

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ALASKA  
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4 ANTHONY L. BLANFORD and  
5 JOHN K. BELLVILLE,

6 Plaintiffs,  
7

8 vs.

9 MICHAEL J. DUNLEAVY, in his  
10 individual and official capacities;  
11 TUCKERMAN BABCOCK; and the  
12 STATE OF ALASKA,

13 Defendants.  
14

Case No. 3:19-cv-00036-JWS

**ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT  
[Docs. 54, 55]**

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16 **I. MOTIONS PRESENTED**

17 At docket 54, Plaintiffs, Anthony L. Blanford and John K. Bellville  
18 (collectively “Plaintiffs”), filed a motion for summary judgment on their claims that  
19 Defendants, Governor Michael J. Dunleavy, Tuckerman Babcock, and the State of  
20 Alaska (collectively “Defendants”), violated their rights under the First Amendment  
21 of the United States Constitution, and Article I, § 5 of the Alaska Constitution.  
22 Defendants responded at docket 61. Plaintiffs replied at docket 64. Defendants filed  
23 their cross-motion for summary judgment at docket 55. Plaintiffs responded at docket  
24 62. Defendants replied at docket 63. Oral argument was requested, but was denied at  
25 docket 66 because it would not be of further assistance to the Court’s determination.  
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## II. BACKGROUND

In November 2018, Defendant Michael J. Dunleavy was elected Governor of the State of Alaska. He selected Defendant Tuckerman Babcock to serve as the chair of his transition team. Part of any transition process requires appointing subordinate executive branch officials, which necessarily involves replacing officials that served under the prior administration. In past transitions, incoming administrations requested resignations from around 250 employees.<sup>1</sup> Governor Dunleavy significantly broadened the scope of this practice when, on November 16, 2018, Mr. Babcock, as the chair of the Governor-Elect's transition team, sent a memorandum to most of the state's at-will employees—numbering at least 800 and including not only department heads, but also criminal prosecutors, state attorneys, medical doctors, psychiatrists, pharmacists, fiscal analysts, tax code specialists, investment managers, geologists, accountants, IT professionals, and administrative law judges.<sup>2</sup> The memorandum required employees to submit a resignation, along with a statement of interest in remaining employed with the new administration. The memorandum stated in part as follows:

In the coming weeks, the incoming administration will be making numerous personnel decisions. Governor-Elect Dunleavy is committed to bringing his own brand of energy and direction to state government. It is not Governor-Elect Dunleavy's intent to minimize the hard work and effort put forth by current employees, but rather to ensure that any Alaskan who wishes to serve is given proper and fair consideration.

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<sup>1</sup> Dockets 54-4; 54-5.

<sup>2</sup> Dockets 54-5; 54-6; 54-7.

1 As is customary during the transition from one  
2 administration to the next, we hereby request that you  
3 submit your resignation in writing on or before  
4 November 30, 2018 to Team2018@alaska.gov. If you  
5 wish to remain in your current position, please make  
6 your resignation effective upon acceptance by the  
7 Dunleavy administration.

8 Acceptance of your resignation will not be  
9 automatic, and consideration will be given to your  
10 statement of interest in continuing in your current or  
11 another appointment-based state position. Please also  
12 include your email address and phone contact so that  
13 you can be reached to discuss your status directly.

14 Governor-Elect Dunleavy is encouraging you  
15 and all Alaskans to submit their names for consideration  
16 for service to our great state. . . .<sup>3</sup>

17 The memorandum was accompanied by a resignation form, which included a sentence  
18 where employees had to choose whether or not they wanted to be considered for their  
19 position with the Dunleavy administration.<sup>4</sup>

20 Plaintiffs were among the employees who received the resignation  
21 memorandum. At that time, Dr. Blanford was the chief of psychiatry and Dr. Bellville  
22 was a staff psychiatrist at Alaska Psychiatric Institute (“API”), the State’s psychiatric  
23 hospital. Dr. Blanford was hired in 2016 as a staff psychiatrist and later was promoted  
24 to the chief of psychiatry position. Dr. Bellville started at API in the spring of 2018.  
25 Dr. Blanford was surprised that he received the resignation request and Dr. Bellville  
26 initially disregarded his receipt of the memorandum as a mistake, because they did not

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28 <sup>3</sup> [Docket 54-1.](#)

<sup>4</sup> [Docket 54-3.](#)

1 consider their jobs to be political in nature and both were professionally well-regarded  
2 at API.<sup>5</sup>

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4 The demand for the resignations of all at-will employees was reported in  
5 the local newspaper. Governor Dunleavy explained his decision to a reporter: “We  
6 want to give people an opportunity to think about whether they want to remain with  
7 this administration and be able to have a conversation with us.”<sup>6</sup> Mr. Babcock was  
8 reported as saying as follows:  
9

10 [Governor Dunleavy] just wants all of the state  
11 employee who are at-will . . . to affirmatively say, “Yes,  
12 I want to work for the Dunleavy administration,” . . . Not  
13 just bureaucracy staying in place, but sending out the  
14 message, “Do you want to work on this agenda, do you  
15 want to work in this administration? Just let us know.”

16 . . . .

17 . . . I do think this is something bold and different, and  
18 it’s not meant to intimidate or scare anybody. It’s meant  
19 to say, “Do you want to be a part of this?”

20 . . . .

21 If you don’t want to express a positive desire, just  
22 don’t submit your letter of resignation, . . . [a]nd then  
23 you’ve let us know you just wish to be terminated.<sup>7</sup>

24 Upon reading these comments, Dr. Blanford became concerned about the propriety of  
25 having to sign what he considered a “pledge . . . to a political agenda” in his role as  
26 chief of psychiatry at API.<sup>8</sup> He voiced his opposition to the resignation demand in a

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27 <sup>5</sup> Dockets 54-14 at ¶ 9; 54-15 at ¶ 8; 54-13 at 8; 56-6 at 2.

28 <sup>6</sup> Docket 54-4.

<sup>7</sup> *Id.*

<sup>8</sup> Docket 54-14 at ¶¶ 10–13.

1 letter to the editor of the newspaper.<sup>9</sup> He indicated in the published letter that he  
2 wanted to keep his job at API, but would not submit a “symbolic gesture of deference”  
3 in order to keep it.<sup>10</sup> He stated he was hired for his expertise and not his “political  
4 allegiance,” and that he could not voice his support for the administration’s agenda if  
5 it involved “further cuts and hiring freezes, because that’s not what’s needed at API at  
6 this time.”<sup>11</sup> He stated his “moral allegiance” is to the mentally ill and staff who care  
7 for them and that it was his belief that “[p]olitics have already cut deeply into our  
8 ability to care for the mentally ill.”<sup>12</sup> Dr. Bellville agreed with Dr. Blanford’s  
9 position.<sup>13</sup>

10 Neither psychiatrist submitted his resignation. In the morning of  
11 December 3, 2018, the day Governor Dunleavy was sworn into office, Mr. Babcock  
12 notified Plaintiffs of their termination from service effective at noon that same day.<sup>14</sup>  
13 While no basis was provided in the notifications, Defendants concede that Plaintiffs  
14 were fired because they failed to submit their resignations.<sup>15</sup> Administration officials  
15 later requested to meet with Plaintiffs to encourage them to stay at API, but maintained  
16 the condition that Plaintiffs reapply with the new administration.<sup>16</sup> Plaintiffs  
17 understood that they could have their jobs on the original condition—by submitting a

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25 <sup>9</sup> Docket 54-21.

26 <sup>10</sup> *Id.*

27 <sup>11</sup> *Id.*

28 <sup>12</sup> *Id.*

<sup>13</sup> Docket 54-15 at ¶¶ 10–13.

<sup>14</sup> Dockets 54-22; 54-23.

<sup>15</sup> Docket 58 at ¶ 3.

