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

ERIC FORRER, Plaintiff, v. STATE OF ALASKA and LUCINDA MAHONEY, Commissioner of the Alaska Department of Revenue in her capacity as an official of the State of Alaska, Defendants.	)	**FILED IN CHAMBERS** STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: July 10, 2020 Case No. 1JU-20-644 CI

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

The world is currently in the grips of the COVID-19 pandemic, which has resulted in the worst economic downturn since the Great Depression. In an attempt to mitigate the economic impacts of the pandemic, Congress passed on March 26, 2020, and the President signed into law on March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act, commonly known as the CARES Act. The CARES Act authorized over $2 trillion in economic assistance to individuals and businesses impacted by the pandemic.[1] The federal legislation established the Coronavirus Relief Fund, which distributed $150 billion to State, local and tribal governments. Out of this fund, $1.25 billion was allocated to the State of Alaska.[2]

[1] *See,* home.treasury.gov/policy-issues/cares (viewed July 8, 2020).
[2] *See,* https://home.treasury.gov/system/files/136/Payments-to-States-and-Units-of-Local-Government.pdf (viewed July 8, 2020).

Two days after the President signed the CARES Act, as America closed down amid rising concern about the pandemic, the Alaska Legislature recessed and left Juneau. Thus the full Legislature was not in the Capitol to consider appropriation of these federal funds.

Alaska Statute 37.07.080(h) sets out a procedure by which items previously appropriated by the Legislature may be increased based on additional federal or other program receipts without specific authorization by the full Legislature. This is referred to as the Revised Program Legislative Request (RPL) process.

Under the RPL process, the governor submits a revised program to the Legislative Budget and Audit Committee for review. Expenditures may not commence for 45 days unless the Legislative Budget and Audit Committee approves the RPL within that time. This process only authorizes increases to existing appropriations; it does not permit an entirely new expenditure not subject to an existing appropriation.

With the Legislature in recess, the Governor in April and early May submitted a series of RPL's to the Legislative Budget and Audit Committee purporting to authorize disbursement by the State of the CARES Act funds. The Legislative Budget and Audit Committee met on May 1 and May 11, 2020 and approved all of the RPL's.

Two days later, on May 13, plaintiff filed his initial complaint, asserting that disbursement by the State of the CARES Act funds would violate Article IX, Section 13 of the Alaska Constitution, which provides that "[n]o money shall be withdrawn from the treasury except in accordance with appropriations made by law." Plaintiff contended that many of the disbursements contained in the RPL's exceeded the permissible scope of the RPL process because they were entirely new expenditures, and not increases to existing appropriations.

Plaintiff sought a preliminary injunction prohibiting disbursement of the funds unless they were properly appropriated by the full Legislature.

Apparently in response to the filing of this case, the Legislature returned to Juneau and reconvened on May 18. On May 20 the Legislature, by a vote of 38 to 1 in the House and 19 to 1 in the Senate, passed HB 313, which retroactively "approved and ratified" the RPL's. The bill was signed into law by Governor Dunleavy on May 21.

Although plaintiff asserts that HB 313 was not a valid appropriation, he withdrew his request for a preliminary injunction after that legislation was passed. However, plaintiff renewed his motion for preliminary injunction on June 22, 2020, claiming that the State has changed the eligibility requirements for $290 million in small business relief in a way that conflicts with the RPL's as ratified by the Legislature. The State has opposed the motion, and oral argument was held on July 9, 2020. Having considered the arguments of counsel and the materials submitted by the parties, the court will deny the motion for the reasons set out in detail below.

