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

ERIC FORRER, Plaintiff, v. STATE OF ALASKA and LUCINDA MAHONEY, in her official capacity as COMMISSIONER OF THE DEPARTMENT OF REVENUE, Defendants.	)	Case No. IJU-20-00644 CI

STATE'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

The COVID-19 pandemic and its economic repercussions have created a fluid, continuously changing landscape requiring the utmost flexibility on the part of government to respond effectively. In the midst of this global pandemic, Governor Dunleavy and the Thirty-First Alaska State Legislature (Legislature) moved quickly to direct federal aid into the hands of Alaskans. Mr. Forrer asks this Court to block portions of that aid not on the grounds that it is not sorely needed by the recipients, and not on the grounds that the Governor and the Legislature disagree on the use of the money, but simply because he objects to procedural and implementation details. The Court should deny his request.

Mr. Forrer has no grounds to obtain an injunction, nor does he even have standing to bring the new claim in his amended complaint, which objects specifically to

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the distribution of a second tranche of federal CARES Act funds by the Department of Commerce, Community and Economic Development (DCCED) under the State's small business relief program. Mr. Forrer can articulate no harm to himself if the requested injunction is denied and grants are distributed—because there will be no harm to him. Instead, *granting* the injunction is what would cause harm—harm to the Alaska small businesses that Mr. Forrer believes should not receive aid simply because they received less than $5000 under a federal program.

Mr. Forrer is also wrong on the merits of his new claim: he asks the Court to apply a rigid interpretation to the terms of legislatively approved spending that was necessarily drafted to meet urgent needs during a pandemic. But his interpretation is contrary to the broader intent of the federal CARES Act and the small business grant program, and the specific intent of the Governor and the Legislature.

Because Mr. Forrer lacks standing to challenge the implementation of the small business grant program, because an injunction would harm Alaskan small businesses without protecting Mr. Forrer from any harm, and because Mr. Forrer's rigid, textualist approach to interpreting program terms is not supported by the legislative history, the goals of the program, or by Alaska law, the Court should deny the motion for preliminary injunction and dismiss Mr. Forrer's new claim.[1]

FACTS

Early this year, an international public health emergency caused by an outbreak

[1] The State filed a motion for summary judgment on the merits of Mr. Forrer's remaining claim on June 19, which has not yet been fully briefed.

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of COVID-19 reached the United States and Alaska with major public health and economic consequences. By March, public officials on a national level and in Alaska began scrambling to address the public health crisis and to mitigate the enormous economic damage triggered by the need to close down much of the commerce in the United States. President Trump declared a national public health emergency and on March 11, Governor Dunleavy issued a public health disaster emergency under AS 26.23.020. The Alaska Disaster Act, AS 26.23, gives the governor broad authority to respond to emergencies of all kinds, and expressly recognizes "the governor's authority to apply for, receive, administer, and spend grants, gifts, or payments from any source, to aid in disaster prevention, preparedness, response, or recovery."[2] Moving quickly so it could go into recess for the health and safety of its members and staff, the Legislature passed a state budget for Fiscal Year 2021 and then recessed on March 29.[3]

The U.S. Congress acted to address the growing economic fallout of the COVID-19 crisis by passing the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which President Trump signed into law on March 27. The CARES Act is complex federal legislation enacted quickly and intended to provide immediate relief to Americans beset by the public health threat and largescale layoffs that were triggered by the need to close workplaces and other places of public accommodation in order to

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2 AS 26.23.050 (c).

3 Under the 121-day constitutional limit the legislature could remain in session until May 20; through concurrent resolution the legislature agreed to an extended recess of longer than three days. CSSCR 14 (RLS), Legislative Resolve 22.

stop the spread of the virus.

The CARES Act included approximately $1.5 billion of aid for the State of Alaska to spend on mitigating the devastating impact of the pandemic. Reflecting the complexity of the law, its swift enactment, and the fast moving events surrounding the federal government's response to the virus, the federal government did not issue its first guidance regarding eligible expenditure of CARES Act money until April 22, nearly a month after enactment of the legislation. So far, that guidance has been updated three times, with the most recent update issued on June 24.[4]

Accordingly, by the time CARES Act money had been disbursed to the State and the first federal guidance on expenditure was available to state officials, the Legislature was in recess and the state's residents and businesses were experiencing the economic shock of an unprecedented national effort to "flatten the curve" by closing businesses and requiring citizens to "hunker down" at home. According to the Alaska Department of Labor, the state lost 42,200 jobs or 13% of its workforce in April alone.[5] The state government continued to operate to the best of its ability with a strong focus on public health through numerous gubernatorial mandates,[6] and the executive and legislative branches came together to address the economic crisis with a focus on prompt distribution of the federal CARES Act funds.

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4 https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf.

5 *See, Economists project another slow recovery after pandemic*, Alaska Journal of Commerce, June 24, 2020.

6 *See,* https://covid19.alaska.gov/health-mandates/.

