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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Plaintiff, v. HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, Defendant.	Case No. 1JU-20-00938 CI

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case presents a question of first impression in Alaska: does the direction of article III, Sections 25 and 26 of the Alaska Constitution that certain executive branch appointments are "subject to confirmation by a majority of the members of the legislature in joint session" allow the legislature also to passively decline appointments without ever convening in joint session or voting on whether to confirm appointees? Ignoring controlling Alaska Supreme Court precedent holding that Sections 25 and 26 "delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate officers," the Legislative

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Council (the Council) claims that the legislature has granted itself sweeping statutory authority to categorically reject an entire slate of executive branch appointments by simply not meeting in joint session—and thus failing even to consider them. This position is contrary to the plain language of the Alaska Constitution, the separation of powers framework in the Constitution, and controlling precedent. It also conflicts with the constitutional delegates' interest in providing for a strong executive and impermissibly permits the legislative branch to encroach upon and impede executive branch operations and policy-making—to Alaskans' detriment.

The Council has nonetheless sued the governor, asking this Court for a preliminary injunction prohibiting the governor from continuing *gubernatorial* appointments that the legislature has not yet voted on, and prohibiting these Alaskans from carrying out the work of the executive branch in the midst of a profound global pandemic. But the Council has not presented facts demonstrating that it has or will suffer any immediate harm that would support the granting of a preliminary injunction. On the contrary, the Council seeks the opposite of what a preliminary injunction is designed to accomplish: it wants an order that would upset, not preserve, the status quo and would arbitrarily hinder the effective administration of state government.

Because the Alaska Constitution does not allow the legislature to decline executive branch appointments without meeting in joint session and voting to confirm or decline those appointments, the governor has filed counterclaims asking this Court to issue a declaratory judgment that AS 39.05.080(3) and ch. 9, SLA 2020 § 1(b) are unconstitutional. The governor requests summary judgment on those counterclaims.

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II. FACTS AND LEGAL BACKGROUND

The Alaska Constitution centralizes the responsibility for carrying out critical state government functions in the executive branch with the governor and his or her appointed department heads and board and commission members. As the Alaska Supreme Court acknowledged, "[t]here is no dispute that our constitution was designed with a strong executive in mind."[1] The delegates' decision to provide for strong executive authority was born in part from the concern that the territorial government was too weak to effectively govern, and that the territorial legislature had contributed to that weakness by moving executive powers from the governor to a variety of independent boards and commissions.[2] Thus, the various sections of Article III work together to establish centralized authority and responsibility for administering state government.

For example, Article III, sec. 1 provides that "[t]he executive power of the State is vested in the governor." And Article III, sec. 16 makes the governor responsible for carrying out and enforcing the Constitution and state laws. Given the enormity of these responsibilities, "the governor is necessarily clothed with the power to appoint subordinate executive officers to aid him in carrying out the laws of Alaska."[3] Indeed, Article III, sec. 24 provides that "[e]ach principal department shall be under the supervision of the governor." Moreover, unlike many states where certain state

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1 *Bradner v. Hammond*, 553 P.2d 1, 8 n.3 (Alaska 1976).

2 Gerald A. McBeath, *The Alaska State Constitution* 99, 113 (2011).

3 *Bradner*, 553 P.2d at 6.

department heads such as the Attorney General are elected,[4] Alaska's Constitution in Article III, sec. 25 provides that department heads "shall be appointed by the governor" and "shall serve at the pleasure of the governor." Likewise, Article III, sec. 26 provides that board and commission members who serve on regulatory or quasi-judicial agencies "shall be appointed by the governor," although the legislature may provide by law for removal procedures. Under both sections 25 and 26, the governor's executive appointments are "subject to confirmation by a majority of the members of the legislature in joint session."

Finding qualified Alaskans who are willing and able to serve on the many boards and commissions in state government is neither easy nor straightforward. [Enright Aff. at ¶ 4] Although a handful of these positions are salaried and appointments are effectively to full-time employment, most boards and commissions are staffed by volunteers. The statutes governing many boards and commissions require that members have specific qualifications and, sometimes, be appointed from different areas of the

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[4] The attorney general is elected in forty-three states. *See* https://www.naag.org/news-resources/research-data/attorney-general-office-characteristics/

state.[5] While these statutory qualifications can help provide valuable subject matter or professional expertise on Alaska's boards and commissions, they complicate the process of identifying and recruiting eligible Alaskans to serve in these positions. It typically takes from two weeks to three months to fill positions. [Enright Aff. at ¶ 4] It would not be possible to immediately replace over ninety board members. [Enright Aff. at ¶ 8]

During the 2020 legislative session, the governor submitted to the legislature his appointments to over ninety executive branch positions including the commissioner of the Department of Revenue and appointments to more than forty important state boards and commissions ranging from the Regulatory Commission of Alaska ("RCA") to the Alaska State Medical Board.[6] During that same 2020 session, the legislature held hearings and passed over thirty bills before adjourning[7]—but it never met "in joint session" to consider the governor's appointments. Instead, the legislature sought to extend the time period to exercise its confirmation responsibilities by passing ch. 9, SLA 2020 ("HB 309"). Section 1(b) of that bill purported to grant the Legislature the

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5 *See e.g.*, AS 08.08.050(a) (Alaska Bar Association Board of Governors, requiring geographical diversity); AS 08.64.010 (State Medical Board, requiring geographical diversity); *see also, e.g.*, AS 08.48.020(b) and (c) (State Board of Registration for Architects, Engineers, and Land Surveyors; 11 member board from multiple professions); AS 08.65.010(b) (Board of Certified Direct-Entry Midwives; 5 members, including two direct-entry midwives, one physician with training in obstetrics, one certified nurse midwife, and one public member); AS 08.68.010 (Board of Nursing; seven members, including five nurses, with four different kinds of qualifications and two members with no financial interest in the health care industry).

