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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, Plaintiff/Counterclaim Defendant, v. ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Defendant/Counterclaimant.	Case No. 3AN-19-09971CI
ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO, Third-Party Plaintiff, v. MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official capacity as Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; and STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Third-Party Defendants.	

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MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT OR, IN THE ALTERNATIVE, TO STAY ARBITRATION

Pursuant to AS 22.10.020 and Civil Procedure Rule 57(a), the State of Alaska and the third-party defendants (collectively, "the State") move for a declaratory judgment that the grievance filed by the Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO ("Union") over the State's issuance and implementation of the Attorney General's August 27, 2019 opinion is not arbitrable and thus cannot proceed. Alternatively, the State moves for a stay of the arbitration pending the final resolution of this litigation.

BACKGROUND

On August 27, 2019, Attorney General Clarkson issued a legal opinion in which he analyzed "the State's current process for deducting union-related dues and fees from employee paychecks in light of the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*." *See* AG Opinion at 1 (attached as Ex. C to Sept. 25, 2019 Decl. of Jake Metcalfe ("Metcalfe Decl.")). Although the plaintiff in *Janus* was a non-member 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 5. The Supreme Court had held that the First Amendment prohibits public employers from forcing *any* employee to subsidize a union, whether through an agency fee or otherwise. Under *Janus*, the Attorney General concluded, the State could not deduct money from an employee's

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paycheck and give it to a union unless the employee's consent to do so was (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 7-8. The Attorney General ultimately concluded that "the State's payroll deduction process is constitutionally untenable under *Janus*" and he recommended a number of changes to bring the State into compliance with *Janus* and the First Amendment. *Id.* at 2.

Later that day, the State sent an email to state employees informing them of the release of the Attorney General's opinion. *See* Email from Comm. Admin. Kelly Tshibaka dated Aug. 27, 2019 (attached as Ex. D to Metcalfe Decl.). The State also posted information about the opinion online. *See* FAQs dated Aug. 27, 2019 (attached as Ex. E to Metcalfe Decl.). Shortly thereafter, it began implementing the Attorney General opinion by ceasing dues deductions for state employees who no longer wished to have money deducted from their paychecks. *See* Metcalfe Decl. at ¶ 15.

On September 16, the state filed an action for declaratory judgment, and two days later the Union filed a grievance over the State's actions "stem[ming] from Attorney General Kevin Clarkson's August 27, 2019 opinion, misinterpreting *Janus[]*." *See* Grievance at 2 (attached as Ex. F to Metcalfe Decl.). In its grievance, the Union claimed the State (1) improperly "dictated new procedures related to dues payments" by issuing and implementing the Attorney General's August 27, 2019 opinion; and (2) improperly interfered with the Union's members by contacting them to discuss and "distribute[] the

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Attorney General's erroneous August 27, 2019 opinion to all State employees." *Id.* at 2-3. The Union claimed that these actions violated the parties' collective bargaining agreement ("CBA"), specifically Section 3.01 of the CBA (prohibiting the State from "interfer[ing] between any bargaining unit member and the Union") and Section 3.04 of the CBA (setting forth mechanisms for payroll deductions). *Id.*

On September 25, after the State had filed an action for declaratory judgment with the Court, the Union filed counterclaims and a third-party complaint against the State and third-party officials over the same dispute raised in its grievance and stemming from the same threshold issue at the core of the State's initial lawsuit: namely, the State's issuance and implementation of the Attorney General's August 27, 2019 opinion interpreting *Janus* and the First Amendment. In its counterclaim and third-party complaint, the Union asked for an injunction restraining the State from "taking any actions to implement the Attorney General's August 27, 2019 opinion letter and from making any changes to the State employee union dues deduction processes that were in place before that opinion letter was issued." *See* ASEA Counterclaims & Third-Party Complaint at 34. On October 3, this Court issued a TRO granting the Union's requested relief.

