From: skoteff@acluak.org
To: ANC_civil@akcourts.us
Cc: jessica.leeah@alaska.gov, lael.harrison@alaska.gov, jdecker@acluak.org, cfrost@acluak.org
Subject: 3AN-19-08349CI Plaintiffs' Response to Defendants' Notice of Supreme Court Order
Date: 4/15/2020 10:49:22 AM

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,** Plaintiffs, v. **Michael J. Dunleavy,** in his official capacity as Governor of Alaska; and the **State of Alaska,** Defendants.	No. 3AN-19-08349CI **Plaintiffs' Response to Defendants' Notice of Supreme Court Order**

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

Defendants noticed the Court on April 10 that the Alaska Supreme Court appears poised to decide questions that "go to the very heart of issues" that are before this Court. Defendants have asked the Court to postpone a decision until after the Supreme Court has ruled in *State of Alaska, Division of Elections and Director Gail Fenumiai v. Recall Dunleavy* (*Recall Dunleavy*), S-17706, because the "Supreme Court's decision would be controlling" in this case. Yet almost simultaneously, the State has argued to the Supreme Court that the "distinct legal issues" in this case "are not before" the Supreme Court in the *Recall Dunleavy* appeal. State's Opposition to Motion for Leave to File Amicus Brief, *Recall Dunleavy,* at 2 (filed April 14, 2020), attached

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

hereto as Exhibit 1. Plaintiffs are concerned that the State's contradictory positions offered in two separate courts could mislead this Court into waiting too long to order meaningful relief. As Plaintiffs have previously observed, an order from this Court directing Defendant's to refund the appellate courts' fiscal year 2020 budget could be of no effect if issued too close to or after June 30.

To be clear, Plaintiffs agree that the Supreme Court's decision in *Recall Dunleavy* could, at the very least, provide guidance for this Court's summary judgment decision. For that reason, Plaintiffs moved the Supreme Court for leave to file an amici curiae brief on the issue of whether Governor Dunleavy's veto violates the separation of powers. Motion for Leave to File an Amici Curiae Brief by American Civil Liberties Union of Alaska, Bonnie L. Jack, and John D. Kauffman, *Recall Dunleavy* (filed April 13, 2020), attached as Exhibit 2. Plaintiffs conditionally filed their amici curiae brief with their motion. Amici Curiae Brief by American Civil Liberties Union of Alaska, Bonnie L. Jack, and John D. Kauffman, *Recall Dunleavy* (filed April 13, 2020), attached as Exhibit 3. Plaintiffs believe that, should the Supreme Court resolve the separation of powers issue, their participation as amici would be helpful to the Supreme Court since they have extensively researched and briefed the issue in this case.

As noted above, however, the State has opposed Plaintiffs' request to file the amici brief, arguing that the issues it raises are "beyond the scope of relief' that the Supreme Court should address. Exhibit 1 at 2. Should the Supreme Court agree with the State's contrary position in *Recall Dunleavy* and deny Plaintiffs' request to participate as amici, that would extinguish any reason for this Court to delay its summary judgment decision, since the Supreme Court would have made it clear that it does not intend to rule on the issues before this Court.

Accordingly, because Plaintiffs believe this Court should remain in a position to rule as expeditiously as possible, should the Supreme Court deny Plaintiffs' request to participate in *Recall Dunleavy* as amici, this Court should deny Defendants' request to delay ruling on the merits.

Dated April 15, 2020

/s/ Stephen Koteff

Stephen Koteff, Bar No. 9407070
ACLU OF ALASKA FOUNDATION
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
(907) 263-2007
skoteff@acluak.org

Counsel for Plaintiffs ACLU of Alaska, Bonnie L. Jack, and John D. Kauffman

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2020, the foregoing was served on the following via electronic mail:

Jessica Leeah (jessica.leeah@alaska.gov)
Lael Harrison (lael.harrison@alaska.gov)

/s/ Stephen Koteff
Stephen Koteff

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

From: skoteff@acluak.org
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Subject: 3AN-19-08349CI Plaintiffs' Response to Defendants' Notice of Supreme Court Order
Date: 4/15/2020 10:49:22 AM
Attachments: image001.gif, image002.jpg, image003.png, 2020.04.15.Plaintiffs' Response to Defendants' Notice

Attached for filing and service in 3AN-19-08349C is 1 document totaling 34 pages:

Plaintiffs' Response to Defendants' Notice of Supreme Court Order.