6 *See* Ex. C to PI Mot.: 1528-1537 House Journal (Feb. 5, 2020).

7 http://www.akleg.gov/basis/Bill/Passed/31?sel=14

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authority to reject the appointments by inaction:[8]

> The failure of the legislature to act to confirm or decline to confirm an appointment during the Second Regular Session of the Thirty-First Alaska State Legislature will be tantamount to a declination of confirmation on the earlier of
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> (1) January 18, 2021; or
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> (2) 30 days after
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> (A) expiration of the declaration of a public health disaster emergency issued by the governor on March 11, 2020; or
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> (B) issuance of a proclamation that the public health disaster emergency emergency identified in the declaration issued by the governor on March 11, 2020, no longer exists.

During the Senate Rules Committee Hearing on HB 309, Senator Begich expressed concern that if the legislature could not reconvene it "would create a situation in which the legislature cannot [] exercise its constitutional obligation to address the governor's appointees in this legislature."[9] In response, the legislature's attorney "answered that HB 309 does not contemplate the legislature not meeting in joint session to approve the confirmation of the governor's appointees."[10] And in reviewing Section 1(b) of the bill during the spring of 2020, the Department of Law advised that consistent with its longstanding position, statutory provisions allowing for categorical legislative

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[8] Alaska Statute 39.05.080(3) contains a similar assertion that the legislature can decline appointments by failing to convene a joint session and providing appointees an up-or-down vote. ("Failure of the legislature to act to confirm or decline to confirm an appointment during the regular session in which the appointment was presented is tantamount to a declination of confirmation on the day the regular session adjourns.")

[9] Ex. D to PI Mot. at 8: Senate Rules Committee Hearing, March 25, 2020.

[10] *Id.*

rejection of executive branch appointees by default constitute an unconstitutional infringement on executive authority.[11]

Ultimately, the 31st Legislature failed to meet its own extended deadline, either by meeting in joint session and voting on the governor's appointments or by pushing back the expiration date of the emergency declaration. When the public health emergency proclamation identified in HB 309 expired on November 16, 2020 and the statutory thirty-day time period from that expiration was reached, the governor informed the legislative leadership that:

> Executive Branch Department heads and Boards and Commissions appointees to Executive Branch Boards, who have not received a confirmation vote, continue to serve under valid appointments. I am also exercising my constitutional authority under the Alaska Constitution, Article III, Section 27 to continue their appointments.[12]

A week later, the Council filed suit, claiming that HB 309—like AS 39.05.080(3)—grants the legislative branch authority to reject a governor's entire slate of executive branch appointments by complete inaction, without even meeting to consider or vote on the appointments.

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[11] http://law.alaska.gov/pdf/bill-review/2020/006_2020200305.pdf. *See* 1983 WL 42546 (Alaska A.G. June 3, 1983) (stating the Department of Law had "serious questions" concerning the validity of any provision of AS 39.05.080 that permits blanket rejection of gubernatorial appointments if the legislature fails to act, and that such rejections would constitute an unwarranted intrusion upon the governor's executive authority to enforce the law and supervise the executive branch).

[12] Ex. B to PI Mot.: Governor Michael J. Dunleavy to Senator Giessel, December 16, 2020. The Governor further noted that he would present the names previously appointed but not confirmed along with any new appointments to the 32nd Alaska State Legislature by February 3, 2021.

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The Council asserts that the governor's position that the appointees continue to serve pending a confirmation vote is contrary to law and that this Court should grant declaratory relief and an injunction "prohibiting [the Governor] from continuing the appointments of Executive Branch Department heads and Boards and Commission appointees to Executive Branch Boards…" and prohibiting the governor from reappointing these same appointees until the regular session of the 32nd Legislature begins on January 19.

The governor filed a counter claim, explaining that executive branch appointees continue to lawfully serve under the Alaska Constitution unless and until the legislature meets in joint session and votes to reject the appointments. He claimed that HB 309, sec. 1(b) and AS 39.05.080(3) are unconstitutional to the extent that they grant the Legislature the authority to reject appointments under Article III, secs. 25 and 26 through inaction. He now opposes the Council's motion for preliminary injunction and cross-moves for summary judgment on his counterclaim for a declaratory judgment that AS 39.05.080(3) and HB 309, sec 1(b) are unconstitutional.