<sup>16</sup> Dockets 56-8 at 4–5; 54-25 at 9; 54-14 at ¶ 20; 54-15 at ¶ 18.

1 letter of intent or otherwise specifically articulating their interest in being employed at  
2 API under the new administration, which they again refused to do, believing the  
3 demand to be a political one to which they objected.<sup>17</sup>  
4

5 This lawsuit followed. Plaintiffs assert a 42 U.S.C. § 1983 claim against  
6 Defendants for violation of their First Amendment rights, as well as a free speech claim  
7 under Article I, § 5 of the Alaska Constitution. Plaintiffs also allege a breach of the  
8 implied covenant of good faith and fair dealing under state law. They seek monetary  
9 relief, as well as injunctive and declaratory relief.  
10

11 Plaintiffs now seek summary judgment on their federal and state free  
12 speech claims. Defendants, in turn, seek summary judgment on these same claims.  
13 They also ask for summary judgment as to Plaintiffs' state claim for the breach of the  
14 covenant of good faith and fair dealing.  
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### 16 III. STANDARD OF REVIEW 17

18 Summary judgment is appropriate where “there is no genuine dispute as  
19 to any material fact and the movant is entitled to judgment as a matter of law.”<sup>18</sup> The  
20 materiality requirement ensures that “[o]nly disputes over facts that might affect the  
21 outcome of the suit under the governing law will properly preclude the entry of  
22 summary judgment.”<sup>19</sup> Ultimately, “summary judgment will not lie if the . . . evidence  
23 is such that a reasonable jury could return a verdict for the nonmoving party.”<sup>20</sup>  
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27 <sup>17</sup> Dockets 54-14 at ¶¶ 20–21; 54-15 at ¶¶ 18–19.

28 <sup>18</sup> Fed. R. Civ. P. 56(a).

<sup>19</sup> *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>20</sup> *Id.*

1 However, summary judgment is mandated “against a party who fails to make a  
2 showing sufficient to establish the existence of an element essential to that party’s case,  
3 and on which that party will bear the burden of proof at trial.”<sup>21</sup>  
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5 The moving party has the burden of showing that there is no genuine  
6 dispute as to any material fact.<sup>22</sup> Where the nonmoving party will bear the burden of  
7 proof at trial on a dispositive issue, the moving party need not present evidence to show  
8 that summary judgment is warranted; it need only point out the lack of any genuine  
9 dispute as to material fact.<sup>23</sup> Once the moving party has met this burden, the  
10 nonmoving party must set forth evidence of specific facts showing the existence of a  
11 genuine issue for trial.<sup>24</sup> All evidence presented by the non-movant must be believed  
12 for purposes of summary judgment, and all justifiable inferences must be drawn in  
13 favor of the non-movant.<sup>25</sup> However, the non-moving party may not rest upon mere  
14 allegations or denials, but must show that there is sufficient evidence supporting the  
15 claimed factual dispute to require a fact-finder to resolve the parties’ differing versions  
16 of the truth at trial.<sup>26</sup> “[W]hen simultaneous cross-motions for summary judgment on  
17 the same claim are before the court, the court must consider the appropriate evidentiary  
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26 <sup>21</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

27 <sup>22</sup> *Id.* at 323.

28 <sup>23</sup> *Id.* at 323–25.

<sup>24</sup> *Anderson*, 477 U.S. at 248–49.

<sup>25</sup> *Id.* at 255.

<sup>26</sup> *Id.* at 248–49.

1 material identified and submitted in support of both motions, and in opposition to both  
2 motions, before ruling on each of them.”<sup>27</sup>

#### 3 4 IV. DISCUSSION

##### 5 A. Plaintiffs’ § 1983 Claim Based on the First Amendment

6 Plaintiffs assert their First Amendment retaliation claim against  
7 Defendants pursuant to 42 U.S. C. § 1983. Section 1983 creates a private right of  
8 action for those plaintiffs seeking to redress and remedy constitutional wrongs caused  
9 by those acting “under the color of state law.”<sup>28</sup> “To state a claim under § 1983, a  
10 plaintiff must allege two essential elements: (1) that a right secured by the Constitution  
11 or laws of the United States was violated, and (2) that the alleged violation was  
12 committed by a person acting under the color of State law.”<sup>29</sup> Based on Eleventh  
13 Amendment considerations, a state, its agencies, and officials acting in their official  
14 capacity cannot be sued under § 1983.<sup>30</sup> An exception exists for § 1983 claims brought  
15 against state officials sued in their official capacity for prospective injunctive or  
16 declaratory relief.<sup>31</sup> These claims, however, must be brought against state officials  
17 with the ability to provide injunctive relief in their official capacities.<sup>32</sup> Claims seeking  
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23 <sup>27</sup> *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir.  
24 2001).

<sup>28</sup> 42 U.S.C. § 1983.

<sup>29</sup> *Long v. Cnty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006).

<sup>30</sup> *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Wolfe v. Strankman*, 392 F.3d  
25 358, 364 (9th Cir. 2004).

<sup>31</sup> *Will*, 491 U.S. at 71 n.10 (“Of course a state official in his or her official capacity, when  
26 sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for  
27 prospective relief are not treated as actions against the state.’” (quoting *Kentucky v. Graham*, 473 U.S.  
28 159, 167 n.14 (1985))); *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007).

<sup>32</sup> *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013).



1 monetary damages may only be brought against a state official if the official is sued in  
2 his or her individual capacity and such claims are subject to a possible qualified  
3 immunity defense.<sup>33</sup> For these personal-capacity claims, Eleventh Amendment  
4 immunity issues are not implicated because the claim is actually against the individual  
5 and not the state.<sup>34</sup> To establish personal liability for damages under § 1983, it is  
6 enough to show that the official, acting under color of state law, caused the deprivation  
7 of a federal right.<sup>35</sup>

10 Under these principles, Plaintiffs’ § 1983 claim against the State of  
11 Alaska itself is not viable. The claim may be brought against Defendant Dunleavy in  
12 his official capacity for prospective injunctive and declaratory relief, and against the  
13 individual Defendants in their personal capacities for damages. Whether Plaintiffs are  
14 entitled to summary judgment on this § 1983 claim depends on whether there has been  
15 an underlying First Amendment violation and, if so, whether Defendants are entitled  
16 to qualified immunity.

19 **1. First Amendment in the public employment context**

20 Plaintiffs’ § 1983 claim against Defendants falls within the ambit of case  
21 law governing First Amendment rights in relation to public employment. “The Court  
22 has rejected for decades now the proposition that a public employee has no right to a  
23 government job and so cannot complain that termination violates First Amendment  
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27 <sup>33</sup> *Suever v. Connell*, 579 F.3d 1047, 1060–61 (9th Cir. 2009); *Kentucky v. Graham*, 473 U.S.  
28 159, 166 (1985).

<sup>34</sup> *Suever*, 579 F.3d at 1060.

<sup>35</sup> *Id.*

1 rights . . . .”<sup>36</sup> Under the Supreme Court’s “unconstitutional conditions” doctrine, “the  
2 government ‘may not deny a benefit to a person on a basis that infringes his  
3 constitutionally protected . . . freedom of speech’ even if he has no entitlement to that  
4 benefit.”<sup>37</sup> Based on this doctrine, “[i]t is by now black letter law that ‘a state cannot  
5 condition public employment on a basis that infringes the employee’s constitutionally  
6 protected interest in freedom of expression.”<sup>38</sup> This means that “[a]bsent some  
7 reasonably appropriate requirement, government may not make public employment  
8 subject to the express condition of political beliefs or prescribed expression.”<sup>39</sup>

11 Stemming from these principals are two types of cases—those falling  
12 under the *Elrod/Branti*<sup>40</sup> line of patronage cases, and those under the *Pickering*<sup>41</sup> free  
13 speech retaliation cases. Under *Elrod/Branti*, as a general rule, public employees  
14 cannot be terminated based upon their political associations.<sup>42</sup> Such patronage  
15 practices impermissibly infringe upon public employees’ First Amendment rights.  
16 “The threat of dismissal for failure to provide [support for the favored political party]  
17 unquestionably inhibits protected belief and association, and dismissal for failure to  
18 provide support only penalizes its exercise.”<sup>43</sup>

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24 <sup>36</sup> *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996).

