incurring a cost overrun, the contractor shall assume liability for any excess costs and fees incurred up until the time at which the contractor notifies the project director of the overrun.

Article 2.5 The period of performance, scope, and amount of this agreement may be amended in writing at the discretion of the State. In addition, the parties to this agreement acknowledge that work may begin on the date shown in Article 3. ("Period of Performance") and that the foregoing date may precede the date of execution of this agreement because immediate performance is required to serve the best interest of the state.

Article 2.6 The Attorney General's Office shall be the primary point of contact for all substantive dealings with the media. In the event the Contractor is contacted by media representatives concerning this or other cases being handled on behalf of the state, the Contractor should decline any comment beyond confirming factual matters that are already a matter of public record and refer the individuals to the Project Director.

Article 2.7 **FOREIGN CONTRACTING:** By signature on this Contract, the Contractor certifies that all services provided under this contract by the contractor and all subcontractors shall be performed in the United States. Failure to comply with this requirement will cause the state to reject the bid or proposal as non-responsive, or cancel the contract.

Article 2.8 **HUMAN TRAFFICKING:** By signature on this contract, the contractor certifies that:

- 1) the contractor is not established and headquartered or incorporated and headquartered, in a country recognized as Tier 3 in the most recent United States Department of State's Trafficking in Persons Report; or 2) if the contractor is established and headquartered or incorporated and headquartered, in a country recognized as Tier 3 in the most recent United States Department of State's Trafficking in Persons Report, a certified copy of the contractor's policy against human trafficking must be submitted to the State of Alaska prior to contract award.

**APPENDIX D**

**Article 1.                    Consideration**

Article 1.1        In full consideration of the Contractor's performance under this agreement, the State shall pay the Contractor the following hourly rates for the professional services of individuals below:

<u>Name/Title</u>	<u>Standard Rate</u>	<u>Alaska Discounted Rate</u>
William Consovoy, Partner	\$950 per hour	\$600 per hour
Michael Connolly, Partner	\$950 per hour	\$600 per hour
Steven Begakis, Associate	\$600 per hour	\$450 per hour

In addition, the State will reimburse the Contractor for the services of other consulting professionals or temporary personnel that may be employed to provide services under this agreement so long as the use of such additional personnel and their rates are approved in advance by the State's project director.

Article 1.2        The State agrees to reimburse the Contractor on a monthly or other periodic basis for reasonable and necessary out-of-pocket expenses incurred under this contract. No reimbursement shall be made for any administrative, surcharge, or other overhead recovery fee. **Unless otherwise noted,** reimbursement for out-of-pocket expenses shall be limited to actual costs except that reimbursement for those specific services or expenses listed below shall be limited as follows:

<u>Service or Expense</u>	<u>Charge/Rate</u>
Reproduction	\$0.10 per page
Computerized Database Research	At cost as invoiced
Courier Services	
Automobile Messenger Deliveries	At cost as invoiced
Overnight Deliveries (such as UPS, Federal Express, Express Mail, DHL)	At cost as invoiced
Postage	At cost
Telephone	At cost as invoiced
Telecopier	\$0.75(local), \$1.50(domestic), \$2.25(international)
Travel and Lodging	
Hotel Accommodations	Not to exceed \$300.00/night
Air Fare	Not to exceed coach class
Cab Fare	At cost as invoiced
Meals & Incidental Expenses	Flat rate payment of \$60.00/day for each full day (midnight to midnight) of travel.

Reimbursement for any of the above shall be limited to actual costs. No reimbursement shall be made for any administrative, surcharge, or other overhead recovery fee. Reimbursement shall not be made for the purchase or lease of office space, furnishings, equipment, or software unless approved in advance by the Deputy Attorney General. Upon conclusion of this agreement, unless the Deputy Attorney General approves other arrangements, the ownership of any furnishings, equipment, or software purchased under this contract shall revert back to the State and those items returned to the Department of Law.

Reimbursement for secretarial overtime or other temporary administrative or clerical assistance may be authorized but only if required by the nature or timing of assignments made under this contract (e.g. large projects or court imposed deadlines) and not because of other client work or firm priorities.

Unless otherwise approved by the Project Director, reimbursement for airline travel costs under this contract shall be limited to coach class fares. Contractor will not bill the State for time in travel status, except for that time during which the individual has performed work on the State's matter while in travel status; in that situation the Contractor shall adhere to billing rates provided in Article 1.1 of this appendix.