III. LEGAL STANDARD

The Alaska Supreme Court has called preliminary injunctions "harsh remedies" that are only used to "preserve the status quo" when necessary to prevent "the irreparable loss of rights before judgment."[13] Alaska courts apply one of two tests to

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[13] *Martin v. Coastal Vills. Region Fund*, 156 P.3d 1121, 1126 n.4 (Alaska 2007) (quoting *United States v. Guess*, 390 F.Supp.2d 979, 984 (S.D. Cal. 2005)).

evaluate requests for such an injunction: "either the balance of hardships or the probable success on the merits standard."[14]

The balance of hardships standard applies when the plaintiff establishes three factors: (1) the plaintiff is faced with irreparable harm; (2) the opposing party is adequately protected; and (3) the plaintiff raises "serious and substantial questions going to the merits of the case."[15] A plaintiff can meet this standard "only where the injury which will result from … the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[16]

When the opposing party's interests cannot be adequately protected in the face of an injunction, the plaintiff must satisfy a much higher burden to obtain one by making a "clear showing of probable success on the merits."[17] In assessing the relative hardships to each party, the Court is required to "assume the plaintiff ultimately will prevail when assessing the irreparable harm to the plaintiff absent an injunction," and also, conversely, "to assume the defendant ultimately will prevail when assessing the harm to

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14 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

15 *Id.*

16 *State v. Kluti Kaah Native Vill. Of Cooper Center*, 831 P.2d 1270, 1273 (Alaska 1992) (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)).

17 *See State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) ("If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a clear showing of probable success on the merits.").

the defendant from the injunction."[18]

Whether to grant an injunction in this case necessarily requires this Court to address a question of constitutional interpretation. The "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [The court is] not vested with the authority to add missing terms or hypothesize differently worded provisions ... to reach a particular result."[19] Instead, courts should "look to the plain meaning and purpose of the provision and the intent of the framers,"[20] and adopt "the rule of law that is most persuasive in light of precedent, reason, and policy."[21]

Finally, because the constitutionality of AS 39.05.080(3) and ch. 9 SLA 2020 §1(b) is a purely legal question, the Court can properly decide this case on summary judgment. "Summary judgment is proper if there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law."[22]

IV. ARGUMENT

The Court should deny the Council's motion because it does not meet either the balance of hardships or the probable success on the merits standards for injunctive relief. To begin, the Council has not identified any tangible harm that will result if an injunction is not issued. Instead, it speculates about some possible, unidentified harm if

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18 *Alsworth*, 323 P.3d at 54.

19 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

20 *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994).

21 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

22 *Devine v. Great Divide Ins. Co.*, 350 P.3d 782, 785-86 (Alaska 2015).

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some unknown act by some unnamed official is later called into question. But the hypothetical harm the Council imagines by theorizing that executive branch agencies, boards, or commissions might take unspecified actions in the next three weeks that could later be challenged and held invalid is neither a harm to the Council, nor is it irreparable, because these kinds of agency actions are subject to judicial review.

The Council's motion also fails to appreciate the operational and administrative challenges of carrying out the business of the executive branch, especially the complexity and difficulty of identifying qualified and willing Alaskans to serve on the many boards and commissions that are essential to the day-to-day functioning of state government. The Council's assertion that the executive branch is adequately protected because the governor can simply and quickly exercise his recess appointment power to fill ninety-odd executive branch vacancies with ready, willing, and qualified Alaskans to continue state government operations from now until January 19 is just wrong. Because the Council is not faced with irreparable harm and the executive branch cannot be adequately protected if an injunction is issued, the Council must demonstrate a probability of success on the merits to obtain a preliminary injunction. Yet critically, the Council has not even acknowledged the constitutional implications of its argument. Indeed, it has not addressed the constitutionality of the statutes it relies on whatsoever, much less shown that they are consistent with Article III, sections 25 and 26. For that reason alone, it cannot demonstrate a probability of success.

Moreover, injunctive relief would be contrary to the public interest. Alaskans will not be served by having executive branch operations suddenly interrupted and

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ninety executive branch officials and employees abruptly ejected from office for a period of less than three weeks. On the contrary, because the Council acknowledges that as of January 19, *all* of these appointees can be reappointed and again serve in the very same positions they now occupy, no useful purpose is served by ordering the executive branch to recognize these positions as vacant until that time.

Although the Council argues that the governor's direction to his appointees to continue to serve is "in direct violation of the Legislature's action by law to decline the appointments of the appointees,"[23] the fact remains that the 31st Legislature has taken no *action* to decline the appointments. It has not convened in joint session, it has not voted whether to confirm or reject any of the appointments, and it has therefore not carried out its statutory responsibility that it "shall before the end of the regular session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented."[24] The Legislature, by its own inaction, has thus violated AS 39.05.080 and HB 309 while simultaneously faulting the governor for doing the same. The only difference is that the statutory language the governor is alleged to have violated is simply unconstitutional. The legislature has no similar safe harbor: on the contrary, the plain language of sections 25 and 26 of Article III of the Alaska Constitution and the purpose of the confirmation process require that the

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23 PI Mot. at 3-4.

24 AS 39.05.080(2)(b).

legislature meet in joint session to affirmatively vote on the governor's appointees.

Because the Alaska Constitution does not authorize the legislature to decline appointments by default, this Court should deny the Council's motion for preliminary injunction and grant the governor's cross motion for summary judgment.