Stephen Koteff
Pronouns: he, him, his

Legal Director
American Civil Liberties Union of Alaska
1057 W. Fireweed Ln, Ste. 207, Anchorage, AK 99503
907.263.2007 | skoteff@acluak.org<mailto:skoteff@acluak.org>
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anc.law.ecf@alaska.gov

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Division of Elections, and Director Gail Fenumiai, Appellants, v. Recall Dunleavy and Stand Tall With Mike, Appellees.	)	Supreme Court No. **S-17706**

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

STATE'S OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

Appellants State of Alaska Division of Elections and Director Gail Fenumiai ("the Division") oppose the request of the American Civil Liberties Union of Alaska, Bonnie L Jack, and John D. Kauffman ("ACLU") to file an amicus brief at the supplemental briefing stage of this appeal. The motion was filed without notice to the Division, one week before reply briefs must be filed, and the brief addresses a legal question that is outside the scope of this appeal and currently the subject of a different lawsuit. Because this appeal is not an appropriate forum for the ACLU to litigate its case, the Division asks the Court to deny the motion.

This Court's April 2, 2020 order asked the parties to address a series of general questions regarding the governor's line item veto power, whether a governor's objections explaining a veto could be a basis for a recall, and whether a line item veto could violate the separation of powers doctrine. As the Division explained in its opening supplemental brief, the Court need not—indeed, should not—address the substance of

the governor's veto message—i.e. his objections—because the recall committee's statement of grounds makes no reference to the veto message, but instead refers only to the line-item veto itself.

Despite this, the ACLU seeks leave to file a brief arguing distinct legal issues raised in a separate lawsuit currently before the Superior Court—issues that are not before this Court in this appeal. In doing so, the ACLU ignores a key limitation for amicus briefing, ironically one established in a case in which the ACLU was a party: "an amicus party may not seek relief beyond the scope of relief sought by the parties of record."[1] And in this case, the relief requested by the committee is the certification of its recall application, not the declaration requested by the ACLU that the governor's veto objections constitute a violation of the separation of powers.

An appeal of the Division's certification decision, which by law was based only on the language of the recall committee's statement of grounds, is not the proper forum for amici's arguments. They have filed a separate lawsuit; and they will have an opportunity to appeal to this Court if they wish, once the superior court has issued a ruling. The ALCU's attempt to leapfrog the superior court is a transparent subversion of the legal process and should not be permitted by this Court.

However, should this Court decide to accept this brief, the Division respectfully requests an additional week to file its reply brief so as to address amici's arguments in full.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

[1] *State v. Alaska Civil Liberties Union*, 159 P.3d 513, 514 (Alaska 2006).

DATED April 14, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: */s/ Margaret Paton Walsh*
Margaret Paton-Walsh
Assistant Attorney General
Alaska Bar No. 0411074

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, Division of Elections, and Gail Fenumiai, Director, State of Alaska, Division of Elections, Appellants, v. **Recall Dunleavy, an unincorporated association,** Appellee.	Case No. S-17706 Superior Ct. No.: 3AN-19-10903CI

Motion for Leave to File an Amici Curiae Brief by American Civil Liberties Union of Alaska, Bonnie L. Jack, and John D. Kauffman

The appeal addresses the question of whether the form and substance of certain grounds for recall are sufficient in a petition to recall Governor Dunleavy from office. One of the grounds for recall asserts that "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law." On April 2, 2020, the Court ordered the parties to submit supplemental briefs answering questions related to whether Governor Dunleavy's June 28, 2019, veto of appellate court funds violated the separation of powers.

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

Amici take no position on whether appellee Recall Dunleavy has asserted adequate grounds to allow a recall vote on Governor Dunleavy, nor do they take a position on whether Alaskans should recall the governor. But Amici have a strong interest in how this Court resolves its supplemental questions on whether the governor's veto violates the separation of powers. Amici are currently plaintiffs in a lawsuit challenging the constitutionality of the June 28, 2019, veto as a violation of the separation of powers. *ACLU of Alaska et al. v. Dunleavy et al.*, Case No. 3AN-19-08349CI (filed July 17, 2019). That matter is currently pending before superior court Judge Jennifer S. Henderson and is now ripe for decision.