II. THE PRELIMINARY INJUNCTION STANDARD

Under Alaska law, there are two alternative tests under which a plaintiff may obtain a preliminary injunction. These are the balance of hardships test and the probable success on the merits test.[3]

Under the balance of hardships test, the court must balance the harm the plaintiff will suffer if the injunction is not granted against the harm the injunction would impose on the

[3] *See, e.g., Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

defendant. A preliminary injunction should be issued under this test when three factors are present:

> "(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'"[4]

In assessing the relative harms, the court "is to assume the plaintiff ultimately will prevail when assessing the irreparable harm to the plaintiff absent an injunction, and to assume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction."[5]

The balance of hardships standard

> applies only where the injury which will result from the temporary restraining order or 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. Where the injury which will result from the temporary restraining order or the preliminary injunction is not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required. . . .[6]

It is clear that this is not a case in which the balance of hardships standard may be applied. Plaintiff does not allege that he will suffer any harm if the injunction is not granted. On the other hand, it would be an understatement to say that the harm to businesses across Alaska if an injunction is granted would be "not inconsiderable." Even if plaintiff could post a bond in the amount of $290 million, which seems unlikely, this would not adequately

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[4] *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1273 (Alaska 1992), *quoting Messerli v. Dept. of Nat. Resources*, 768 P.2d 1112, 1122 (Alaska 1989).
[5] *Alsworth v. Seybert*, 323 P.3d at 54.
[6] *State v. United Cook Inlet Drift Ass'n.*, 815 P.2d 378, 378-79 (Alaska 1991); *Alsworth v. Seybert*, 323 P.3d at 54.

indemnify the immediate harm these businesses would suffer if this assistance is delayed or lost. Because the requirements for the balance of hardships test are not met, plaintiff's motion must be analyzed under the probable success on the merits test.

Under this standard, a preliminary injunction may only be granted if the plaintiff can make a "clear showing of probable success on the merits."[7] The State argues that, even under this standard, the plaintiff is not entitled to a preliminary injunction unless he can show that he faces the danger of irreparable harm.

The Supreme Court in *A.J. Industries, Inc. v. Alaska Public Service Comm'n.* made the following statement:

> While the rule requiring a clear showing of probable success applies in situations where the party asking for relief does not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued, a different rule applies where the party seeking the injunction stands to suffer irreparable harm and where, at the same time, the opposing party can be protected from injury.[8]

In *State, Division of Elections v. Metcalfe,* the Court set out a similar formulation:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits."[9]

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[7] *A.J. Industries, Inc. v. Alaska Public Service Comm'n.*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects,* 483 P.2d 198 (Alaska 1971).
[8] *Id.*
[9] 110 P.3d 976, 978 (Alaska 2005).

In light of these decisions, I am not persuaded that irreparable harm is required under the clear showing of probable success on the merits test. That conclusion, though, does not mean that either irreparable harm or the balance of hardships are irrelevant in deciding whether to issue an injunction under the clear probability of success on the merits test.

The Supreme Court considered this question in *State v. Kluti Kaah Native Village of Copper Center.* In that case, the trial court issued a preliminary injunction using the balance of hardships test. The Supreme Court reversed, finding that the trial court should have used the clear probability of success on the merits test because the defendant – the State of Alaska – faced substantial harm as a result of the granting of the injunction. The Court remanded the case to the trial court to reconsider the issuance of an injunction under the correct standard. The Court indicated that the trial court should have considered the interests of the State and the public, as well as whether there was a clear showing of a probability of success.[10] This holding suggests that both irreparable harm and the balance of hardships are still factors the court must consider in applying the clear showing of probability of success test. What the Court did not make clear, though, is how these factors should be considered, and what part they should play in the court's decision.

III. PROBABILITY OF SUCCESS ON THE MERITS

A. Standing:

Turning to analysis of the probability that plaintiff will succeed on the merits of his claim, this requires consideration of several issues. The first is the threshold question of whether the plaintiff has standing to bring this action.

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[10] 831 P.2d at 1275-76.

There are two types of standing under Alaska law: interest-injury standing and citizen-taxpayer standing.[11] There is a lack of precision in plaintiff's filings as to which of these he is relying upon.

To the extent he claims to have been personally harmed by the State's allegedly unlawful actions, the harm he claims is only an abstract or theoretical harm. While he argues strongly that the State's actions have harmed Alaska in a general sense, by striking at the balance of power among the branches of government established by Alaska's constitution, he does not allege that this has caused any harm to him in particular, other than by offending his beliefs about the appropriate structure of Alaska's government.