A. The Council has not identified any harm that it will suffer that is remotely sufficient to meet its burden to obtain a preliminary injunction.

To obtain a preliminary injunction, the moving party must usually demonstrate irreparable harm, or at least that some serious negative consequence will result absent an injunction.[25] But the Council has failed to articulate any harm it or the legislature will suffer other than the abstract affront to its authority created by the governor's refusal to adhere to an unconstitutional statute.

The Council contends that the continuation of appointees in office over the next three weeks "irreparably harms the Legislature."[26] But it fails to identify what harm irreparable harm the legislature will suffer beyond repeating its position that it has the power to confirm or not to confirm appointments—even by default—and arguing that not allowing the legislature to carry out its constitutionally delegated functions by inaction somehow undermines its authority, the separation of powers and the Constitution. But the Council's arguments on this point are just that—argument—and

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25 *See e.g., Holmes v. Wolf*, 243 P.3d 584, 591 (explaining that "the plaintiff must be faced with irreparable harm" for "[i]mmediate injunctive relief" to be warranted, but also indicating that "[w]here the harm is not irreparable … the moving party must show probable success on the merits."

26 PI Mot. at 3, 14.

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are not tangible evidence of harm. Instead, the Council's alleged harm simply restates the basic issue in this case, namely, the scope of the executive power of appointment delegated to the legislature. And that basic legal question can be answered through the ordinary course of civil litigation and motion practice. Any temporary uncertainty over how the court will decide that core question over the next few weeks does not in and of itself create irreparable harm. If it did, any constitutional dispute of first impression or separation of powers case would automatically meet the significant standard required to obtain preliminary injunctive relief.

Viewed correctly, the legislature's usurpation of executive authority represents a mirror-image affront to the governor that counsels outright rejection—not granting—of injunctive relief. This is because in order to evaluate the harm to a party of the granting or denial of a preliminary injunction, the court must assume that that party will ultimately prevail.[27] Here, the hypothetical "harm" to the legislature of "[a]llowing the Governor to disregard the Constitution and the correlating statutory requirements explicitly addressing appointments" is offset entirely by the very real harm to the governor and all Alaskans of allowing the legislature to thwart the administration of state government by disregarding the Alaska constitution's express requirement—repeated in the statutes—that the legislature confirm or decline appointments in a joint session. Moreover, if the harm of having to live with an opposing party's alleged

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27 *Alsworth*, 323 P.3d at 54.

violation of the law was enough to warrant a preliminary injunction, every litigant would be entitled to one.

The Council also argues that actions taken by appointees "may be found invalid if challenged."[28] But that does not establish harm *to the Council* because it is not a party to matters before executive branch boards and commissions or departments at which the appointees serve. Whether someone who is actually a party in a matter before some executive branch agency in the next three weeks could be harmed in some way by some hypothetical action or decision is pure speculation. And notably, the Council provided scant support for this alleged harm in its original motion. Its reply on the motion for expedited consideration unconvincingly sought to backfill this factual deficiency, as even there the Council identifies only a handful of meetings scheduled to occur before January 19, 2021.[29]

The Council's contention that actions by these agencies are potentially at risk of being invalidated is little more than idle speculation. Moreover, if there was any concrete action taken by an executive branch agency that depended on the participation of one of the appointees at issue—and a party to that proceeding considered themselves

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28 PI Mot. at 10.

29 For example, the Alaska Public Offices Commission is scheduled to meet on January 13; two appointees of that five member Commission are included in the appointees not acted upon by the Legislature. The Alaska Workers Compensation Board is scheduled to meet on January 14-15. [Reply on Mot. to Exp. at 5] The Council also includes a list of eleven meetings of boards and commissions that presumably it cites to support its injunction motion, but one of those meetings took place before the Council ever filed its motion and seven are scheduled for after the date of January 19 that the Council admits the appointees can lawfully serve again.

harmed as a result—there is a clear remedy at law because decisions of executive branch agencies are subject to judicial review.[30] In other words, any such harm would not be irreparable.

Critically, the Council does not allege that any harm arises from the continuing service of the specific appointees at issue here—there is no allegation that they are not competent or lack the required statutory qualifications. In fact the legislature's own statutes contemplate that appointees are explicitly authorized to carry out the functions and duties of the office pending confirmation or rejection of an appointment.[31] Thus, the Council's only harm is the "irreparable damage … to the Legislature's law-making authority and to the public, [and] … to the integrity of our entire system of government"[32] that it asserts results from the governor's violation of the appointment statutes. Yet given that the 31st Legislature has violated the very same statutes and abdicated its constitutional responsibility to vote to confirm or decline the governor's appointments, it is the legislature's actions here that harmed its "law-making authority, … . the public, [and] . . . the integrity of our entire system of government." At bottom, then, the Council's alleged "harm" is political rhetoric designed to divert attention from the legislature's own failure to perform its constitutional and statutory duty to meet in joint session and vote on the governor's appointees. It would not warrant a preliminary injunction, even if the other parts of the test were met; and they are not.

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30 *See* AS 44.62.302; Appellate Rule 601.