25 <sup>37</sup> *Bd. of Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

26 <sup>38</sup> *Nichols v. Dancer*, 657 F.3d 929, 932 (9th Cir. 2011) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

27 <sup>39</sup> *O’Hare*, 518 U.S. at 717.

28 <sup>40</sup> *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

<sup>41</sup> *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563 (1968).

<sup>42</sup> *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994 (9th Cir. 1999).

<sup>43</sup> *Elrod*, 427 U.S. at 359 (plurality opinion).

1           *Pickering* retaliation cases involve situations where a government  
2 employer takes an adverse employment action against an employee in response to that  
3 employee’s speech. Under these cases, it is acknowledged that the government cannot  
4 unduly abridge employees’ free speech rights, but nonetheless has broader power to  
5 restrict the speech of its employees than the speech of its constituents given the  
6 different interests at play. As a result, unlike the *Elrod/Branti* cases “where the raw  
7 test of political affiliation suffice[s] to show a constitutional violation,” these speech-  
8 related cases require the application of a balancing test developed in *Pickering* to  
9 determine whether the employee’s speech is constitutionally protected.<sup>44</sup> Under the  
10 balancing test, the court must consider “the interests of the [employee], as a citizen, in  
11 commenting upon matters of public concern, and the interest of the State, as an  
12 employer, in promoting the efficiency of the public services it performs through its  
13 employees.”<sup>45</sup> This balancing test is also applied in “hybrid speech/association”  
14 claims, where speech is inextricably linked with the associational activity in question.<sup>46</sup>

15           Under both types of cases—whether involving political affiliation or  
16 political speech—an exception is carved out for those employees holding  
17 policymaking positions; such employees may be fired for “purely political reasons.”<sup>47</sup>  
18 In the Ninth Circuit, “an employee’s status as a policymaking or confidential employee  
19 [is] dispositive of *any* First Amendment retaliation claim[,]” not just a claim based  
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26           <sup>44</sup> *O’Hare*, 518 U.S. at 719.

27           <sup>45</sup> *Pickering*, 391 U.S. at 568.

28           <sup>46</sup> *Hudson v. Craven*, 403 F.3d 691, 695–98 (9th Cir. 2005); *Candelaria v. City of Tolleson, Ariz.*, 721 Fed. Appx. 588, 590 n.1 (9th Cir. 2017).

<sup>47</sup> *Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003).

1 solely on political affiliation.<sup>48</sup> This exception reflects the view that dissenting  
2 political speech, beliefs, or affiliations from a policymaker is disruptive enough that  
3 the government’s interests will necessarily permit patronage-based dismissals.<sup>49</sup>  
4 However, “the exception is ‘narrow’ and should be applied with caution.”<sup>50</sup> Whether  
5 an employee falls within this classification is not simply a matter of labels and titles;  
6 rather, “the question is whether the hiring authority can demonstrate that party  
7 affiliation is an appropriate requirement for the effective performance of the public  
8 office involved.”<sup>51</sup> Party affiliation is interpreted broadly to encompass political  
9 affiliation more generally, which “includes commonality of political purpose and  
10 support.”<sup>52</sup>

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14 **2. Dr. Blandford’s position as the chief of psychiatry at API**

15 As a threshold matter, Defendants argue that they cannot be liable to  
16 Dr. Blandford for any First Amendment violation because Dr. Blandford occupied a  
17 policymaking position at API and, therefore, could be fired for purely political reasons.  
18 Defendants bear the burden of establishing Dr. Blandford occupied such a position.<sup>53</sup>  
19 That is, they must show that political considerations are relevant to the chief of  
20 psychiatry position at API. The duties of this position are not disputed and, therefore,  
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25 <sup>48</sup> *Biggs*, 189 F.3d at 994–95 (emphasis added).

26 <sup>49</sup> See *Hobler*, 325 F.3d at 1150 (noting that “some positions must be subject to patronage  
dismissals for the sake of effective governance and implementation of policy”).

27 <sup>50</sup> *Hunt v. Cnty. of Orange*, 672 F.3d 606, 611 (9th Cir. 2012) (quoting *DiRuzza v. Cnty. of  
Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000)).

28 <sup>51</sup> *Branti*, 445 U.S. at 518.

<sup>52</sup> *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (2001) (quoting *Biggs*, 189 F.3d at 996).

<sup>53</sup> *DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1311 (9th Cir. 2000).

1 whether it constitutes a policymaking one is a question of law amenable to summary  
2 judgment.<sup>54</sup>

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4 The Ninth Circuit has set forth nine factors that can be relevant when  
5 determining the nature of a position for purposes of the policymaking exception under  
6 the First Amendment. These factors are as follows: (1) vague or broad responsibilities;  
7 (2) relative pay; (3) technical competence; (4) power to control others; (5) authority to  
8 speak in the name of policymakers; (6) public perception; (7) influence on programs;  
9 (8) contact with elected officials; and (9) responsiveness to partisan politics and  
10 political leaders.<sup>55</sup> These factors do not need to be applied mechanically, but rather  
11 should act as a guide to the underlying purpose and intent of the exception.<sup>56</sup>

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14 As chief of psychiatry, Dr. Blandford supervised the medical, pharmacy,  
15 and social work departments at API.<sup>57</sup> He was involved in hiring decisions, and  
16 evaluated and disciplined staff members within these departments.<sup>58</sup> He performed  
17 administrative tasks such as running department meetings, completing documentation,  
18 and ensuring compliance with various medical laws, policies, procedures, and  
19 standards of care.<sup>59</sup> He oversaw patient care and clinical services.<sup>60</sup> His supervisor  
20 was the CEO, and the CEO, in turn, was supervised by API's 11-member "Governing  
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25 <sup>54</sup> *Walker*, 272 F.3d at 1132.

26 <sup>55</sup> *Fazio v. City & Cnty. of San Francisco*, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997).

27 <sup>56</sup> *Hunt*, 672 F.3d at 611–12.

28 <sup>57</sup> Docket 62-2 at 2, ¶ 2.

<sup>58</sup> Dockets 54-14 at ¶ 4; 62-2 at 3, ¶ 6.

<sup>59</sup> Dockets 56-4; 56-5; 54-14 at ¶ 4.

<sup>60</sup> Dockets 56-4; 56-5; 54-14 at ¶¶ 3–4.

1 Body.”<sup>61</sup> The Governing Body “is responsible for broad policy making in accordance  
2 with applicable State of Alaska laws and regulations.”<sup>62</sup> Its authority is delegated to it  
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4 by the Commissioner of Health and Social Services, and it “is empowered to determine  
5 and maintain the objectives, purposes, and values of the Hospital,” to hire and fire the  
6 CEO, and approve budgets, bylaws, rules, regulations, policies, and procedures of  
7 API.<sup>63</sup> Dr. Blanford was not a member of the Governing Body.<sup>64</sup>  
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9           Based on the record provided, including the duties of Dr. Blanford as  
10 chief of psychiatry and the structural organization of API, the Court concludes that  
11 political affiliation was not a requirement for the effective performance of his job at  
12 API. Gavin Carmichael, API’s CEO at that time and Dr. Blanford’s supervisor,  
13 confirmed that Dr. Blanford’s support of Governor Dunleavy’s agenda and his  
14 particular political affiliations had no influence on any of his job responsibilities.<sup>65</sup> He  
15 confirmed that Dr. Blanford’s clinical judgment was not influenced by political  
16 considerations.<sup>66</sup> Furthermore, the evidence does not show that he had contact with  
17 elected officials or that he spoke on behalf of those officials as chief of psychiatry. His  
18 duties were distinct and clear, involving patient care, compliance, and medical services  
19 and staff management.  
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26           <sup>61</sup> Docket 62-2 at 2, ¶ 5; *id.* at 5; *id.* at 14.