It is certainly true that, in *Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources,*[12] the Alaska Supreme Court adopted a broad view of the type of injury sufficient to confer interest-injury standing. The Court referred to its "broad interpretation of standing and our policy of promoting citizen access to the courts."[13]

The *Kanuk* court, however, did not suggest that an abstract or theoretical harm is sufficient to confer interest-injury standing. The plaintiffs in that case were seeking declaratory and equitable relief against the State on the grounds that the State should have done more to prevent climate change. The plaintiffs alleged that they were personally affected by climate change because, among other things, their homes were flooded, the forests that surrounded their villages were damaged, they were at increased risk from forest fires, and the salmon and

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[11] *See, e.g., Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources*, 335 P.2d 1088, 1092 (Alaska 2014).
[12] *Id.*
[13] *Id.* at 1093.

wildlife on which they rely for subsistence were in decline. Accepting these allegations to be true, as the court must in deciding a motion to dismiss, the Court found that these were sufficient allegations of direct injury to the plaintiffs to give them standing.[14]

Forrer makes no analogous allegations here. While he alleges that the State's actions have done harm to the constitutional structure of Alaska's government, he does not allege that this has harmed him personally. Interest-injury standing requires actual harm to the plaintiff, not a mere abstract or metaphysical harm. If this sort of theoretical harm could give rise to interest-injury standing, then a plaintiff could establish interest-injury standing merely by caring deeply about a harm suffered by someone else. While the *Kanuk* court certainly adopted a broad definition of standing, the court does not believe it was the Supreme Court's intention to eliminate all boundaries to standing.

The real question is whether the plaintiff has citizen-taxpayer standing. In order to establish citizen-taxpayer standing, a plaintiff must show that the case is of public significance and that the person who brings the case is an appropriate plaintiff.[15]

As to the public significance prong, it is clear that the distribution of hundreds of millions of dollars in COVID relief funds is a matter of public significance. It is less clear that the eligibility question raised by the present motion is a matter of public concern. The court has no information about the number of businesses that received prior federal funding, who would be denied small business relief funds if plaintiff prevails.

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[14] *Id.*

[15] *See, e.g., Keller v. French*, 205 P.3d 299, 302 (Alaska 2009).

There is little discussion in Alaska caselaw about what level of public significance is necessary to support citizen-taxpayer standing. In *Trustees of Alaska v. State*, a challenge to the Alaska Railroad's plan to extract 670,000 cubic feet of gravel from a parcel of land in Anchorage, on a theory which might have implications for 50,000 mining claims around Alaska, was found to be a matter of public significance.[16]

In *Hoblit v. Commissioner of Natural Resources*, by contrast, citizen-taxpayer standing was denied in a citizen's challenge to the State's sale of 20 acres of land to the plaintiff's neighbor.[17]

While the eligibility question at issue is, as the State characterizes it, a mere matter of statutory interpretation, the implications for Alaskans of plaintiff's challenge, and the magnitude of the funds at issue, are sufficient, in the court's view, to render this case a matter of public significance. I find, therefore, that the first prong of the citizen-taxpayer standing test is satisfied.

The second prong is whether there is a more appropriate plaintiff. The State argues that small businesses who are actually applying for funds would be more appropriate plaintiffs. Certainly a hypothetical small business whose application for funds under this program was denied, in whole or in part, because the funds were exhausted could claim that it suffered actual harm as a result of the distribution of funds to other businesses who previously received federal COVID funds under other programs. That business would arguably be a more appropriate plaintiff to bring this case.

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[16] 736 P.2d 324, 329 (Alaska 1987).
[17] 678 P.2d 1337 (Alaska 1984).