31 AS 39.05.080(4).

32 PI Mot. at 14-15.

B. The executive branch cannot be adequately protected.

The second part of the "balance of the hardships" test asks whether the party sought to be enjoined can "be adequately protected."[33] The Council mistakenly contends that "[a]ny harm Governor Dunleavy may suffer if the Courts grants the preliminary injunction would be relatively slight."[34] A party is only "adequately protected" if "the injury that will result from the injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[35] Here, a bond is not appropriate and, as explained above, the harm to legislature absent an injunction has its mirror image in the harm to the governor if an injunction issues.

But over and above the harm to the governor in this matter, there are significant and obvious additional harms that would result from an injunction—both to the operation of state government and to the individuals whose appointments the legislature seeks to invalidate. The Council erroneously suggests that an injunction would not cause problems for state government and the executive branch, blithely suggesting that the governor can just make interim appointments to carry out these functions for the next three weeks,[36] as long as they are not the incumbent appointees. But the Council

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33 *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1273-74 (Alaska 1992).

34 PI Mot. at 15.

35 *Kluti Kaah*, 831 P.2d at 1273.

36 PI Mot. at 9.

makes no serious effort to show how that would or could work as a practical matter. Indeed, this assertion ignores the realities of recruiting qualified Alaskans to serve on boards and commissions.[37]

The appointees that the Council wants removed through an injunction serve on over forty different state boards and commissions as well as the commissioner of the Department of Revenue and the Public Defender.[38] In some cases, the positions require specific qualifications based on specialized experience or education. The notion that these appointees can quickly and easily be replaced with substitutes for a brief duration, with no interruption in the quality or continuity of state services provided, simply defies logic. A review of only a handful of the appointments at issue illustrates this point.

For example, the Council contends that seven of the eight members of the State Medical Board can no longer serve given that the Legislature did not take up their appointments.[39] The Medical Board's governing statutes require that five of the eight members must be licensed physicians, a sixth must be a licensed physician assistant, and the members are supposed to be from geographically separate areas of the state to the extent possible.[40] Similarly, the Council contends that four of the members of the

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37 *See* Enright Aff. at ¶¶ 3-4, 8.

38 Ex. E; Liz Clark. Secretary of the Senate, to Governor Michael J. Dunleavy, December 23, 2020. (The defendant has designated his first exhibit E to avoid confusion because the Council has used letters to mark its exhibits rather than the usual numbers for plaintiffs.)

39 Ex. E at 3.

40 *See* AS 08.64.010; AS 08.64.107.

Alaska Police Standards Council (APSC) should be removed from their positions and replaced.[41] But the thirteen members of APSC must include four chief administrative officers or chiefs of police, one police officer and one probation, parole, or correctional officer, each of whom has had an APSC certification for at least five years, one correctional administrative officer "employed at the level of a deputy director or higher," and four public members, two of whom must come from communities with fewer than 2,500 residents.[42]

The notion that more than ninety board and commission members can simply be replaced immediately with new people who can fill in for the next three weeks defies common sense. It would be simply impossible to identify, recruit, and evaluate that many potential board members, much less to get them into place and up to speed to carry out any meaningful work before January 19, 2021.

The only practical result of an injunction, therefore, would be to interfere with the functioning of these state agencies, leaving some short staffed and others potentially unable to act for lack of a quorum.[43] The Council's recent reply referencing some upcoming board and commission meetings in January only underscores how disruptive it would be to grant an injunction removing more than ninety executive officials from their positions with no realistic possibility of replacing them in the near term. And the

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41 Ex. E at 4.

42 AS 18.65.150.

43 Enright Aff. at ¶ 9; *see also e.g.* AS 08.65.090, requiring five members of the Medical Board to constitute a quorum.

Council's blithe acknowledgment that all of these appointees will once again be eligible to serve in the same positions in a matter of weeks simply highlights the absurdity and pointlessness of the Council's extraordinarily expedited litigation effort.

The Council also ignores the reality that its requested injunction would have this Court abruptly dismiss multiple state employees from their positions in the midst of a pandemic, resulting in lost employment and corresponding benefits for several appointees. For example, individuals such as the commissioners of the Regulatory Commission of Alaska ("RCA")[44] and the Alaska Oil and Gas Conservation Commission ("AOGCC)[45] are salaried state employees whose employment is linked to their status as a commissioner. Similarly, the commissioner of revenue and the public defender are also state employees. An injunction would terminate these individuals' employment in a totally arbitrary manner, causing personal distress while also potentially crippling the agencies they lead by creating a needless leadership vacuum.

C. The requested injunction is contrary to the public interest.

The Council also claims that an injunction would protect the public interest, but this too is incorrect. Indeed, the Council's assertion that absent an injunction "the public will suffer irreparable harm to its interest in maintaining the integrity of the appointment process,"[46] is remarkable given the legislature's own unwillingness or inability to fulfill

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44 *See* AS 42.04.020(f) providing that RCA commissioners are in the exempt service and setting the salary range for these positions.

45 *See* AS 31.05.015 providing that AOGCC commissioners are in the exempt service and "shall receive an annual salary."