27           <sup>62</sup> *Id.* at 17.

28           <sup>63</sup> *Id.* at 14, 17, 19.

<sup>64</sup> *Id.* at 4, ¶ 11.

<sup>65</sup> Docket 62-1 at 8–9.

<sup>66</sup> *Id.* at 10; Docket 54-13 at 10.

1 Defendants argue that Dr. Blanford's control over subordinate medical  
2 staff is a factor that weighs in favor of finding that his position was a policymaking  
3 one. They argue that he supervised a large number of skilled medical staff, including  
4 over 140 nurses. Looking at the record, however, that number is disputed. While a  
5 memorandum dated June 4, 2018, from the Department of Health and Social Services  
6 indicates that the duties of chief of psychiatry include supervising the nursing  
7 department at API,<sup>67</sup> and Mr. Carmichael testified that the nursing department reported  
8 to Dr. Blanford,<sup>68</sup> the organizational chart provided by Plaintiffs demonstrates that the  
9 nursing department was overseen by a separate director of nursing, who reported to the  
10 CEO.<sup>69</sup> Both Mr. Carmichael and Dr. Blanford stated that he only directly supervised  
11 about fifteen people.<sup>70</sup> Even assuming the chief of psychiatry supervised the entire  
12 nursing staff at API, this alone would not show that political affiliation is part of the  
13 job, as simply increasing the number of medical personnel under his supervision does  
14 not sufficiently demonstrate in and of itself that he affected the administration's  
15 political policy goals.<sup>71</sup>

21 Defendants argue that his supervision of the nurses bled into influential  
22 policy decisions, such as when he "negotiated with the nurses' union" and ultimately  
23 solved a staffing issue.<sup>72</sup> However, the deposition testimony that Defendants rely upon  
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25 <sup>67</sup> Docket 56-5.

26 <sup>68</sup> Docket 56-3 at 5.

27 <sup>69</sup> Docket 62-2 at 5; *id.* at 2, ¶ 3.

28 <sup>70</sup> Dockets 56-3 at 11; 62-2 at 2, ¶ 2.

<sup>71</sup> *Hunt*, 672 F.3d at 614 (acknowledging that merely being a supervisor is not sufficient to show status as a policymaker).

<sup>72</sup> Docket 55 at 5.

1 does not support such a conclusion about Dr. Blanford's role in the staffing changes.  
2 Mr. Carmichael stated in his deposition that he had asked Dr. Blanford to consider  
3 API's staffing model and propose a way that would allow for continuous nursing  
4 coverage at the facility, and that Dr. Blanford was able to come up with a solution that  
5 eventually was implemented.<sup>73</sup> There was nothing said about Dr. Blanford himself  
6 advancing this solution or negotiating with the nurses' union. Indeed, there is nothing  
7 in the record to suggest he had such authority.  
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10 To the contrary, Dr. Blanford's ability to make consequential policy  
11 decisions was constrained by the hierarchical system at API. Even as the supervisor  
12 of the medical staff at API, his hiring and termination decisions had to be approved by  
13 the CEO and Governing Body.<sup>74</sup> Similarly, his ability to implement or change policies  
14 and practices at API was limited. Decisions involving clinical administrative matters,  
15 whether initiated by him as chief of psychiatry or by the CEO, had to be considered  
16 and approved by the Governing Body, which would take those matters to the applicable  
17 commissioners as necessary.<sup>75</sup> Any medical policies and procedures developed by him  
18 as the chief were designed to meet medical standards of care, not policy agendas, and  
19 even those items had to be approved by the Governing Body to go into effect.<sup>76</sup>  
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23 Defendants also point to Dr. Blanford's salary of \$298,000 a year, one  
24 of the top salaries in the executive branch, as a factor suggesting he qualifies as a  
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27 <sup>73</sup> Docket 56-3 at 11.

<sup>74</sup> Dockets 62-1 at 6; 62-2 at 3, ¶ 6; 62-2 at 14.

<sup>75</sup> Dockets 62-1 at 7; 62-2 at 3, ¶ 8.

<sup>76</sup> Docket 62-2 at 3, ¶ 7.



1 policymaker.<sup>77</sup> When Dr. Blanford was first hired as a staff psychiatrist, his salary was  
2 \$273,000.<sup>78</sup> This salary was based on his board certification, his five years of  
3 experience, and his familiarity with API.<sup>79</sup> Dr. Bellville, who Defendants do not claim  
4 was a policymaker, was hired with a similar salary of \$262,500.<sup>80</sup> The evidence shows  
5 that the alternative to hiring staff psychiatrists was to hire *locum tenens* psychiatrists,  
6 which cost between \$550,00 and \$600,000 per year, per position.<sup>81</sup> Given these facts,  
7 Dr. Blanford's high salary had more to do with the cost required to hire a qualified  
8 psychiatrist as a permanent staff member and less about the level of influence he  
9 exerted over state policy and governance. The same can be said of the technical  
10 competence possessed by Dr. Blanford. It is no more than any other psychiatrist  
11 working at API. Defendants have failed to show how Dr. Blanford's salary and  
12 competence as a psychiatrist is relevant to the overall purpose of the policymaking  
13 exception to the First Amendment analysis. Given the Court's finding that  
14 Dr. Blanford did not occupy a policymaking position, his termination can implicate the  
15 First Amendment.  
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### 21 3. Mass resignation demand as an unconstitutional patronage practice

22 Plaintiffs assert their terminations under Defendants' resignation plan  
23 were political in nature, raising patronage issues. As noted above, the Supreme Court  
24 has held that patronage dismissals—where public employees are discharged or  
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26 <sup>77</sup> Docket 56-5.

27 <sup>78</sup> Docket 56-11.

28 <sup>79</sup> *Id.*

<sup>80</sup> Docket 54-12.

<sup>81</sup> Docket 56-11.

1 threatened with discharge solely because of their partisan affiliation or lack thereof—  
2 impermissibly restrict freedoms of belief and association guaranteed under the First  
3 Amendment. In cases involving patronage practices applied to employees not holding  
4 policymaking positions, no balancing test is necessary because such practices  
5 “unquestionably inhibit protected belief and association” and “are not narrowly  
6 tailored to serve vital government interests.”<sup>82</sup> The interest the government has in  
7 securing effective employees “can be met by discharging, demoting, or transferring  
8 persons whose work is deficient,” and the interest the government has in loyally  
9 implementing its policies “can be adequately served by choosing or dismissing [only  
10 those] high-level employees on the basis of their political view” under the policymaker  
11 exception.<sup>83</sup>

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15           The seminal cases addressing unconstitutional patronage involved  
16 dismissal based on party membership. In *Elrod*, a newly elected Democratic sheriff  
17 discharged certain at-will employees because they did not belong to or otherwise have  
18 the support of the Democratic party. The court found that conditioning public  
19 employment on political activity is “tantamount to coerced belief” and inhibits  
20 employees from exercising their own political beliefs.<sup>84</sup> In *Branti*, a newly appointed  
21 public defender had threatened to dismiss two assistant public defenders on the sole  
22 ground that they were Republicans. The Court, in finding a constitutional violation,  
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28 <sup>82</sup> *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69, 74 (1990).

<sup>83</sup> *Id.* at 74.

<sup>84</sup> 427 U.S. at 355.