Reimbursement of hotel costs shall be limited to a maximum of \$300.00 per night unless otherwise approved by the Project Director. The Contractor shall, when possible, use moderately priced hotels comparable to those used by Department of Law employees. Reimbursement for meals and other incidental expenses shall be made at the flat rate of \$60.00 per day for each full day (midnight to midnight) of travel along with partial payment of \$45.00 for the day of departure and \$45.00 for the day of return.

Article 1.3 Unless the contract is amended in writing, the total sum expended under this agreement shall not exceed \$600,000 including all out-of-pocket expenses.

**Article 2. Billing Procedures**

Article 2.1 The Contractor agrees to bill the State within thirty days of the end of the monthly billing period. All billing statements shall be sent directly to the state's designated Project Director with a pdf copy emailed to [03ContractPayments@alaska.gov](mailto:03ContractPayments@alaska.gov)

Article 2.2 The Contractor's billing statements shall be itemized to show the agency contract number, time spent, a task description and the date that tasks were performed by the name and hourly rate of the individual performing the work. All billing statements shall include an itemization of all costs and copies of invoices for travel and other out-of-pocket expenses.

Article 2.3 As a standard cost control practice, the State may conduct an audit of time and cost records of the Contractor, its employees and subcontractors. Any such audit may be conducted at the Contractor's offices or a place mutually agreed to by the Contractor and the Project Director.

Article 2.4 Billing rates are capped for one year from date of execution of the Contract. If after one year the Contractor wishes to seek an adjustment to its billing rates, the Contractor shall:

- a. notify the Project Director and obtain approval in writing at least sixty (60) days before activating any change in billing rates;
- b. specify the impact the rate adjustment would have on the existing workplan and budget; and
- c. limit the change in any individual billing rate to an amount that does not exceed the percentage increase in the Consumer Price Index (CPI) for the locale from which the services are being rendered, or obtain the approval of the Project Director for any increase above the CPI.

If billing rates are increased under this Article, the new rates shall be capped for one year following the date of the increase.



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**Appendix B**  
**Excerpt from HB 205 as enrolled**  
**(Version Z)**

	<b>Appropriation</b>	<b>General</b>	<b>Other</b>
	<b>Allocations</b>	<b>Items</b>	<b>Funds</b>
		<b>Funds</b>	<b>Funds</b>
<b>Alaska Vocational Technical Center</b>	<b>15,402,200</b>	<b>10,476,000</b>	<b>4,926,200</b>
Alaska Vocational Technical Center	13,477,800		
The amount allocated for the Alaska Vocational Technical Center includes the unexpended and unobligated balance on June 30, 2020, of contributions received by the Alaska Vocational Technical Center receipts under AS 21.96.070, AS 43.20.014, AS 43.55.019, AS 43.56.018, AS 43.65.018, AS 43.75.018, and AS 43.77.045 and receipts collected under AS 37.05.146.			
AVTEC Facilities	1,924,400		
Maintenance			
	*****	*****	
	***** Department of Law *****		
	*****	*****	
<b>Criminal Division</b>	<b>36,310,000</b>	<b>31,092,800</b>	<b>5,217,200</b>
It is the intent of the legislature that the Department of Law provide a recruitment and retention plan for prosecutors and support staff to reverse the trend of high turnover to the Legislative Finance Division by January 1, 2021.			
First Judicial District	2,074,400		
Second Judicial District	2,437,200		
Third Judicial District:	7,869,600		
Anchorage			
Third Judicial District:	5,492,900		
Outside Anchorage			
Fourth Judicial District	6,346,900		
Criminal Justice Litigation	4,170,900		
Criminal Appeals/Special Litigation	7,918,100		
<b>Civil Division Except Contracts</b>	<b>48,036,200</b>	<b>21,113,900</b>	<b>26,922,300</b>
<b>Relating to Interpretation of Janus v</b>			
<b>AFSCME</b>			
It is the intent of the legislature that when managing caseloads while making budget reductions the department use staff instead of outside contracts whenever possible; and that			