46 PI Mot. at 15.

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its constitutional obligation to meet in joint session to vote on appointees. Yet it now seeks to completely eviscerate the integrity of the confirmation process—itself an outgrowth of an *executive* appointment function—by claiming the right to reject wholesale the governor's appointees without regard to or consideration of their individual qualifications and merits. Neither the legislature, the governor, nor the public is served by the blanket declination of appointees contemplated by these unconstitutional statutes or by the Council's attempt to enforce these unlawful statutes for only a few weeks.

D. The Council has not established a probability of success on the merits.

Because Council has not shown that it will be irreparably harmed without an injunction, or that the executive branch can be adequately protected, the balance of hardships test does not apply. And the Council cannot meet its burden to show a probability of success on the merits because it ignores the key constitutional question at the heart of this dispute and because "precedent, reason, and policy"[47] all confirm that the legislature may not decline executive branch appointments by inaction.

The Council's motion for preliminary injunction fails to acknowledge the constitutional dispute that precipitated this litigation, instead arguing simply that (1) the Alaska Constitution incorporates the doctrine of the separation of powers; (2) the failure to enforce or comply with a law passed by the legislature "encroaches on the legislative

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47 *Treacy*, 91 P.3d at 260.

power to repeal statutes and the judicial branch's power of judicial review;"[48] and (3) Governor Dunleavy has violated ch. 9, SLA 2020 and AS 39.05.080 by continuing the appointments of persons who have not been confirmed by the legislature.[49] Notably, the Council makes no attempt to address, much less defend, the constitutionality of ch. 9, SLA 2020 or AS 39.05.080(3), even though that issue is at the crux of the case.

Although the Council quotes *Bradner v. Hammond*[50] at length on the subject of the separation of powers,[51] it ignores that case's central holding—that article III, sections 25 and 26 of the Alaska Constitution "mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government."[52] Ironically, the Council asks this Court to declare that the governor has violated the separation of powers by refusing to comply with a law that itself violates the separation of powers by attempting to usurp executive branch authority over appointments by legislative default. And it does so relying on the very case that establishes the legislature's overreach.

In *Bradner*, the Alaska Legislature had enacted—over the governor's veto—a law providing "that the appointment of deputy heads of each principal department and 19 specified directors of divisions were subject to confirmation by the legislature in

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48 PI Mot. at 18.

49 *See* PI Mot. at 16-19.

50 553 P.2d 1 (Alaska 1976).

51 PI Mot. at 17-18.

52 *Id.* at 7.

joint session."[53] The governor refused to present the names of his appointees to the legislature for confirmation, and the legislature sued "for a declaratory judgment of the constitutionality of [the law]."[54] Similarly here, the legislature has enacted two laws, AS 39.05.080(3) and ch. 9 SLA 2020,[55] and the governor has refused to comply because these statutes are unconstitutional.

The Council attempts to dodge the issue of the legislature's unconstitutional intrusion on the executive realm by framing its complaint and motion for preliminary injunction as a claim that the governor has intruded on legislative and judicial authority by refusing to execute an unconstitutional statute.[56] But the legislature cannot usurp the governor's constitutional authority by enacting an unconstitutional statute and then utilize the governor's responsibility under Article III, section 16 to require that he blindly adhere to it. To the contrary, the laws that the governor must "faithfully execute" under Article III, section 16, include the provisions of the constitution. For this reason, the governor has filed counterclaims against the legislature, asking this Court to

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53 *Id.* at 2.

54 *Id.* at 3.

55 The Council does not explicitly argue that Governor Dunleavy's decision to sign HB 309—which became ch. 9 SLA 2020—constitutes some kind of concession of its constitutionality or waiver of the claim that the law is unconstitutional, and any such argument would lack merit. If the governor had not signed HB 309, the parallel provisions of AS 39.05.080(3) would have remained in effect and the only result would have been to precipitate the current dispute. By signing the bill, Governor Dunleavy allowed the legislature additional time to perform its constitutional duty so that this lawsuit might be averted.

56 PI Mot. at 17-18.

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declare AS 39.05.080(3) and ch. 9 SLA 2020, § 1(b)(2) unconstitutional.[57]

Indeed, it is particularly ironic here for the Council to argue that the governor is violating article III, section 16, by not faithfully executing the laws, while it seeks to thwart the appointments that make it possible for the governor to fulfill that very constitutional responsibility. As the Alaska Supreme Court explained in *Bradner v. Hammond*, "[i]n view of the responsibilities imposed by Section 16, and the authority granted in Section 1, the governor is necessarily clothed with the power to appoint subordinate executive officers to aid him in carrying out the laws of Alaska."[58]

And *Bradner* controls the outcome of this case. In *Bradner*, the governor argued that the power to appoint executive officers was an executive power and that the legislature's role in confirming appointees was a delegated authority that "must be strictly construed."[59] The Alaska Supreme Court agreed, concluding "that the appointment of executive officers is an executive function;"[60] and that "confirmation is not a distinct legislative power, but rather a part of the executive power of appointment

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57 *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 369 (Alaska 2001) (noting that in response to the Legislative Council's lawsuit seeking a declaration that Governor Knowles's vetoes were invalid, the governor counterclaimed arguing "the vetoed language violated the Alaska Constitution's confinement clause.") In *Knowles*, "the parties later agreed to treat the governor's counterclaims as defenses, to avoid the question of legislative immunity." *Id.* at 369 n.5. Here, the Council has framed its lawsuit to try to preclude the governor from asserting the unconstitutionality of the statutes, thereby necessitating the counterclaims.