In the past, the Court has denied citizen-taxpayer standing "when there was another potential plaintiff more directly affected by the challenged conduct who had sued or was likely to sue."[18] The Court has said that "the crucial inquiry is whether the more directly concerned plaintiff has sued or seems likely to sue in the foreseeable future."[19] If a more appropriate plaintiff exists, however, the mere fact that the more appropriate plaintiff chooses not to sue does not confer citizen-taxpayer standing onto an inappropriate plaintiff.[20]

Although the State argues that any business who is a potential applicant or recipient of the grant money under this program is a more appropriate plaintiff, I am unconvinced that such a plaintiff will able to sue within the foreseeable future. By the time a business' grant application is denied, in whole or in part, because the federal funds have been exhausted, it will be too late for that business to bring suit. If the federal funds have been disbursed, it will be too late for such a plaintiff to obtain any meaningful relief.

It is not enough to say that a hypothetical plaintiff who will have suffered actual injury exists, if that plaintiff will be unaware that they have suffered an injury until it is too late to do anything about it. Applying the "crucial inquiry" of whether such a plaintiff is likely to bring suit, it seems unlikely that any plaintiff will go to the trouble of bringing suit if there is no relief available.

The court therefore concludes that Forrer is likely to prevail on the question of citizen taxpayer standing.

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[18] *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009).
[19] *Trustees for Alaska v. State*, 736 P.2d 324, 330 (Alaska 1987).
[20] *Keller v. French*, 206 P.3d at 303. *See also, Law Project for Psychiatric Rights, Inc. v.State,*239 P.3d 1252, 1256 (Alaska 2010); *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 526 (Alaska 1993).

B. The Merits of Plaintiff's Claims:

1. The RPL process

There are three threads to plaintiff's arguments on the merits. Plaintiff questions the appropriateness of the initial RPL process, arguing that it violated Article IX, Section 13 of the Alaska constitution because funds can only be expended from the State treasury if they are appropriated by the entire Legislature. He also challenges HB 313, arguing that it was not a valid appropriation. And he challenges the Executive branch's subsequent determination of which businesses are eligible for grants under the Small Business relief program. Because these threads are somewhat tangled together in plaintiff's briefing, it is unclear whether he intends to rely on all three of them now. The court will consider all three issues in determining whether plaintiff has a likelihood of success on the merits.

As to the first issue, the RPL process itself, if HB 313 was a valid appropriation, this cured any constitutional infirmities in the earlier process.[21] This would render moot plaintiff's objections to the RPL process. Thus the court will turn to the second issue.

2. Was HB 313 a valid appropriation?

Forrer repeatedly alleges that HB 313 is not a valid appropriation in compliance with Article IX, Section 13 of the Alaska Constitution. For example, at paragraph 18 of his Second Amended Complaint, he alleges that this act "is inconsistent with Article IX, Section 13 of the Alaska Constitution requiring moneys in the Alaska treasury be expended according to an appropriation." At paragraph 19 of his Second Amended Complaint, he asserts that allocation of funds "cannot be ratified by an act of the Alaska Legislature." At paragraph 21 of his

[21] *See, Fairbanks North Star Borough v. State*, 753 P.2d 1158 (Alaska 1988).

Second Amended Complaint, he alleges that the State of Alaska failed to allocate CARES Act funding "in conformity with the Alaska Constitution provision requiring that funds be appropriated." At paragraph 30 of the Second Amended Complaint, he seems to allege that HB 313 is defective because it is not "an actual bill for appropriations, which must be subject to the constitutionally mandated procedures of enactment -- including three readings and a public process."

In order to consider these allegations, however, one searches in vain for any specific procedural requirements for appropriations bills in the Alaska Constitution. Article IX, Section 13 of the Constitution states the following:

> **Section 13. Expenditures.** No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

The only specific requirement for appropriations set out in this section is that they be made "by law."

Article II governs the Legislature. There are only three sections of Article II that refer to appropriations bills. Article II, Section 13 provides, *inter alia,* as follows:

> Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations.

Plaintiff does not contend that HB 313 violated these requirements.