1 clarified that “there is no requirement that dismissed employees prove that they, or  
2 other employees, have been coerced into changing, either actually or ostensibly, their  
3 political allegiance.”<sup>85</sup> Instead, it is enough for a plaintiff to prove that they were  
4 dismissed because they were not affiliated with the favored party.<sup>86</sup>

6 In *Rutan*, the Court revisited the *Elrod/Branti* doctrine to consider  
7 whether it applies to employment actions short of dismissal. In that case, the Illinois  
8 governor issued an executive order instituting a hiring freeze, whereby state officials  
9 were prohibited from hiring any employee, filling any vacancy, or creating a new  
10 position without the Governor’s express permission. Plaintiffs in that case alleged that  
11 the Governor’s hiring freeze was operating as a patronage system whereby the  
12 Governor limited employment and beneficial employment-related decisions to those  
13 affiliated with his favored party to the detriment of those not affiliated with that party.  
14 The Court held that, in line with *Elrod* and *Branti*, promotions, transfers, or recalls  
15 based on political affiliation or support impermissibly infringe on public employees’  
16 First Amendment rights.<sup>87</sup> It found that the same First Amendment concerns  
17 underlying the decisions in *Elrod* and *Branti* were implicated by the governor’s freeze:  
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22 Employees who do not compromise their beliefs stand  
23 to lose the considerable increases in pay and job  
24 satisfaction attendant to promotions, the hours and  
25 maintenance expenses that are consumed by long daily  
26 commutes, and even their jobs if they are not rehired  
27 after a “temporary” layoff. These are significant

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28 <sup>85</sup> 445 U.S. at 517.

<sup>86</sup> *Id.*

<sup>87</sup> 497 U.S. at 75.

1 penalties and are imposed for the exercise of rights  
2 guaranteed by the First Amendment.<sup>88</sup>

3 As for hiring decisions, it concluded that, under the Supreme Court’s long-standing  
4 precedent, “conditioning hiring decisions on political belief and association plainly  
5 constitutes an unconstitutional condition” when applied to public positions that cannot  
6 be considered policymaking ones.<sup>89</sup>

8 Party affiliation of the employee is not, in and of itself, the determinative  
9 factor in these cases. That is, neither active campaigning, nor affiliation with a  
10 competing party, nor vocal opposition to the favored political party by the employee is  
11 required to raise the issue of unconstitutional patronage. “[T]he right not to have  
12 allegiance to the official or party in power itself is protected under the First  
13 Amendment.”<sup>90</sup> Consequently, to support a First Amendment claim under these  
14 patronage cases, it is sufficient for the employee to show “that they were fired for  
15 failing to endorse or pledge allegiance to a particular political ideology.”<sup>91</sup>

18 While not as direct as the patronage practices described above,  
19 Defendants’ demand for the resignations of over 800 at-will employees, with  
20 acceptance or rejection of each resignation dependent upon an accompanying  
21 statement of commitment to state employment under the incoming administration, is  
22 sufficiently analogous as to its purpose and effect to be considered an unconstitutional  
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26 <sup>88</sup> *Id.* at 74.

27 <sup>89</sup> *Id.* at 78.

28 <sup>90</sup> *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 272 (3d Cir. 2007).

<sup>91</sup> *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) (quoting *Bass v. Richards*, 308 F.3d 1081, 1091 (10th Cir. 2002)).

1 patronage practice. It is undisputed the resignation plan was designed to communicate  
2 to employees that they needed to express a desire to work for the Dunleavy  
3 administration in order to retain their jobs and the resignation and reapplication process  
4 was the means by which they were to do this.<sup>92</sup> This intent was made sufficiently clear  
5 to its recipients. The resignation memorandum itself stated that Governor Dunleavy  
6 was “committed to bringing his own brand of energy and direction to government” and  
7 asked employees to consider whether they wanted to remain in state service.<sup>93</sup> The  
8 resignation form provided to employees included a line where, after resigning their  
9 position, the employee had to indicate whether they wanted to be considered for their  
10 current position “with the new administration.”<sup>94</sup> The media reports that followed  
11 solidified the nature of the request. Mr. Babcock was quoted as affirming that the  
12 purpose of the mass resignation request was to have employees commit to working for  
13 the Dunleavy administration and its agenda in particular, rather than just staying in  
14 place as part of the usual bureaucracy.<sup>95</sup> He stated that “[n]o public servant should  
15 ever think that they are irreplaceable,”<sup>96</sup> and he made it clear that their jobs were on  
16 the line. Employees who did not offer a resignation would be terminated. More  
17 specifically, he directed employees who did not want to “express a positive desire” to  
18 work with the new administration to simply not turn in a resignation, which would,  
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26 <sup>92</sup> [Docket 64-1 at 7–11.](#)

27 <sup>93</sup> [Docket 54-1.](#)

28 <sup>94</sup> [Docket 54-3.](#)

<sup>95</sup> [Docket 54-4.](#)

<sup>96</sup> [Docket 54-8.](#)

1 convolutedly, indicate a “wish to be terminated.”<sup>97</sup> In other words, to keep their jobs,  
2 employees had to actually resign it as a gesture of support and then hope that the  
3 incoming administration would reject the resignation based on unknown criteria.  
4

5 Based on these circumstances, Defendants were requiring an ostensible  
6 commitment of political support, or at least deference, in return for continued  
7 employment, the effect of which was to either interfere with or chill employees’  
8 exercise of protected First Amendment rights. Those that did not want to signal such  
9 a commitment, like Plaintiffs, were fired. Those that complied to keep their jobs could  
10 thereafter reasonably “feel a significant obligation to support political positions held  
11 by their superiors, and to refrain from acting on the political views they actually hold”  
12 that officials might find subversive in order to avoid dismissal.<sup>98</sup> As such, this threat  
13 of dismissal for failure to provide the resignation as a gesture of support for the newly  
14 elected governor “unquestionably inhibit[ed] protected belief and association.”<sup>99</sup>  
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18 Defendants assert that there was nothing political about the resignation  
19 plan; they issued pro forma resignation requests from at-will employees as a routine  
20 part of the administrative transition process. However, the sheer scope of the demand  
21 for resignations, which undisputedly went beyond what was customary during an  
22 administration transition, and extended to employees not occupying policymaking  
23 positions, demonstrates that the purpose went beyond routine employment action.  
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27 <sup>97</sup> Docket 54-4.

28 <sup>98</sup> *Rutan*, 497 U.S. at 73.

<sup>99</sup> *Elrod*, 427 U.S. at 359.

1 They were not actually asking at-will employees to resign en mass. Rather, they were  
2 asking employees to offer up their job to the new administration’s express approval on  
3 a basis left unclear, but with suggestive political underpinnings. Indeed, Defendants  
4 did not describe it to employees as a mere formality. Rather, in connection with the  
5 resignation demand, Mr. Babcock stressed that “[n]o public servant should ever think  
6 that they are irreplaceable” and another transition team member stated that the  
7 resignation demand served as a reminder to state employees that they work for the  
8 public and that the public elected the governor.<sup>100</sup> Therefore, it functioned less as an  
9 employment formality and more of a hedge against, and warning to, political dissenters  
10 working in state government. At a minimum, the resignation demand had the purpose  
11 and effect of infusing political concerns and considerations into the civil service  
12 sector.<sup>101</sup>

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17 The fact that actual party membership or activity did not factor into who  
18 received the resignation memorandum is not dispositive here. It is sufficient if, under  
19 Defendants’ plan, employees faced potential dismissal, or other adverse employment  
20 action, if they did not want to affiliate with a particular political ideology. Such is the  
21 case here. It was made clear that by submitting a resignation, the employee was  
22 actually signaling a commitment to work with the new governor and on behalf of his  
23 agenda. This agenda was later described by Mr. Babcock to include support for a full  
24 statutory PFD, the repeal of Senate Bill 91, reorganization of government agencies,  
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28 <sup>100</sup> [Dockets 54-7; 54-8.](#)