Plaintiffs in the superior court, Amici here, have asked that court to issue an injunction ordering the State to refund the vetoed sum to the appellate courts' fiscal year 2020 budget as soon as practicable, so that the appellate courts have a meaningful opportunity before June 30 to use that money. Should the superior court hold that the veto unconstitutionally violates the separation of powers, ordering a return of the vetoed funding after the June 30 close of the 2020 fiscal year would have no monetary impact, since there would be no budget to which the funds could be restored.

This Court's answers to the questions posed in its April 2 Order could resolve the constitutional issues before the superior court, or, at the very least, are likely to provide guidance to the court in its summary judgment ruling. Because they have fully researched and briefed the question of whether the veto violates the separation of powers before the superior court, Amici's insight may help this Court's inquiry.

Amici therefore ask permission to file an amici curiae brief, which they conditionally filed with this motion.

Dated: April 13, 2020

Respectfully submitted,

s/ Stephen Koteff /
STEPHEN KOTEFF, NO. 9407070
JOSHUA A. DECKER, No. 1201001
ACLU OF ALASKA FOUNDATION
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
907-263-2007

Attorneys for Amici Curiae

Certificate of Typeface

I certify that the text of this motion's font is 13-point (proportionally spaced) Century Schoolbook. Alaska R. App. P. 513.5(c).

s/ Stephen Koteff /
Stephen Koteff

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.258.0044
FAX: 907.258.0288
EMAIL: *legal@acluak.org*

SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, Division of Elections, and Gail Fenumiai, Director, State of Alaska, Division of Elections, Appellants, v. **Recall Dunleavy, an unincorporated association,** Appellee.	Case No. S-17706 Superior Ct. No.: 3AN-19-10903CI

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

Brief of Amici Curiae American Civil Liberties Union of Alaska, Bonnie L. Jack, And John D. Kauffman

Filed in the Supreme Court
for the State of Alaska on
this _____, day of April 2020

Meredith Montgomery, Clerk
Appellate Courts

By:_____
Deputy Clerk

Stephen Koteff
Alaska Bar No. 9707070
Joshua A. Decker
Alaska Bar No. 1201001
ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Lane, Ste. 207
Anchorage, AK 99503
Phone: (907) 263-2007

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STATEMENT OF INTEREST OF AMICI CURIAE

In 2001, this Court held that the State of Alaska violated the equal protection guarantee of the Alaska Constitution by denying Medicaid funding for medically necessary abortions. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001) (*Planned Parenthood 2001).* Subsequent to that decision, the State adopted statutory and regulatory definitions for "medically necessary" abortions that could be eligible for Medicaid reimbursement. On February 15, 2019, this Court concluded that the statute and regulation so narrowly defined which abortions could be considered "medically necessary" that they violated the equal protection clause because they imposed eligibility criteria on women seeking abortions that were more onerous than those applied to women who sought to carry a pregnancy to term. *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019) (*Planned Parenthood 2019*).

On June 28, 2019, Governor Dunleavy issued a line-item veto defunding the appellate courts of the Alaska Court System by $334,700. Office of Management and Budget, Veto Change Record Details, June 28, 2019, at 122, accessed at https://omb.alaska.gov/fiscal-year-2020-enacted-budget/. In his "statement of his objections" accompanying his June 28 veto, Governor Dunleavy left no doubt that he was reducing the appellate courts' funding as an executive act of reprisal for this Court's *Planned Parenthood*

decisions: "The Legislative and Executive Branch 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." Office of Management and Budget, Veto Change Record Details, June 28, 2019, at 122, accessed at https://omb.alaska.gov/fiscal-year-2020-enacted-budget/.

