IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

AMERICAN CIVIL LIBERTIES UNION OF ALASKA, BONNIE L. JACK and JOHN D. KAUFFMAN,

Plaintiff,

v.

MICHAEL DUNLEAVY, in his official capacity as Governor of Alaska, and the STATE OF ALASKA,

Defendant.

Case No. 3AN-19-08349CI

ORDER GRANTING, IN MOST RESPECTS, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

"[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis in original). These were the words of the late United States Supreme Court Justice Antonin Scalia, on behalf of the Court majority, in describing the separation of powers doctrine embodied in the federal Constitution and in finding unconstitutional a legislative act that would mandate the reopening of some previously entered court judgments. In framing the conflict at issue in that case, Justice Scalia importantly noted that "[t]he nub of the infringement [amounting to a constitutional violation] consist[ed] *not* of the Legislature's acting in a . . . nonlegislative fashion, but rather of the Legislature's nullifying prior, authoritative judicial action." *Id.* (emphasis in original). In other words, the separation of powers violation was found, not in the mechanism utilized by Congress, but in the impact of the statutory section at issue on the judiciary and judicial decisions.

Similarly, in the present case, this Court is asked, not to determine whether the Governor of the State of Alaska has the authority to exercise the power of line item veto, but to determine whether, through exercise of his veto

power, the Governor acted so as to improperly influence the State's judiciary in performance of its central function of interpreting and applying the State's Constitution and laws. Put differently, the Court is asked to examine whether the Governor exercised his veto power in a manner threatening to undermine the independence of the State's judiciary, thus violating the separation of powers doctrine embodied in our State's Constitution. In light of the undisputed facts presented, and in spite of this Court's faith that the Alaska judiciary remains independent and committed to its essential function of deciding cases according to the rule of law, the Court must unfortunately conclude that in vetoing funds appropriated to the State appellate courts in express retaliation against the Alaska Supreme Court for its legal decision-making, the Governor violated the separation of powers doctrine. Although this Court rejects Plaintiffs' separate argument that the Governor improperly reallocated budget appropriations, the Court must conclude that the Governor's vetoes of appropriations at issue in this case were unconstitutional, and that the veto impacting appropriations for the current fiscal year is void. Plaintiffs' Motion for Summary Judgment is thus GRANTED in most respects, and Defendants' Cross-Motion for Summary Judgment is DENIED.

I. Facts and Procedural History

The facts underlying this legal dispute are straightforward and undisputed.[1] On June 13, 2019, the Alaska Legislature transmitted an operating budget to Governor Dunleavy, containing, among many other items, appropriations for the Alaska Court System for the 2020 fiscal year. On June 28, 2019, Governor Dunleavy vetoed $2,168,400 from the Court System budget. Among the Governor's line item vetoes was a reduction of $334,700 to the appellate courts' budget. The Governor's statement of objections accompanying the veto stated: "The Legislative and Executive Branch [sic] are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction." The Governor's veto came after the Alaska Supreme Court's February 15, 2019 decision in *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019), wherein the Court had determined that a state statute and regulation defining when an abortion could be considered "medically necessary" for purposes of Medicaid reimbursement eligibility violated the equal protection clause of the Alaska Constitution.

Following the Governor's vetoes, on July 8, 2019, the Legislature convened a special session, but failed to override the above-outlined vetoes. Through a later special session, the Legislature passed legislation restoring all

[1] Because the material facts are set forth in both parties' briefs, and in the sources referenced by those briefs, without any contest by either party, the Court does not herein provide citations to the briefing and sources outlined and agreed upon by the parties.

vetoed funds to the Court System's budget. Governor Dunleavy once again exercised his veto power, this time related to just two Court System line items. These vetoes included once again a $334,700 cut to the appellate courts' budget, and in support of that cut, the Governor repeated his prior statement of objections.

Although the parties dispute the manner in which the Court should understand and treat reactions to, or statements made about, the Governor's veto of the $334,700 from the appellate courts' budget, the parties agree and it is a matter of record that, on July 3, 2019, the Alaska Supreme Court issued the following statement:

> Alaska, like the country as a whole, has a system of government with three co-equal branches. At its most basic, this means that the legislature makes the law, the governor enforces the law, and the supreme court, when faced with a constitutional challenge to a law, is required to decide it. Legislators, governors, and all other Alaskans certainly have the right to their own opinions about the constitutionality of government action, but ultimately it is the courts that are required to decide what the constitution mandates. In a democracy based on majority rule, it is important that laws be interpreted fairly and consistently. We assure all Alaskans that the Alaska Court System will continue to render independent court decisions based on the rule of law, without regard to the politics of the day.

