IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF ELECTIONS, GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS, Appellants, v. RECALL DUNLEAVY, an unincorporated association, Appellee.	Case No. S-17706 Superior Court No.: 3AN-19-10903CI

SUPPLEMENTAL BRIEF OF APPELLEE

INTRODUCTION

The third ground for recall, as amended by the superior court, alleges: "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law."[1] [Exc. 1, 303] A ground is legally sufficient if, assuming all alleged facts are true, the allegation satisfies one of the statutory grounds for recall and does not allege acts that are within "the discretion granted to [the official] by law."[2]

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[1] The Division challenged only the factual particularity of this ground, and did not argue that it was legally insufficient or that the governor's veto of judicial funding did not violate the constitution. [At. Br. 52-53; At. R. Br. 18-19]

[2] *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995). Under the legal sufficiency review, a recall application need not allege a violation of law; it is legally sufficient if it alleges acts that show lack of fitness, incompetence, or neglect of duties that are not within the discretion granted by law to the official. *Id.* The Division agrees a violation of law is not required. [At. R. Br. 5] This Court does not need to reach the issue of whether the governor's veto of the judiciary's budget violates a law in a manner that the courts can remedy.

Although the governor has broad veto power, he does not have the constitutional authority to attempt to control or undermine the performance by another branch of government of its constitutional duties. Because the veto was an exercise of arbitrary power in retribution for a decision of this Court, the application alleges a valid basis for recall on the grounds of lack of fitness, incompetence, and neglect of duties. This veto is inconsistent with the governor's constitutional duty to faithfully execute the laws, and threatens the judiciary's role to interpret the law and ensure compliance with the Alaska Constitution.

I. ALASKA'S CONSTITUTIONAL REQUIREMENT TO EXPLAIN A VETO IS MODELED ON THE U.S. CONSTITUTION AND THE CONSITUTIONS OF MANY STATES.

Minutes and other materials from the Alaska Constitutional Convention available online shed no light on the historical basis of article II, section 15 of the Alaska Constitution.[3] Most state constitutions (though not the federal constitution) grant the executive line-item veto authority over appropriations bills.[4] This Court reviewed the framers' discussion of the purpose of granting a line-item veto power in *Alaska Legislative Council v. Knowles*, and determined that the drafters granted the governor the veto as a

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[3] The veto power of the executive was discussed principally during the sessions on January 10 and 11, 1956. *See* 3 Proceedings of the Alaska Constitutional Convention (PACC) 1732-36 (Jan. 10, 1956), 1738-41, 1744-45, 1757-59, 1806-13, 1819-23 (Jan. 11, 1956).

[4] *See* COUNCIL OF STATE GOV'TS, THE BOOK OF STATES, tbl. 4.4 (2017), http://knowledgecenter.csg.org/kc/system/files/4.4.2017.pdf (showing that 45 states currently grant the governor line-item veto authority regarding appropriations bills).

limited legislative power that would serve as a check and balance on the legislature's appropriations power.[5]

The minutes of the Constitutional Convention also reflect no discussion of the requirement that the governor provide a statement of objections when he exercises his veto authority. The final, adopted language on this subject differs minimally, and only stylistically, from the language originally proposed.[6] The lack of discussion is not surprising. The language adopted for the Alaska Constitution closely resembles the language of the U.S. Constitution and many state constitutions.[7] It reasonably may be inferred that the drafters of Alaska's constitution modeled this part of article II, section 15 on these other constitutions.

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[5] *See* 21 P.3d 367, 371-72 (Alaska 2001); *see also Thomas v. Rosen*, 569 P.2d 793, 795-97 (Alaska 1977).

[6] *Compare* ALASKA CONSTITUTIONAL CONVENTION FILES, Folder 310.5, Committee Proposal No. 5, at 5-6, § 15 (Dec. 14, 1955), http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20310.5.pdf ("If the Governor vetoes a bill he shall return it to the house of representatives together with his objections.") *with id.*, Report of Committee on Style and Drafting, at 4, § 15 (Jan. 23, 1956) ("He shall return any vetoed bill, with a statement of his objections, to the house of origin."). The Commentary on the Legislative Article contains no discussion of the requirement for a statement of reasons for the veto. *See id.*, Commentary on the Legislative Article, at 6-7 (Dec. 14, 1955).

