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 REPLY BRIEF OF APPELLEE

INTRODUCTION

Preventing one branch of government from overreaching into the powers of another is the purpose and function of the doctrine of separation of powers.[1] The third ground for recall alleges that "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law."[2] [Exc. 1, 303] His administration now argues that neither the courts *nor the people* can do anything about it—

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1 *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976) (noting that separation of powers is "designed to resolve the problem of efficient government versus tyrannical government").

2 The voters can certainly understand that "rule of law" means that nobody, including the governor, is above the law. *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. 17, 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.").

that his veto power is absolute and can be used for any reason he desires. This argument is legally untenable and, if accepted, would drastically re-order the powers allocated by the constitution among the three branches of government and the citizens of Alaska. For the reasons discussed below in response to the questions posed by the Court, the third allegation in the recall application states legally sufficient grounds for recall and should be certified.

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

The parties agree that the provisions in the Alaska Constitution authorizing the governor to use a line-item veto on appropriations bills and requiring the governor to provide a statement of objections explaining any vetoed item are standard formulations in state constitutions. [At. Supp. Br. 5-6; Ae. Supp. Br. 2-3]

The parties' research also is significant for what it did not find. Nothing in the history of the drafting of the Alaska Constitution suggests that the framers intended to grant the governor complete immunity to violate any constitutional provision through the use of the line-item veto and veto message, subject only to the legislature's ability to override a veto. Such a position would be fundamentally inconsistent with the constitution's recognition of the power of the courts to check and balance the actions of the other branches of government when either acts in a way that violates the constitution.

Further, nothing suggests that a governor's veto message may not form part of a basis for recalling a governor. The Division's brief quotes a significant passage from

Arnett v. Meredith,[3] one of the cases relied on in *Alaska Legislative Council v. Knowles*.[4] [At. Supp. Br. 6] In the words of the Kentucky court, the veto message forces the governor to reveal his reasoning so that "[t]he public," as well as the legislature, can know the governor's motivations and thus "may exercise their rights and powers as voters . . . to overcome such objections in the future."[5] One way the people may exercise their rights as voters is in a recall election, if a veto message reveals motivations that establish unfitness for office, incompetence, neglect of duties, or corruption.[6]

II. THE GOVERNOR MAY NOT USE LINE-ITEM VETO AUTHORITY TO VIOLATE THE CONSTITUTION.

The Division contends that the content of a governor's veto message is essentially unreviewable by the courts. [At. Supp. Br. 7-9] The Division acknowledges the judiciary's right to review vetoes and veto messages for only two reasons: (1) to determine whether the line-item veto was exercised in accordance with article II, section 15 (meaning the governor used the line-item veto only to veto "an item" in an "appropriations bill"); and (2) to determine whether the veto message met the "minimum of coherence" standard. [*Id.*]

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3 121 S.W.2d 36 (Ky. 1938).

4 21 P.3d 367, 375-76 & nn.57-58 (Alaska 2001).

5 *Arnett*, 121 S.W.2d at 40.

6 The Division cites no law to support its position that a veto message can never constitute a ground for recall. [At. Supp. Br. 14] Suppose Lieutenant Governor Coghill had been governor and used his line-item veto to reduce the budget for the Division of Elections, with a veto message that stated, "I haven't read the elections law; that's why I am vetoing this money." If the admission of ignorance, standing alone, can be a ground for recall [At. Br. 38], no logical reason exists why a ground for recall cannot be established by that same statement made in the context of a veto message.

Neither precedent nor principle supports this narrow view. As Recall Dunleavy discussed in its opening brief, officials with broad discretion to act may exercise their discretion for almost any reason—including foolish reasons—but they may not exercise their discretion in a way that violates the constitution. [Ae. Supp. Br. 9-10]

The Division suggests that evaluating the governor's reasons for a veto would "stray into political questions" that courts "are required to eschew." [At. Supp. Br. 8] This is incorrect. Debating the wisdom of a veto and veto message would be a political question. Determining the constitutionality of a veto and veto message is a legal question that courts are both competent and obligated to decide.[7]

Recall Dunleavy previously offered one illustration of a veto and veto message that would violate the guarantee of equal protection and should not evade judicial review simply because the unconstitutional discrimination was implemented through a veto and veto message. [Ae. Supp. Br. 7] Other examples make the same point:

Suppose the legislature appropriated funds to the court system to pay the state's required annual contribution to the judicial retirement fund,[8] and the governor used a line-

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[7] *See Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396-402 (Alaska 1997) (deciding the constitutionality, not the wisdom, of legislative funding decisions); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 339 (Alaska 1987) (noting that, even though the legislature has the right to adopt and enforce its own rules, the Court would be required to review and invalidate rules if they "ignored constitutional restraints or violated fundamental rights"); *Malone v. Meekins*, 650 P.2d 351, 356-57 (Alaska 1982) (concluding that, under the political question doctrine, the Court would not review whether the House followed its own rules, while reiterating that "the judicial branch of government has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution").

[8] *See* AS 22.25.046.

item veto to strike that funding, with a message that said, "I disagree with some of the courts' recent decisions and I am therefore vetoing funds to pay for judicial retirement."

Suppose the governor vetoed $334,700 from the budget the legislature approved for the Department of Health and Social Services, with a message stating, "Although the Supreme Court has required the state to provide medically necessary abortions for Medicaid patients, I disapprove of all abortions and I am therefore vetoing the Medicaid funds necessary to provide these medically necessary abortions."

Suppose the legislature appropriated a small amount of funds to each public radio station in the state, and the governor used a line-item veto to strike the funds for station KXYZ with a message stating, "I intend to penalize this station for its willingness to disapprove of my policies."

In each example, the governor's veto and veto message either violated separation of powers by willfully refusing to execute the law as declared by a specific statute or the courts, or violated a provision of the Alaska Constitution, such as article I, section 5. To adopt the Division's position that vetoes and veto messages are unreviewable would insulate unconstitutional conduct from scrutiny by the courts, fundamentally altering the checks and balances built into the Alaska Constitution.[9]

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[9] A statement of objections must accompany any veto. Alaska Const. art. II, § 15. Thus, a veto includes the message. Because words are coupled with action, the veto message in this case was not some idle threat to take punitive action in the future. And this Court must assume as true every fact alleged in the recall application, including that 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).

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

The Division takes issue with whether the constitutional principle of separation of powers is a law the governor could violate. [At. Supp. Br. 2 ("But the 'separation of powers' is not a law that can be violated . . . .")] However, the common definition of "law" includes constitutional principles such as separation of powers—and actions by the governor certainly could violate this law.[10]

The Division argues that separation of powers can be violated only if one branch of government actually exercises the power of another branch. [At. Supp. Br. 2-3, 16-18] To decide if there has been a violation, the Division argues that this Court applies a four-factor test outlined in *Alaska Public Research Interest Group v. State*. [At. Supp. Br. 16] This Court did not call its analysis in that case "a test" and has not since applied it as a test.[11] The very narrow view of separation of powers advocated by the Division would

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[10] *See Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]he legal system . . . . The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them[.]").

[11] *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007). No case after 2007 applies this "test," and at least two recent separation of powers cases do not mention it. *Jones v. State, Dep't of Revenue*, 441 P.3d 966, 981 (Alaska 2019); *State v. Heisey*, 271 P.3d 1082, 1089 (Alaska 2012). The Court in *Alaska Public Interest Research Group* derived the four components of the "test" from *Bradner v. Hammond*. *See* 553 P.2d 1, 6-8 (Alaska 1976). Post-*Bradner* cases also analyze separation of powers in the context of each case, and do not cite *Bradner* for the rigid four-part test advocated by the Division. *See, e.g., Smith v. State, Dep't of Corr.*, 872 P.2d 1218, 1227-28 (Alaska 1994); *State v. Dupere*, 709 P.2d 493, 496-97 (Alaska 1985); *Thomas v. Rosen*, 569 P.2d 793, 796-97 (Alaska 1977).

authorize threats, intimidation, and retaliation by one branch against another, and is not supported by this Court's precedent or the very purposes of separation of powers.