Plaintiffs filed this lawsuit on July 17, 2019, contending that Governor Dunleavy's veto of the $334,700 from the appellate courts' budget violated the separation of powers doctrine as embodied in the Alaska Constitution and amounted to a reallocation of an appropriation in violation of Article II § 15 of the Alaska Constitution. Plaintiffs request both declaratory and injunctive relief in the form of declaration of constitutional violations alleged, an injunction ordering the Governor "to refrain from any further intrusion or interference with the judici[al] branch," and a separate injunction ordering Defendants to restore the vetoed amount of $334,700 to the appellate courts' budget for the fiscal year of 2020.

Defendants initially responded to the lawsuit by filing a motion to dismiss the case for asserted "failure to state a claim upon which relief can be granted." Following briefing and oral argument, this Court denied the motion to dismiss for the reasons stated in its December 12, 2019 Order. The parties thereafter mutually informed the Court that this case did not involve disputes regarding material facts and at Plaintiffs' request, the Court instituted a schedule for briefing of Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. The Court granted leave to the entity Legal Voice to file a Brief of Amicus Curaie, but notes here that the Court's instant decision does not rest upon or specifically address the additional information or arguments

contained in the Amicus brief. Oral argument was initially scheduled, but then vacated with the parties' non-opposition, following the onset of the COVID-19 pandemic in Alaska.[2]

Of note, one of Plaintiffs' original requests for relief – the request for an order that the State restore funding to the appellate courts' budget – became moot at the expiration of the 2020 fiscal year. Plaintiffs have, however, recently filed an amended complaint, outlining Governor Dunleavy's more recent, April 7, 2020 veto of $334,700 from the Alaska Court System budget for the 2021 fiscal year, with the accompanying statement, "Reduce funding for the Alaska Court System consistent with Legislative intent language included in HB 205 that no money appropriated under Medicaid Services may be expended for an abortion and consistent with FY 2020 reduction in funding." The Amended Complaint further provides that the veto was not overridden by the Legislature, and became effective on July 1, 2020. Defendants admit these allegations in their Answer to Amended Complaint, and the parties have stipulated that their summary judgment motion work remains ripe before the Court, with the substance and analysis of legal issues before the Court remaining the same, and with no need for further briefing.

II. Analysis

Before moving into its legal analysis, the Court pauses first to clarify what this case is not about. This case neither revisits nor analyzes the Alaska Supreme Court's decision *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019), or any prior related decisions of the Alaska Supreme Court. All parties agree that Alaska's Constitution vests the judicial power in "the supreme court, the superior court, and additional courts as established by the legislature," *Alaska Pub. Int. Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007); *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976); thus,

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[2] As reflected in filings just following the completion of briefing on the instant motions, the parties and the Court are aware of the course of related litigation in the matter of *Recall Dunleavy v. State of Alaska, Division of Elections, and Gail Fenuniai, Director, State of Alaska Division of Elections*, 3AN-19-10903CI, and the appeal of the Superior Court decision, in Supreme Court No. S-17706. Given its understanding of the Superior Court's order in that matter, the nature of the arguments made on appeal, and the supplemental briefing requested by and then provided to the Alaska Supreme Court related to the question of whether the Governor's veto of funds from the appellate courts' budget amounted to a violation of the separation of powers doctrine, this Court has reluctantly opted to hold off on issuing a decision of the parties' summary judgment motion work, with the hope that the Supreme Court's decision in that separate case would provide guidance to the parties and Court in this matter, and perhaps provide for greater economy for these parties in moving forward. Although the Supreme Court has stated its decision affirming the Superior Court's Order largely in favor of Recall Dunleavy, it has not yet issued the anticipated decision that would explain that conclusion and potentially provide some guidance as related to this case. Because this Court is not in a position to know when that decision will be released, and because it is possible that the Supreme Court's decision in the that case may have been made on grounds that do not control this matter, this Court will not alter its deadline for decision of the parties' motion work, and thus issues its decision at this time.

the parties agree that decision of those cases referenced above was committed specifically to the Alaska Supreme Court and must recognize that it would be inappropriate to analyze or otherwise examine those decisions here.

Additionally, consistent with the duty of this Court to render decisions independently and in accord with the rule of law, without regard for politics, this decision is not about, and offers no opinions regarding, any of the political issues, debates, or controversies currently before the people of the State of Alaska.