Article II, Section 15 permits the Governor to "veto, strike or reduce items in appropriation bills." That provision is not at issue in this case; there was no veto.

Article II, Section 16 deals with veto overrides, and requires a three-fourths vote to override the Governor's veto of an appropriations bills. Again, that provision is not at issue in this case because there was no veto.

These are the only references in Article II to appropriations. There are, therefore, no special procedural requirements for appropriations bills in the Alaska Constitution.[22]

As noted above, plaintiff contends in paragraph 30 of his Second Amended Complaint that HB 313 is not a bill for appropriations because it does not comply with "the constitutionally mandated procedures of enactment -- including three readings and a public process." The Constitutional requirement for three readings, though, is not confined to appropriations bills. Article II, Section 14 provides that "[n]o bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it."

The legislative journal indicates that HB 313 was read the first time in the House on May 18. It was read the second time on May 19, and then advanced on unanimous consent to a third reading the same day, before being passed the same day. The bill was read the first time

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[22] There are additional procedural requirements contained in the "Alaska Legislature Uniform Rules." *See,* http://w3.legis.state.ak.us/docs/pdf/uniform_rules.pdf. Plaintiff does not allege any specific failures to comply with the Uniform Rules. Nor is the court aware of any authority suggesting that a law, passed by the Legislature and signed by the Governor, is invalid because of any alleged failure to comply with the Legislature's uniform rules of procedure. On the contrary, the Alaska Supreme Court has held that allegations of violations of the Legislature's Uniform Rules do not give rise to a justiciable claim. *Malone v. Meekins*, 650 P.2d 351, 359 (Alaska 1982). A claim that the Legislature failed to follow its Uniform Rules is a nonjusticiable political question. *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987).

in the Senate on May 19. It was read the second time on May 20, and then advanced on unanimous consent to a third reading the same day, before being passed the same day.[23] Plaintiff does not specify any defects in this process. At least from the legislative journal, it appears that this process complied with Article II, Section 14.

Plaintiff alleges that there was not a public process, but he does not elaborate on what he means by this or why, if this is true, it should invalidate the bill.[24]

It appears that plaintiff's primary objection to HB 313 is that it does not contain the words "appropriate," or "appropriation." Instead, the bill states that it "approves" and "ratifies" the earlier action of the Legislative Budget and Audit Committee.

While there are no Alaska cases on point, there is an overwhelming weight of authority from other jurisdictions that no special words are required to make an appropriation; rather, the question is whether it is the intent of the Legislature that the money in question be paid.[25]

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[23] *See,* http://www.akleg.gov/basis/Bill/Detail/31?Root=HB%20313 (viewed July 8, 2020).

[24] *See, Abood v. League of Women Voters of Alaska, supra,* holding that claims that the Legislature violated either its rules on public access or the Open Meetings Act are nonjusticiable political questions.

[25] *See, Crawford v. Hunt*, 17 P.2d 802, 804 (Ariz. 1932)("It is well settled that no special form of language is required to make an appropriation. If it be the intent of the appropriating body that the money in question be paid, it makes no difference in what terms such intent is expressed."); *County of Orange v. Flournoy*, 117 Cal. Rptr. 224, 227 (Cal. App. 1974)("Although appropriation legislation need not be in any particular form, the intent to make an appropriation must be clear."); *Campbell v. Commissioners of State Soldiers & Sailors' Monument*, 18 N.E. 33, 34 (Ind. 1888)("The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation."); *People v. Goodykoontz*, 45 P. 414, 415 (Colo. 1896)(". . . no set form of words is necessary to constitute an appropriation. It is sufficient if the legislative intent to appropriate money for a specific purpose clearly appears from the statute."); *State v. LaGrave*, 41 P. 1075, 1076 (Nev. 1895)("The word "appropriate" means to allot, assign, set apart, or apply to a particular use or purpose. An appropriation in the sense of the constitution means the setting apart a portion of

There can be little debate about the purpose of the first sentence of Article IX, Section 13. Its purpose, plainly, is to give the Legislature the power of the purse. Or, stated another way, it is to ensure that State funds will not be expended unless duly authorized by the Legislature.