On April 21, with the Legislature still in recess, the Governor sought expedited authority to spend the CARES Act funds by presenting Revised Program Legislative Requests (RPLs) to the Legislative Budget and Audit (LB&A) Committee. Budget bills authorize the spending of unanticipated federal receipts[7] through the process provided in AS 37.07.080(h), which requires submission of RPLs to the LB&A Committee.[8] The Governor's RPLs for the CARES Act money included funding for community

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[7] In HB 39, the operating budget bill for FY 2020, the relevant language is in Section 32(a):

> FEDERAL AND OTHER PROGRAM RECEIPTS. (a) Federal receipts that are received during the fiscal year ending June 30, 2020, and that exceed the amounts appropriated by this Act are appropriated conditional on compliance with the program review provisions of AS 37.07.080(h).

[8] AS 37.07.080(h) provides:

> The increase of an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature may be expended in accordance with the following procedures:
>
> (1) the governor shall submit a revised program to the Legislative Budget and Audit Committee for review;
>
> (2) 45 days shall elapse before commencement of expenditures under the revised program unless the Legislative Budget and Audit Committee earlier recommends that the state take part in the federally or otherwise funded activity;
>
> (3) should the Legislative Budget and Audit Committee recommend within the 45-day period that the state not initiate the additional activity, the governor shall again review the revised program and if the governor determines to authorize the expenditure, the governor shall provide the Legislative Budget and Audit Committee with a statement of the governor's reasons before commencement of expenditures under the revised program.

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assistance payments,[9] relief for small businesses[10] and fisheries,[11] and funding for rural airports and other transportation needs.[12]

In early May, the Governor revised many of these RPLs and issued others as the State received further federal guidance on eligible uses of the CARES Act funds (the federal guidance was updated on May 4) and refined its policies aimed at mitigating the devastating economic impact of the pandemic. The LB&A Committee approved some of the RPLs on May 1, and the rest on May 11.

But the ongoing nature of the federal response to the COVID-19 crisis and the continual updating of federal guidance created a challenging situation for legislative and executive branch officials—who all sought to ensure the most effective use of the funds to aid Alaskans in need, including small businesses—requiring frequent amendments to proposals. For example, the Office of Management and Budget (OMB) submitted a small business relief RPL on April 21, revised it on May 1,[13] and then revised it again

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9 RPL #08-2020-0250 (http://www.legfin.akleg.gov/RPL/2020/2020-05-11_RPLAdditionalPacket.pdf at p. 2).

10 *See,* Exhibit A: RPL #08-2020-0251 (http://www.legfin.akleg.gov/RPL/2020/2020-05-11_RPLAdditionalPacket.pdf at p. 8).

11 RPL #08-2020-0054 (http://www.legfin.akleg.gov/RPL/2020/2020-05-11_RPLAdditionalPacket.pdf at p. 23).

12 RPLs #25-2020-8771 and -8772 (http://www.legfin.akleg.gov/RPL/2020/2020-05-11_RPLCompletePacket.pdf at pps 4, 6).

13 Legislative Budget & Audit Committee Hearing, May 1, 2020, Memorandum from Pat Pitney, at http://www.akleg.gov/basis/get_documents.asp?session=31&docid=61924

on May 11.[14] The state small business relief program was originally designed as a loan program but was changed into a grant program after consideration of further federal guidance regarding the use of the CARES Act funds.[15]

During the legislative process, participants acknowledged the difficulty of designing and administering the small business relief program to direct money where it was needed given the ongoing federal efforts and continually updated federal guidance. For example, at the May 11 hearing at which the small business relief program RPL [#08-2020-0251] was approved, LB&A Committee member Representative Ivy Sponholz asked DCCED Commissioner Anderson about which Alaskan small businesses would be eligible for aid, particularly

> people who applied for economic injury disaster loans [EIDL] but did not receive them many of them got an advance but they did not actually receive the loan, and the advances averaged about $4600, in the state of Alaska there were about 1600 of them, in your mind does that make people ineligible for this program or can they still be eligible for this program?[16]

Commissioner Anderson responded that the program would be flexible and intended to help as many small businesses as possible:

> I believe that is something that we will have to look at I had not heard that statistic that obviously still probably create a need out there so I think we would be willing to look at that. The intent of this program is that we help as many small businesses as possible. If there are some

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14 Exhibit B: HB 313, sec. 1(a)(6); (8); (10).

15 *Compare* Exhibits C & D (developing drafts of RPL) *with* Exhibit A (final approved RPL); *see also*, Exhibit G (federal guidance).

16 May 11 LB&A Committee hearing at 2:26-2:28 http://www.akleg.gov/basis/Meeting/Detail?Meeting=SBUD%202020-05-11%2013:00:00.

