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-20-938 CI

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This case presents important legal questions about separation of powers, the scope of the Legislature's power of confirmation, and the constitutionality of two Alaska statutes, one of which has been on the books since 1964. Pending full briefing and a decision on those questions, the Legislature seeks a preliminary injunction that would void the Governor's appointments of 94 executive branch officials, including the Commissioner of Revenue, the Public Defender, and members of over forty state boards and commissions spanning a broad range of governmental functions. As an example, the requested injunction would immediately remove seven of the eight members of the State Medical Board from their positions in the midst of the COVID-19 pandemic.

Oral argument was held on the motion for preliminary injunction on January 8, 2021. Having considered those arguments, and the parties' briefing, I find that the requirements for a preliminary injunction have not been met, for the reasons set forth in more detail below. As a result, the motion for preliminary injunction will be denied.

II. DISCUSSION

A. Preliminary Injunction Standard:

The Alaska Supreme Court has set out two different standards for a preliminary injunction, depending on the nature of the threatened injury:

> If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.' " 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."[1]

B. The Nature of the Threatened Injury:

The first question to be considered, under this framework, is the nature of the harm faced by the plaintiff. The Legislature argues that, if the Governor's appointees are not immediately removed from office, this will cause irreparable harm to the authority of the Legislature in our constitutional framework. The Legislature does not, however, make any fact-specific argument as to any particular appointee. That is, the Legislature does not allege that any of the appointees will commit some act deleterious to the public welfare during the next 11 days, nor that they have done so during their time in office.

---

[1] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

Without question, this constitutes an allegation of real harm. If the Legislature ultimately prevails on the merits of its claims, that will mean that these appointees have held their positions unlawfully, after having been denied confirmation. This would constitute an injury to the Legislature's position as a coequal branch of government under Alaska's constitutional structure. The fact that this potential harm is abstract in nature does not mean it is any less real.

I am not persuaded, however, that this is an irreparable harm. The injury complained of is an abstract one. If the Legislature ultimately obtains a decision in its favor on the merits, then its authority under the Constitution will be made clear, and any harm done to the structure of government will be remedied. The plaintiff has not demonstrated that any permanent or irreparable damage would be done to the Legislature as an institution as a result of the short period of time during which these individuals will have served without being properly confirmed.[2]

Nor am I persuaded that any harm resulting from any actions that may have been taken by these appointees cannot be remedied. If a board or commission makes an adjudicative decision in a particular case, that decision can be reconsidered or challenged on appeal if a deciding vote was cast by someone who was not confirmed. If an agency takes an action or issues a regulation during this period of time, those actions might be subject to challenge if the responsible official was not properly confirmed. The Legislature has not pointed to any instance in which this harm cannot be remedied.

---

[2] I am also not persuaded that this harm to the Legislature would exceed the harm that would result to the executive branch if the court abruptly removes 94 people from office, nor that the executive branch can be adequately protected against this harm.

C. Probability of Success on the Merits:

Thus the plaintiff must show a "clear probability of success on the merits."[3] This determination puts the court in the unaccustomed position of handicapping the likely outcome of a matter that is not yet ripe for decision. Normally judges are expected to refrain from expressing an opinion on matters that they will have to decide at a later time.

The court believes it would have been preferable to consolidate this decision with a decision on the merits. Doing so would have produced a final, appealable order which would expedite the process of appellate review, if that were necessary, which would have minimized any harm resulting from the court's decision. The court also believes there is an element of unfairness in plaintiff's position that the court should expedite its decision on a preliminary injunction, but that the court should then delay its decision on the merits.

The court would have been prepared to decide the merits of this issue today, if it were called upon to do so. Insofar as plaintiff believes additional briefing should be submitted before the court makes that decision, though, the court defers to that belief.

There is no question that the plaintiff has raised serious and substantial questions going to the merits of this case. Perhaps one could go further than that, and say that there is a distinct possibility that the plaintiff will ultimately prevail. The test for granting a preliminary injunction requires more than a mere probability, however. Under all the circumstances of this

[3] *Id. See also, State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1274 (Alaska 1992).

case, I am not willing to find that the plaintiff has a "clear probability" of ultimately prevailing.[4]

Given that, I am unwilling to grant a preliminary injunction at this time. The court's decision on the merits will have to await completion of briefing on the motion for summary judgment, and any cross-motion that may be filed.

III. CONCLUSION

For the reasons set forth above, the motion for preliminary injunction is DENIED.

Entered at Juneau, Alaska this 8th day of January, 2020

Philip M. Pallenberg
Superior Court Judge

Certification
Copies Distributed
Date 1-8-2021
To M. Wallace
H. Martin
W. Milks
M. Paton-Walsh
By MB

[4] The Governor also argues that the granting of a preliminary injunction would not be in the public interest. The Alaska Supreme Court has never stated that this is part of the test for whether a preliminary injunction should be granted. Nor has the Alaska Supreme Court ever made it clear how the balance of hardships factors into the analysis in applying the "clear probability of success on the merits" test. Under federal law, a preliminary injunction should only be granted if "the balance of equities tips in [the plaintiff's] favor, and . . . an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). It is unclear whether either of these elements may be considered here as a factor in the court's decision. If Alaska law allows consideration of these factors, I would find that the balance of hardships, as to a preliminary injunction, tips in favor of the defendant, and that the public interest does not favor the granting of this preliminary injunction.