On October 16, Commissioner of Administration Kelly Tshibaka—herself a named third-party defendant here—denied the Union's grievance, explaining that the issues it raised were not substantively arbitrable because the dispute did not "turn on or involve application or interpretation of the terms of the CBA." *See* Response to Grievance at 1 (attached to Reply Decl. of Jake Metcalfe dated Oct. 17, 2019 ("Reply

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Metcalfe Decl.") as Ex. G). Instead, the grievance "involves and inevitably turns on core questions of federal constitutional interpretation," which were "discreet Constitutional questions" that were "outside a grievance arbitrator's authority." *Id.*

On October 17, the Union advanced its grievance to Step III, demanding that the State select arbitrators by today, November 6, 2019. *See* ASEA Letter at 1 (attached to Reply Metcalfe Decl. as Ex. H). The Union made this request even though this Court already had enjoined the State from "taking any actions to implement the Attorney General's August 27, 2019 opinion or the State's September 26, 2019 Administrative Order No. 312, and from making any changes to the State employee dues deduction practices that were in place before the August 27, 2019 AG Opinion was issued." TRO 22-23.

On November 4, the Union informed the State that it would not (as the State had requested) stay its grievance pending final resolution of this litigation.[1] On November 5, the Court granted the Union's motion for a preliminary injunction and denied the State's request to consolidate the proceedings. On November 6, the State informed the Union that it would not be proceeding with arbitration and that it would be asking this Court for a declaratory judgment that the Union's grievance is not arbitrable.

[1] A different public employee union—the Public Safety Employees Association (PSEA)—filed a similar grievance but has agreed to hold it in abeyance pending resolution of this litigation. *See* Pickett Aff. at ¶ 2, filed with this motion.

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ARGUMENT

I. The Court Should Declare that the Union's Dispute Is Not Arbitrable.

A. Whether the Parties' Dispute Is Arbitrable Is for the Court to Decide.

Whether a dispute is arbitrable is a "threshold question for the court, not the arbitrator." *Classified Employees Ass'n v. Matanuska-Susitna Borough School Dist.*, 204 P.3d 347, 353 (Alaska 2009); *see Local Joint Exec. Bd. v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 595-96 (9th Cir. 2018) ("[S]ubstantive arbitrability, *i.e.*, whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance, is a question for judicial determination unless the parties clearly and unmistakably provide otherwise.") (citation omitted). This division of authority between the court and an arbitrator exists because "arbitrators have such broad discretion," and so "it is often problematic for them to decide their own jurisdiction, for if they are wrong, there may be essentially no review." *Classified Employees Ass'n*, 204 P.3d at 353 (citation omitted).

This presumption that arbitrability is a question for the courts can be rebutted only if "the parties have clearly and unmistakably provide[d] otherwise" *SMJ Gen. Constr., Inc. v. Jet Commercial Constr., LLC*, 440 P.3d 210, 214 (Alaska 2019) (citation omitted); *see Classified Employees Ass'n*, 204 P.3d at 353 n.14. Because the parties' CBA contains no provision clearly and unmistakably reserving this issue to the arbitrator, whether the parties' dispute is arbitrable is for the court to decide, not the arbitrator.

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B. The State Cannot Be Required to Arbitrate a Dispute It Never Agreed to Arbitrate.

"Because arbitration is a matter of contract, parties can only be compelled to arbitrate a matter where they have agreed to do so." *Lexington Mktg. Grp., Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 477 (Alaska 2007). Although there generally is a presumption of arbitrability, this presumption "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to *interpret the terms of a CBA.*'" *Wright v. Universal Maritime Serv. Co.*, 525 U.S. 70, 78 (1998) (emphasis in original). If the dispute "ultimately concerns not the application or interpretation of [the] CBA, but the meaning of [federal law]," it should not be presumed that the parties agreed to arbitrate the dispute. *Id.* Put simply, if a party did not agree to resolve the dispute through arbitration, it cannot be forced to do so. *Lexington Mktg. Grp., Inc.*, 157 P.3d at 477.