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> gaps like that that we are not aware of that need to be addressed we are definitely open to looking at those. We want to have enough guidelines around the program so that people are clear so that there is not too much ambiguity about whether they are eligible or not.[17]

Representative Sponholz responded that it "was important that businesses are not penalized because they got small advance in the EIDL and can't get a larger grant through the state program."[18]

Senator Von Imhoff immediately followed up and said to Commissioner Anderson that "to reiterate" federal grants were not being consistently administered and should not be a basis to deny state aid:

> if you could just put that concept in a box when looking at eligibility because it has been inconsistent, it has been sometimes no rhyme or reason and when folks have applied for a larger amount, never heard back, and then suddenly four thousand dollars appeared in their account, and so it was nice to have but there was also no consistency or I guess rhyme or reason I suppose so the EIDL has been a good program but not reliable so if you could use that as a consideration don't penalize a business if they have received even some funding which I think is as Representative Sponholz is right it is about between 3 and 5.[19]

Commissioner Anderson said that she appreciated that comment, that it was good advice, and that DCCED "\would look at that."[20]

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17 *Id.*

18 *Id.*

19 May 11 LB&A Committee hearing at 2:28 http://www.akleg.gov/basis/Meeting/Detail?Meeting=SBUD%202020-05-11%2013:00:00

20 May 11 LB&A Committee hearing at 2:29 http://www.akleg.gov/basis/Meeting/Detail?Meeting=SBUD%202020-05-11%2013:00:00

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Also at the LB&A hearing, Representative Tuck asked about applications from businesses that received some federal funding and Commissioner Anderson responded that "the initial tranche of funding" was to help businesses that had received no federal funds, but that the "beauty of working through this process is we can be nimble to respond to needs as they arise," that the Department was not dedicating all of the funds immediately, and that "we'll be able to adjust as we move forward, understanding that there may be some other entities out there that maybe did not get sufficient funding. My concern is that we are still tracking the SBA programs." The Commissioner explained that she "would like to have the ability to adjust as we move forward."[21]

The LB&A Committee approved the small business relief program on May 11 along with numerous other RPLs for expenditure of CARES Act funds.[22] About a week later, the Alaska Legislature passed legislation—HB 313—to eliminate any uncertainty about the legality of spending CARES Act funding pursuant to the LB&A process such as the claims made by Mr. Forrer in this case. When Governor Dunleavy signed HB 313, that curative legislation, approving and ratifying the actions of the executive branch to expend federal funds in accordance with the LB&A Committee process, became law as ch. 32, SLA 2020, with retroactive effect to May 1, 2020.

DCCED began accepting applications for the first tranche of small business relief

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21 May 11 LB&A Committee hearing at 2:20-2:23. http://www.akleg.gov/basis/Meeting/Detail?Meeting=SBUD%202020-05-11%2013:00:00.

22 EX B: HB 313, sec. 1(a)(8), (11).

funding on June 1, 2020. It soon became apparent that adjustments would be needed. While disqualifying small businesses that had received less than $5,000 of federal relief may have been in line with the technical language of the documents submitted as part of the rushed RPL,[23] it would thwart the purpose of the relief program by preventing it from fully serving the needs of Alaska businesses. For example, at a House Finance hearing on June 17 extensive testimony from small businesses reflected confusion about the eligibility requirements and about the hardships created by applying a categorical prohibition on access to grants against small businesses when they had received only nominal sums from the federal government.[24]

During this period, fourteen Alaska legislators wrote to Commissioner Anderson requesting that she "accommodate the needs of Alaskan small businesses who desperately need the relief available in the AK CARES Grant Program" by permitting those businesses that did not qualify under the first tranche of funding because they received some federal funds to apply for a grant so that they could be approved "under

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[23] Exhibit A: RPL #08-2020-0251 (http://www.legfin.akleg.gov/RPL/2020/2020-05-11_RPLAdditionalPacket.pdf at p. 8).

[24] http://www.akleg.gov/basis/Meeting/Detail?Meeting=HFIN%202020-06-17%2015:00:00;
Packet 1 of written testimony:
http://www.akleg.gov/basis/get_documents.asp?session=31&docid=81991;
Packet 2 of written testimony:
http://www.akleg.gov/basis/get_documents.asp?session=31&docid=81990;
Packet 3 of written testimony
http://www.akleg.gov/basis/get_documents.asp?session=31&docid=81993.

the second tranche."[25]

In planning for the second tranche of funding, DCCED exercised its authority to adjust its administration of the program for this phase to permit small businesses that received less than $5,000 in federal relief to apply for state small business relief program grants, which could provide grants between $5,000 and $100,000.[26] This $5,000 benchmark was consistent with the number identified by legislators at the LB&A Committee who urged that the program be administered in a way so as not to penalize businesses that received less than $5,000 in federal funds.

Mr. Forrer now challenges DCCED's authority to make that adjustment to the small business relief program, and asks for a preliminary injunction to stop the distribution of grants to small businesses that received minor sums of money in federal relief.

ARGUMENT

The Court should deny Mr. Forrer's injunction motion for basic reasons: he has no standing to challenge the implementation of the small business relief program, and even if he did, he will not suffer irreparable harm if the program goes forward (and, conversely, the small businesses that would have received the relief would be harmed if an injunction were granted). Mr. Forrer thus cannot meet either the balance of hardships

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25 Exhibit. E: June 12, 2020 letter to Commissioner Anderson and James Wileman, CEO of Credit Union 1.