Rather, this case is about deciding the legal question of whether an action of the Governor – here, in the course of exercising his veto power – violated Alaska's Constitution.

A. The Governor's vetoes did not unconstitutionally reallocate appropriations.

Before moving into its separation of powers analysis, the Court first addresses what has appeared to be a secondary argument made by Plaintiffs – that being the argument that the Governor's vetoes of funds from the appellate courts' 2020 and 2021 budgets constituted a reallocation of appropriations that violates Article II § 15 of the Alaska Constitution. Article II § 15 of the Alaska Constitution authorizes the Governor to "veto, strike, or reduce items in appropriation bills." The Alaska Supreme Court has clarified that this authorization allows the Governor to "delete and take away, but . . . does not give the [G]overnor power to add to or divert for other purposes the appropriations enacted by the legislature." *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001).

The Court first notes that this argument is very sparsely briefed by the parties. Based upon the record before it, the Court determines that there was no reallocation of the vetoed funds at issue for either the fiscal year 2020 budget or the fiscal year 2021 budget. While the Court understands the essence of Plaintiffs' argument – that the reduction in funding to the courts each year was to account for the Governor's estimation of costs associated with certain abortion procedures – Plaintiffs have demonstrated no actual reallocation or re-appropriation of the funds at issue. The argument that a veto of funds meant to serve one purpose in light of costs associated with a different entity or purpose amounts to an invalid reallocation of an appropriation is an argument that could potentially extend to numerous exercises of the veto power in multiple contexts. The Court is not aware of authority that would support such an extension on the limitation of the Governor's authority to veto without actually reallocating specific appropriations, and thus denies this aspect of Plaintiffs' summary judgment motion.

B. **The Governor's vetoes that reduce court funding in retribution for judicial decision-making violate the Alaska Constitution's separation of powers doctrine.**

The Court now turns to the primary claim before it, and holds that the undisputed facts demonstrate that the Governor's exercise of his veto power to reduce the appellate courts' budget in fiscal years 2020 and 2021 expressly undermines the Alaska Constitution's commission of judicial powers to the judiciary, as well as the structural independence of the judiciary, and thus violates the doctrine of separation of powers embodied in the Alaska Constitution.

The Alaska Supreme Court has long recognized that, as with the United States Constitution, the Alaska Constitution creates a purposeful framework for separation of powers between the branches of government, and necessarily also relies upon the doctrine of checks and balances between those branches. *See e.g., Alaska Pub. Int. Research Grp. v. State*, 167 P.3d 27, 34-35 (Alaska 2007) ("We have recognized that the separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of this state.") [hereinafter *AKPIRG*]. As outlined through the Alaska Constitution's provision of powers to State government, and spelled out in precedent interpreting the Constitution: "The Alaska Constitution vests legislative power in the legislature; executive power in the governor; and judicial power in the supreme court, the superior court, and additional courts as established by the legislature." *Id.* (citing *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976)). The doctrine of separation of powers limits the authority of each branch to interfere with the powers delegated by the Constitution to the other branches. *Id.* Of particular significance, the recognized purposes of the separation of powers doctrine "are to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government." *Id.*; *see also State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (quoting *Myers v. United States*, 272 U.S. 52, 85 (1926) (recognizing that the separation of powers doctrine was adopted "not to promote efficiency but to preclude the exercise of arbitrary power")); *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947 (Alaska 1975).

The framers of the Alaska Constitution were particularly concerned with providing for a judiciary that would perform its work independently of, and without influence by, the political branches of government and the political concerns of the day. As recognized by the Alaska Supreme Court in *Buckalew v. Holloway*, 604 P.2d 240 (1979), wherein the Court addressed distinctions as related to the work of magistrate judges, "There is no doubt that judicial independence was a paramount concern of the delegates . . . ." 604 P.2d at 245. The Court continued by noting some of the specific constitutional provisions that promote judicial independence, and the major concern driving those provisions:

> The independence of which the delegates spoke was independence from political pressures. The objective was an impartial judiciary. The framers rejected a system in which judges competitively campaign for election, fearing that financial and psychological debts would be incurred in the process, and that pre-election decisions in controversial cases would be molded more by public mood than the dictates of law; they likewise rejected a simple gubernatorial appointment system, fearing executive dominance over the judiciary.

Id. at 245-46.

