IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Division of Elections and Director Gail Fenumiai,	)	
Appellants,	)	
v.	)	
Recall Dunleavy,	)	Supreme Court No. **S-17706**
Appellee.	)	

Trial Court Case No. **3AN-19-10903 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC AARSETH, JUDGE

SUPPLEMENTAL REPLY BRIEF OF APPELLANTS STATE OF ALASKA, DIVISION OF ELECTIONS AND DIRECTOR GAIL FENUMIAI

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CONSTITUTIONAL PROVISIONS

Alaska Const. art. II, § 16. Action Upon Veto

Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses. *[Amended 1976]*

Alaska Const. art. IV, § 5. Nomination and Appointment

The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

Alaska Const. art. IV, § 8. Judicial Council

The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

Alaska Const. art. IV, § 13. Compensation

Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.

Alaska Const. art. IV, § 15. Rule-Making Power

The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Alaska Const. art. IV, § 16. Court Administration

The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

ALASKA STATUTES

§ 15.45.510. Grounds for recall

The grounds for recall are (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption.

INTRODUCTION

In order for this Court to hold that the third paragraph of the committee's statement merits a recall, the Court would have to trample on three distinct areas of established Alaska law. First, the Court would have to ignore its precedents defining the legal test for the constitutionality of a governor's veto message. Second, the Court would have to ignore its precedents for identifying violations of the separation of powers. Third, the Court can only reach the question of whether the committee's subsequent explanation of the third paragraph—which was given only in this litigation—is legally sufficient to constitute any of the statutory grounds for recall, by ignoring the plain language of the recall statutes and all prior Alaska cases interpreting the state's recall law. The committee's statement of grounds—alleging that the governor "violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law" [Exc. 1]—makes no mention of the governor's veto objection and is so lacking in factual particularity that it is impossible to analyze its legal sufficiency.

The governor's statement of objections supporting his veto of court system funding was coherent and comprehensible. The Constitution places no restriction on the reasons the governor might rely upon for an objection. The governor's use of the line item veto to reduce court system funding was an exercise of purely executive power. No encroachment on judicial power occurred. "Attacking the judiciary" and "attacking the rule of law," are merely declamatory phrases that lack substantive meaning. The Court should reject the committee's third statement along with the rest of its petition.

ARGUMENT

I. This Court has already established the rules for determining whether a line-item veto is constitutional; the governor's veto complied with those rules.

The committee recognizes this Court has ruled that only limited judicial review of a veto message is constitutionally appropriate and that such messages need only meet the "minimum of coherence" test. [Ae. Supp. Br. 8[1]] Doubtless recognizing that the governor's veto message satisfies that test, the committee makes no attempt to claim that it lacks a "minimum of coherence." Instead, the committee argues that the test is "not applicable here," [Ae. Supp. Br. 7-8] and urges that a "different test … must apply when the Court analyzes a veto against the constitutional guarantee of separation of powers." [Ae. Supp. Br. 8-9] But no legal authority supports this argument.

The committee points to *State, DHSS v. Planned Parenthood*, where this Court invalidated a regulation limiting funding for abortion.[2] In that case, the State argued that by requiring payment for abortions, the superior court had effected an appropriation of funds in violation of the separation of powers.[3] The Court rejected that argument, holding that "the mere fact that the legislature's appropriations power underlies Medicaid funding cannot insulate the program from constitutional review."[4]

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1 *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 376 (Alaska 2001).

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

3 *Id.* at 913.

4 *Id.* at 914.

Planned Parenthood stands only for the unremarkable proposition that sometimes the Court's interpretation of the constitution will require the State to spend money. By its ruling the Court did not directly intrude into the legislative power of appropriation; the Legislature must still appropriate money in order for the State to comply with the Court's order. The Court in *Planned Parenthood* did not invalidate a legislative appropriation or a lack of appropriation; instead, it invalidated a regulation that established rules for reimbursement out of legislatively appropriated funds.[5] The Court's ruling thus remained squarely within the realm of judicial power to interpret the Constitution.

The committee's hypothetical regarding vetoed school construction funds[6] does not present a prima facie denial of equal protection let alone suggest a basis for having the Court overturn a veto objection. The committee's hypothetical veto would only result in a violation of equal protection if it created unequal construction funding for schools serving different racial populations. Equal protection is not violated unless government treats similarly situated persons disparately.[7] In such a case it would not be the veto that was unconstitutional, but rather the resultant unequal funding of school construction based upon the suspect classification of race. Just as in *Planned Parenthood*, if the Court struck down such racially unequal funding the Court would not thereby also be finding

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5 *Id.* at 913 ("We conclude that 7 AAC 43.140 violates equal protection under the Alaska Constitution.").