26 Exhibit F: DCCED Press Release, June 17, 2020 "CARES Act Funding for Alaska Businesses to be Expanded."

or the probable success on the merits standards for injunctive relief. Injunctive relief would also be contrary to the public interest, which favors the State distributing the needed federal CARES Act funds to Alaska businesses and communities before they lapse and have to be returned to the federal government unspent.

A. Mr. Forrer lacks standing to challenge the Department of Commerce's implementation of the small business grant program.

Alaska recognizes two sources of standing—interest-injury standing and citizen-taxpayer standing.[27] "To establish interest-injury standing plaintiffs must demonstrate that they have a 'sufficient personal stake' in the outcome of the controversy and 'an interest which is adversely affected by the complained-of conduct.'"[28] Mr. Forrer does not even attempt to argue that he has some kind of personal interest at stake here. He does not allege that he is eligible for any CARES Act funding, or that the State's administration of CARES Act funds will harm him personally in any way. On the contrary, he expressly disavows any interest in how small business relief funding is distributed, declaring: "[L]et me be crystal clear that I do not harbor any interest in telling the legislature how to divvy up the funds" allocated to the small business relief program. [Affidavit of Eric Forrer at 6, ¶ 24] Thus, Mr. Forrer has not even shown an "identifiable trifle" of a personal injury that could establish standing to bring this claim.

The closest he comes to an allegation of personal harm is the unexplained assertion that the State's alleged failure "to allocate CARES Act funding for the relief of

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27 *Keller v. French*, 205 P.3d 299, 302-305 (Alaska 2009).

28 *Id.* at 304 (internal citations omitted).

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the COVID-19 in conformity with the Alaska Constitution provisions requiring that funds be appropriated violates Forrer and public's right to due process." [2nd Amended Complaint at 10, ¶ 21] But there are two problems with this. First, despite quoting Alaska's due process clause in the complaint, Mr. Forrer fails to explain how the State's administration of CARES Act funds has, or could, "deprive[] [him] of life, liberty, or property," rendering any due process claim fundamentally deficient.

Second, even assuming this allegation about "conformity with the Alaska Constitution" could somehow support interest-injury standing, it is inapplicable to Mr. Forrer's new claim, which alleges that the State's expanded small business relief program does not comply with the terms of the RPL and HB 313. This new claim raises an issue akin to statutory interpretation; it is not a constitutional claim, unlike Mr. Forrer's original claim that the RPL process and subsequent ratification by the Legislature violates the constitutional requirements for state spending. Mr. Forrer has not established interest-injury standing to bring his new claim.

"Citizen-taxpayer standing, on the other hand, arises when taxpayers or citizens wish to challenge governmental action based on their status as taxpayers or citizens."[29] While the State acknowledges that Alaska cases suggest that Mr. Forrer likely has citizen-taxpayer standing to bring his original constitutional claim, the same cannot be said for his new claim about the implementation details of the small business

[29] *Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*, 210 P.3d 1213, 1219 (Alaska 2009).

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relief program. "To establish citizen-taxpayer standing, plaintiffs must show that the case is of public significance and that they are appropriate plaintiffs."[30] Mr. Forrer cannot meet either requirement with respect to this new claim.

Mr. Forrer's new claim is about eligibility criteria for receipt of a grant—in effect, he wants to challenge the details of the implementation of a state program. This is not a matter of "public significance" for the purposes of citizen-taxpayer standing. Although Mr. Forrer's pleadings are full of constitutional rhetoric, his new challenge to grant eligibility standards is purely a question of statutory interpretation, as noted above. If any citizen has citizen-taxpayer standing to challenge the details of an agency's implementation of a state program—even with no direct personal interest in the program at all—then lack of standing could never be grounds for dismissal of a claim against the government. But that is not the law.[31]

Similarly, Mr. Forrer is not an appropriate plaintiff to challenge the details of the State's small business grant program implementation. "[A] court may properly deny standing to a taxpayer-plaintiff where 'there is a plaintiff more directly affected by the challenged conduct in question.'"[32] Here, small businesses applying for grants will

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30 *Keller*, 205 P.3d at 302.

31 *See e.g.*, *Hoblit v. Commissioner of Natural Resources*, 678 P.2d 1337 (Alaska 1984) (holding plaintiff lacked standing as taxpayer to challenge sale of 20 acres of state land); *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252 (Alaska 2010) (holding that public interest law firm lacked standing to challenge state's administration of psychotropic medications to children).

32 *City of St. Mary's v. St. Mary's Native Corp.*, 9 P.3d 1002, 1009 (Alaska,2000) (quoting *Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.3d 528, 526 (Alaska 1993)).

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be directly affected by the Department's administration of the program and "there is no reason to believe that any potentially" affected business "would be unwilling to sue if they thought their rights were being violated"[33] by the Department's conduct. Certainly, Mr. Forrer has not claimed that the small businesses who will be directly affected will be somehow unable to challenge the legality of the new rules.[34] Thus, he has not established that he is an appropriate plaintiff to police the Department's administration of the small business relief program.