Indeed, state courts across the country have recognized the necessity of maintaining an independent judiciary, as well as the separation of powers concerns implicated by threats to such independence. In *Solomon v. State*, for example, the Supreme Court of Kansas held that a house bill amending the governing duties of the chief judges of judicial districts violated the separation of powers doctrine and unconstitutionally encroached on the constitutional authority of the Supreme Court to administer the judiciary. *See generally* 364 P.3d 536 (Kan. 2015). The Court explained that "[i]t is . . . essential to the successful working of this system that the persons intrusted [sic] with power in any [one] of these branches shall not be permitted to encroach upon the powers confided to the others . . ." *Id.* at 545 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880)). Particularly telling as related to the context of this current case, the Kansas Supreme Court discussed at length the way in which one should examine whether there has been a violation of separation of powers, and held that "[o]ne department of government usurps the powers of another department when it exercises coercive influence on the other." *Solomon*, 364 P.3d at 546 (citing *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 792 (Kan. 1976)).

The Court of Appeals of New York raised related concerns in *Maron v. Silver*, finding that the State Legislature violated the separation of powers doctrine and, in particular, threatened the independence of the State's judiciary when it passed legislation tying a proposed increase in judicial compensation to other unrelated legislative goals and provisions. 925 N.E.2d 899 (N.Y. App. 2010). The New York Court quoted the United States Supreme Court in *Plaut*, in emphasizing that the separation of powers doctrine is a "*structural safeguard*," *id.* at 915 (quoting *Plaut*, 514 U.S. at 239), and holding that the very politicizing of the question of whether judges should receive an increase in compensation, regardless of the answer to that question, was the act that encroached upon the judiciary's functional and structural independence. *Id.* at 914. The Court explained: "[W]hether the Judiciary is entitled to a compensation increase must be based upon an objective assessment of the Judiciary's needs if it is to retain its functional and structural independence. Simply put, by failing to consider judicial compensation increases on the merits, and instead holding them hostage to other legislative objectives, the Legislature weakens the Judiciary by making it

unduly dependent on the Legislature." *Id.* (citing *People ex rel. Burby v. Howland*, 49 N.E. 775, 779 (1898) (internal quotations omitted)). The Court also discussed important differences between the judicial branch and the other two, political branches of government, and the resulting necessity for good faith to be exercised by those political branches in actions impacting the judiciary:

> As members of the two "political" branches, the Governor and Legislature understandably have the power to bargain with each other over all sorts of matters including their own compensation. Judges and justices, on the other hand, are not afforded that opportunity. They have no seat at the bargaining table and, in fact, are precluded from participating in politics. The judicial branch therefore depends on the good faith of the other two branches . . . [G]iven its unique place in the constitutional scheme, it is imperative that the legitimate needs of the judicial branch receive the appropriate respect and attention. This cannot occur if the Judiciary is used as a pawn or bargaining chip in order to achieve ends that are entirely unrelated to the judicial mission.

Id.

In *Jorgenson v. Blagojevich*, the Illinois Supreme Court ruled that a statute and a gubernatorial reduction veto which prohibited judges from receiving previously vested cost of living adjustments in pay violated the Illinois Constitution. 811 N.E.2d 652 (Ill. 2004). Although that Court's decision centered on a provision that prevented judges' salaries from being reduced during their term in office, its words on judicial independence and the threats against such independence in our political scheme resonate here. Having recognized that the judicial branch of government depends upon the legislative and executive branches in order to "sustain itself financially and to implement its decisions," the Court aptly stated:

> This presents a profound problem. As arbiters of the law and guardians of individual liberties, members of the judiciary often find themselves at odds with these other branches of government. In fulfilling their duties, judges must frequently challenge the actions of the very governmental bodies [that] provide the financial and other resources they need to operate. Such challenges are unavoidable. They are an inherent part of the adjudicatory process. That their constitutional duty requires this of judges does not mean their decisions will be well received by the other branches of government. Retribution against the courts for unpopular decisions is an ongoing threat.

Id. at 660-61.