6 Ae. Supp. Br. 7.

7 *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005) ("Absent disparate treatment of similarly situated persons, the law as applied to the aggrieved group does not violate the group's right to equal protection.").

that the governor's veto or his veto message were improperly used or expressed.[8] Moreover, even assuming that the committee's incomplete hypothetical stated an equal protection violation—which it does not—the judicial remedy for such a violation would be a court order requiring the equalization of funding, not an order overriding the governor's veto or rejecting his veto message. The constitutional power to override the governor's veto based upon disapproval of the reasons for it—no matter how offensive those reasons might be—belongs solely to the Legislature.[9] And, it is axiomatic that voters are the ultimate check on elected officials when they vote in scheduled elections.

Oddly, the committee's hypothetical contemplates that a different message accompanying the same veto of Native village school construction funds—one based upon fiscal constraints—would be constitutional. Inexplicably the committee reaches this conclusion without even contemplating whether the veto would result in unequal funding based upon the suspect classification of race.[10] Neither Alaska's equal protection clause nor any other part of the Alaska Constitution prohibits elected officials from expressing distasteful views, much less gives this Court the authority to invalidate political policy decisions because it disapproves of the reasons for those decisions. Indeed, this is exactly

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8 If the committee's hypothetical veto resulted in a situation wherein the construction of village schools was funded equal to the construction of schools in other areas of the state, then regardless of the distasteful nature of the stated veto objection there would be no foundation for equal protection analysis. *See ACLU*, 122 P.3d at 787.

9 *See* Alaska Const. art. II, § 16.

10 The foundation of an equal protection violation is unequal treatment of similarly situated people. *See Planned Parenthood of the Great NW v. State*, 375 P.3d 1122, 1135 and n. 68 (Alaska 2016). Absent unequal treatment there can be no equal protection violation. *ACLU*, 122 P.3d at 787.

the insight underlying this Court's adoption of the "minimum of coherence" test for a governor's veto message—veto disputes "are inherently political because they implicate the appropriations and budgetary powers of the legislature and the executive, and the political relationship between those branches of government."[11]

The committee notes that this Court has never said the "minimum of coherence" test is the only test for determining whether a veto is constitutional. [Ae. Supp. Br. 8] But this Court *has* established very limited review of the sufficiency of a veto message and has never applied a different test. That this Court has held line-item vetoes to be ineffective when applied to (1) intent language that was not an "item in [an] appropriation bill," or (2) things that were not an "appropriation," does not render the "minimum of coherence" test inapplicable for evaluating the veto message here. This Court has established a rule for evaluating the content of veto objections—it asks only whether the objections are minimally coherent and does "not attempt to evaluate the reasoning underlying the objection"[12]—and the committee cannot argue that the rule doesn't apply here just because it doesn't like the result. As the Colorado Supreme Court observed, having a court review a governor's reasons for exercising a veto in order to determine if they are "sufficient," would establish a subjective standard that invites limitless judicial mischief.[13] The Court should be careful not to stray across the separation of powers.

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11 *Knowles*, 21 P.3d at 377.

12 *Id.* at 376.

13 *Romer v. Colorado General Assembly*, 840 P.2d 1081, 1085 (Colo. 1992) ("To disallow a veto because the Governor's reasons are not 'sufficient' establishes a

The only sound argument for why this Court should not apply the "minimum of coherence" test in this case, is the Division's argument that there is no reason to consider the veto message because the committee's statement of grounds says nothing about the governor's objections.[14]

II. Violation of the separation of powers alone is not a valid ground for recall.

The committee asserts without elaboration, that "violation of the separation of powers is a valid ground for recall." [Ae. Supp. Br. 11] But the grounds for recall are "(1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption."[15] Contrary to the committee's view, there is no link between a violation of separation of powers and any of these grounds.

An elected official who takes an action later found by a court to violate the separation of powers has not thereby demonstrated lack of fitness, incompetence, neglect, or corruption. For example, would all the legislators who voted for SB 98 in 1975—which this Court found to violate the separation of powers by seeking to give the legislature some of the executive branch's power over appointments[16]—have been subject to recall for violating the separation of powers? The failure to anticipate a court's determination of a question of first impression, or more specifically here, to anticipate

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subjective standard that invites limitless mischief.") (quoting *Jones v. Rockefeller*, 303 S.E.2d 668, 683 (W. Va. 1983)).

14 *See* discussion *infra.* Section IV.

15 AS 15.45.510.

16 *Bradner v. Hammond*, 553 P.22d 1, 7-8 (Alaska 1976).

that the court will depart from existing precedents to find a violation of separation of powers does not establish any of the grounds for recall.

III. The governor's veto does not violate the separation of powers.

Although the committee's statement of grounds alleges that the governor violated the separation of powers, its briefing ignores this Court's test for evaluating separation of powers. Doubtless this is because under that test the governor's veto of court system funding does not violate separation of powers.[17] This should be the end of the matter.