Mr. Forrer thus cannot establish either interest-injury or citizen-taxpayer standing to bring his new claim challenging the State's implementation of the small business relief program, and the Court should grant summary judgment to the State on that claim.

B. Mr. Forrer is not entitled to a preliminary injunction inhibiting the Department of Commerce's implementation of the small business grant program.

Even if the Court concludes that Mr. Forrer has standing to challenge the State's implementation of the small business relief program, Mr. Forrer is not entitled to a preliminary injunction stopping the distribution of relief funds to businesses. Although Mr. Forrer correctly recites the standards for granting a preliminary injunction, [Mot. at 17–18] he does not demonstrate that he meets any part of that standard.

Preliminary injunctions are extraordinary remedies that should be infrequently

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33 *Keller*, 205 P.3d at 303.

34 *Id.* ("The Keller plaintiffs do not contend that the governor or any other potential plaintiffs were somehow limited in their ability to sue. That individuals who are more directly affected have chosen not to use despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.").

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granted. The Alaska Supreme Court has called preliminary injunctions "harsh remedies" that are only used to "preserve the status quo" when necessary to prevent "the irreparable loss of rights before judgment."[35]

Under Alaska law, a "[p]laintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard."[36] The balance of hardships standard applies when the plaintiff establishes three factors: (1) the plaintiff is faced with irreparable harm; (2) the opposing party is adequately protected; and (3) the plaintiff raises "serious and substantial questions going to the merits of the case."[37] A plaintiff can meet this standard "only where the injury which will result from . . . the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[38] When the opposing party's interests cannot be adequately protected in the face of an injunction, the plaintiff must satisfy a much higher burden to obtain one by making a "clear showing of probable success on the

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

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

37 *Id.* at 54.

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

merits."[39] In assessing the relative hardships to each party, the Court is required to "[a]ssume the plaintiff will ultimately prevail when assessing the irreparable harm to the plaintiff absent the injunction," and also, conversely, "[a]ssume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction."[40]

1. Mr. Forrer will suffer no harm—much less irreparable harm—from the State's implementation of the small business grant program.

The Alaska Supreme Court has never affirmed a preliminary injunction in the absence of irreparable harm to the moving party. Indeed, a preliminary injunction is never justified unless the moving party can demonstrate irreparable harm. If the moving party does not face irreparable harm, he or she can wait for a decision on the merits in due course.[41] Without irreparable harm to the moving party, there is simply no reason for a court to truncate its usual procedures and attempt to quickly assess the merits of a case on an abbreviated record. Allowing accelerated mini-trials on the merits of every case at a very early stage would burden the court system and lead to hasty, erroneous

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39 *See, Misyura v. Misyura*, 244 P.3d 519, 521-22 (Alaska 2010) ("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.") (quoting *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005)).

40 *Id.*

41 *See Holmes v. Wolf*, 243 P.3d 584, 591 (Alaska 2010) (question is "whether exigent circumstances require that relief be granted before a full adjudication on the merits").

decisions.[42] Although language in a handful of Alaska cases suggests that a party whose harm is "less than irreparable" might nonetheless be able to obtain a preliminary injunction,[43] the Alaska Supreme Court has never approved of such an injunction. And such an injunction would be inappropriate as language in other cases makes clear.[44]

Mr. Forrer argues that denying an injunction "will result in irreparable harm to Alaska's most fundamental constitutional principles and likely result in an arbitrary allocation of business relief funds." [Mot. at 11] But the limited relief that Mr. Forrer requests here is unrelated to "Alaska's most fundamental constitutional principles," because he seeks only to enjoin small business relief that is inconsistent with his reading of the RPL and HB 313. Thus, the issue here is not a constitutional question at all, but rather one of statutory interpretation.

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42 *See, A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970) modified, 483 P.2d 198 (Alaska 1971) ("The necessity of avoiding litigation of the merits at this early stage stems from two factors. First a ruling on the merits in an action for preliminary relief would be premature, since it would usually be based on an incomplete complete record and made with an insufficient amount of time. Second, a ruling at this early stage would ultimately result in forcing the court to rule on the merits of the case twice-once at the preliminary stage and once in the final adjudication.").

43 *See, Misyura*, 244 P.3d at 521-22; *Holmes v. Wolf*, 243 P.3d 584, 591 (Alaska 2010) ("Where the harm is not irreparable, or where the other party cannot be adequately protected, then the moving party must show probable success on the merits.").

44 *See, VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 718 (Alaska 1988) ("VECO could have sought to enjoin the state from enforcing the Campaign Disclosure Act. That would require a showing of irreparable harm, among other things."); *Miller v. Atkinson*, 365 P.2d 550, 552 (Alaska 1961) (preliminary injunctive relief is available "to enjoin acts of the defendant which will cause irreparable injury to the personal or property rights of the plaintiff"; "to call into action this extraordinary power required a clear showing of the irreparable injury for which there was no other adequate remedy").