In an opinion that quoted heavily the concerns voiced by the Illinois Supreme Court in *Jorgenson*, the Pennsylvania Supreme Court ruled on a similar issue in *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006). Here again, the Pennsylvania Court particularly addressed an unconstitutional reduction in judicial salaries in the form of a repeal of a salary increase, but its words regarding the necessity of judicial independence, and the impact of threats to that independence, are telling in this case. First, the Court recognized the important concept that the case was not only about protection of judicial compensation, and that such protection is "but a part of a more global protection of the fundamental, coequal role of the Judiciary, as provided by the doctrine of separation of powers." *Id.* at 940. The Pennsylvania Court thoroughly examined the concerns of the Illinois Supreme Court in *Jorgenson* regarding the dependence of the judiciary on the legislative and executive branches, and the threat of retribution that could be posed in the face of unpopular decisions by courts, and it declared that "the vulnerability of the judicial branch cannot be allowed to impair its duty and power to decide cases and effectuate its judgment." *Id.* at 943. The Court further clarified that this was true regardless of whether the threat could be rectified through the political process. *Id.* at 953. The Court went on to analyze the constitutional viability of a non-severability clause in the legislation at issue, and held that "[w]here the provision appears to be aimed at securing a coercive effect upon the Judiciary, it necessarily implicates the separation of powers." *Id.* at 978-79. The Court concluded that "enforcement of [that severability] clause would intrude upon the independence of the Judiciary and impair the judicial function." *Id.* at 980.

In a different context, wherein the Mississippi Supreme Court assessed the failure of a County Board to provide for adequate conditions in a County courthouse, the Court engaged in a frank discussion of the crucial nature of judicial independence:

> The judicial branch is set apart to decide controversies in which the judges themselves are above the fray, and can sit dispassionately because they have no personal interest in the issues before them. This one fact is most responsible for the respect and confidence which people have in their judges. Conversely, the darkest cloud which can be cast upon a judge's honor is suspicion that he has a personal interest in a case. Judges are, after all, impartial and have no interest except to use their best judgment in making a decision.

Hosford v. State, 525 So.2d 789, 798 (Miss. 1988). The Court underscored that "[n]o court created by the Constitution is required to accept conditions that prevent it operating independently and effectively. Such court also has the duty . . . to protect its own integrity." *Id.*

While the above cases address contexts that differ in some respects from the immediate case, and look to different sources of the authority in the various State Constitutions, obvious parallels can be drawn between the concerns present in those cases and those presented by the Executive's actions in this matter. Here, the Governor has, through exercise of his veto power, reduced the judiciary's budget in retribution for court decision-making that he disagrees with. The Governor may counter that it is not just his disagreement, but that of the Legislature and of some number of the people of the State, that he acts upon, but this misses the point. Regardless of the source of disapproval of the judicial decisions at issue, the power and duty to make those judicial decisions is vested wholly in the judiciary. The Governor, through exercise of his veto power, has exacted a monetary punishment of the judiciary for the very performance of its constitutional duties. There perhaps could be no more direct a threat against judicial independence. The idea that the judiciary's budget could be based upon the popularity of its decisions, rather than on a coherent assessment of the actual needs of the Court System, strikes at the core of the structural protections of the separation of powers doctrine.

Ironically, the parties agree that there is no legal precedent or authority that addresses a situation quite like this one. The parties and Court have been unable to find a reported decision addressing a situation in which a political branch of government explicitly tied the judiciary's budget to the political branch's agreement or disagreement with court decisions. Defendants would have the Court take that as a signal that there is no violation of separation of powers present here. This Court disagrees, and instead finds an assessment of Justice Scalia in the *Plaut* case to be applicable on this point. Justice Scalia noted not once, but twice, in authoring the opinion of the *Plaut* majority, that the Court was aware of no other case in which Congress had acted in the manner that was ultimately struck down. 514 U.S. at 230, 240. Justice Scalia and the majority of the Court concluded that this was "for good reason," *id.* at 240, and that such "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Id.* at 230. Similarly, here, the Court notes that the lack of precedent contemplating a conflict exactly like this one may be due to the clear proscription from the Executive's authority of the ability to exert such influence over the courts and their decision-making. Regardless of the reason for the unique nature of this case amongst precedent, this Court's assessment remains.

Due in part to the unique nature of the conflict in this case, the parties disagree, at least to some extent, about the measures this Court should look to in analyzing whether the Governor's undisputed actions violate the separation of powers doctrine. Defendants argue that the Court must apply the multi-part analysis outlined in the Alaska Supreme Court's decision of *AKPIRG*, which would call on this Court to examine the nature of the power at issue; which branch of government is assigned this power in the constitution and whether the constitution suggests that the power is to be shared by two branches; and

whether the limits of any express grant have been exceeded or present an encroachment on another branch. 167 P.3d at 35. Plaintiffs, meanwhile, contend that the above analysis is not the exclusive means by which to determine whether there has been a separation of powers violation, and that regardless, the Governor's veto of appellate court funding at issue is established as a violation of separation of powers even under the *AKPIRG* factors. In an abundance of caution, this Court applies the analysis outlined in *AKPIRG*, and concludes that the Governor's veto of appellate court funding in retaliation against the appellate courts for certain decisions that he disagreed with represents an impermissible encroachment on the powers and duties of the judiciary, and thus violates the separation of powers doctrine.