Even if one assumes, for the purpose of argument, that the RPL's in question were defective, because they were not adopted by the full Legislature, it seems clear that HB 313 reflects the overwhelming intent of the Legislature that the expenditures set out in those RPL's be made. It does not appear that any of the money was, in fact, expended in the meantime. Given that, the court can perceive no reason why HB 313 should not be deemed a valid appropriation, made "by law" as required in Article IX, Section 13. Thus it is unlikely that plaintiff will prevail on this claim.

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the public funds for a public purpose. No particular form of words is necessary for the purpose if the intention to appropriate is plainly manifested."); *State v. Eggers*, 91 P. 819, 820 (Nev. 1907)(" The provision that no moneys shall be drawn from the treasury but in consequence of appropriations made by law requires that their expenditure shall first be authorized by the Legislature, which stands as the representative of the people. No particular words are essential so long as the will of the lawmaking body is apparent. It has been held in a number of decisions that the word "appropriate" is not indispensable. It is not necessary that all expenditures be authorized by the general appropriation bill. The language in any act which shows that the Legislature intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient."); *Commonwealth v. Ferries Co.*, 92 S.E. 804, 807 (Va. 1917)("[T]he use of technical words in a statute making an appropriation is not necessary."); *Menefee, State Treasurer v. Askew*, 107 P. 159 (Okla. 1910)(" No arbitrary form of expression or particular words are required by the Constitution in making an appropriation, which may be made by implication when the language employed reasonably leads to the belief that such was the intention of the Legislature."); *State ex rel Bonstreet v. Allen*, 91 So. 104, 106 (Fla. 1922)("The appropriation of money is the setting it apart formally or officially for a special use or purpose, and, where that is done by the Legislature in clear and unequivocal terms in a duly enacted law, it is an 'appropriation.'").

3. Statutory interpretation

Insofar as HB 313 approved and ratified the RPL's previously approved by the Legislative Budget and Audit Committee, it is reasonable to assume that the Legislative intent was to give the force of law to the terms of those RPL's. The legislation itself referenced, incorporated and approved the various RPL's. Thus the court concludes that the appropriation encompassed in HB 313 adopted as law the language of the RPL's.

The plaintiff argues that the eligibility requirements promulgated by the Department of Commerce, Community and Economic Develoment (DCCED) on June 17[26] conflict with the RPL's as approved and ratified by the Legislature. This presents a question of statutory interpretation.

Plaintiff devotes much of his briefing to an argument that the court cannot depart from the plain language of the statute. The State, on the other hand, argues that the eligibility requirements promulgated by DCCED are consistent with the Legislature's intent in enacting HB 313. In arguing that there is something "brazen" or "Orwellian" about the State's legislative intent argument, the plaintiff overlooks the Alaska Supreme Court's longstanding approach to statutory interpretation:

> In statutory interpretation "we consider three factors: 'the language of the statute, the legislative history, and the legislative purpose behind the statute.'" We use a sliding scale: "the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[27]

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[26] Exhibit F to defendant's opposition to the motion for preliminary injunction.
[27] *Office of Public Advocacy v. Superior Court, Third Judicial District*, 462 P.3d 1000, 1005 (Alaska 2020), *quoting Alaska Ass'n. of Naturopathic Physicians v. State, Dept. of Commerce*, 414 P.3d 630, 634 (Alaska 2018) and *Alaska Trustee, LLC v. Bachmeier*, 332 P.3d 1, 7 (Alaska 2014).

The Court has explicitly rejected a "mechanical application of the plain meaning rule."[28] As the Court put it in a 2012 case:

> Statutory interpretation in Alaska begins with the plain meaning of the statute's text. But "the plain meaning of a statute does not always control its interpretation"; "legislative history can sometimes alter a statute's literal terms." Nonetheless, under our sliding-scale approach to statutory interpretation, a statute's plain language remains significant: "the plainer the language of the statute, the more convincing contrary legislative history must be."[29]

Whether or not the legislative history supports the State's argument as to this particular statute, that argument is certainly based upon a long line of Alaska Supreme Court precedent.