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To conclude that Mr. Forrer has established the irreparable harm necessary to warrant a preliminary injunction would be to eviscerate the standard for injunctive relief in cases involving the State. The Court would have to endorse the proposition that every Alaskan is sufficiently harmed by any violation of any statute by the State to warrant a preliminary injunction prohibiting the State from acting. But as explained above, this extraordinarily attenuated theory of harm does not even give Mr. Forrer standing, much less establish that he will suffer the kind of irreparable harm necessary to support the extraordinary relief of a preliminary injunction. Mr. Forrer's sense of personal affront at the State's efforts to respond to the pandemic and economic catastrophe as quickly and effectively as possible simply does not constitute an irreparable harm.

To be clear, the only alleged "harm" that might result here absent an injunction is that the State might give a grant of federal funds to a small Alaska business that has also received less than $5,000 in relief directly from the federal government. In the context of the current economic crisis, this is not a "harm" at all, and is plainly not the irreparable harm required to support a preliminary injunction.

2. The State—and the Alaskan businesses it is trying to help—will be irreparably harmed by an injunction.

In contrast to the lack of harm Mr. Forrer faces absent an injunction, the impact of an injunction on the State and certain small businesses would be severe.

The State currently faces an unprecedented ongoing public health and economic crisis. To respond as effectively as possible to the changing landscape, the State needs the maximum possible flexibility, especially in its efforts to save Alaskan small

businesses from collapse. Mr. Forrer purportedly understands the "devastation to the economy" wrought by the pandemic, [Forrer affidavit at 2, ¶ 8], but nevertheless wants to micromanage the administration's response by imposing a rigid view on RPL language that flies in the face of the purposes of the small business relief program. If this Court issues the requested injunction, the only effect will be to deny small Alaska businesses assistance from the State that they desperately need, potentially forcing them out of existence.[45] That is the real harm here and it far outweighs Mr. Forrer's concerns.

Moreover, the CARES Act imposes an expiration date of December 30, 2020 on the federal funding granted to states.[46] This means that the State must expend the federal funds by that date or any unspent funds must be returned to the federal government. As a result, court-imposed delays in distributing these funds would create a risk that the State—and Alaskans—could lose the money entirely.

3. Mr. Forrer has not established a probability of success on the merits.

Mr. Forrer also cannot establish probable success on the merits of his new claim because it relies on a literal application of language in the small business relief RPL that runs counter to the purposes of the program and ignores both the legislative history and

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45 *See e.g.*, June 17, 2020 House Finance Hearing at 2:07, http://www.akleg.gov/basis/Meeting/Detail?Meeting=HFIN%202020-06-17%2015:00:00 ("If I do not receive some form of loan or relief grant funds by July 1st, I will be forced to close down my business of nine years permanently and will lose my condo.")

46 Section 601(f)(2) of the Social Security Act, as added by section 5001(a) of the CARES Act.

the context of the pandemic. This is not how Alaska courts interpret Alaska statutes.[47]

On the contrary, the Alaska Supreme Court has rejected a rigid plain language approach to statutory interpretation, instead employing "a 'sliding-scale approach' to interpret the language."[48] Applying this sliding scale, "the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[49] When "a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent."[50] But the Court has expressly acknowledged that "we would depart from [a] plain reading of the statute if we were convinced that a different reading was required by legislative history," explaining that: "[w]e will sometimes interpret a statute expansively if an expansive interpretation 'will accomplish beneficial results, serve the purpose for which the statute was enacted, [or] is a necessary incidental to a power or right.'"[51]

Moreover, the Alaska Supreme Court has also noted that "in determining the reasonable meaning of a law, courts regularly look for guidance to the 'fundamental

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47 *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 992 (Alaska, 2019) ("When 'interpreting a statute, we consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.'") (citations omitted).

48 *Id.*

49 *Id.*

50 *State v. Alaska State Employees Ass'n/AFSCME Local 52*, 923 P.2d 18, 23 (Alaska 1996) (quoting *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 428 n. 5 (Alaska 1983)).

51 *State v. Fyfe*, 370 P.3d 1092, 1100–01 (Alaska 2016).

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canon of statutory interpretation that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[52] "In other words, 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'"[53] In this case, the legal authority at issue is RPL 08-2020-0251, in which the Legislative Budget & Audit Committee approved the expenditure of certain federal receipts and HB 313, in which the Legislature expressly "approved and ratified" [54] both the RPL and the actions of the Committee in approving the RPL.

Since HB 313 ratified the actions of the LB&A Committee in approving the RPL, it is important to understand what an RPL is meant to do and the role of the information presented in the RPL. The purpose of an RPL is to authorize the spending of money that the State did not anticipate receiving when the budget was passed[55]—in this case, federal disaster relief funds. The RPL explains how the executive branch proposes to spend the money and what existing appropriation the funds would be added to. The Committee's decision on whether to approve the proposed spending (i.e., use of a sum of money for a specific purpose) is informed by the explanatory language in the RPL and the discussion at the Committee's hearing on the RPLs. Regardless of the

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52 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 217 (Alaska 2007) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

53 *Id.* (quoting *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971)).