[7] *See* U.S. Const. art. I, § 7, cl. 2 (if the President does not approve and sign a bill presented to him, "he shall return it, *with his Objections*, to that House in which it shall have originated" (emphasis added). Among the states, see, e.g., Ala. Const. art. V, § 13; Colo. Const. art. IV, § 11; Del. Const. art. III, § 18; Ga. Const. art. III, § V, para. XIII(c); Iowa Const. art. III, § 16; Ky. Const. § 88; N.D. Const. art. V, § 9; Or. Const. art. V, § 15b(1); Tex. Const. art. IV, § 14; Utah Const. art. VII, § 8(1); Va. Const. art. V, § 6(b)(ii); Wash. Const. art. III, § 12; W. Va. Const. art. VII, § 14.

With respect to the purpose of the requirement, the drafters of the Alaska Constitution may have been aware of judicial decisions from other jurisdictions that discuss why a statement of reasons is required.[8] This Court surveyed some of that case law when it considered the purposes of this constitutional requirement in *Alaska Legislative Council v. Knowles*, and embraced the rationale expressed by the high court of Kentucky in *Arnett v. Meredith*:

> The requirement that the governor explain the reasons for a veto serves at least two principal functions. It allows the legislature to determine what it must do to avoid incurring another veto. And it forces the governor to reveal his or her reasoning, "so that both the Legislature and the people might know whether or not he was motivated by conscientious convictions in recording his disapproval."[9]

II. ALASKA'S CONSTITUTION LIMITS THE GOVERNOR'S EXERCISE OF THE LINE-ITEM VETO AUTHORITY.

Little relevant case law exists concerning the limits on a governor's exercise of the authority to veto items in appropriations bills. Nonetheless, the cases make clear that the governor's authority has limits, and, if the exercise is challenged, the judiciary is

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[8] *See, e.g.*, *Wright v. United States*, 302 U.S. 583, 596 (1938) (In an opinion focused principally on the deadlines for the President to act and Congress to react to a veto, the Court explained that "[t]he constitutional provisions have two fundamental purposes": to provide the President "suitable opportunity to consider the bills presented to him," and to provide Congress "suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes."); *Arnett v. Meredith*, 121 S.W.2d 36, 40 (Ky. 1938) ("The public . . . and also the members of the Legislature, have the right to know the reason or reasons why a particular act was disapproved by the Governor so that they may exercise their rights and powers as voters and lawmakers to overcome such objections in the future, if the act is a meritorious one and approved by them.").

[9] 21 P.3d at 375-76 (footnote omitted) (quoting *Arnett*, 121 S.W.2d at 40).

constitutionally responsible for determining whether a governor's veto was exercised properly.

Some cases focus on the timing of the governor's veto.[10] These are factually distinct from the current case, but they illustrate the principle that the judiciary is charged with determining whether the governor's veto was exercised constitutionally. Another line of cases examines the constitutionality of vetoes accompanied by a message from the governor stating only that he disapproves of the bill, without providing any further statement of reasons for the veto. These cases hold such a veto unconstitutional, because the governor failed to meet his constitutional obligation to provide the reasons for his veto.[11]

This Court's previous cases likewise recognize the role of the judiciary when a veto is challenged as unconstitutional. This Court has held vetoes unconstitutional when the governor attempted to use a veto to assert a power beyond that granted to him by the constitution—such as when a governor struck intent language (rather than a dollar amount) from an appropriations bill,[12] or when a governor attempted to exercise a line-item veto in a bill that this Court determined was not an appropriations bill.[13] In both of these cases,

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10 *See, e.g.*, *Wright*, 302 U.S. at 585-98; *Wolfe v. McCaull*, 76 Va. 876, 877-91 (1882); *Capito v. Topping*, 64 S.E. 845, 846-48 (W. Va. 1909).

11 *See, e.g.*, *Romer v. Colo. Gen. Assembly*, 840 P.2d 1081, 1081-85 (Colo. 1992); *Arnett*, 121 S.W.2d at 36-41.

12 *See Knowles*, 21 P.3d at 373-75, 381; *see also Wielechowski v. State*, 403 P.3d 1141, 1152-53 (Alaska 2017) (examining veto and determining that the governor's striking of a few words did not alter the legislature's purpose).