The RPL, as approved and ratified in HB 313, contains the following language as to eligibility standards:

> Subject to the availability of funding and the order of applications received, 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 have had business impacted by COVID-19. For purposes of this program, small businesses are defined as those with 50 full time equivalent employees or less. Businesses that have secured an Economic Injury Disaster Loan, PPP loan, or other federal program funding made available directly to small businesses under the Cares Act do not qualify. Up to 20 percent (but not limited to) of the funding is designated for rural communities (defined as a population of 5,000 or less). The amount of the DCCED directed grant is based upon an application for funding for (i) defined eligible expenses incurred by the applicant business during the period from March 11, 2020 to the application date plus (ii) defined eligible expenses certified to be incurred over the next eight weeks by the applicant business to re-staff/re-open.[30]

The underlined language is the source of the present dispute. On June 17, 2020, DCCED announced that businesses that received $5,000 or less under the Paycheck Protection Program

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[28] *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996).
[29] *Ward v. State, Dept. of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012), *quoting Bartley v. State, Dept. of Amin., Teacher's Ret. Bd.*, 110 P.3d 1254, 1258 (Alaska 2005).
[30] RPL No. 08-2020-0251, page 2 (emphasis added).

(PPP) or the Economic Injury Disaster Loan (EIDL) program would be eligible for CARES Act funding, despite the language of the RPL that would seem to exclude them.

It is clear that the initial RPL did not spell out all of the criteria for eligibility in detail. Thus it seems clear that, at the time the RPL was promulgated, it was anticipated that DCCED would set out a detailed set of eligibility standards at a later date. In reviewing these standards, the court must determine whether they accurately interpret the requirements of the RPL, as approved and ratified by the Legislature.

In reviewing an agency interpretation of a statute, the court uses one of two applicable standards:

> There are two standards under which this court has reviewed agency interpretations of statutory terms. The reasonable basis standard, under which the court gives deference to the agency's interpretation so long as it is reasonable, is applied where the question at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions. The independent judgment standard, under which the court makes its own interpretation of the statute at issue, is applied where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute.[31]

In the rapidly evolving circumstances of a public health emergency, it is clear that the RPL was intended to be a broad-brush description of the program, leaving the details to be fleshed out later. Thus it seems clear that the intent of the RPL was to leave the details to be specified by DCCED. And by approving and ratifying the RPL, this was the intent of the Legislature. Where the Legislature intends to place a decision in the hands of an agency, it is appropriate to use the reasonable basis standard.[32]

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[31] *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986).
[32] *Id.*

The small business relief program permits grants of between $5,000 and $100,000. Clearly, the exclusion in the RPL was intended to prevent double-dipping. That is, it was intended to prohibit small businesses from receiving double compensation for their COVID-19 losses from different federal programs.

Prior funding of $5,000 or less falls below the lower limit of the grants authorized under this program. Where a business received prior funding falling below the lower limit of what is authorized, DCCED determined that this prior funding was *de minimis* in terms of whether it should disqualify that business from receiving a grant. Thus the question before the court is whether there is a reasonable basis for this determination.

There is precedent for interpretation of a statute to permit an exception for something that is deemed to be *de minimis*. Alaska law authorizes a tax exemption for property used "exclusively" for charitable purposes.[33] The plain language of the statute would lead to a conclusion that any noncharitable use would defeat the tax exemption.

However, in *City of Nome v. Catholic Bishop of Northern Alaska*, the Supreme Court interpreted the statute to provide that a *de minimis* noncharitable use will not defeat the tax exemption.[34] Despite the lack of any statutory language creating such an exemption, or any legislative history on the subject, the Court interpreted the statute to permit a *de minimis* exception because it found that strict application of the "exclusive use" rule "could be 'so literal and narrow that it defeats the exemption's settled purpose.'"[35]

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[33] AS 29.53.020.
[34] 707 P.2d 870, 880 (Alaska 1985).
[35] *Id., quoting Association of the Bar of the City of New York v. Lewisohn*, 313 N.E.2d 30, 35 (N.Y. 1974).