54 HB 313, sec. 2.

55 AS 37.07.080(h).

Committee's decision, the Governor can move forward with the spending, so long as he responds to any disapproval.[56] Ultimately, although the underlying authority to operate the program and the scope of the program may be part of the discussion, the Committee's focus is on the expenditure and appropriation authority.

The specific RPL at issue here proposes funding a grant program for small businesses called the "AK CARES Funding Program" and notes that DCCED estimates, based on "outreach to Alaska small businesses," that "an average funding need by these businesses [of] between $30,000 and $50,000." [Ex. A at 2] The RPL provides that "AK CARES will make DCCED directed grants of between $5,000 and $100,000 to all licensed and eligible Alaska small businesses established prior to March 11, 2020 who had had business impacted by COVID-19." [Ex. A at 2] The RPL identifies the statutory authority for DCCED to operate the grant program under AS 44.33.020(35) which authorizes DCCED to "perform all other duties and powers necessary or proper in relation to economic development and planning for the state." The RPL also identifies the statutory authority related to AIDEA, which is assisting DCCED in administering the program's distribution of federal CARES funds.[57]

Although Mr. Forrer is correct that the RPL also says that "[b]usinesses that have secured an Economic Injury Disaster Loan, PPP loan, or other federal program funding

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56 AS 37.07.080(h)(3).

57 Under AS 44.88.080, AIDEA has the authority to "accept, gifts, grants, or loans from a federal agency, from an agency or instrumentality of the state or of a municipality, or from any other source."

made available directly to small businesses under the Cares Act do not qualify," [Ex A at 2] his literal reading of this language to preclude grants even to businesses that received just a couple thousand dollars of federal funds, is contrary to the clear purpose and intent of the program as a whole as well as the legislative history.

This is apparent from AIDEA's summary of the program, which was incorporated into the RPL. AIDEA explained that "DCCED has directed AIDEA to structure a program using the CRF [the Coronavirus Relief Fund] to expeditiously distribute DCCED directed grant funding to Alaska's small businesses impacted by the COVID-19 health emergency and unable to access or qualify for funding directly from the federal programs enacted under the Cares Act." [Ex. A at 3] The grant program covers a variety of eligible expenses, including payroll costs, payment of short term credit card debt, rent or mortgage payments, utilities, purchase of personal protective equipment, and reopening expenses; and grant amounts range from $5,000 to $100,000. [Ex. A at 3] It is thus clearly directed at keeping small businesses afloat during mandatory closures and through the economic reopening of the state.

Given that DCCED understood that, on average, businesses would likely need between $30,000 and $50,000 in relief funding—and contemplated that the least amount a business might need would be $5,000—it makes no sense to exclude from the program small businesses that had received less than $5,000 in direct federal aid, which is less than the smallest amount of relief that DCCED expected any business to need. Instead, the RPL language simply allows DCCED to deny grants to businesses whose emergency needs have already been met by direct federal funds. Also excluding those

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businesses that received less than the minimum grant does little to address legitimate concerns about double-dipping, and simply abandons small businesses that got only minimal assistance direct from the federal government. Mr. Forrer is thus asking this Court to ignore the purpose of the small business grant program and punish businesses who applied for direct federal assistance and got very little help.

Not only does Mr. Forrer's rigid reading undermine the program's effectiveness, it runs contrary to the intent of legislators on the LB&A Committee, who indicated their desire that businesses who received only small sums of direct federal aid should not be excluded.[58] And read in the context of the RPL as whole and the Legislature's ratification of the RPL through passage of HB 313—as the Alaska Supreme Court has directed[59]—the purpose of the language is not served by its literal application. Rather this court should "interpret [this] statute expansively" to "'accomplish beneficial results, [and] serve the purpose for which the statute was enacted . . . .'"[60]

This Court should also defer to DCCED's interpretation of the statute as the agency tasked with administering the program. The Alaska Supreme Court has explained that it applies "the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue

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58 May 11, LB&A Committee hearing at 2:26–2:30 http://www.akleg.gov/basis/Meeting/Detail?Meeting=SBUD%202020-05-11%2013:00:00.

59 *See e.g., Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 217 (Alaska 2007).

60 *State v. Fyfe*, 370 P.3d 1092, 1100–01 (Alaska 2016).

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implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions."[61] The small business relief program clearly implicates DCCED expertise and is a vital policy within the scope of the agency's statutory functions. The agency's duties, as provided in AS 44.33.020, include to:

> (18) apply for, receive, and use funds from federal and other sources, public or private, for use in carrying out the powers and duties of the department;
>
> . . .
>
> (20) administer state and, as appropriate, federal programs for revenue sharing, community assistance, grants, and other forms of financial assistance to community and regional governments;
>
> . . .
>
> (29) receive gifts, grants, and other aid that facilitate the powers and duties of the department from agencies and instrumentalities of the United States or other public and private sources;
>
> (30) establish and activate programs to achieve a balanced economic development in the state and advise the governor on economic development policy matters;
>
> (31) formulate a continuing program for basic economic development and for the necessary promotion, planning, and research that will advance the economic development of the state;
>
> (32) cooperate with private, governmental, and other public institutions and agencies in the execution of economic development programs;
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> . . .
>
> (34) administer the economic development programs of the state;

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[61] *Marathon Oil Co. v. State, Dep't of Natural Resources*, 254 P.3d 1078, 1082 (Alaska 2011).