Amici American Civil Liberties Union of Alaska, Bonnie L. Jack, and John D. Kauffman sued to challenge the constitutionality of the June 28, 2019, veto as a violation of the separation of powers. *ACLU of Alaska et al. v. Dunleavy et al.*, Case No. 3AN-19-08349CI (filed July 17, 2019). That matter is currently pending before superior court Judge Jennifer S. Henderson. Both sides filed motions for summary judgment,[1] briefing was completed on April 10, 2020, and the matter is now ripe for decision.[2]

[1] Appended to this brief are the parties' summary judgment filings as follows:
Appendix A: Plaintiffs' Memorandum in Support of Motion for Summary Judgment (filed February 21, 2019).
Appendix B: State of Alaska's Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment and Memorandum in Support (filed March 13, 2019).
Appendix C: Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment (filed April 3, 2010).
Appendix D: State of Alaska's Reply in Support of Cross-Motion for Summary Judgment (filed April 10, 2019).

[2] The parties agreed that the matter could be decided without oral argument considering the logistical challenges posed by the COVID-19 pandemic.

Plaintiffs in the superior court, Amici here, have asked that court to issue an injunction ordering the State to refund the vetoed sum to the appellate courts' fiscal year 2020 budget as soon as practicable, so that the appellate courts have a meaningful opportunity before June 30 to use that money. Should the superior court hold that the veto unconstitutionally violates the separation of powers, ordering a return of the vetoed funding after the June 30 close of the 2020 fiscal year would have no monetary impact, since there would be no budget to which the funds could be restored.

This Court's April 2, 2020, Order for supplemental briefs directs the parties to answer questions about whether the governor's veto violates the separation of powers. Amici have no position on whether Recall Dunleavy has asserted adequate grounds to allow a recall vote on Governor Dunleavy, nor do they take a position on whether Alaskans should recall him. But given their interest as Plaintiffs in the superior court, Amici have a strong interest in how this Court resolves its supplemental questions on whether the governor's veto violates the separation of powers and, because they have fully researched and briefed that question before the superior court, their insight may help this Court's inquiry. The Court's answers could resolve the constitutional issues before the superior court, or, at the very least, are likely to provide guidance to the court in its summary judgment ruling.

SUMMARY OF ARGUMENT

The independence of the judiciary is a central component to a tripartite government. A court's independence cannot be maintained if it is subjected to undue financial pressures from the other branches of government, and the separation of powers is violated if that pressure works to influence the outcome of judicial decision making. Courts must be particularly wary of the potential for these pressures to undermine the public's confidence in the integrity of the judiciary.

Judicial independence and the doctrine of separation of powers are cornerstones of Alaska's constitution. Although Alaska courts have not previously confronted a defunding act by another branch of government in direct response a court ruling, this Court has on other occasions concluded that the separation of powers has been violated by encroachments on its independence. Furthermore, other courts have held that the withholding of funds from the judiciary by legislative or executive branch, or even the threat to do so, can constitute a significant threat to their independence and violate the separation of powers.

Governor Dunleavy's veto of the appellate courts' budget breaches the separation of powers, and violates the Alaska Constitution, because it subjects the court system to direct financial pressure in retaliation for this Court's holding requiring the State to provide Medicaid funding for medically

necessary abortions. This Court has explicitly held that it has the constitutional authority and duty to vindicate Alaskan's constitutional rights even when its decisions have effectively required state expenditures. The governor's veto eviscerates that authority by unilaterally shifting the financial burden of constitutional protections to the courts.

ARGUMENT

I. A Court's Freedom from Financial Pressures is a Fundamental Characteristic of Judicial Independence

From the beginning of our American democracy, the independence of the judiciary has been revered as an essential component of our constitutional form of government. In 1788, Alexander Hamilton famously wrote in support of the ratification of the United States Constitution, agreeing with the 18th century political philosopher Montesquieu, that there can be "no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Alexander Hamilton). Hamilton foresaw that "[t]he complete independence of the courts of justice [would be] peculiarly essential in a limited constitution," where courts are often called on to rule on the constitutionality of the acts of the other two branches. *Id.* Hamilton recognized judicial independence as especially important in guarding against the oppression of the rights of the minority by a tyrannous majority. *Id.*

Hamilton was also wary of the formidable "power of the purse" that the other two branches of government held over the judiciary. In support of the constitutional provision safeguarding the salaries of judicial officers from diminution, Hamilton understood that judicial independence from the executive and legislative could never be maintained "in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter." The Federalist No. 79 (Alexander Hamilton). These principles became enshrined in Article III, section 1 of the United States Constitution, and have been acknowledged as foundations of democratic government.