	<b>Appropriation</b>	<b>General</b>	<b>Other</b>
	<b>Allocations</b>	<b>Items</b>	<b>Funds</b>
		<b>Funds</b>	<b>Funds</b>
3	the department should not make reductions to contracts if the contract is a possible revenue		
4	generator.		
5	Deputy Attorney General's	285,400	
6	Office		
7	Child Protection	7,497,400	
8	Commercial and Fair	5,704,200	
9	Business		
10	The amount allocated for Commercial and Fair Business includes the unexpended and		
11	unobligated balance on June 30, 2020, of designated program receipts of the Department of		
12	Law, Commercial and Fair Business section, that are required by the terms of a settlement or		
13	judgment to be spent by the state for consumer education or consumer protection.		
14	Environmental Law	1,926,500	
15	Human Services	3,271,700	
16	Labor and State Affairs	4,588,900	
17	Legislation/Regulations	1,311,200	
18	Natural Resources	7,818,700	
19	Opinions, Appeals and	2,399,400	
20	Ethics		
21	Regulatory Affairs Public	2,848,000	
22	Advocacy		
23	Special Litigation	1,587,600	
24	Information and Project	2,021,900	
25	Support		
26	Torts & Workers'	4,143,000	
27	Compensation		
28	Transportation Section	2,632,300	
29	<b>Administration and Support</b>	<b>4,964,300</b>	<b>2,568,300</b>
30	Office of the Attorney	959,600	
31	General		
32	Administrative Services	3,158,400	
33	Department of Law State	846,300	

	Appropriation		General	Other
	Allocations	Items	Funds	Funds
1				
2				
3	Facilities Rent			
4	Legal Contracts Relating to	20,000	20,000	
5	Interpretation of Janus v AFSCME			
6	Decision			
7	Legal Contracts Relating to	20,000		
8	Interpretation of Janus v			
9	AFSCME Decision			
10		*****	*****	
11	***** Department of Military and Veterans' Affairs *****			
12		*****	*****	
13	<b>Military and Veterans' Affairs</b>	<b>55,251,900</b>	<b>23,384,600</b>	<b>31,867,300</b>
14	It is the intent of the legislature that the Department of Military and Veterans' Affairs			
15	(DMVA) submit a report to the Legislative Finance Division by January 1, 2021 as to the			
16	status of the transfer of the Alaska Land Mobile Radio (ALMR) and the State of Alaska			
17	Telecommunications System (SATS) into the Department of Military and Veterans' Affairs.			
18	The report shall include a review of operational and administrative challenges, the transfer's			
19	impact on carrying out the Department's mission, and the Department's long-term plan for			
20	ALMR and SATS.			
21	Alaska Land Mobile Radio	4,263,100		
22	State of Alaska	5,017,800		
23	Telecommunications System			
24	Office of the Commissioner	5,992,100		
25	Homeland Security and	9,824,400		
26	Emergency Management			
27	Army Guard Facilities	10,624,900		
28	Maintenance			
29	Air Guard Facilities	6,974,800		
30	Maintenance			
31	Alaska Military Youth	9,773,700		
32	Academy			
33	Veterans' Services	2,206,100		

## Appendix C

Excerpt from HB 205 with partial vetoes  
and reductions



Appendix D

“Brief for the State of Alaska as *Amicus Curiae* in Support of Petition for Rehearing en Banc”

12 October 2020

*Belgau v Inslee*, Case 19-35137

No. 19-35137

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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MELISSA BELGAU, ET AL.,

*Plaintiffs-Appellants,*

v.

JAY INSLEE, Governor, et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Western District of Washington at Tacoma,  
No. 3:18-cv-05620-RJB, Honorable Robert J. Bryan

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**BRIEF FOR THE STATE OF ALASKA AS *AMICUS CURIAE*  
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

---

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J. Michael Connolly  
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*Counsel for Amicus Curiae*

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304 U.S. 458 (1938) ..... 5, 6

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*Leavitt v. Arave*,  
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*Roberts v. U.S. Jaycees*,  
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*State of Alaska v. ASEA*,  
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*W. Va. State Bd. of Educ. v. Barnette*,  
319 U.S. 624 (1943) .....9

*Woods v. Alaska State Emps. Ass’n/ AFSCME Local 52*,  
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*Woods v. Carey*,  
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*Wooley v. Maynard*,  
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**Other Authorities**

Administrative Order No. 312 (Sept. 26, 2019).....2

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*First Amendment Rights and Union Due Deductions and Fees*, Office of the Attorney  
General, 2019 WL 4134284 (Alaska A.G. Aug. 27, 2019)..... *passim*

*Payroll Deductions for Public Sector Employees*, Office of the Attorney General,  
2020 WL 4209604, Op. No. 2020-5 (Ind. A.G. June 17, 2020) ..... 13, 14

**Rules**

Fed. R. App. P. 35 .....2

**IDENTITY & INTEREST OF *AMICUS CURIAE***

The State of Alaska submits this brief in support of the Appellants' ("Employees") petition for rehearing en banc. Alaska has a strong interest in this case because the panel's decision impacts the constitutional rights of thousands of Alaska state employees. Alaska employs approximately 15,000 individuals, and most of these employees are represented by public-sector unions.