<sup>101</sup> [Dockets 54-2 at 2; 54-5; 54-8.](#)

1 pro-life issues, and a balanced state budget.<sup>102</sup> Plaintiffs did not want to align  
2 themselves with these political priorities to the extent they involved funding cuts and  
3 hiring freezes that would detrimentally affect the functioning of API, and therefore  
4 they did not submit their resignations.<sup>103</sup> They consequently were fired for this  
5 exercise of their associational rights guaranteed under the First Amendment.  
6

#### 7 **4. Retaliation for the exercise of First Amendment speech**

8 Plaintiffs' terminations based upon their refusal to provide their  
9 resignations also implicates free speech issues under the *Pickering* line of cases. The  
10 Ninth Circuit has synthesized *Pickering* and its progeny into a five-factor evaluation:  
11

- 12  
13 (1) whether the plaintiff spoke on a matter of public  
14 concern; (2) whether the plaintiff spoke as a private  
15 citizen or public employee; (3) whether the plaintiff's  
16 protected speech was a substantial or motivating factor  
17 in the adverse employment action; (4) whether the state  
18 had an adequate justification for treating the employee  
19 differently from other members of the general public;  
20 and (5) whether the state would have taken the adverse  
21 employment action even absent the protected speech.<sup>104</sup>

22 The plaintiff bears the burden at the first three steps of the inquiry. The fourth step of  
23 the analysis represents the *Pickering* balancing test, and it is at this step where the  
24 burden shifts to the government employer to show that there were legitimate  
25 administrative interests involved that outweigh the employee's interest in commenting  
26 about matters of public concern.<sup>105</sup>

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27 <sup>102</sup> [Docket 64-1 at 5.](#)

28 <sup>103</sup> [Docket 54-21.](#)

<sup>104</sup> [Eng v. Cooley, 552 F.3d 1062, 1070 \(9th Cir. 2009\).](#)

<sup>105</sup> [Thomas v. City of Beaverton, 379 F.3d 802, 808 \(9th Cir. 2004\).](#)



1 As a threshold matter, Defendants argue there is no speech actually at  
2 issue here. They stress that Plaintiffs were not fired for anything they said or failed to  
3 say, nor were they compelled to convey any public message in order to keep their  
4 jobs.<sup>106</sup> However, non-verbal conduct, such as refusing to submit a resignation, can in  
5 fact be expressive. Conduct “implicates the First Amendment when it is intended to  
6 convey a ‘particularized message’ and the likelihood is great that the message would  
7 be so understood.”<sup>107</sup>  
8

9  
10 That requisite intent and understanding is present here. Dr. Blanford,  
11 upon reading the media reports, understood the resignation demand to be politically  
12 motivated. He “did not think [he] could or should have to pledge [himself] to a political  
13 agenda in order to effectively carry out [his] duties as the chief of psychiatry [at  
14 API].”<sup>108</sup> He even penned an editorial stating as much. In it, Dr. Blanford indicated  
15 that he wanted to continue in his role at API, but would not submit what he considered  
16 to be a “symbolic gesture of deference” to a political agenda he did not necessarily  
17 agree with and that actually may run counter to the best interests of patients and staff  
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22 <sup>106</sup> The parties brief the issue as one of compelled speech. However, as shown by the  
23 arguments made, this case does not fall neatly within the confines of that body of law. Indeed, as noted  
24 by the Supreme Court in *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct.  
25 2448 (2018), except for speech that is part of an employee’s official duties, “it is not easy to imagine  
26 a situation in which a public employer has a legitimate need to demand that its employees recite words  
27 with which they disagree. And we have never applied *Pickering* in such a case.” *Id.* at 2473. It went  
28 on to state that even if *Pickering* applied in a situation involving compelled speech in the public  
employment context, “it would certainly require adjustment.” *Id.* Here, the speech issues are more  
accurately viewed as expressive conduct on the part of Plaintiffs rather than speech compelled by  
Defendants.

<sup>107</sup> *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Texas v. Johnson*, 491 U.S.  
397, 404 (1989)); *Thomas*, 379 F.3d at 810 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11  
(1974) (per curium)).

<sup>108</sup> Docket 54-14 at ¶ 13.

1 at API.<sup>109</sup> In line with this editorial, he did not submit the resignation. Dr. Bellville  
2 agreed with Dr. Blanford's position and also did not submit the resignation.<sup>110</sup> Their  
3 refusal to resign was intended to act as a repudiation of the political underpinnings of  
4 Defendants' resignation requests, and the likelihood people understood their refusal as  
5 sending such a message was indeed great. In fact, medical staff at API wrote a letter  
6 to Defendants requesting that they not terminate Dr. Blanford despite his stated intent  
7 not to file the resignation, which they understood to be in protest of Defendants'  
8 directive.<sup>111</sup> Therefore, Plaintiffs' refusal to participate clearly conveyed an implicit  
9 message of disapproval of the resignation demand, and therefore was expressive.<sup>112</sup>

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13 Defendants also challenge the First Amendment's application in this  
14 situation, arguing that the resignation request was simply a job-related directive,  
15 internal to state operations, and that Plaintiffs were fired for not complying with that  
16 directive. This argument touches upon the first two factors discussed above: whether  
17 the expressive conduct addressed a matter of public concern, and whether it was  
18 undertaken in their capacity as private citizens or public employees. Both of these  
19 issues are questions of law.<sup>113</sup>

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24 <sup>109</sup> Docket 54-21.

25 <sup>110</sup> Docket 54-15 at ¶¶ 10–14.

26 <sup>111</sup> Docket 56-6.

27 <sup>112</sup> See *Nunez*, 169 F.3d at 1227–28 (holding that an employee's refusal to limit attendees at training seminars to those court employees who had worked on her supervisor's re-election campaign was expressive conduct on a matter of public concern).

28 <sup>113</sup> *Eng*, 552 F.3d at 1070. The issue of whether the speech was made in the employee's capacity as a private citizen is a matter of law so long as the employee's job duties are not disputed. *Id.* at 1071.

1           The inquiry into the public concern factor requires the court to undertake  
2 a “generalized analysis of the nature of the speech.”<sup>114</sup> The analysis considers the  
3 “content, form, and context of [the expression at issue], as revealed by the whole  
4 record”<sup>115</sup> to decide whether it fairly relates to a “matter of political, social, or other  
5 concern to the community.”<sup>116</sup> “Of the three concerns, content is king.”<sup>117</sup> When the  
6 content of the message addresses “issues about which information is needed or  
7 appropriate to enable the members of society to make informed decisions about the  
8 operation of their government,” it constitutes a matter of public concern.<sup>118</sup> When the  
9 content involves individual personnel disputes and grievances, it does not constitute a  
10 matter of public concern.<sup>119</sup>

14           The message Plaintiffs intended to convey by refusing to comply with  
15 Defendants’ directive clearly falls within the former content category. Plaintiffs were  
16 surprised to have received a resignation request, and believed the directive effectively  
17 was requiring political loyalty. The infusion of politics into what normally would be  
18 non-political civil service jobs is a matter that the community appropriately would  
19 want to know about to make an informed decision about how the new administration  
20 planned to operate. While their objection to the request was tailored to their roles as  
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25           <sup>114</sup> *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 964 (9th Cir. 2011) (quoting  
26 *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009)).

27           <sup>115</sup> *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

28           <sup>116</sup> *Id.* at 146.

<sup>117</sup> *Johnson*, 658 F.3d at 965.

<sup>118</sup> *Desrochers v. City of San Bernardino*, 572 F.3d 703, 710 (9th Cir. 2009) (quoting *McKinley*  
*v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)).