These principles remain as strong today as they were more then 230 years ago. As one more modern court has said, they "are the bulwarks of independence of the federal judiciary against reprisal, fear of reprisal or undue influence from any quarter and particularly from the other branches of the federal government." *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1039 (7th Cir. 1984). "Judicial independence is crucial to the preservation of our system of government as has been demonstrated throughout the history of the Republic." *Id.*

Hamilton's concerns for judicial independence were offered chiefly in support of the Constitution's compensation clause, but these principles apply equally to pressures brought to bear on the court's budget. "[A] court is not free if it is under financial pressure" from the executive or legislative "in the

consideration of the rights" of those who would challenge the official acts of those branches. *Carlson v. State ex rel. Stodola,* 247 Ind. 631, 633-34 (1966). "[C]ourts frequently have to rule upon the acts or refusal to act of those controlling the purse strings in rendering justice" and they cannot allow "[t]hreats of retaliation or fears of strangulation [to] hang over such judicial functions." *Id.* at 638.

No court has addressed a retaliatory defunding veto like the governor issued in this case. But the potential havoc the executive could wreak on the courts through its abuse of the line item veto was cited with alarm by members of the judiciary in response to Congress's intent to pass legislation granting the president line item veto authority extending to the federal courts' budget. In a statement before a joint Senate and House committee on the proposed bill, Gilbert S. Merritt, Chief Judge of the Sixth Circuit and Chairman of the Executive Committee of the Judicial Conference of the United States, expressed the judiciary's "serious concerns" about the proposal. Statement Before the Sen. Comm. on Governmental Affairs and the House Comm. on Government Reform and Oversight, 104th Cong. (1995) available in 1995 WL 10418. Judge Merritt explained:

> The President and his Department of Justice litigate approximately half the cases before us. The Executive Branch is often upset with our rulings. Many Presidents have gotten very upset with us. . . . Presidents, Attorneys General and Members of the Department of Justice have great power. To permit them to

> control the Judicial budget would endanger the integrity and fairness of the Judiciary. Litigants against the Department of Justice would legitimately doubt the capacity of the courts to dispense even-handed justice. This may further erode public trust in the courts. This is our concern.

Id.

The concerns expressed by Judge Merritt and the *Carlson* court make clear that the diminution of a court's budget can represent as much of a coercive and retaliatory threat to a court's independence as can an attack on judicial salaries. And Judge Merritt's warning speaks to an equally essential component of judicial independence—the public's confidence in the impartiality of the courts. Any distinction between jurists' concerns about their salaries and their courts would rest on the dubious proposition that justices and judges are motivated more by personal pecuniary interests than they are by their duty to do justice and to preserve the integrity and independence of the judiciary.

II. Judicial Independence and the Separation of Powers are Cornerstones of the Alaska Constitution

The same principles of judicial independence inherent to the United States Constitution were similarly considered to be indispensable to the framers of the Alaska Constitution. Indeed, "[t]here is no doubt that judicial independence was a paramount concern of the delegates" at Alaska's Constitutional Convention. *Buckalew v. Holloway*, 604 P.2d 240, 245 (Alaska

1979). The delegates sought to ensure that Alaska had an "impartial judiciary" free from "political pressures." *Id. See also Hudson v. Johnstone*, 660 P.2d 1180, 1185 (Alaska 1983) ("That the drafters of Alaska's constitution sought to insulate the judiciary from political pressure that might interfere with its impartiality is clear . . . ."). There was particular concern that "executive patronage" could "affect the outcome of particular cases in contravention of the dictates of the law . . . ." *Buckalew*, 604 P.2d at 246. The delegates therefore adopted strong measures to insulate the judiciary from the vagaries of the political process, in particular eschewing a judicial selection method that would allow for the election of judges or depend on a "simple gubernatorial appointment system . . . ." *Id.* at 245–46.