Interestingly, although Defendants assume, without examining, that the first portion of the *AKPIRG* analysis, regarding the nature of the power at issue, centers on the Governor's power of veto, it could appropriately be argued that the power at issue in this matter is really the power of the judiciary to determine the cases that come before it in accord with the Alaska Constitution and Alaska law. This is, of course, a power vested solely in the judiciary, without any intent that it be shared by the political branches of government. If the Court considers the power at issue in the *AKPIRG* analysis to be that unique power of the judiciary, it must follow that the Governor's action, punishing or retaliating against the judiciary for performance of its judicial function, amounts under the *AKPIRG* analysis to a violation of the separation of powers doctrine.

Even assuming, however, that the power at issue to be examined under the *AKPIRG* factors is the power of the veto – a power committed to the Governor – there can be no mistake, given the uncontested facts here, that the Governor exercised his power in a way that dramatically encroaches upon the power of the judiciary. Again, the undisputed facts establish that the Governor exercised his veto authority – reducing the budget of the appellate courts – in direct reaction to and disapproval of the Alaska Supreme Court's decision of one or more cases committed solely to that Court for decision. The idea that another branch of government could manipulate the Court's System's budget, to any degree, based solely upon its agreement or disagreement with decisions that are committed solely to the judiciary necessarily encroaches upon powers and duties committed to the judiciary. It also strikes at the heart of the independence that the framers of our Constitution were so concerned that judges and the Court maintain. It inevitably presents the concerns expressed by the New York Court of Appeals in *Maron* regarding the improper politicizing of judiciary's budget, and realizes the threat recognized by the Illinois Supreme Court in *Jorgenson* and the Pennsylvania Supreme Court in *Stilp* of "[r]etribution against the courts for unpopular decisions." 811 N.E.2d at 661.

Defendants seem to contend, in response to such concerns, that the separation of powers doctrine as applied to the judiciary encompasses only those specific protections enumerated in the Constitution and the inherent ability of the

Court to compel the minimum level of funding necessary to perform its most basic functions. This argument regarding the Court's inherent powers suggests a factual question regarding what level of funding is inherently required to maintain the duties of the judiciary. The Court notes that determination of that factual issue is not as straightforward a determination as Defendants appear to suggest; however, neither party contends that the Governor's veto at issue deprived the Court System of the minimum level of funding necessary to perform its most basic functions, and this Court's analysis does not rely on resolution of that factual issue. This Court ultimately disagrees with Defendants' view of the separation of powers doctrine as applying only to specifically enumerated instances of encroachment on the judiciary. As Justice Scalia emphasized in *Plaut*, and as other state courts have recognized, the separation of powers doctrine is a structural safeguard, vital to the maintenance of our tri-partite system of government. It is not a tool to be applied merely to specific harms, but rather is a more fundamental recognition of the need to maintain the very structure of our governing system. The understanding that the judiciary's budget cannot be based upon the popularity of its opinions, or agreement or disagreement with its opinions, is so essential to the ability of judges and the courts to independently perform the basic functions of the judiciary that it is necessarily part of the structural safeguard provided by the separation of powers doctrine. Moreover, where Defendants agree that the courts have certain powers that are inherent in their existence as part of an independent branch of government, this Court questions the suggestion that the inherent powers of the judiciary do not include an ability to declare unconstitutional attempts to diminish or encroach upon its powers and duties to independently decide the cases before it.

The Court similarly rejects Defendants' contention that there has been no violation of the separation of powers doctrine simply because the judiciary has announced its continued commitment to independently deciding cases in accord with the rule of law. The existence of the Executive's threat against the judiciary's ability to perform its duties does not depend upon a finding that the judiciary has capitulated to that threat. The violation of the separation of powers doctrine lies in the Executive's act that encroaches on powers of the judiciary – the act that manipulates the judiciary's budget based upon disagreement with the Alaska Supreme Court's performance of its core function. This Court's decision does not rest on or require any finding that any particular judge or court has been swayed by the Executive's violation of separation of powers. Indeed, this Court's observation has been consistent with the Alaska Supreme Court's July 3, 2019 pronouncement that "the Alaska Court System will continue to render independent court decisions based on the rule of law, without regard to the politics of the day." The Court System's continued commitment to independently performing its duties, in the face of the encroachment of the Executive, does not somehow remove that encroachment. Moreover, the announcement of the Alaska Supreme Court regarding the Court System's continued commitment to its duties cannot be read as suggesting that there has been no threat by the