Since the Supreme Court issued *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the State of Alaska has been at the forefront of efforts to protect the First Amendment rights of state employees. On August 27, 2019, Alaska's Attorney General issued a legal opinion in which he concluded that the State's payroll deduction process was constitutionally untenable under *Janus* and recommended actions the State should take to bring it into compliance. *First Amendment Rights and Union Due Deductions and Fees*, Office of the Attorney General, 2019 WL 4134284, at \*2 (Alaska A.G. Aug. 27, 2019) ("AG Opinion"). The Attorney General recognized, *inter alia*, that *Janus* "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." *Id.*

After the AG Opinion was issued, Alaska state employees contacted the State and asked it to stop deducting union dues from their paychecks to send to public sector unions. Consistent with *Janus* and the AG Opinion, the State honored these requests. A public sector union opposed this stoppage of dues, however, arguing that

nonconsenting state employees must pay union dues (and thus subsidize the union's speech) unless and until they opted out during a narrow ten-day annual window. Shortly thereafter, Governor Mike Dunleavy issued an administrative order instructing the State to establish new procedures to protect state employees' First Amendment right to choose whether to pay union dues and fees. *See* Administrative Order No. 312 (Sept. 26, 2019), [bit.ly/3dpBZgb](https://bit.ly/3dpBZgb). The validity of these actions is currently being litigated in state court. *See State of Alaska v. ASEA*, No. 3AN 19-9971CI. This Court, too, is reviewing claims brought by Alaska state employees who wish to stop the continued compelled subsidization of public sector unions. *See Creed v. Alaska State Emps. Ass'n/AFSCME Local 52*, No. 20-35743 (9th Cir.); *see also Woods v. Alaska State Emps. Ass'n/AFSCME Local 52*, No. 20-cv-75-HRH (D. Alaska).

The panel's decision here undermines Alaska's efforts to protect its employees' 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.'" *Janus*, 138 S. Ct. at 2463. Because the panel's decision conflicts with the Supreme Court's decision in *Janus* and presents several questions of "exceptional importance," Fed. R. App. P. 35(b)(1)(B), the Court should grant the petition for rehearing en banc.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Alaska agrees that this Court should grant the petition for rehearing en banc. The State writes to emphasize two particular mistakes that the panel made.

*First*, the panel improperly constrained *Janus* to “nonmembers” paying “agency fees.” Opinion (“Op.”) 19-20. *Janus* held that *all* state employees have a First Amendment right not to be compelled to subsidize union speech—through “an agency fee [or] *any other payment*.” 138 S. Ct. at 2486 (emphasis added). A State can deduct union dues or fees only if the employee has waived his or her First Amendment rights. This waiver must be “freely given and shown by ‘clear and compelling’ evidence,” and such a waiver “cannot be presumed.” *Id.* (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 145 (1967)). Thus, “[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met.” *Id.*

Despite this holding, the panel concluded that the State of Washington could deduct union dues even without this “clear and compelling” evidence because *Janus* applies only to “nonmembers” who were forced to pay “agency fees.” Op. 19-20. Not only does this holding conflict with the explicit language of *Janus*, but it also undermines the fundamental principles behind the opinion—that the First Amendment prevents state employees from being compelled to subsidize a union’s speech. A state simply cannot withhold monies from a non-consenting employee’s wages and transfer those funds to a union because doing so inherently forces that employee to speak on matters when the employee may wish to remain silent—or vociferously object. But under the panel’s decision, states can deduct money from employees’ paychecks to give to a union—and thus subsidize the speech of a private actor with whom they may disagree—without the employees ever knowingly and intentionally waiving their First

Amendment rights. This is error. The Supreme Court requires “clear and compelling” evidence that individuals have waived their constitutional rights precisely to protect them from unwittingly relinquishing their fundamental freedoms. This is especially true of purported waivers of First Amendment rights, as this amendment “safeguards a freedom which is the ‘matrix, the indispensable condition, of nearly every other form of freedom.’” *Curtis Publ’g Co.*, 388 U.S. at 145.

*Second*, the panel gave the misimpression that its interpretation of *Janus* is unanimously shared. Op. 19 n.5. The States of Alaska, Texas, and Indiana have all recognized that the First Amendment protections in *Janus* are not narrow ones: they apply to *all* employees and *all* types of compelled financial support to public sector unions. These states’ legal opinions are sound and directly refute the panel’s constrained interpretation of *Janus*. They also reflect differing legal views on a profound constitutional question of exceptional importance to both states and public employees. The panel’s opinion, if allowed to stand, will undermine Alaska’s and others’ efforts to protect the First Amendment rights of public employees. The Court should grant the petition for rehearing en banc.