The authority and independence of the Alaska's judicial branch of government is manifested in the Alaska Constitution in several explicit ways. Article IV, section 1 vests the exclusive power of the judiciary with the courts: "The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. . . ." As a complement to this power, the Alaska Supreme Court is granted the sole authority under the Constitution to "make and promulgate rules governing the administration of all courts," subject only to change by a two-thirds vote of the legislature. Article IV, section 15. And the Chief Justice of the Alaska Supreme Court

acts as "the administrative head of all courts," with the authority to appoint an administrative director for the Court System. Article IV, section 16.

The Alaska Constitution, like its federal counterpart, also guards the independence of the judiciary with its inclusion of a compensation clause that prohibits the diminution of "[c]ompensation of justices and judges . . . during their terms in office, unless by general law applying to all salaried officers of the State." Article IV, section 13. The compensation clause embodies the principle that an independent court, "free from control by the [other branches of government,] is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *Hudson v. Johnstone,* 660 P.2d 1180, 1184–85 (Alaska 1983) (quoting *United States v. Will,* 449 U.S. 200, 217–18 (1980)).

Inherent in the Alaska Constitution, and crucial to the courts' independence, is the doctrine of the separation of powers, which "is derived from the distribution of power among the three branches of government." *Alaska Pub. Interest Research Grp. v. State,* 167 P.3d 27, 34–35 (Alaska 2007). *See also Pub. Def. Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975) (Although the separation of powers doctrine is not explicit in the its text, "what is implied is as much a part of the constitution as what is expressed."). The Alaska Supreme Court has described "the underlying rationale" of the doctrine as "the avoidance of

tyrannical aggrandizement of power by a single branch of government." *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976). Most importantly, the separation of powers "limits the authority of each branch to interfere in the powers that have been delegated to the other branches." *Alaska Pub. Interest Research Grp.*, 167 P.3d at 35. At its core, the doctrine exists to "preclude the exercise of arbitrary power and to safeguard the independence of each branch of government." Id.

III. Alaska Courts Have Held that Threats to Their Independence Violate the Separation of Powers

On several occasions, Alaska courts have held that incursions into their autonomy have violated the separation of powers. For example, in *State v. Williams*, 356 P.3d 804 (Alaska Ct. App. 2015), the Alaska Court of Appeals rejected attempts to dilute its contempt power. The State in *Williams* argued that executive branch prosecutors had the authority to pursue contempt proceedings against persons who violated court orders, including "the authority to require the court to adjudicate the contempt charge, regardless of how the court views the matter." *Id.* at 805. The court found this position to be an untenable violation of the separation of powers. This Court had previously determined that contempt power is "an inherent power of the judiciary." *Cont'l Ins. Companies v. Bayless & Roberts, Inc.*, 548 P.2d 398, 408 (Alaska 1976). Therefore, the Court of Appeals held that allowing state

prosecutors to decide whether a person should be held in contempt would usurp that inherent power, "undermine judicial independence," and "seriously shift the balance of power between the executive and judicial branches of government." *Williams*, 356 P.3d at 811.

This Court confronted a similar threat when its authority to regulate the practice of law was compromised by a statute addressing procedures for attorney discipline. The statute compelled the court to adopt without deviation recommendations for discipline made by the Alaska Bar Association's Board of Governors in specific cases. *In re MacKay*, 416 P.2d 823 (Alaska 1964). The Court found the statute "unconstitutional for being an invasion of the inherent power of the court to discipline and disbar members of the Alaska Bar Association." *Id.* at 829.

And in *Citizens Coal. for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162 (Alaska 1991), the Court's authority to promulgate court rules was challenged by an organization seeking to place an initiative on the ballot that would limit the amount of attorney's fees that could be awarded in personal injury cases. The Court upheld the lieutenant governor's rejection of the initiative on the basis that Article XI, section 7 of the Alaska Constitution "precludes use of the initiative to prescribe such a rule of court." *Id.* at 172. In so holding, the Court emphasized its inherent rulemaking authority under Article IV, section 1, referencing its power to regulate the admission to the

practice of law and to control the professional conduct of attorneys. *Id.* at 165. *See In re Stephenson*, 511 P.2d 136 (Alaska 1973); *Miller v. Paul*, 615 P.2d 615 (Alaska 1980).