13 *See Thomas*, 569 P.2d at 797.

this Court held that the veto was invalid because the governor tried to exercise a veto in violation of his authority as defined in article II, section 15.[14]

The governor also may not use a line-item veto to violate another provision in the constitution. This Court has not addressed how a governor might unconstitutionally use his line-item veto authority to violate a provision in the constitution outside of article II, but the Court has addressed how the legislature may not use its appropriations powers to violate a constitutional guarantee. The 2001 *Planned Parenthood* case arose after DHSS adopted a regulation denying Medicaid funding for abortions except when the woman was at risk of dying or the pregnancy resulted from rape or incest.[15] The superior court held the regulation unconstitutional as a violation of the right of privacy and enjoined DHSS from enforcing the regulation to deny coverage for medically necessary abortions.[16] On appeal, the State contended that the superior court order violated separation of powers by effectively ordering an appropriation of funds.[17] This Court, having also concluded that the regulation violated the constitution (relying on equal protection analysis rather than the right of privacy), rejected the State's argument: "[T]he mere fact that the legislature's appropriations power underlies Medicaid funding cannot insulate the program from constitutional review."[18] This Court observed that "the funding implications and

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14 *See Knowles*, 21 P.3d at 373-75, 381; *Thomas*, 569 P.2d at 797.

15 *See State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 907 (Alaska 2001).

16 *See id.*

17 *See id.* at 913.

18 *Id.* at 914.

separation of powers issue in this case would be identical if the State relied on other suspect criteria, such as race, to deny Medicaid benefits."[19] In other words, legislative action does not escape judicial review simply because the legislature exercised its appropriations power.

The same must be true when the governor exercises the appropriations power granted to him—his line-item veto authority regarding an appropriations bill. The governor may not exercise his budgeting authority in a way that violates the constitution any more so than may the legislature. Suppose a governor exercised his line-item veto power to strike all the appropriations for funding school construction in Alaska villages, and the veto message stated, "I am vetoing these funds because I disapprove of funding schools for Alaska Natives." Surely this Court would have the power and responsibility to review the content of that veto message and to declare the veto unconstitutional as a violation of the guarantee of equal protection, although the same veto might withstand constitutional scrutiny if the governor had written, "In these tough economic times, I am vetoing school construction funds where the cost per student is the greatest." The veto at issue in this case does not violate the guarantee of equal protection, but Section III.B, below, discusses why the line-item veto based explicitly only on disagreement with an opinion by this Court is unconstitutional in violation of separation of powers.

The State may point to this Court's decision in *Knowles*, where this Court adopted a rule allowing only limited judicial review of a veto message.[20] That holding is not

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19 *Id.*

20 *See* 21 P.3d at 376.

applicable here. That case required this Court to determine whether a veto statement was adequate to satisfy the constitutional requirement that the governor state the grounds of his objections. For that specific purpose, this Court adopted the "minimum of coherence" test developed by the Colorado Supreme Court in *Romer v. Colorado General Assembly*, where "courts look to see whether the objection makes comprehensible reference to the provision being vetoed, and do not attempt to evaluate the reasoning underlying the objection."[21]

However, no case from this Court suggests that the "minimum of coherence" test is the *only* test that ever applies to determining whether a veto is constitutional. For instance, this Court did not turn to the "minimum of coherence" test when it held line-item vetoes unconstitutional because the governor struck out portions of a bill that did not fit the definition of "item."[22] This Court held those vetoes invalid because the governor violated separation of powers and attempted to exercise a power not granted to him under the constitution.[23]

This Court has not previously confronted a situation where a governor's veto message was clear (it met the "minimum of coherence" test) and the veto, on its face, was proper in the sense that it reduced the amount of funds appropriated in a line of an appropriations bill, but the veto message was alleged to be unconstitutional in another way. A different test for the constitutionality of the governor's action—not the "minimum of coherence" test—must apply when the Court analyzes whether a veto is unconstitutional

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21 *Id.* at 376 (citing *Romer*, 840 P.2d at 1084-85).

22 *See id.* at 373-75, 381.

23 *See id.*

because it violates another specific provision of the constitution or the constitutional guarantee of separation of powers.