## ARGUMENT

### I. The Panel Improperly Limited *Janus*’s First Amendment Protections to “Nonmembers” Paying “Agency Fees.”

The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430

U.S. 705, 714 (1977)). The right to “eschew association for expressive purposes is likewise protected.” *Id.*; see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association ... plainly presupposes a freedom not to associate.”). Forcing individuals to “mouth support for views they find objectionable violates [these] cardinal constitutional command[s].” *Janus*, 138 S. Ct. at 2463.

“Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.” *Id.* As Thomas Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.” *Id.* at 2464 (citation omitted). The Supreme Court thus has repeatedly recognized that 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 powerful political and civic consequences.’” *Id.* (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310-11 (2012)).

That does not, of course, mean that state employees cannot financially support a union. First Amendment rights, like most constitutional rights, can be waived. But there is a “presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That is because “courts ‘do not presume acquiescence in the loss of fundamental rights.’” *Knox*, 567 U.S. at 312-13.

This is especially true when it comes to the waiver of First Amendment freedoms. Courts will not find a waiver of First Amendment rights “in circumstances which fall short of being clear and compelling” because the First Amendment “safeguards a freedom which is the ‘matrix, the indispensable condition, of nearly every other form of freedom.’” *Curtis Publ’g Co.*, 388 U.S. at 145.

In *Janus*, the Supreme Court made clear that these longstanding waiver rules apply no differently in the context of compelled subsidies to public sector unions. *Janus*, 138 S. Ct. at 2486. In laying down a roadmap for future cases, the Court relied on a long list of Supreme Court decisions addressing the waiver of constitutional rights. Going forward, the Court warned, public employers, like the State of Washington here, may not deduct “an agency fee *nor any other payment*” unless “the employee affirmatively consents to pay.” *Id.* (emphasis added). The Court stressed that employees must waive their First Amendment rights, and “such a waiver cannot be presumed.” *Id.* (citing *Zerbst*, 304 U.S. at 464; *Knox*, 567 U.S. at 312-13). Rather, “to be effective, the waiver must be freely given and shown by ‘clear and compelling’ evidence.” *Id.* (quoting *Curtis Publ’g Co.*, 388 U.S. at 145). Thus, the Court explained, “[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met.” *Id.*

The panel’s analysis thus should have been straightforward. Employees informed the State of Washington that they objected to dues deduction, but the union believed that Employees already agreed to pay the dues. The panel should have prohibited the

State from deducting further dues from Employees unless the State showed, through “clear and compelling’ evidence,” that the employees had waived their First Amendment rights. *Janus*, 138 S. Ct. at 2486.

But the panel did not do that. Instead, the panel held that the State of Washington could deduct union dues from employees even if it had no “clear and compelling” evidence that the employee waived his or her First Amendment rights. Op. 19-20. Evidence of prior membership in a union was enough. *Id.* That was because, the panel believed, the Court in *Janus* had narrowly limited its holding and corresponding constitutional protections to only “nonmembers” who were forced to pay “agency fees.” *Id.* This was error.

While *Janus* involved a non-union member, the Court’s decision placed prohibitions on public employers generally, and has clear application to members and nonmembers alike. As it often does, the Supreme Court “laid down broad principles” dictating States’ obligations when deducting dues and fees from *all* employees. *Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir. 1989). The Court made clear that state employees cannot be compelled to subsidize the speech of a union with which they disagree. *Janus*, 138 S. Ct. at 2486. Although employees can waive this First Amendment right, “such a waiver cannot be presumed,” and it must be shown by “clear and compelling’ evidence.” *Id.* (quoting *Curtis Publ’g Co.*, 388 U.S. at 145). The outcome in *Janus* was simply an application of these broader principles.

The panel opinion, however, “strip[ped] content from principle by confining the

Supreme Court’s holding[] to the precise facts before [the Court].” *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994). The panel found that the government can take money from employees’ paychecks to give to a union—and thus subsidize a private actor’s speech with whom they may disagree—without the employees ever knowingly and voluntarily waiving their First Amendment rights. That directly contradicts the reasoning of *Janus*.