IV. Other Courts Have Held that Funding Decisions Can Erode Their Independence and Violate the Separation of Powers

None of these cases involved cuts to court funding or judicial salaries. But courts in other jurisdictions have recognized that these threats compromise their independence and violate the separation of powers. For example, in *Carlson v. State ex rel. Stodola*, 247 Ind. 631 (1966), the city council of Hammond, Indiana, reduced the city court's requested fiscal year 1965 budget by almost 25%. The judge of the city court sued to get the money back, and the Indiana Supreme Court upheld a lower court's order compelling a return of the diminished funds. *Id.* at 638. As described above, the court particularly noted that "a court is not free if it is under financial pressure" from those who may be affected by its decisions. *Id.* at 633–34. "[C]ourts frequently have to rule upon the acts or refusal to act of those controlling the purse strings in rendering justice" and they cannot allow "[t]hreats of retaliation or fears of strangulation [to] hang over such judicial functions." *Id.* at 638.

Similarly, in Davenport, New York, after the town board significantly reduced the salary of the town justice, New York's intermediate appellate

court determined the action "likely to affect or impinge upon the independence of the judiciary" and reversed the decision. *Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110, 1112 (N.Y. 2007). In so doing, the court observed that "[a] real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions." *Id.*

And in *Smith v. Miller*, 384 P.2d 738 (Colo. 1963), county commissioners refused to approve the requested salaries of certain district court judges. The Supreme Court of Colorado held that the commissioners' refusal interfered with the court's inherent power to set judicial salaries. *Id.* at 741. In so holding, the court recognized "the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source." *Id.* The court found it "abhorrent to the principles of our legal system and to our form of government" that courts should be forced to "depend upon the vagaries of an extrinsic will." *Id.*

Courts have also held that the coercive nature of threats to prospective financial consequences breaches of the separation of powers. In *Stilp v. Com.*, 588 Pa. 539 (Pa. 2006), the court considered a challenge to a statute that provided for unvouchered expense reimbursements to legislators—a provision

of dubious constitutionality—that also included compensation provision for the judiciary, which appeared constitutionally sound. *Id.* at 640-43. The Pennsylvania legislature had included a non-severability clause in the statute so that if one provision of the law was struck down, the entire statute would fail. The court noted that where such a "provision appears to be aimed at securing a coercive effect upon the [j]udiciary, it necessarily implicates the separation of powers." *Id.* at 640. The court held "the potential 'retribution' . . . built into the statute" to be an unacceptable intrusion on the independence of the judiciary that violated the separation of powers and struck down the non-severability clause. *Id.* at 643.

Notably, the *Stilp* court expressed its confidence that no member of the Pennsylvania judiciary would have allowed the prospect of a diminished salary to influence their decision in passing on the legislation, but it found that to be irrelevant. What mattered, said the court, was the fact that the non-severability clause "act[ed] as an incentive to engage in a less exacting constitutional inquiry."[3] *Id.* at 642.

[3] One commentator has described the type of non-severability clause confronted in *Stilp* as an "in terrorem clause." Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 Alb. L. Rev. 997, 1001 (2005). They are "especially troubling," he argues, because they "amount to coercive threats, and the principle that people should not be subject to such threats, or should be free of the consequences of their acts if the acts are coerced, is about as basic as legal principles get."

V. Governor Dunleavy's Veto of the Court System's Budget is an Unconstitutional Breach of the Separation of Powers

Cutting a court's budget in response to its rulings threatens the court's independence and violates the separation of powers.[4] No Alaska case (and indeed, no other reported case in American jurisprudence) addresses a retaliatory defunding measure such as the governor's veto. But in each of the cases from other jurisdictions cited above, the courts unambiguously concluded that a court's independence is threatened, and the separation of powers is violated, if another branch of government is able to wield the power of the purse in a way that could impact the substance of judicial decision making. If these defunding measures represent intrinsic incursions into courts' autonomy, then the executive act of taxing a court, in any amount, for exercising its duty to interpret and uphold the constitution stands as an existential threat to the court's independence and the separation of powers.