The underlying principle on the limit of a governor's line-item veto power is the well-recognized one applied in other settings: a person with broad discretion to act may exercise that discretion for almost any reason, but may not exercise that discretion in a way that violates the constitution. This principle is illustrated in many types of cases:

- The legislature has broad discretion to set policy through legislation, and this Court does not pass on the wisdom of legislation, but the Court is obligated to strike down legislation when the law is unconstitutional.[24]

- State agencies have broad discretion to adopt regulations, but this Court is obligated to invalidate regulations that violate the constitution.[25]

- The executive branch has broad discretion on whether to initiate a criminal prosecution, but this Court must act to prevent a prosecution when the discretion is exercised unconstitutionally, such as when vindictive prosecution is shown.[26]

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[24] *See, e.g.*, *Bradner v. Hammond*, 553 P.2d 1, 5-7 (Alaska 1976) (invalidating as a violation of separation of powers a law that increased the legislature's power to confirm gubernatorial appointments where the constitution sets the outer limit on the legislature's confirmation authority); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (invalidating as a violation of separation of powers a law that established a legislative veto of administrative regulations).

[25] *See, e.g.*, *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992, 1004-05 (Alaska 2019).

[26] *See, e.g.*, *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974) (due process clause forbids prosecutor from basing charging decisions on vindictiveness for exercise of procedural rights or even the appearance of vindictiveness, "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction"); *Atchak v. State*, 640 P.2d 135, 143-51 (Alaska App. 1981) (adopting

- Prosecutors and defense attorneys alike in criminal trials have broad discretion to exercise peremptory challenges against prospective jurors, but they may not exercise that discretion unconstitutionally to exclude jurors because of their race.[27]

- An employer has broad discretion to terminate the employment of an at-will employee, but may not fire a person for an unconstitutional reason.[28]

In sum, "When an act is committed to executive discretion, the exercise of that discretion *within constitutional bounds* is not subject to control or review by the courts."[29] Conversely, as the sole branch of government with authority to interpret the constitution, courts must act to invalidate executive action when it is not exercised within constitutional bounds.

From this discussion, it should be clear that the standards in *Knowles* for

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and applying U.S. Supreme Court standards for evaluating vindictiveness and appearance of vindictive prosecution); *id.* at 150 ("We recognize that there is a broad ambit to prosecutorial discretion, most of which is not subject to judicial control. But if *Blackledge* teaches any lesson, it is that a prosecutor's discretion to reindict a defendant is constrained by the due process clause[.]" (quoting *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977))).

[27] *See Batson v. Kentucky*, 476 U.S. 79, 84-100 (1986) (prosecutor may not exercise peremptory challenges to exclude potential jurors based on race because that violates the equal protection clause); *Georgia v. McCollum*, 505 U.S. 42, 44-59 (1992) (defendant, through his counsel, also may not exercise peremptory challenges based on race).

[28] *See, e.g., Okpik v. City of Barrow*, 230 P.3d 672, 679 (Alaska 2010) ("At-will employees may be terminated for any reason that does not violate the implied covenant of good faith and fair dealing." (citation omitted)); *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1224 (Alaska 1992) (firing an at-will employee for an unconstitutional reason amounts to unfair dealing).

[29] *Pub. Def. Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975) (emphasis added)).

invalidating a line-item veto do not govern this case. Recall Dunleavy did not seek to invalidate the governor's partial veto of funds appropriated to the appellate courts.[30] Rather, Recall Dunleavy's complaint and summary judgment motion asserted that the governor's veto message constituted an attack on the judiciary and a violation of separation of powers, and, as such it establishes a ground for recall on the basis of lack of fitness, incompetence, and/or neglect of duties. [Exc. 4-6, 43-51] Accordingly, this Court should analyze the content of the governor's statement outside the context of the law governing the sufficiency of a veto message.

As the next section shows, a governor violates separation of powers if he or she uses the veto to threaten judicial independence by making funding decisions expressly based upon the governor's disagreement with a judicial decision.

III. VIOLATION OF SEPARATION OF POWERS IS A VALID GROUND FOR RECALL.

A. The Judiciary Has The Inherent Authority To Adjudicate And Decide What The Law Is.

Before analyzing how the governor's line-item veto of the judiciary's budget violates the separation-of-powers doctrine as alleged in the recall application, it is important to examine the constitutional powers entrusted to the judiciary.[31]

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30 Whether the veto is unconstitutional and should be invalidated is squarely presented as the central issue in another case: *ACLU of Alaska v. Dunleavy*, 3AN-19-08349CI.

31 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007) ("We also examine which branch of government is assigned this power in the constitution. . . . Finally, we must determine whether the limits of any express grant have been exceeded or present an encroachment on another branch.").