Even assuming the “clear and compelling” waiver standard is limited to nonmembers (which it is not), the panel still should have applied it to Employees. As the panel recognized, “compelling nonmembers to subsidize union speech is offensive to the First Amendment.” Op. 5. Yet the panel refused to apply *Janus*’s waiver standard even though Employees *were not members* when they tried to stop their dues deduction. After the *Janus* decision, Employees “notified [the union] that they no longer wanted to be union members or pay dues,” and the union “terminated Employees’ union memberships.” *Id.* at 8. The State of Washington, however, “continued to deduct union dues from Employees’ wages until the irrevocable one-year terms expired.” *Id.*

The panel believed *Janus*’s protections did not apply because Employees had already “affirmatively consented to deduction of union dues” by signing the union’s dues deduction form. Op. 5, 7-8. But this reasoning is circular. In *Janus*, the Court did not hold that agency fees could be deducted from nonmembers’ paychecks as long as there is some indication that the employee agreed to it. To the contrary, the Court held that “nonmembers are waiving their First Amendment rights,” such a waiver “cannot

be presumed,” and the waiver must be “shown by ‘clear and compelling’ evidence.” *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ’g Co.*, 388 U.S. at 145); *see also* AG Opinion, 2019 WL 4134284, at \*5-7 (describing contours of the “clear and compelling” waiver standard).

At bottom, freedoms of speech and association are critical to our democratic form of government, the search for truth, and the “individual freedom of mind.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634, 637 (1943); *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982). Individuals should not be deprived of these rights unless there is “clear and compelling” evidence that they have waived them. *Curtis Publ’g Co.*, 388 U.S. at 145. The panel opinion disregarded these fundamental principles.

## **II. The Panel’s Opinion Conflicts with Multiple States’ Interpretations of *Janus*.**

The panel narrowly focused on the various district courts that have interpreted *Janus*’s “clear and compelling” standard as applying only to nonmembers and agency fees, relying on this “swelling chorus” to support its reasoning. *See* Op. 18-19 & n.5. Of course, none of these decisions are binding here. And this Court has repeatedly cautioned against reflexively following other courts’ decisions. *See Woods v. Carey*, 722 F.3d 1177, 1183 n.8 (9th Cir. 2013) (“[A]lthough a circuit split is not desirable, we are not required to follow the initial circuit to decide an issue if our own careful analysis of the legal question leads us to [a different result].”); *see, e.g., Leavitt v. Arave*, 383 F.3d 809, 824-25 (9th Cir. 2004) (disagreeing with six circuits, creating a circuit split); *In re Penrod*,

611 F.3d 1158, 1160-61 (9th Cir. 2010) (disagreeing with eight circuits, creating a circuit split).

Critically, these district courts are *not* the only voice on this issue. Multiple State Attorneys General have issued legal opinions in line with Employees' arguments here.

The State of Alaska. In August 2019, Alaska's Attorney General, in response to a request from Governor Mike Dunleavy, issued a legal opinion concluding that the State of Alaska's "payroll deduction process is constitutionally untenable under *Janus*." AG Opinion, 2019 WL 4134284, at \*2. Although the plaintiff in *Janus* was a nonmember who was objecting to paying a union's agency fee, the Attorney General recognized that "the principle of the Court's ruling . . . goes well beyond agency fees and non-members." *Id.* at \*3. The Court in *Janus* had held that the First Amendment prohibits public employers from forcing *any* employee to subsidize a union *in any way*, whether through an agency fee or otherwise. *Id.* at \*3-4.

The Attorney General explained: "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)." *Id.* at \*3. 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." *Id.* In both cases, "the State can only deduct monies from an employee's wages if the employee provides affirmative consent." *Id.* That was why, as the Attorney General explained,

“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.” *Id.* (quoting *Janus*, 138 S. Ct. at 2486).

Following Supreme Court guidance governing the waiver of constitutional rights in other contexts, the Alaska Attorney General concluded that an employee’s consent to have money deducted from his paycheck was constitutionally valid only if it met three requirements. The employee’s consent must be: (1) “free from coercion or improper inducement”; (2) “knowing, intelligent . . . [and] done with sufficient awareness of the relevant circumstances and likely consequences”; and (3) “reasonably contemporaneous.” *Id.* at \*5-6 (citations omitted).