For well over two hundred years, it has been "emphatically the province and duty" of the courts "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This authority is enshrined in Article IV,

[4] In their briefing to the superior court, Amici expressly argue that the governor's June 28 veto was a punitive, retaliatory, and coercive act against the judiciary. App. A at 22–24; App. C at 5–6. Nowhere in their responses to this argument do the governor or State deny that the *purpose* of the veto was punitive, retaliatory, or coercive.

section 1 of the Alaska Constitution and gives this Court the ultimate power and obligation to rule on the constitutionality of statues and executive actions. *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982) (courts have "the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 972 (Alaska 1997) (supreme court "cannot defer to the legislature when infringement of a constitutional right results from legislative action").

But a court cannot be free to "say what the law is," especially if its decisions compel the expenditure of resources, when it is made to suffer financial consequences as retribution for those decisions. Such a result would wholly undermine the principle of judicial independence, putting judges on notice that there was a cost, imposed at the caprice of the executive, in fulfilling their constitutional obligation to be impartial arbiters of the law. The governor's line veto cannot be a valid exercise of his constitutional authority when it operates as an annual appraisal of the court's performance, especially when the performance is evaluated using stark political criteria and rewarded or punished with fiscal incentives.

As a general proposition, this should be enough for the Court to conclude that the governor's June 28, 2019, line item veto is an unconstitutional violation of the separation of powers. But there is a more

compelling reason in this case for it to do so. As noted above, this Court, in *Planned Parenthood 2001*, upheld a superior court decision that the State of Alaska violated the equal protection guarantee of the Alaska Constitution by denying Medicaid funding for medically necessary abortions. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001). In that case, the State argued that "the superior court effected an appropriation of funds in violation of the separation of powers between branches of government." *Id.* at 913.

This Court compellingly rejected that argument. Noting that its "constitutional legal rulings commonly affect state programs and funding," *id.* at 914, the Court observed that it had "never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review." *Id.* On the other hand, the Court said, "the State's claim would remove all constitutional restraints from legislative exercise of the spending power . . . ." *Id.* The Court "emphatically reject[ed] such a claim." *Id.*

The Court cited to a number of seminal United States Supreme Court decisions in which the Court's exercise of its duty to uphold the Constitution "effectively required state expenditures." *Id.* The Court therefore confirmed its holding to be "squarely within the authority of the court, not in spite of, but *because* of, the judiciary's role within our divided system of government."

Id. This Court noted that the decisions of "twenty-one other courts" reinforced its conclusion that "the separation of powers doctrine" supported its decision. *Id.*

Yet today, this important constitutional principle has been turned on its head by the governor's veto. In one fell swoop, the governor has accomplished the result that the Court so emphatically rejected in *Planned Parenthood 2001.* By defunding the appellate courts in the amount he thinks the Court's decisions have cost the state in Medicaid-funded abortions, the governor has assumed the constitutional authority of the Court and defied the separation of powers by single-handedly assessing these costs against the court system itself. If allowed to stand, the Court's authority to resolve constitutional questions involving state expenditures is lost. If not struck down, the governor's veto will stand as precedent for a forced annual accounting by which the judiciary pays the cost for upholding the constitutional rights of Alaskans.[5]

[5] This is not conjecture. On April 7, 2020, the governor again vetoed the same amount—$344,700—from the appellate courts' budget, this time for fiscal year 2021. Although explaining it in slightly different terms than in his previous statement of objections, this year the governor again made clear that the reduction was in response to the Court's *Planned Parenthood* decision. The purpose is to "[r]educe 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." HB 205 FY21

CONCLUSION

Governor Dunleavy's veto of the appellate courts' budget, issued in explicit response to this Court's exercise of its constitutional duty to interpret and uphold the Alaska Constitution, is an unprecedented threat to the independence of the Alaska judiciary, and violates the separation of powers. The veto "strikes at the heart of judicial independence" because it imposes "financial consequences" for the Court's issuance of "legally correct but unpopular decisions." *Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110, 1112, (N.Y. 2007). In answering the questions presented in its April 2, 2020, Order on supplemental briefs, this Court should rule consistently with these conclusions.

Respectfully submitted this 13th day of April 2020.

s/ Stephen Koteff /
Stephen Koteff, Bar No. 9407070
Joshua A. Decker, Bar No. 1201001
ACLU OF ALASKA FOUNDATION

Veto Change Records, April 7, 2020 at 65, accessed at https://omb.alaska.gov/fiscal-year-2021-enacted-budget/.