Executive to judicial independence. Indeed, there would have been no reason to announce the Court System's ongoing commitment to independently performing its duties if there was not understood to be some threat against that independence. Finally, we must remember that the rule of law relies upon the people's belief in the independence and integrity of the courts, and here, the Executive's action tying the Court System's budget to the substance of its decisions, threatens the public's faith in the courts, regardless of the judiciary's ongoing commitment to perform its job well and truly.

Finally, this Court holds that the fact that the Governor's violation of the doctrine of separation of powers took the form of exercising a veto does not remove that action from constitutional review. While Defendants have suggested that the Alaska Supreme Court's opinion in *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001) wholly removes the Executive veto from the purview of review for constitutionality, that simply is not the case. As an initial matter, in *Alaska Legislative Council*, the Supreme Court conducted analyses of the constitutionality of several aspects of legislation and Executive vetoes at issue. *See generally id.* That in itself would tend to dispel the notion that the Court meant to suggest that all aspects of Executive vetoes are immune from constitutional review. Moreover, where the Court in *Alaska Legislative Council* focused upon the Governor's statement of objections accompanying the vetoes in question, the Court was not examining whether the statement of objections advanced a violation of a structural component of the Alaska Constitution; rather, the Court was examining the "adequacy" of the language used by the Governor in explaining the purpose for the vetoes. *Id.* at 375-76. Here, the Court contemplated that disputes regarding the adequacy or sufficiency of the Governor's language "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." *Id.* at 376. The Court recognized that "[t]he judiciary has no special competence to settle these types of inherently political disputes," and concluded that the "minimum of coherence" standard should be applied, without further evaluation of the reasoning expressed in the statement of objections. *Id.* In making this decision, the Court contemplated the contest before it, and contests underlying related precedent, between the Legislature and the Executive. *Id.* The Court acknowledged that the judiciary offers no special competency, or ability beyond the political branches, to determine matters of politics and policy. *Id.* There is a difference, however, between considering whether or not legislation and/or a veto of legislation, is good policy, and determining whether or not legislation and/or a veto violates the Constitution. Here, of course, the courts do hold a special competency, and indeed, a duty vested solely in the judiciary.

Underlying this Court's interpretation of the *Alaska Legislative Council* decision is, of course, its understanding of the Governor's veto power. This power was granted "to preserve the integrity of the executive branch of government and thus maintain an equilibrium of governmental powers and to act

as a check upon corrupt or hasty and ill-considered legislation." *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (citing *Thomas v. Rosen*, 564 P.2d 793, 795 n.5 (Alaska 1977)). In particular, the Governor's line-item veto power is designed to "prevent legislators from 'logrolling,'" or packaging unrelated bills together so that governors are forced to approve of all, or approve of none. *Alaska Legislative Council*, 21 P.3d at 373. The line-item veto power "was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power . . ." *Id.* at 372. It certainly stands to reason that, just as the line-item veto has been found not to convey quasi-legislative powers to the Executive, it similarly does not convey judicial authority to the Executive.

Maintaining the balance of restraint in addressing political contests, while also recognizing the Court's unique authority and duty to decide questions of constitutionality, is consistent with the above-analyzed Alaska Supreme Court precedent, as well as the approach utilized by multiple other state courts, including those cited by Defendants. In *Maron*, for example, the New York Court of Appeals emphasized that while the question of whether judicial compensation should be adjusted was within the province of the legislature in that context, "it should be ke[pt] in mind . . . that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court. 925 N.E.2d at 917. Likewise, in *Ninetieth Minnesota State Senate v. Dayton*, the Minnesota Supreme Court addressed questions of whether the Executive's use of the line-item veto power violated the separation of powers doctrine. 903 N.W.2d 609 (Minn. 2017). Because the legislature, as the branch impacted by the exercise of the line-item veto, had sufficient funding in order to reconvene and address the conflict itself, and because the conflict asked the Court to "assess, weigh, and judge the motives of co-equal branches of government engaged in a quintessentially political process," the Court refrained from conducting an analysis of the constitutional separation of powers question, and deferred to the legislature for further action. The Court recognized, however, that "the Judiciary is responsible for determining when the separation of powers among our three branches of government has been violated," *id.* at 623, that "[i]t is the 'province and duty' of the Judiciary to 'say what the law is," *id.* at 625 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), and that "[i]f the Legislature were unable to continue its usual operations until it reconvened in February, [the Court] would be presented with a different situation." *Id.* at 624. Of note, in the present matter, the judiciary, as a non-political branch, lacks any alternative to the necessary constitutional analysis in correcting the Executive's encroachment on judicial powers and duties.