It seems clear that the purpose of HB 313 is to expeditiously distribute the federal CARES Act funds to Alaskan businesses and individuals who have suffered financial harm due to the COVID-19 public health emergency, in order to mitigate the financial impacts of the crisis. Plaintiff has not pointed to any legislative purpose which is served by excluding from the program those businesses who received small prior amounts of federal funding under other programs. Just as the Supreme Court interpreted the tax exemption statute to permit a *de minimis* exception in *City of Nome,* there is a reasonable basis for DCCED to create a *de minimis* exception for prior federal funding falling below the lower limit of the small business relief program.

Because including these businesses in the small business relief program serves the goals of HB 313, and because plaintiff has identified no legitimate purpose of the program that is served by excluding them, I find that it is likely that the court will find that there is a reasonable basis for DCCED's decision that the RPL, as approved and ratified by the Legislature, permits a *de minimis* exception. In light of that conclusion, I cannot find that plaintiff has established a clear probability of success on the merits.

C. Application of injunction standard:

Based on the finding that plaintiff has not shown a clear probability of success on the merits, plaintiff's motion for preliminary injunction must be denied. However, because it may provide a separate and alternative basis for ruling on that motion, the court will also consider whether a preliminary injunction would be appropriate if plaintiff had shown a clear probability of success on the merits.

As discussed above, the Alaska Supreme Court has left some uncertainty about how the court should consider irreparable harm and the balance of hardships under the clear probability of success standard. The State argues that irreparable harm is still required under this standard. As noted above, decisions of the Alaska Supreme Court suggest otherwise.

Under federal law, irreparable harm must always be shown.[36] But that is not the standard, as discussed above, under Alaska law.

Plaintiff does not allege that he will suffer any direct harm if an injunction is not granted. Rather, he expresses the concern that failure to enjoin disbursement of these funds will lead this or future administrations to commit other violations of law in the future that will themselves cause harm. In the court's view, this potential harm is too speculative to form the basis for an injunction.

On the other side of the balance, though, the potential for harm to Alaska's small businesses if the court blocks distribution of these funds in the midst of a public health emergency and an economic catastrophe is incalculable. It is obvious to every Alaskan that businesses across the State are suffering in the present downturn, and it is obvious that any delay in providing relief to those businesses will cause some to fail.

In summary, plaintiff alleges no irreparable harm, and the balance of hardships strongly favors the defendants. These factors militate against granting an injunction.

It has been said that a "judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law."[37] The United States Supreme Court has

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[36] *See, e.g., Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008).
[37] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 (1978).

described the caution trial courts must use in deciding whether to use their equitable powers to grant a preliminary injunction:

> A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[38]

While this statement was made in the context of federal law, which applies a different standard to the decision whether to grant a preliminary injunction, these words of caution apply equally, in the court's view, to the decision here under Alaska law.

With these considerations in mind, I would not grant a preliminary injunction in this case even if plaintiff had shown a probability of success on the merits. The current situation is too grave, and the needs of Alaskans too great in the present emergency, for this court to stand in the way of the distribution of these federal funds to those who need them.

For those reasons, I conclude that the court's equitable powers are not appropriately used in this situation. This provides a separate and alternative basis for the court's decision.

IV. CONCLUSION

Because I do not find that plaintiff has shown a clear probability of success on the merits of this case, and because I do not find this an appropriate case for use of the court's

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[38] *Winter v. Natural Resources Defense Council*, 555 U.S. at 24 (citations omitted).

equitable power, the plaintiff's motion for preliminary injunction is DENIED.

Entered at Juneau, Alaska this 10th day of July, 2020.

Philip M. Pallenberg
Superior Court Judge

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