58 *Bradner*, 553 P.2d at 6.

59 *Id.* at 4.

60 *Id.* at 6.

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which has in turn been delegated in some specific instances by constitution to the legislative branch of government."[61] Given this, the Court held that Sections 25 and 26 of article III "*delineate the full extent* of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate officers."[62] But the legislature has ignored that express limit, instead declaring for itself the right not to carry out its own constitutional responsibilities while simultaneously thwarting the governor from fulfilling his own.

Moreover, because this is a question of constitutional interpretation, the words of the constitution itself are paramount.[63] And the language of Sections 25 and 26 is clear. Both sections provide that gubernatorial appointments are "subject to confirmation by a majority of the members of the legislature in joint session." This language admits of only one reading: the legislature must take a vote on whether to confirm appointees.

The word "confirmation" is defined by Webster's New International Dictionary, Second Edition,[64] as an "*act* of confirming or strengthening," or an "*act* of establishing, ratifying, or sanctioning; as, the confirmation of an appointment or election, or of a person in a position." In essence, the word incorporates the idea of action, not inaction.

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61 *Id.* at 7.

62 *Id.*

63 *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020) ("Our first step when presented with a question of constitutional law not squarely addressed by precedent is to consult the plain text of the Alaska Constitution as clarified through its drafting history.")

64 The constitutional convention used Webster's New International Dictionary, Second Edition. *See, Alaska's Constitutional Convention*, Victor Fisher, ch. 4, fn.27.

Moreover, without a vote, it is not possible to ascertain that there is a *majority*. The declination by inaction provided for in AS 39.05.080(3) and ch. 9 SLA 2020 is simply not "confirmation by a majority of the members"—even of each chamber—because there is no vote. Finally, declination by inaction does not involve the *joint session* expressly required by the constitution. Thus, nothing about the language of Sections 25 and 26 supports the legislature's claim that it may decline appointees by default, by failing to meet in joint session and failing to vote.

The Alaska Supreme Court has explained that "[c]onstitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[65] More specifically, the Constitution should be interpreted according "to the meaning the people themselves probably placed on the provision."[66] Common sense here compels the conclusion that Sections 25 and 26 authorize the legislature to confirm or decline appointees *only by majority vote of a joint session*. Courts "are not vested with the authority to add missing terms or hypothesize differently worded provisions ... to reach a particular result."[67] The constitution does not give the legislature the power to reject nominees by default and it is hard to imagine that the voters who ratified the constitution imagined they were granting the legislative branch authority to reject appointments to run the important departments of state government simply by never

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65 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1994)).

66 *Id.* at 1147.

67 *Id.* at 1146 (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

meeting to consider them. And, to the extent there is any ambiguity regarding the scope of the legislature's authority over executive appointments, *Bradner*'s clear direction that Sections 25 and 26 "mark the full extent" of the legislature's confirmation power, can only mean that AS 39.05.080(3) and ch. 9, SLA 2020 section 1(b) exceed the scope of the legislature's delegated confirmation power and are unconstitutional.

Good public policy also supports this reading. The Alaska Supreme Court has explained that "[t]he constitutional grant of the confirmation power implies a coincident power and duty to investigate the status of the appointed offices as well as the qualifications of the individuals appointed to those offices."[68] Thus, the confirmation process contemplates an individual examination of an appointee's responsibilities and credentials before the legislature votes on the appointment. This is the antithesis of the kind of blanket rejection of appointees advocated by the legislature here, where the legislature seeks to eject ninety-four appointees[69] from office for a period of about four weeks,[70] not because of any apparent concern regarding their qualifications or competence, but simply to show that it can.

Moreover, the legislature's bold assertion of the power to decline appointments by inaction would permit legislators to interfere with the governor's ability to manage state government with little accountability, because they do not have to go on record

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68 *Cook v. Botelho*, 921 P.2d 1126, 1132 (Alaska 1996).

69 *See* Ex. E; *see also* Enright Aff. at ¶ 8.

70 The Council filed this lawsuit on December 23, 2020, a little less than four weeks before the new legislature will convene on January 19, 2021.

with a vote. Indeed, this lawsuit epitomizes the sort of irresponsible conduct that may result if legislators who are hostile to a governor can undermine the administration by default. This would be particularly problematic for a new administration, which is necessarily tasked with filling a huge number and range of executive branch positions in short order to carry out the electoral will of Alaskans upon taking office.

To be clear, the Council seeks through this lawsuit a radical reorganization of the separation of powers: a constitutional rule providing that every department head serving in a governor's cabinet and all appointees to executive branch boards and commissions can summarily be dismissed by the legislature simply taking no action. The Council implicitly argues that the legislature has no constitutional obligation to meet "in joint session" and act through a vote "by a majority of members of the legislature." Instead, it can simply ignore a governor's presentation of his appointees. In this case, the appointments at issue include over forty different boards and commission appointments as well as a commissioner of an executive branch department and the public defender but the rule the Council seeks will apply in the future as well. Thus, for example, a legislature at odds with a new governor could cripple an administration by adjourning without meeting in joint session to confirm appointees to head all the principal departments, leaving a governor without any of the officials she wanted to implement her policy agenda. That is clearly not consistent with the constitutional framework under Article III; nor is it a reasonable understanding that the voters would have had of how their state government would be managed when they adopted the Alaska Constitution.