In turn, the Attorney General identified three basic problems with the State of Alaska’s payroll deduction process. First, because unions design the form by which an employee authorizes the State to deduct his pay, the State could not “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.” *Id.* at \*7. Nor could the State ensure that its employees knew the consequences of their decision to waive their First Amendment rights. *Id.*

Second, because unions control the environment in which an employee is asked to authorize a payroll deduction, the State could not ensure that an employee’s authorization is “freely given.” *Id.* at \*7. For example, some collective bargaining agreements require new employees to report to the union office within a certain period

of time so that a union representative can ask the new employee to join the union and authorize the deduction of union dues and fees from his pay. *Id.* Because this process is essentially a “black box,” the State had no way of knowing whether the signed authorization form is “the product of a free and deliberate choice rather than coercion or improper inducement.” *Id.*

Third, because unions often add specific terms to an employee’s payroll deduction authorization requiring the payroll deduction to be irrevocable for up to twelve months, an employee is often “powerless to revoke the waiver of [his] right against compelled speech” if he later disagrees with the union’s speech or lobbying activities. *Id.* at \*8. This is especially problematic for new employees, who likely have no 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.” *Id.* An employee, as a consequence, may be forced to “see [his] wages docked each pay period for the rest of the year to subsidize a message [he does] not support.” *Id.*

To remedy these First Amendment problems, the Attorney General recommended that the State implement a new payroll deduction process to comply with *Janus*. Specifically, the Attorney General recommended that the State have employees provide their consent directly to the State, instead of allowing unions to control the very conditions in which they elicit an employee’s consent. The Attorney General recommended that the State implement and maintain an online system and draft new written consent forms. *Id.* He also recommended that the State allow its employees to

regularly have the opportunity to opt-in or opt-out of paying union dues. *Id.* at \*8-9. This process would ensure that each employee's consent is up to date and that no employee is forced to subsidize speech with which he disagrees. *Id.*

The State of Texas. After the Alaska Attorney General issued his opinion, the Texas Attorney General issued a legal opinion reaching similar conclusions. *See Application of the United States Supreme Court's Janus Decision to Public Employee Payroll Deductions for Employee Organization Membership Fees and Dues*, Attorney General of Texas, Op. No. KP-0310 (Tex. A.G. May 31, 2020), [bit.ly/3cqdcYk](https://bit.ly/3cqdcYk). According to the Texas Attorney General, after *Janus*, "a governmental entity may not deduct funds from an employee's wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees." *Id.* at 2. The Texas Attorney General recommended that the State create a system by which "employee[s], and not an employee organization, directly transmit to an employer authorization of the withholding" to ensure the employee's consent was "voluntary." *Id.* at 2-3. The Texas Attorney General also recommended that the employer explicitly notify employees that they are waiving their First Amendment rights. *Id.*

The State of Indiana. The following month, the Indiana Attorney General released a similar opinion. *See Payroll Deductions for Public Sector Employees*, Office of the Attorney General, 2020 WL 4209604, Op. No. 2020-5 (Ind. A.G. June 17, 2020). According to the Indiana Attorney General, after *Janus*, "[t]o the extent the State of Indiana or its political subdivisions collect union dues from its employees, they must

provide adequate notice of their employees' First Amendment rights against compelled speech in line with the requirements of *Janus*.” *Id.* at \*1. Such notice “must advise employees of their First Amendment rights against compelled speech and must show, by clear and compelling evidence, that an employee has voluntarily, knowingly, and intelligently waived his or her First Amendment rights and consented to a deduction from his or her wages.” *Id.* Finally, “to be constitutionally valid, a waiver, or opt-in procedure, must be obtained from an employee annually.” *Id.*

The Federal Labor Relations Authority. In addition to these States, a member of the U.S. Federal Labor Relations Authority has reached similar conclusions. *See Decision on Request for General Statement of Policy or Guidance*, Office of Pers. Mgmt. (Petitioner), 71 F.L.R.A. 571, 574-75 (Feb. 14, 2020) (Abbott, concurring). In a recent opinion, the Federal Labor Relations Authority was asked by the Office of Personnel Management to decide whether *Janus* required federal agencies to, upon receiving an employee's request to revoke a previously authorized union-dues assignment, process the request as soon as administratively feasible. Although the FLRA ultimately did not reach the issue, one of the members, James Abbott, wrote separately to provide his views on *Janus*. He explained that if *Janus* did not apply to such a situation, it would mean that “once a Federal employee elects to authorize dues withholding, the employee loses any and all rights to determine when, how, and for what reasons the employee may stop those dues.” *Id.* at 574. But the whole “theme of *Janus*” is that “an employee has the right to support, or to stop supporting, the union by paying, or to stop paying,

dues.” *Id.* Thus, Member Abbott concluded, “restricting an employee’s option to stop dues withholding—for whatever reason—to narrow windows of time of which that employee may, or may not be, aware does not protect the employee’s First Amendment rights.” *Id.* at 575.

These authorities undermine the panel’s perception of uniformity on this critical issue and its reliance on district court opinions to buttress its holding, and they make clear that the panel’s opinion conflicts with *Janus* and the First Amendment principles that underlie the Court’s decision. The Employees here, like Mr. Janus, are entitled to the First Amendment’s protections against compelled speech.