The Alaska Constitution vests all judicial power in the courts.[32] This Court has held that "[t]he judiciary alone among the branches of government is charged with interpreting the law."[33] "Early in this country's jurisprudence it was established that we are a government of laws, not of men, and that the task of expounding upon fundamental constitutional law and its application to disputes between various segments of government and society rests with the judicial branch of government."[34] As this Court has recognized in prior separation-of-powers cases, "the essence of judicial power is the final authority to render and enforce a judgment."[35] It is the judiciary that "ensure[s] compliance with the provisions of the Alaska Constitution."[36]

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32 Alaska Const. art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature.").

33 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 43 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

34 *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) (citing *Marbury*, 5 U.S. at 177).

35 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 37 (quoting *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 356 (Alaska 1988)).

36 *Wielechowski v. State*, 403 P.3d 1141, 1142-43 (Alaska 2017) ("This appeal provides another opportunity to remind Alaskans that, of the three branches of our state government, we are entrusted with the 'constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution.' " (quoting *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982))); *see Planned Parenthood of Alaska*, 28 P.3d at 913 ("Under Alaska's constitutional structure of government, 'the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.' " (ellipsis in original)).

Alaska's constitutional convention delegates clearly intended to create an independent and impartial judiciary.[37] To ensure impartiality, the delegates were very concerned that the judiciary have "independence from political pressures."[38] Before Alaska's constitutional convention began, consultants with the Public Administration Service provided twelve papers on a number of relevant subjects to the delegates.[39] When discussing the general framework of state constitutions, the consultants emphasized the importance of an independent judiciary,[40] even labeling "the independence of the judiciary" as one of seven criteria when drafting a state constitution.[41] "Certainly . . . a judge must not be in a position where his decisions can be dictated by either the executive or legislative branches."[42]

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37 *Buckalew v. Holloway*, 604 P.2d 240, 245 (Alaska 1979) ("There is no doubt that judicial independence was a paramount concern of the delegates[.]" (citing 1 PACC 586-602 (Dec. 9, 1955)).

38 *Id.*; *see also Hudson v. Johnstone*, 660 P.2d 1180, 1185 (Alaska 1983) ("That the drafters of Alaska's constitution sought to insulate the judiciary from political pressure that might interfere with its impartiality is clear[.]"); 1 PACC 727-28 (Dec. 12, 1955).

39 *See* ALASKA CONSTITUTIONAL CONVENTION FILES, PUBLIC ADMINISTRATION SERVICE, Folders 180.1-.3, Constitutional Studies, Volumes 1-3, https://akleg.gov/pages/constitutional_convention.php.

40 *See id.*, Folder 180.1, *The State Constitution within the American Political System*, at 25 (Nov. 1955), http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20180.1.pdf ("The [separation of powers] idea had its classic expression in Montesquieu, . . . [who] argued that the key to the maintenance of individual civil liberty lay in so separating . . . [governmental] powers [so] that no one man or group of men could ever hold *all* of them." (emphasis in original)).

41 *Id.* at 47 ("The constitution should guarantee the independence of the judiciary[.]").

42 *Id.* at 46.

B. The Governor's Retributive Veto Offends Separation Of Powers.

This Court has recognized many times that "separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of this state."[43] The separation-of-powers doctrine derives from the constitution's distribution of powers between the three independent branches of government, and "limits the authority of each branch to interfere in the powers that have been delegated to the other branches."[44] Under our constitution, the legislature creates the law, the judiciary interprets the law, and the executive faithfully executes the law.[45] Separation of powers is a constitutional principle, fundamental to the rule of law, that ensures "we are a government of laws, not of men."[46] Separation of powers is a "law," in the broad sense that "the law" encompasses statutes, constitutions, and judicial decisions.[47]

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43 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 34-35 (citing *Planned Parenthood of Alaska*, 28 P.3d at 913); *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) ("The doctrine of separation of powers is implicit in the Alaska Constitution.").

44 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 35.

45 Alaska Const. art. II, §§ 1, 14; art. III, § 16; art. IV, § 1.

46 *Boucher*, 495 P.2d at 79 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

47 When interpreting the third allegation for recall, voters can be expected to rely on the common definitions of "rule of law," as well as their understanding of the basic and foundational principles of America's tripartite form of government. *See, e.g.*, *Rule of Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The supremacy of regular as opposed to arbitrary power . . . . The doctrine that general constitutional principles are the result of judicial decisions determining the rights of private individuals in the courts[.]"); *Rule of Law*, DICTIONARY.COM, www.dictionary.com (last visited Apr. 10, 2020) ("[T]he principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced; the principle of government by law.").