While the sort of retaliation at issue here is thankfully unusual given the respect each branch normally accords the others, this Court has not immunized or protected such behavior. With the goal of "safeguard[ing] the independence of each branch," and "protect[ing each] from domination and interference" from the other branches, this Court has made clear that separation of powers also means that one branch cannot interfere with how another branch exercises its core powers.[12] For example, this Court held that the legislature could not require it to defer to the Bar Board of Governors when exercising its power to discipline attorneys.[13] Similarly, the Court held that the legislature could not require it to abide by the legislature's idea of the maximum appropriate fine for contempt.[14] In neither case was the legislature attempting to exercise the power of the judiciary; instead, its actions attempted to constrain the Court's exercise of its own discretion and judgment in areas constitutionally committed to the judiciary. Here, the governor may not be exercising judicial power himself, but he is certainly trying to

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12 *Bradner*, 553 P.2d at 6 n.11. As the Washington Supreme Court phrases it, "To determine whether a particular action violates separation of powers, we look 'not [to] whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.' " *Brown v. Owen*, 206 P.3d 310, 316-17 (Wash. 2009) (alteration in original) (quoting *Carrick v. Locke*, 882 P.2d 173, 177 (Wash. 1994)).

13 *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)).

14 *Cont'l Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 409-11 (Alaska 1976).

undermine the authority of this Court and influence the way Alaska's courts decide future abortion cases.

Similarly, the Division also incorrectly states that "Separation of powers cannot be violated when one branch of government exercises a power that the Constitution expressly grants to that branch." [At. Supp. Br. 2] If such were the case, the legislature, which has the core function of legislating, could never violate separation of powers by passing statutes that infringe on the powers of the executive or judiciary. And the courts could never violate separation of powers by deciding cases that involve political questions the judiciary should not decide.

Although the Division argues the governor's veto power is absolute, in the next breath it concedes that a governor could violate separation of powers by underfunding the courts to such a degree that they could not function. [At. Supp. Br. 3, 9] This concession is logically inconsistent with the Division's position that there are no constitutional limits to the governor's veto power. There is no logical or principled distinction between interfering with the court's core functions by underfunding it and reducing its funding as a penalty for rendering decisions the governor dislikes; indeed, a punitive veto that attempts to coerce and control the court may be a greater threat to the independence of the judiciary.

The Division's supplemental brief is most noticeable for what it does not address. The Division analyzes separation of powers in a vacuum, considering only the governor's veto power without any mention of the reason for that veto or the possible impact of the veto on the judiciary. Referring to "the rule of law" as a "nebulous" concept [At. Supp. Br. 3, 18], the Division fails to acknowledge 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."[15] Stopping its analysis with the express grant of constitutional power to the governor to veto appropriations, the Division fails to consider "whether the limits of any express grant have been exceeded *or present an encroachment* on another branch."[16]

In addition to side-stepping the separation of powers analysis requested by this Court, the Division spends a significant portion of its brief re-arguing the factual particularity of the third allegation, although this briefing was not requested by this Court. Unlike the legal sufficiency issue, which the Court asked the parties to address,[17] factual particularity was well-briefed by both parties in the main appellate briefs; Recall Dunleavy relies on its prior briefing and does not respond again to the Division's arguments. [Ae. Br. 12-16, 41-43]

This Court was exercising its constitutional duty in deciding the *Planned Parenthood* case, holding that the constitution requires the state to fund medically necessary abortions.[18] By disrespecting the independence of the courts—a fundamental pillar of our

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15 *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

16 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007) (emphasis added) (citing *Bradner*, 553 P.2d at 7-8).

17 The legal sufficiency issue was not addressed by the parties because the Division challenged only the factual particularity of this ground, and did not contend that the ground 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]

18 *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1001-05 (Alaska 2019).

democracy—the governor acted arbitrarily and outside the law in improperly exercising his veto power.[19] He is subject to recall by the people for this act because neither the constitution nor any other law gives the governor the discretion to penalize or threaten the judiciary for fulfilling its constitutional adjudicatory obligations.

CONCLUSION

The governor does not have unfettered discretion in wielding his veto. The constitution provides side-boards to the governor's veto power, as it does to all governmental action. The allegation that the governor violated separation of powers by using his veto power to attack the judiciary states legally valid grounds for recall.

DATED this 20th day of April 2020, at Anchorage, Alaska.

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[19] The Division takes issue with the term "improper." [At. Supp. Br. 13-15] In the context of the third allegation, which asserts a violation of separation of powers and rule of law, the term obviously means "unconstitutional." Contrary to the arguments of the Division, the third allegation alleges acts outside the governor's lawful discretion and does not allege a mere policy disagreement.

CERTIFICATE OF SERVICE AND TYPEFACE

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

Further, I hereby certify that on this 20th 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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