C. The Parties' Dispute Is Not Arbitrable

The CBA states that the parties will use the arbitration procedures outlined in the CBA as "the sole means of settling grievances." CBA § 16.01A (attached as Ex. B to Metcalfe Decl.). The CBA defines "grievance" as "any controversy or dispute involving the application or interpretation of the terms of this Agreement arising between the Union or an employee or employees and the Employer." *Id.*

Here, the parties' dispute is not arbitrable because it does not involve the "application or interpretation of the terms" of the CBA. On the contrary, this dispute stems entirely from the Union's claim that the Attorney General has "misinterpret[ed]"

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Janus and the First Amendment. Grievance at 2. According to the Union, the State improperly interfered with ASEA members by distributing the "erroneous August 27, 2019 opinion," which stated, *inter alia*, that union members "can immediately cancel dues authorizations, even though many have signed dues authorization agreements that can be cancelled only during a window period." *Id.* The Union similarly claims that "the State's implementation of Attorney General Kevin Clarkson's erroneous August 27, 2019 opinion [interpreting *Janus*] also violates the CBA." *Id.* at 2-3. In short, the Union's grievance turns entirely on whether the State's interpretation of the First Amendment and *Janus* is "erroneous"—not on the "application or interpretation" of the CBA.

This important constitutional question—*i.e.*, the rights of state employees and the obligations of the State as employer under *Janus* and the First Amendment—are issues that the State did not agree to, and never would have agreed to, submit to arbitration. An arbitrator "has authority to resolve only questions of contractual rights." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974). An arbitrator's "source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop.'" *Id.* at 53. "Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations." *Id.*

By contrast, "the resolution of statutory or *constitutional issues* is a primary responsibility of courts." *Id.* at 57 (emphasis added). "Labor arbitrators have specific skills that are not easily transferable to issues that go beyond the actual collective

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bargaining agreement they are attempting to interpret." *Amalgamated Local 2327 v. Tri-County Community Action Agency, Inc.*, 243 F. Supp. 2d 159, 163 (D.N.J. 2002). Thus, "[w]ithin the context of arbitration and labor disputes, arbitrators are helpful in interpreting contractual provisions and in understanding the law of the shop. However, it is not appropriate to leave to arbitration issues of law." *Id.*

When a union seeks to arbitrate a grievance that is outside the scope of the CBA (*e.g.*, the Constitution, a statute, or a judicial opinion), the grievance must be deemed not arbitrable. *See, e.g., Marathon Ashland Petroleum, LLC v. Int'l Brotherhood of Teamsters*, 300 F.3d 945, 949 (8th Cir. 2001) (affirming declaratory judgment that union's grievance was not arbitrable because the dispute did not implicate the "interpretation of and/or application" of the collective bargaining agreement); *City of Tahlequah*, 124 BNA LA 1147, 1152 (Nichols, Jr., Arb. 2007) (finding a grievance was not arbitrable because "ruling on the substantive merits of the grievance [would be] tied directly to Oklahoma law" and not the "interpretation and application of the terms" of the CBA) (attached as Ex. A to Pickett Decl.). That is what is required here. As the parties' CBA makes clear, an arbitrator is limited to resolving disputes over the "application or interpretation of the terms" of the CBA. Because the Union's grievance is not such a dispute, it is not arbitrable. The resolution of the constitutional issues underlying the Union's grievance is for the courts to resolve, and these issues are already squarely before this court.

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II. Alternatively, the Court Should Stay the Arbitration of the Union's Grievance Pending the Final Resolution of this Litigation.

If the Court determines that the Union's grievance is arbitrable, it should nevertheless stay the arbitration pending the final resolution of this litigation. This Court "is empowered to stay [an] arbitration for purposes of judicial economy and to avoid inconsistent results." *North Slope Borough v. Hydropro, Inc.*, No. 2BA-99-54CI, 2000 WL 35509009 (Alaska Super. Ct. June 1, 2000) (Rabinowitz, J.).[2] Courts also have recognized the authority to stay an arbitration when a party satisfies the preliminary injunction standard. *See, e.g., Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 221 (E.D.N.Y. 2015). *See also Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (laying out preliminary-injunction requirements). The State can satisfy the requirements of either standard.