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Thus, precedent, reason, and policy all support the plain language of the constitutional text, which straightforwardly requires that a "joint session of the legislature" act to confirm or decline the governor's appointees and precludes a blanket rejection of appointees through legislative inaction. *Bradner* holds that the constitutional language marks the outer bounds of the legislature's appointment power.[71] The reason for the confirmation process requires individualized consideration of appointees and an up-or-down vote. And good policy counsels against giving any branch of government the ability to significantly impact the operation of government without accountability.

V. CONCLUSION

The Legislative Council has failed to meet the standards for a preliminary injunction. Accordingly, the Council's motion should be denied. Additionally, the Court should grant the governor's motion for summary judgment, because the statutes purporting to allow the legislature to decline confirmation by default violate Art. III, sections 25 and 26 of the Alaska Constitution.

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71 *See, Bradner*, 553 P.3d at 7.

DATED: January 5, 2021.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Plaintiff, v. HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, Defendant.	Filed in the Trial Courts STATE OF ALASKA, FIRST DISTRICT AT JUNEAU JAN - 5 2021 By _____ Deputy Case No. 1JU-20-00938 CI

AFFIDAVIT OF COURTNEY ENRIGHT

I, Courtney Enright, declare under penalty of perjury that the following is true and correct:

1. I am the Deputy Director of Boards and Commissions for the Office of the Governor for the State of Alaska, and I have personal knowledge of the matters in this declaration. The Director was out of the office while this affidavit was being prepared. I have been the Deputy Director since February 16, 2020.

2. The Office of the Governor is responsible for finding and recruiting qualified Alaskans to serve on over 130 boards and commissions. Although some positions are full-time salaried jobs—for example members of the Regulatory Commission of Alaska—most of the members of Alaska's many boards and

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commissions are volunteers.

3. Boards and commissions often have membership rules set by statute that are designed to ensure that members have particular expertise to serve on boards and commissions regulating professions and businesses as well as broad geographic representation, so recruitment for particular openings can be constrained by the need for very specific professional credentials and at times geographic requirements.

4. These limitations combined with the volunteer nature of most positions can sometimes make finding qualified persons quite difficult. On average, recruiting a new board member typically takes between two weeks and three months.

5. Although there are approximately 1,300 positions on Alaska's boards and commissions, the use of staggered terms and gubernatorial discretion to replace members of some boards means that my office generally has between 100 and 300 vacancies to fill at any one time.

6. On February 4, 2020, Governor Dunleavy presented to the Thirty-First Alaska State Legislature the names of seventy-nine executive branch appointees for confirmation by a majority of the members of the legislature in joint session. That correspondence was published in the House Journal on February 5, 2020 at 1528-1537. The governor made additional executive branch appointments during the regular session.

7. On December 23, the Senate Secretary informed the Governor by letter that the executive branch appointees including to positions on boards and commissions and the department head of the Department of Revenue had "failed to be confirmed."

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even though no joint session of the legislature had voted. The number of appointees that the Senate Secretary listed as not confirmed was ninety-four.

8. Filling over ninety positions immediately while excluding the incumbent appointees—as proposed by the Legislative Council—is not reasonably possible. As a result, the invalidation of the appointments of persons whose appointment was not acted upon by the Thirty-First Legislature would mean that those positions would be vacant until the Thirty-Second Legislature meets on January 19, 2021.

9. The invalidation of appointments would mean that many boards would not have a legal quorum to conduct business, including the Alaska State Medical Board, Board of Fisheries, and State Commission for Human Rights.

10. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on Tuesday, January 5, 2021.

Courtney Enright

Courtney Enright
Deputy Director of Boards and Commissions
State of Alaska
Office of the Governor

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Plaintiff, v. HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, Defendant.	Case No. 1JU-20-00938 CI

STATEMENT OF THE GOVERNOR'S POSITION

In its December 30, 2020 order granting the Legislative Council's motion for expedited consideration, the Court asked the parties to state their positions on whether there are factual issues that require testimony to be given at the hearing on Friday, January 8, and whether the hearing should be consolidated with a trial on the merits under Alaska Civil Rule 65(a)(2). The governor responds as follows:

1. The governor has cross-moved for summary judgment on his counter claims and, because the unconstitutionality of the statutes at issue in this litigation is a pure question of law, consolidation with the hearing on the preliminary injunction would be possible and appropriate.

2. The governor has provided an affidavit from his deputy director for boards

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and commissions in support of his opposition to the Council's motion for preliminary injunction. Although the governor does not believe the facts in the affidavit are subject to any reasonable dispute and accordingly a factual hearing is not necessary, should there be any material dispute—and if the Court does not consolidate the injunction hearing with a trial on the merits under Civil Rule 65(a)(2)—the court could take testimony.

DATED: January 5, 2021.

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