<sup>119</sup> *Id.*

1 psychiatrists at API, it cannot fairly be characterized as simply a personnel grievance.  
2 Their refusal to comply was rooted in their concern about protecting the integrity of  
3 patient care at API from political interests, which clearly is a concern that would be of  
4 importance to the general public.  
5

6           The fact that Plaintiffs’ actual failure to turn in their resignations was not  
7 publicly announced is not dispositive. Speech, or expressive conduct as is the case  
8 here, about a matter of public concern may be protected even when made in a private  
9 context to staff and superiors rather than the general public.<sup>120</sup> Staff at API discussed  
10 the matter of resignations in a meeting and were aware of Plaintiffs’ position and intent  
11 not to turn in a resignation, and they in turn signaled the issue to Defendants in a letter.  
12 Moreover, Dr. Blanford’s intent and decision not to comply with the resignation  
13 demand as a form of protest was, in fact, publicized.  
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16           The inquiry into whether Plaintiffs were acting as private citizens or as  
17 public employees focuses on whether an employee’s expressions were made pursuant  
18 to official responsibilities.<sup>121</sup> When an employee makes a statement as part of his  
19 official job responsibilities, he is acting on behalf of the government, and when that  
20 statement is unauthorized, incorrect, or improper, the First Amendment provides no  
21 protection from disciplinary measures. Defendants argue that that Plaintiffs’ failure to  
22 comply with their job-related directive falls within this category—a simple refusal to  
23 follow a job directive. Determining whether the conduct at issue was job related  
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28 <sup>120</sup> *Thomas*, 379 F.3d at 810–11.

<sup>121</sup> *Barone v. City of Springfield, Oregon*, 902 F.3d 1091, 1098–99 (9th Cir. 2018).

1 requires “a ‘practical’ inquiry into an employee’s ‘daily professional activities’ to  
2 discern whether the speech at issue occurred in the normal course of these ordinary  
3 duties.”<sup>122</sup> The focus is on “whether the speech at issue is itself ordinarily within the  
4 scope of an employee’s duties, not whether it merely concerns those duties.”<sup>123</sup> Under  
5 this case law, the fact that the subject matter of the resignation request was the job  
6 itself does not make Plaintiffs’ refusal to submit their resignations job related. Offering  
7 up a resignation obviously was not part of Plaintiffs’ daily activities as psychiatrists at  
8 API.  
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11           Given the foregoing analysis, Plaintiffs’ refusal to resign in these  
12 circumstances is protected expressive conduct. There is no dispute that this conduct  
13 was the reason Defendants fired Plaintiffs, and that they would not have been fired but  
14 for this conduct. It therefore falls on Defendants to show that Plaintiffs’ First  
15 Amendment rights are outweighed by the interest the government has “in promoting  
16 the efficiency of the public services it performs through its employees.”<sup>124</sup> They can  
17 do this by demonstrating some actual disruption stemming from the message. This  
18 includes speech or conduct that impairs discipline, disrupts co-worker harmony,  
19 negatively impacts confidential working relationships, impedes the performance of an  
20 employee’s duties, or interferes with regular operations.<sup>125</sup> No such showing has been  
21 made, or even asserted, here. Indeed, any such disruptive effects shown in the record  
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27           <sup>122</sup> *Id.* at 1099 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 422, 424 (2006)).

28           <sup>123</sup> *Lane v. Franks*, 573 U.S. 228, 240 (2014).

<sup>124</sup> *Pickering*, 391 U.S. at 568.

<sup>125</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

1 appear to be a product of the resignation plan itself.<sup>126</sup> Without any outweighing  
2 interests, Defendants could not terminate Plaintiffs for their protected expressive  
3 conduct without running afoul of the First Amendment.  
4

## 5 **5. Qualified immunity**

6 Defendants argue that regardless of any underlying constitutional  
7 violation, they are entitled to qualified immunity that shields them from Plaintiffs’  
8 § 1983 claim for damages.<sup>127</sup> “The doctrine of qualified immunity shields officials  
9 from civil liability so long as their conduct does not violate clearly established . . .  
10 constitutional rights of which a reasonable person would have known.”<sup>128</sup> Given the  
11 Court has found a First Amendment violation, the remaining issue to be determined is  
12 whether Plaintiffs’ rights in relation to the demand for resignations and their  
13 subsequent refusal to comply were clearly established. A right is clearly established  
14 when it has a “sufficiently clear foundation in then-existing precedent.”<sup>129</sup> The rule  
15 must be “dictated by controlling authority or a robust consensus of cases of persuasive  
16 authority.”<sup>130</sup> “There does not need to be a ‘case directly on point,’ but existing  
17 precedent must place the statutory or constitutional question ‘beyond debate.’”<sup>131</sup> The  
18 right cannot be defined with a “high level of generality.”<sup>132</sup> This particularly is so  
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24 <sup>126</sup> [Dockets 54-2; 54-5; 54-7; 54-8.](#)

25 <sup>127</sup> Qualified immunity is only an immunity from suit for damages, not immunity from suit for  
26 declaratory or injunctive relief. *L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir.  
1993).

27 <sup>128</sup> *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotations omitted).

28 <sup>129</sup> *Nunes v. Arata, Swingle, Van Egmond & Goodwin (PLC)*, 983 F.3d 1108, 1112 (9th Cir.  
2020) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)).

<sup>130</sup> *Id.* (quoting *Wesby*, 138 S. Ct. at 589–90).

<sup>131</sup> *Id.* (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)).

<sup>132</sup> *Id.*

1 when the circumstances involve quick judgments made by officials in uncertain and  
2 rapidly evolving circumstances, or when an outcome is otherwise highly fact  
3 dependent.<sup>133</sup>  
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5           With due consideration of the case law discussed in the preceding  
6 sections, the Court finds that the First Amendment violation in these circumstances  
7 was clearly established and would have been known to any reasonable government  
8 official. It is beyond debate based on Supreme Court precedent that it is  
9 unconstitutional to require non-policymaking employees to signal a commitment to a  
10 political agenda in order to retain their jobs. The purpose and effect of Defendants'  
11 employment practice was the same as in the seminal cases discussed above, placing  
12 Defendants on notice that their resignation plan triggered application of these long-  
13 standing precedents. It is not the specific details of the patronage practice that matter  
14 in the application of the case law; rather, it is whether the practice would interfere with  
15 an employee's political beliefs or otherwise inhibit the political activities of public  
16 employees. That effect is beyond debate here. As noted above, the nature of the  
17 demand was political. As a condition to retained employment, employees had to offer  
18 a resignation that represented a commitment to serve under a new governor and to  
19 support his political agenda. Those that did not want to signal support of the governor's  
20 political agenda would be fired. For those who gave the ostensible pledge of support,  
21 the demand admittedly served as a warning that they were replaceable and that they  
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<sup>133</sup> *Id.* at 1112–13; *Gilbrook v. City of Westminster*, 177 F.3d 839, 867 (9th Cir. 1999).