First, the State will suffer "irreparable harm" if the arbitration is not stayed. *Alsworth*, 323 P.3d at 54. "[M]ultiple federal and state courts have concluded that wasting time and resources in arbitrations that might result in awards inconsistent with future judicial rulings constitutes irreparable harm sufficient to stay arbitration." *Gov. Emp. Ins. Co. v. Strutsovskiy*, No. 12-cv-330, 2017 WL 4837584, at *6 (W.D.N.Y. Oct. 26, 2017). Here, the core dispute in both this litigation and the arbitration is whether the State's actions are compelled by *Janus* and the First Amendment. If both the litigation and the arbitration proceed, there is a significant risk that the State will be subjected to

[2] For the court's convenience, the State is attaching a copy of the decision as Exhibit B to the Affidavit of Jeff Pickett.

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inconsistent rulings and/or conflicting judgments. The parties could be in a position where they are litigating the *same issue* on two separate tracks—(1) in front of this Court, then to the Alaska Supreme Court, and potentially the U.S. Supreme Court; and (2) in front of an arbitrator, on appeal to an Alaska superior court, and then to the Alaska Supreme Court and potentially the U.S. Supreme Court. That is untenable.

Second, the Union is "adequately protected" if the Court stays the arbitration. *Alsworth*, 323 P.3d at 54. The Court has issued a preliminary injunction enjoining the State from implementing the Attorney General's August 27, 2019 opinion and the State's September 26, 2019 Administrative Order No. 312, and from making any changes to the State employee dues deduction practices that were in place before the August 27, 2019 Attorney General Opinion was issued. PI Order at 2; TRO at 22-23. The Union will suffer no harms from a stay of its grievance arbitration.

Indeed, a stay of the arbitration will likely *benefit* the Union because it will allow the parties to avoid expending significant resources in parallel forums. Final resolution of this litigation (and all subsequent appeals) will almost certainly resolve all of the Union's grievance. That is because, as discussed above, the Union's grievance turns entirely on whether the Attorney General's opinion correctly interprets *Janus* and the First Amendment. Indeed, if the State prevails in this litigation, then the allegations in the Union's grievance are largely negated outright because the Court will have issued a final judgment approving of the implementation of the Attorney General's August 27, 2019 opinion. And if the Union ultimately prevails in this litigation, its grievance will be moot

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because it will have obtained the relief it is seeking from an arbitrator, as neither the Attorney General's opinion nor the Governor's Administrative Order 312 will be implemented. There is simply no reason for the State to be forced to litigate the same dispute in two parallel forums when this Court's decision will almost certainly control the outcome of the arbitration.

Finally, although the Court has already found that the Union has demonstrated probable success on the merits of its claims, TRO at 21, the State's position is, at a minimum, not "frivolous." *Alsworth*, 323 P.3d at 54; *see generally* State Opp. to TRO at 19-31, 33-43, 46-49.

For the same reasons, a stay of arbitration is warranted because it will promote "judicial economy and avoid inconsistent results." *North Slope Borough*, 2000 WL 35509009; *see id.* (staying arbitration because the claims in litigation and arbitration "arise out of the same water filtration projects, relate to the same alleged defects, and the evidence presented ... will be substantially similar"). There is "no doubt that staying [the] pending ... arbitration[] is the most economic result," as the outcome of this litigation "will guide the outcome of ... all related arbitration proceedings." *Allstate Ins. Co.*, 929 F. Supp. 2d at 217-18. Staying arbitration here pending final resolution of this litigation thus will conserve party resources, preserve judicial economy, avoid the risk of contradictory judgments, and effectively resolve the arbitration. *See North Slope Borough*, 2000 WL 35509009 (identifying "considerations of judicial economy, efficiency, and fairness"). Thus, if the Court concludes that the Union's grievance is

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arbitrable, it should nevertheless stay the arbitration pending final resolution of this litigation.

CONCLUSION

For the foregoing reasons, the Court should issue a declaratory judgment that the Union's dispute with the State is not arbitrable. Alternatively, it should stay the arbitration pending final resolution (including appeals) of this litigation.

DATED: November 6, 2019.

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