The framers of our constitution deemed this doctrine necessary "for two principal purposes: first, to protect the liberty of the citizen; and second, to safeguard the independence of each branch of the government and protect it from domination and interference by the others."[48] As such, it "preclude[s] the exercise of arbitrary power" in order to "save the people from autocracy."[49] Along with the complementary doctrine of checks and balances, separation of powers is "designed to resolve the problem of efficient government versus tyrannical government."[50]

This Court has not shied away from finding violations of separation of powers.[51] With respect to the judiciary's inherent constitutional powers, this Court has found violations of the separation-of-powers doctrine in numerous instances where the legislature attempted to infringe or limit the courts' inherent powers. For example, this Court held that the legislature could not interfere with the judiciary's constitutional right to promulgate

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48 *Bradner*, 553 P.2d at 6 n.11.

49 *Fairbanks N. Star Borough*, 736 P.2d at 1142 ("[T]he doctrine was adopted 'not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.' " (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

50 *Bradner*, 553 P.2d at 5.

51 *See Fairbanks N. Star Borough*, 736 P.2d at 1142 (holding that a statute that gave the governor broad authority to reduce the amount the state spent on governmental services to less than that appropriated by the legislature was unconstitutional because it gave the governor legislative power); *Bradner*, 553 P.2d at 5 (holding that the legislature impinged on the governor's powers of appointment by attempting to confirm more appointees than those set forth in the constitution because the power of appointment is an executive power, not a power the legislature shares).

rules on how peremptory challenges may be exercised in the courts.[52] Because the judiciary has the inherent power to discipline and disbar members of the Alaska Bar Association, this Court held unconstitutional a statute that "attempted to impose upon this court the mandatory duty of issuing an order in full accordance with the recommendation of the Board [of Governors]."[53] Similarly, because it is "the inherent power of the court to punish for contempt," this Court held that it could not be bound by any statutory enactment that attempted to limit the courts' contempt powers.[54]

And as a final example, this Court narrowly construed the statutes creating the Workers' Compensation Appeals Commission to ensure they would not "encroach on judicial functions."[55] As this Court stated, "the legislature cannot constitutionally require the courts to give precedential value to Appeals Commission decisions"; this Court

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52 *Gieffels v. State*, 552 P.2d 661, 667 n.5 (Alaska 1976) ("Under Alaska's tripartite form of government, the legislature may not impose a rule which would interfere with the proper functioning of the judicial system.").

53 *In re: MacKay*, 416 P.2d 823, 836-37, 839 (Alaska 1964) ("The power of the courts to suspend or disbar has long been recognized in other jurisdictions. It cannot be defeated by the legislative branch of government." (footnote and citations omitted)).

54 *Cont'l Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 409, 411 (Alaska 1976); *see also State v. Williams*, 356 P.3d 804, 810 (Alaska App. 2015) ("[T]he Alaska Supreme Court has squarely held that the contempt power remains inherent in the judicial branch, and that any such legislative enactments are not binding if they impede the courts from the full and proper exercise of the contempt power."). But the separation of powers doctrine also prevents courts from ordering the attorney general to undertake specific prosecutions for contempt, since that is within the province of the executive branch. *See Pub. Def. Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 951 (Alaska 1975).

55 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 43 (Alaska 2007).

emphasized that "precedent 'maintain[s] public faith in the judiciary as a source of impersonal and reasoned judgments.' "[56]

For much the same reasons as this Court has held that legislative efforts to control the courts are invalid as violative of separation of powers, the governor's veto in this case is equally unconstitutional. This Court has recognized that appropriation power—the power to control the purse of the government—is a great power that has to be subject to constitutional constraints and review:

> There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper.[57]

The governor's veto at issue here is an arbitrary, punitive, and disrespectful act that was intended to threaten the future independence of the judiciary and to deter it from rendering politically unpopular decisions.[58] The governor's refusal to acknowledge and

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[56] *Id.* at 43-44 (alteration in original) (quoting *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1175-76 n.4 (Alaska 1993)). This Court has also had the opportunity to confirm that certain judicial actions did not infringe on legislative power. *See, e.g.*, *Hornaday v. Rowland*, 674 P.2d 1333, 1339-41 (Alaska 1983) ("We thus hold that a permanent intra-district transfer of a district court judge by a judicial officer does not contravene the principle of separation of powers."); *State v. Williams*, 681 P.2d 313, 318-19 (Alaska 1984) ("[W]e hold that Rule 45 is a constitutional exercise of this court's rule-making authority.").