1 worked for the new governor, which reasonably could be interpreted as a warning  
2 against political dissention in the state workforce. This warning would be expected to  
3 chill employees' political affiliations and activities that officials would consider  
4 subversive to the administration's agenda. The Supreme Court has repeatedly stated  
5 that employment practices with this effect inhibit the right to free association.  
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8 It also is clearly established that a government employer may not  
9 terminate a non-policymaking employee based upon his expressive conduct absent an  
10 appropriate government interest. It is without question that Plaintiffs' terminations for  
11 refusing to resign runs afoul of this law. The Ninth Circuit has specifically held that  
12 when an employee intends to convey an implicit message of disapproval of an official's  
13 activity by refusing to facilitate or participate in that activity, and the message relates  
14 to a political matter, it is speech that implicates the First Amendment.<sup>134</sup> In *Nunez*, the  
15 plaintiff was a court administrator who was instructed by a judge to limit attendees at  
16 training seminars to those employees who had worked on the judge's campaign. In  
17 protest of the directive, the plaintiff arranged for two employees who did not work on  
18 the reelection campaign to attend a training seminar and consequently was fired. The  
19 Ninth Circuit found that the plaintiff's refusal to comply was an implicit repudiation  
20 of the judge's discrimination against other employees and therefore was expressive  
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26 <sup>134</sup> *Nunez*, 169 F.3d at 1227–28 (holding that an employee's refusal to limit attendees at  
27 training seminars to those court employees who had worked on her supervisor's reelection campaign  
28 was expressive conduct on a matter of public concern); *Thomas*, 379 F.3d at 809 (recognizing that a  
plaintiff's refusal to acquiesce to a supervisor's treatment of another employee—by promoting that  
employee against the supervisor's wishes—with an intention to convey her disapproval of the  
supervisor's unlawful retaliation against that employee would be protected expressive conduct).



1 conduct that touched upon a matter of public concern. The evidence in that case  
2 demonstrated that the plaintiff intended to convey a message of disapproval and that  
3 her intention was understood by others. The same situation is presented on the record  
4 here. Plaintiffs' refusal to resign was intended to convey disapproval of the political  
5 nature of the demand and was communicated as, and understood to be, an act of protest.  
6 The political nature of Plaintiffs' message was obvious, and the law clearly established  
7 that the resignation request could not be considered part of their duties at API.  
8 Furthermore, while the issue of the government's interest in these free speech cases  
9 can hinge on disputed facts about the nature and extent of any workplace disruption,  
10 no such government interest has been asserted here. Therefore, the Court cannot  
11 conclude that the situation presented some fact-sensitive, content-specific analysis that  
12 would make the application of existing case law uncertain.  
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17 Defendants assert they are entitled to qualified immunity, at least as to  
18 Dr. Blanford's § 1983 claim, because there is no existing case law which would have  
19 put them on notice that an employee operating as the head of one of the departments  
20 in a state-run hospital could not occupy the role of a policymaker for purposes of the  
21 First Amendment. They assert the issue is too fact dependent to clearly be established.  
22 This Court disagrees. It is well understood that a non-policymaking public employee  
23 cannot be fired for reasons encompassing political speech or affiliation. The  
24 established case law makes it clear that determining whether an employee occupies a  
25 policymaking position is a matter of that position's particular job duties and requires a  
26 showing that political affiliation is a part of those job duties. Here, Defendants asked  
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1 for resignations in a manner that the Court has concluded clearly was violative of First  
2 Amendment political association rights from almost all at-will employees, without any  
3 regard to the particular positions they held. It reasonably would be understood that the  
4 requests went to people not occupying policymaking positions, and that their demand  
5 would violate at least some employees' First Amendment rights. More specifically,  
6 there is no dispute about the nature of Dr. Blanford's job duties, and those duties would  
7 have been well known to officials making employment decisions of this nature. As the  
8 preceding analysis shows, none of his job duties suggest under the relevant factors that  
9 the position of chief of psychiatry at API is one where political consideration would  
10 come into play. In other words, Defendants could not have reasonably believed  
11 Dr. Blanford occupied a political position in light of his clearly defined and medically  
12 related job duties; indeed, there was no actual individual consideration of his position  
13 prior to his termination.  
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18 **B. Plaintiffs' Free Speech Claim under Article 1, § 5 of the Alaska**  
19 **Constitution**

20 The Alaska Constitution in Article 1, § 5 protects citizens' right to free  
21 speech. Generally speaking, Alaska's public employee free speech cases rely heavily  
22 on federal law,<sup>135</sup> but the Alaska Constitution is applied more broadly in protecting  
23 speech.<sup>136</sup> Consequently, given the First Amendment violation present in the  
24 circumstances here, Defendants' conduct also violated Alaska's free speech  
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27 <sup>135</sup> See *Wickwire v. State*, 725 P.2d 695, 703 (Alaska 1986); *State v. Haley*, 687 P.2d 305, 312  
28 (Alaska 1984).

<sup>136</sup> *Club SinRock, LLC v. Anchorage*, 445 P.3d 1031, 1037–38 (Alaska 2019).

1 protections. The Court notes, however, there is no implied private cause of action for  
2 damages under the Alaska Constitution unless the case involves flagrant violations  
3 where no alternative remedies are otherwise available.<sup>137</sup> Given the Court’s ruling in  
4 favor of Plaintiffs on their federal § 1983 claim, Plaintiffs cannot seek damages for the  
5 state constitutional violation, only declaratory and injunctive relief.<sup>138</sup>

7  
8 **C. Good Faith and Fair Dealing**

9 Under Alaska law, all at-will employment is governed by an implied  
10 covenant of good faith and fair dealing.<sup>139</sup> The covenant prohibits an employer from  
11 terminating an employee for the purpose of depriving the employee of the contract’s  
12 benefits and from dealing with the employee in a manner that a reasonable person  
13 would regard as unfair.<sup>140</sup> “Unfair actions include disparate employee treatment,  
14 terminations on grounds that are unconstitutional, and firing that violates public  
15 policy.”<sup>141</sup> Defendants ask for summary judgment on this claim. They argue that the  
16 basis of Plaintiffs’ good faith claim is the First Amendment violation, and they contest  
17 that any such violation occurred. However, the Court has found in Plaintiffs’ favor as  
18 to their constitutional claims, voiding Defendants’ basis for summary judgment.

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22 Plaintiffs have not moved for summary judgment on this claim. It is  
23 unclear from their complaint what additional remedies Plaintiffs seek under this claim  
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<sup>137</sup> *Larson v. State*, 284 P.3d 1, 9–10.

27 <sup>138</sup> *Id.*

28 <sup>139</sup> *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 (Alaska 2008).

<sup>140</sup> *Id.* at 761.

<sup>141</sup> *Montella v. Chugachmiut*, 283 F. Supp. 3d 774, 780 (D. Alaska 2017) (citing *Crowley v. State*, 253 P.3d 1226, 1232 (Alaska 2011)).

1 that are not provided for pursuant to their § 1983 claim, and unclear whether Plaintiffs  
2 have reason to pursue further litigation on this issue apart from the federal claim.

### 3 4 **V. CONCLUSION**

5 Based on the preceding discussion, Plaintiffs' motion at docket 54 is  
6 GRANTED, and Defendants' motion at docket 55 is DENIED. The Court hereby  
7 orders as follows:

8  
9 (1) Plaintiffs are entitled to judgment on their § 1983 claim for  
10 damages against Defendant Governor Dunleavy and Defendant Babcock in  
11 their personal capacities based upon the First Amendment violation articulated  
12 in the Court's order.

13  
14 (2) Plaintiffs are entitled to judgment on their § 1983 claim for  
15 declaratory relief and injunctive relief, to the extent the requested relief is  
16 prospective in nature, against Defendant Governor Dunleavy in his official  
17 capacity.

18  
19 (3) Plaintiffs are entitled to judgment on their free speech  
20 claim brought under Article I, § 5 of the Alaska Constitution.

21  
22 Counsel are instructed to promptly confer and then, within 14 days from  
23 this order's date, to file a notice that identifies the remaining issues for litigation,  
24 including whether Plaintiffs are pursuing their state claim for good faith and fair  
25 dealing and what specific injunctive and monetary relief they seek for each claim. The  
26 notice also should suggest a schedule for resolving the outstanding issues.  
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1 IT IS SO ORDERED this 8th day of October, 2021, at Anchorage,  
2 Alaska.

3  
4 /s/ John W. Sedwick  
5 JOHN W. SEDWICK  
6 Senior United States District Judge  
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