In a ruling particularly relevant to this point, the Supreme Court, Appellate Division, Third Department in New York, aptly recognized "a tension between competing legal principles" where asked to address a town Board's setting of a very meager salary for a local judicial officer. *In re: Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110 (NY App. 2007). There the question was not

whether the Board could set the judicial salary – that was within the Board's authority – the question was whether the Board had violated the separation of powers doctrine by arbitrarily setting the salary at a very low rate. *Id.* The Court recognized that it had before it competing principles, both based upon separation of powers:

> On one hand, the judiciary as a coequal branch of government should not interfere with a legislative body's actions or exercise of discretion regarding matters within that body's authority absent fraud, corruption, oppression, illegality, unconstitutionality or a violation of public policy.
>
> . . .
>
> On the other hand, legislation cannot be sustained where the independence of the judiciary and the freedom of the law will depend upon the generosity of the legislature.
>
> . . .
>
> We are presented with a situation in which either the judiciary, in the guise of this Court, must interfere with actions of the legislative branch, or we must allow respondent, as a legislative body, to affect the independence of the judiciary by fixing petitioner's salary at only $500 per year. . . . While we do not lightly decide to involve this Court in respondent's legislative actions, that body's abuse of its power on a constitutional level requires our intervention.

Id. at 1111-12 (internal citations and quotations omitted). In holding that the town Board violated the separation of powers, the Court warned:

> A real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of [a co-equal branch] or personally suffer the financial consequences for rendering legally correct but unpopular decisions. An appearance of impropriety, if not an actual concern, would arise that the scales of justice could be tipped by political influence . . . . Such concerns highlight the purpose of creating constitutions which separate the powers and divide them among three coequal branches of government.

Id. at 1112.

In the present matter, this Court concludes that it must, while maintaining all due deference to its co-equal branches, the Legislature and the Executive, perform its duties of deciding this matter in accord with the rule of law and of applying the requirements of Alaska's Constitution. While finding the necessity for this ruling very unfortunate, the Court must conclude, based on the undisputed facts before it, that the Governor, in exercising the line-item veto at issue, reduced funding to the judiciary in order to punish that body for performance of a central function that is committed to that body alone. In doing

so, the Governor threatens judicial independence, as well as the faith of the public in the integrity of the judiciary, which is crucial to the rule of law. The separation of powers doctrine simply cannot tolerate a construct in which the funding of the judiciary is based on the popularity of its opinions. For these reasons, the Court holds that the Governor's vetoes of $334,700 from the appellate courts' budget, for both of the fiscal years 2020 and 2021, violated the separation of powers doctrine embodied in the Alaska Constitution. As to the veto of funds for the fiscal year 2021, the Governor's veto is void, and the prior appropriation of funds to the appellate courts for that fiscal year should be restored. Should the parties see the need for further briefing regarding the proper mechanism for restoring that appropriation, either party or both parties may file supplemental briefs within two weeks of the issuance of this order, with responsive briefs to be filed within the ten days following. This Court trusts that its co-equal branches, in receiving this Court decision, and any following order of the Alaska Supreme Court, will move forward in good faith in light of the final assessment of the Courts – whether that be this order, or a further order of the Alaska Supreme Court. With that expectation and respect for the Executive branch, the Court finds it unnecessary to issue the further overly broad injunctive order requested by Plaintiffs, that the Governor "refrain from any further intrusion or interference with the judicia[l] branch."

III. Conclusion

Consistent with the above, Plaintiffs' Motion for Summary Judgment is, in most respects, GRANTED, and Defendants' Cross-Motion for Summary Judgment is DENIED.

DATED at Anchorage, Alaska this 16th day of October, 2020.

JENNIFER HENDERSON
SUPERIOR COURT JUDGE

I certify that on 10.16.2020
a copy of the above was emailed to each of
the following at their addresses of record:
J. Decker, S. Koteff, J. Leeah, L. Harrison, J. Lindemuth

Jessica Isnako
Judicial Assistant