[57] *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 914 (Alaska 2001) (quoting *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798 (Cal. 1981)).

[58] Any veto in retribution for another branch of government exercising its constitutional duties violates separation of powers. Here, this Court does not need to guess as to the governor's motivations, because his statement of objections makes his intent clear. Further, this Court must assume as true every fact alleged in the application, including that

respect the legitimacy of this Court's decision is inconsistent with his constitutional duties to faithfully execute the laws. As this Court has stated, "Any attempt to undermine independent judicial review . . . cannot be constitutional."[59]

Other courts have addressed judicial independence in the context of judicial salaries and resources. As the Indiana Supreme Court noted, "The courts frequently have to rule upon the acts or refusal to act of those controlling the purse strings in rendering justice. Threats of retaliation or fears of strangulation should not hang over such judicial functions."[60] The Colorado Supreme Court tied this concern over interference in judicial funding to the "bone and sinew" of our constitutional system of government, the doctrines of separation of powers and the rule of law: "It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will."[61]

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the governor used the line-item veto to attack the judiciary. *See Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 300-01 n.18 (Alaska 1984).

59 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 43.

60 *Carlson v. State ex rel. Stodola*, 220 N.E.2d 532, 556 (Ind. 1966) ("It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments."); *see also In re: Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110, 1112 (N.Y. App. Div. 2007) ("A real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions.").

61 *Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963); *see also id.* ("Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice. These principles, concepts, and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national policy.").

The judicial funding veto validly subjects the governor to recall. Governor Dunleavy, in his own words, did not veto $334,700 from the appellate courts' budget for any legitimate reasons but only for the illegitimate reason of penalizing the Supreme Court for a decision the governor does not like.[62] The review for legal sufficiency ensures that a recall application does not allege as grounds acts that are within "the discretion granted to [the official] by law."[63] Neither the constitution nor any other law gives the governor the discretion to threaten the judiciary. While a veto may be a discretionary act, the governor can be subject to recall because his "discretion was exercised in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons."[64]

It is an abuse of power for the governor to use the budgeting process as leverage to bully the courts to rule in a way he approves, and to pressure the judiciary to refrain from exercising independence in fulfilling its constitutional role as a check on the powers of the

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62 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS, at 122 (June 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/FY20Enacted_cr_detail_6-28-19.pdf ("The Legislative and Executive Branch are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction.").

63 *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995). To illustrate, a lieutenant governor does not violate the law by not knowing the elections code, but no law gives him the discretion to be ignorant of it when he is in charge of elections. *Coghill v. Rollins*, 4FA-92-01728CI, Memorandum Decision (Alaska Super. Sept. 14, 1993) at Exc. 124-25 (holding that an allegation that official in charge of elections did not know election laws was legally sufficient).

64 *Cole v. Webster*, 692 P.2d 799, 802 (Wash. 1984) ("We are unable to find any facts in the recall petition which might suggest that the school board exercised its discretion in a manner which was arbitrary, unreasonable or untenable."); *see also CAPS v. Bd. Members*, 832 P.2d 790, 791 (N.M. 1992) (holding that malfeasance ground for recall can include discretionary acts if "done with an improper or corrupt motive").

legislative and executive branches. The governor's disrespect for the rule of law, the role of the judiciary, and the limits on the power of the executive states a valid claim that the governor lacks fitness for his office. It shows neglect of his duty to faithfully execute the laws, as interpreted by this Court. The governor's veto message also demonstrates incompetence and neglect of duties because it offers a patently mistaken interpretation of the *Planned Parenthood* decision. [Ae. Br. 43-44] To exercise the executive's broad line-item veto authority consistent with the law, the governor must take sufficient care to understand what he is doing, so he does not let a political consideration override his duty to abide by the Alaska Constitution.

CONCLUSION

The third allegation in the recall application states legally sufficient grounds for recall and should be certified.

DATED this 13 day of April 2020, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify, pursuant to App. R. 513.5, that this Supplemental Brief of Appellee was prepared in 13 point proportionally spaced Times New Roman typeface.

Further, I hereby certify that on this 13th day of April 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

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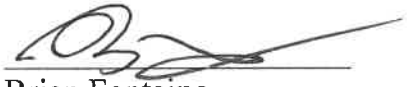

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