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> (35) perform all other duties and powers necessary or proper in relation to the economic development and planning for the state . . .

Pursuant to this authority, the Division of Economic Development at DCCED manages a variety of loan programs open to small Alaska businesses and the Division of Community and Regional Affairs administers numerous grants.[62] This RPL is a vital part of the State's policies aimed at shoring up Alaska's economy and the prospects for ongoing economic development in the face of this economic disaster.

DCCED's interpretation of the RPL is also reasonable, despite the language Mr. Forrer emphasizes. Mr. Forrer may argue that if the Legislature had intended to permit this, it could have written the eligibility criteria differently, but this ignores the reality of the pandemic emergency during which the RPL was drafted and approved, the evolving guidance from the federal government, and the ratification of the committee's actions through passage of HB 313. The evolving emergency and the developing federal response are vital aspects of the context in which the program was created. The program was initially conceived as a loan program and was modified at the eleventh hour into a grant program, when it became clear that the federal guidelines would support this.[63] The last-minute character of this change is clear on the face of the RPL, in places where the old language of "loans" and "borrowers" remains. [*See e.g.,* Ex. A at 9, 10, 11, 12]

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62 *See e.g.,* Alaska Microloan Program, AS 44.33.950–.990.; Alaska Capstone Avionics Revolving Loan Program, AS 44.33.655; Alaska Division of Tourism Grant Program, AS 44.33.135; Alaska Regional Economic Assistance Program, AS 44.33.896.

63 May 11 LB&A Committee hearing at 1:59–2:05 http://www.akleg.gov/basis/Meeting/Detail?Meeting=SBUD%202020-05-11%2013:00:00.

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Mr. Forrer's rigid interpretation would make access to the program essentially arbitrary by excluding businesses that have not, in fact, received meaningful federal relief. In contrast, DCCED's approach honors the intent of the program and furthers the public interest by making grants available to businesses who have not received sufficient federal funds to give them a chance at surviving the economic crisis resulting from the pandemic. Because DCCED's interpretation of the statute is reasonable and the program is within the agency's expertise and implements a key policy within its statutory functions, this Court should give deference to it.

Restricting the ability of the executive branch to distribute federal funds in this manner in the context of the public health and economic disaster created by COVID-19 would also be contrary to the intent of the Alaska Disaster Act. That law envisions the State receiving and spending federal funds in a disaster emergency and provides clearly that "[n]othing in this section limits the governor's authority to apply for, receive, administer, and spend grants, gifts, or payments from any source, to aid in disaster prevention, preparedness, response, or recovery."[64]

Because under Alaska case law governing statutory interpretation, the purpose of the law, the legislative history, and the language of the RPL taken as a whole, establish that DCCED's interpretation of the RPL is lawful and proper, Mr. Forrer cannot show probable success on the merits in this case and is, therefore, not entitled to a preliminary injunction. And for the same reasons, Mr. Forrer's new claim fails on the merits, and the

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64 AS 26.23.050(c).

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Court should grant summary judgment to the State dismissing it.

4. The public interest will not be served by blocking the State's ability to provide grants to Alaskan businesses who have also received de minimis levels of federal assistance.

Finally, the injunction Mr. Forrer requests is not in the public interest. The public will not benefit if small businesses who received minimal federal funding are excluded from any state relief programs and go out of business as a result, and the State risks losing federal CARES Act funds by not distributing them before their expiration date.

Mr. Forrer appears to believe that the modifications to the program represent a complete abandonment of any standards for determining who will receive grants, claiming that the "executive branch has embarked on a plan for expending public funds by which there are no standards." [Mot. at 8, 9, 10] But this is untrue. Although the Department has expanded eligibility for the second tranche of small business relief, there are still eligibility requirements and limits—this is not some kind of free-for-all through which CARES Act funds can be misspent. [Ex. F] On the contrary, the expansion of the program recognizes the concerns of many businesses and legislators that small businesses that received only minimal amounts of federal aid still *desperately need economic assistance* in order to avoid closing their doors forever. As more small businesses go under, more jobs will be lost, and the economic outlook for all Alaskans will deteriorate. Such an outcome is plainly not in the public interest.

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CONCLUSION

Because Mr. Forrer fails to meet the standards for a preliminary injunction, the Court should deny Mr. Forrer's motion. And because Mr. Forrer lacks standing to bring his new claim about the interpretation of the RPL or because the claim fails on the merits, the Court should grant summary judgment to the State on this new claim.

DATED: June 30, 2020.

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