### CONCLUSION

The Court should grant the petition for rehearing en banc.

DATED: October 12, 2020

CLYDE “ED” SNIFFEN  
ACTING ATTORNEY GENERAL

By: */s/ J. Michael Connolly*

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### CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits because it contains 3,803 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface and type-style requirements because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

DATED: October 12, 2020

/s/ J. Michael Connolly

**CERTIFICATE OF SERVICE**

I certify that on October 12, 2020, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 12, 2020

/s/ J. Michael Connolly

## Appendix E

# Communications with Department of Law

Re: *Belgau Amicus*

Committees:  
House Finance Committee  
•  
Legislative Budget &  
Audit  
•  
Finance Subcommittee  
Chair of:  
Alaska Court System  
Department of Law  
University of Alaska

# ALASKA STATE LEGISLATURE



*Serving Midtown,  
University, and  
East Anchorage  
neighborhoods*

## REPRESENTATIVE ANDY JOSEPHSON

Attorney General Designee Ed Sniffen  
Assistant Attorney General Sharla Mylar  
Alaska Department of Law  
1031 West 4th Avenue, Suite 200  
Anchorage, AK 99501-1994

October 13, 2020

Dear Attorney General Sniffen and AAG Mylar:

In the spring of 2020, the Alaska Legislature closed out the state's Operating Budget early. It did so because of pressing concerns with the COVID-19 crisis.

The Operating Budget included the creation of a new appropriation-line for the department of Law's Civil Division. One can see this new appropriation-line by reviewing pages 23-24 of CCS HB 205. As you will recall, as House Finance Subcommittee Chair for your department's budget, I participated in the creation of this new appropriation-line. (Civil Division Except Contracts Relating to Interpretation of Janus v. AFSCME).

AS 37.07.080(a) prohibits a government agency, like yours, from spending money from one appropriation on another appropriation. (*See also*, Article IX, Section 13). The Legislative Finance Division was helpful in the January-February, 2020 timeframe in directing my office to expressly, and unambiguously, declare in the new appropriation-line, the intent of that appropriation. I believe we did that in pages 23-24. Certainly, all 60 legislators were aware of what was intended by that language. The subject was directly taken up both on the House Floor, and especially in a Senate Floor debate.

Meanwhile, the budget authorized the expenditure of \$20,000 on legal contracts relating to Janus. For reasons unclear to me, Governor Dunleavy vetoed that sum. The result should have been, presumptively, that the department of Law had no resources—none at all—to spend during FY '21 on Janus-related litigation.

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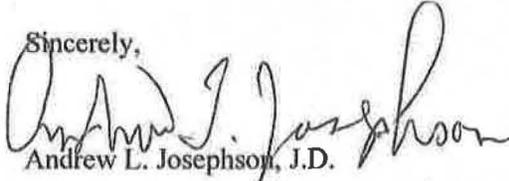
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With this in mind, can you explain whether or not state of Alaska resources, and more particularly department of Law resources, were used in any way to pay Mr. William Consovoy to prepare the Amicus Brief in *Belgau v. Inslee*, Case No. 19-35137 (9<sup>th</sup> Cir), dated October 12, 2020?

Thank you in advance.

Sincerely,



Andrew L. Josephson, J.D.  
Alaska State House of Representatives

Cc: Rep. Matt Claman, House Judiciary Chair

## Elise Sorum-Birk

---

**From:** Rep. Andy Josephson  
**Sent:** Thursday, October 22, 2020 2:39 PM  
**To:** 'sharla.mylar@alaska.gov'  
**Subject:** Belgau Litigation in 9th Circuit

Ms. Mylar:

I am following up on an email and letter I sent (letter was identical to email) on October 13, 2020, about the funding of Mr. Consovoy's 9<sup>th</sup> Circuit amicus brief in defense of Alaska's position in Belgau.

Essentially, I inquired about how—if at all—Mr. Consovoy was paid for production of his 15-page brief in Belgau.

In my view, funding of this brief with FY '21 dollars is flatly prohibited by law. If I'm wrong about this, it would make the executive branch an appropriator, which it is not.

Given that fact, I am curious whether there was a source of funding outside the Department of Law's FY '21 civil section operating budget, or if the department used FY '21 appropriations to pay Mr. Consovoy a fee?

I look forward to hearing from the department on this matter.

Sincerely,

/s/

Andy Josephson  
State House  
Chair, House Finance Subcommittee for the Department of Law