But rather than apply the appropriate legal test, the committee instead notes that this Court has on several occasions invalidated attempts by the legislature to exercise control over matters traditionally understood to be within the judicial sphere, such as court procedures,[18] bar discipline,[19] and punishment for contempt.[20] [Ae. Supp. Br. 16] The committee then argues that because legislative efforts to control the courts violate separation of powers, the governor's veto is "equally unconstitutional." [Ae. Supp. Br. 17] But the reason this Court struck down these various statutes was because each involved an attempt by the legislature to direct the court as to how it should manage operations in the judicial arena. The governor's veto, by contrast, was an exercise of executive power. The Constitution expressly grants the line item veto power to the

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17 *See* State's Supp. Br. 15-18.

18 *Gieffels v. State*, 552 P.2d 661 (Alaska 1976) (procedures for preempting judges).

19 *In re: MacKay*, 416 P.2d 823 (Alaska 1964) (Supreme Court's authority to discipline attorneys).

20 *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 548 P.2d 398 (Alaska 1976).

executive; the veto was not an exercise of judicial power. Thus, even under the cases the committee cites, the governor's veto did not violate separation of powers.

Alternatively, the committee points out that the State may not use the power of appropriation "to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights."[21] [Ae. Supp. Br. 17] But this is only half an argument, because the governor's veto does not violate anyone's constitutional rights, and it is thus irrelevant to this case. The committee argues that the governor's veto "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." [Ae. Supp. Br. 17] But none of these adjectives—arbitrary, punitive, disrespectful—are part of any legal test for violation of separation of powers; nor are they part of the statutory grounds for recall. They are also absent from the committee's statement of grounds.

The committee is correct that Alaska's constitutional delegates took seriously the job of ensuring an independent and impartial judiciary. [Ae. Supp. Br. 13] As a result, Alaska's constitution provides for the merit selection of judges;[22] it gives the Supreme Court power to "make and promulgate rules governing the administration of all courts;"[23] it makes the chief justice the administrative head of all courts;[24] and it protects judicial

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21 *Planned Parenthood*, 28 P.3d at 914.

22 Alaska Const. art. IV, §§ 5, 8.

23 Alaska Const. art. IV, § 15 (subject only to change by a two-thirds vote of the legislature).

24 Alaska Const. art. IV, § 16.

salaries from diminishment.[25] Notably, however, it does not insulate the court's budget from the governor's line item veto.[26] The governor did not violate any section of Article IV of the Alaska Constitution protecting judicial independence. The judiciary's independent power can certainly withstand a tiny budget reduction and a critical veto message. The governor's veto did not cut the court system's budget so that the courts cannot perform their constitutional functions. And contrary to the committee's claim, he has not defied the Court or refused to comply with its ruling in *Planned Parenthood.*[27] Funding for abortions flowed un-vetoed to DHSS in 2019.

Even if the substance of the governor's veto message were properly part of this case, which it is not, the committee can point to nothing to support its claims that the governor violated separation of powers. Ironically the committee quotes this Court for the proposition that "precedent 'maintain[s] public faith in the judiciary as a source of impersonal and reasoned judgments,'" [Ae. Supp. 17] while urging this Court to abandon its precedents—with respect to recall, veto objections and separation of powers—so as to resuscitate an allegation in the recall petition that is factually and legally insufficient. This Court should not accept the committee's invitation.

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25 Alaska Const. art. IV, § 13.

26 *Cf. Nineteenth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 618 (Minn. 2017) ("Had the framers of the Minnesota Constitution and the people of Minnesota wished to exclude any branch, officer, or agency from the scope of the Governor's veto power, they could have done so. They did not.").

27 *State v. Planned Parenthood of the Great Northwest,* 436 P.3d 984 (Alaska 2019).

IV. This Court may not consider the substance of the governor's veto message because it is not part of the statement of grounds.

In its attempt to persuade this court to ignore well-established precedents regarding gubernatorial veto messages and separation of powers, the committee makes a key admission; one that establishes that this Court should not be applying either of these legal standards because they are not relevant to the issues at the heart of this case. The committee admits it only first mentioned the idea that the governor's veto message violates separation of powers and thus constitutes a ground for recall, in their pleadings in this litigation. [Ae. Supp. 11] But this case turns on what the committee said in its statement of grounds, not what it argued in its pleadings. No amount of elaboration in this lawsuit can remedy the inadequacy of what the statement of grounds actually says.

Although the committee wants the Court to analyze the governor's veto objection outside the law governing the sufficiency of a veto message [Ae. Br. 11], this case is not about the governor's statement, it is about the committee's statement, and that statement makes no reference to the governor's veto message. This Court should not strain to reach a question that is not properly before it, especially one in which it has such a direct interest. Although the committee purports to be acting in defense of the judiciary, this Court cannot protect its independence and impartiality by ignoring statute and precedent and intruding on separation of powers.

CONCLUSION

For these reasons, and those previously stated, the Court should reverse the superior court and affirm the division's decision to reject the committee's application.

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CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on this date, true and correct copies of the **Supplemental Reply Brief of Appellants State of Alaska, Division of Elections and Director Gail Fenumiai** and this **Certificate of Service** were served via email on the following:

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