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8 **SUPERIOR COURT FOR THE STATE OF ALASKA**
9 **FIRST JUDICIAL DISTRICT AT JUNEAU**

10 ERIC FORRER)
11 Plaintiff,)

12 vs.)

13 STATE OF ALASKA)
14 and LUCINDA MAHONEY,)
15 Commissioner of the Alaska)
16 Department of Revenue and)
17 JULIE ANDERSON,)
18 Commissioner of the Alaska)
19 of Commerce, both)
20 in their capacity as officials of)
21 the State of Alaska.)
22 Defendants.)

1JU-20-00644 Civil

23 **REPLY TO STATE'S OPPOSITION TO PLAINTIFF'S MOTION FOR**
24 **PRELIMINARY INJUNCTION**

25 **INTRODUCTION**

26 Eric Forrer ("Forrer"), through counsel and on behalf of the public interest,
27 replies to the *State's Opposition to the Plaintiff's Motion for Preliminary*
28 *Injunction and Cross-Motion for Summary Judgement* ("Opposition"), filed by
the State of Alaska ("State"), dated June 30, 2020. Essentially, the State seeks to

1 preclude equitable relief sought by Forrer in regard to certain funds the executive
2 branch of Alaska's government intends to expend without a valid appropriation.

3
4 The State mischaracterizes Forrer's position, asserting that "Forrer asks this
5 Court to block portions of (federal CARES Act funds) not on the grounds that it is
6 not sorely needed by the recipients, and not on the grounds that the Governor and
7 Legislature disagree on the use of the money, but simply because he objects to
8 procedural and implementation details."¹ This peculiar characterization by the state
9 of what Forrer seeks in this case (using as it does a double-negative description
10 pertaining to which recipients should receive the money and implying without
11 evidence that the Governor and the Legislature are somehow in magical agreement
12 on how to spend the CARE Act funds in dispute), is misplaced.

13
14 The bald conclusion by the State that Forrer is seeking judicial relief "...
15 because he objects to procedural and implementation details," trivializes the
16 underpinnings of the most significant issue in this case: whether obvious terms of
17 Alaska's Constitution pertaining to the appropriation of public funds have force and
18 meaning.

19
20 Forrer believes the Alaska Constitution contains express requirements that
21 must be applied to the expenditure of public funds. It follows, in Forrer's view, that
22 this dispute is centered on constitutional principles. Accordingly, the casual

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28 ¹ *State's Opposition* at page 1.

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2 denigration by the State that Forrer's claims are based on "procedural and
3 implementation details," ² is repugnant to Forrer and believed to be antithetical to
4 sound constitutional analysis.

5
6 Context matters in this case. The roughly \$290 million dollars in CARES
7 Act funding that Forrer seeks to enjoin is part of a much larger package of COVID-
8 19 relief funding the State received from the federal government. Forrer is not
9 seeking to enjoin the bulk of this large relief package. Instead, Forrer is reluctantly
10 seeking judicial relief in the form of an injunction related only to the business relief
11 portion of the entire CARES Act funding package.
12

13
14 The underlying reason Forrer initially applied for an injunction on May 18,
15 2020, pertaining to a larger slice of the total COVID-19 relief package for which
16 Forrer believed the lack of an appropriation or other valid legal authority by which
17 a portion of the CARES Act funds received for COVID-19 relief was based on the
18 combined failure by the executive branch and the legislative branch.
19

20
21 In the instance where Forrer first sought equitable relief, the legislative
22 branch and executive branch failed to adhere to the express provision of the Alaska
23 Constitution requiring that public funds be appropriated, an act that obviously did
24 not take place in regard to CARES Act funding. Instead of adopting an
25 appropriation act, as required by the Alaska Constitution, the executive branch
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² *Id.*

1 advanced an allocation scheme for the CARES Act funds according to the Revised
2 Program Legislative Requests (“RPL”), process. Forrer promptly brought suit when
3 this arcane funding allocation process was used to divvy up the CARES Act funds.
4 As a result of the “ratification” of the RPL allocation scheme for the CARES Act
5 funds by the Alaska Legislature according to HB 313, a measure that was adopted
6 by the legislature on May 20, 2020, Forrer reconsidered his legal assertions.
7

8
9 Forrer, reviewing the obvious harm to individual Alaskans and Alaskan
10 businesses, elected to withdraw his then pending request to enjoin the portions of
11 CARES Act funds for which there was no appropriation or pre-existing authority to
12 expend the federal funds on May 22, 2020. Forrer’s decision to withdraw his first
13 request for equitable relief was grounded in the belief that the standards contained
14 in the RPL language, as proposed by the executive branch and ratified by the
15 legislature, would suffice even though the criteria was not part of a valid
16 appropriation. In the event and given the circumstances, Forrer was content at that
17 time to resolve the underlying constitutional issues according to a full briefing on
18 the merits and for the purpose of seeking *prospective* relief related to the proper
19 interpretation and application of the Alaska Constitution. (emphasis added).
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22
23 One might ask, what changed and why did Forrer reinvigorate his request for
24 equitable relief according to the application for injunctive relief filed on June 22,
25 2010.
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1
2 Forrer now seeks injunctive relief pertaining to the business relief portion of
3 the total CARES Act funding package ratified by the legislature in HB 313, a
4 discrete fraction of the CARES Act relief funds, amounting to approximately
5 \$290M. What has become apparent since Forrer withdrew his earlier request for
6 injunctive relief is the obvious desire on the part of the executive branch to ignore
7 the express criteria and eligibility terms applicable to business relief expenditures
8 that were adopted in HB 313.
9
10

11 Following the legislature's ratification of the RPL criteria advanced by the
12 executive branch related to business relief funding (as ratified in HB 313), and as
13 the executive branch slowly prepared to expend the business relief funds, it became
14 obvious that the RPL criteria prevented a number of businesses in Alaska from
15 participating in the relief efforts. What followed was an attempt by the executive
16 branch to avoid the express eligibility criteria that the executive branch had
17 proposed and drafted and subsequently ratified by the legislature. Instead of
18 adhering to the literal terms contained in the RPL's ratified by the legislature in HB
19 313, the executive branch now asserts the actual language containing the standards
20 applicable to the business relief portion of the CARES Act funds can be ignored
21 and instead should be governed by nebulous "intent" criteria. In effect the State is
22 asking the judiciary to set aside express language pertaining to the business relief
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1 funds in the RPL standards ratified by HB 313 and allow for expenditures of these
2 funds in an arbitrary manner.
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4 Forrer objects to this latest twist in the tortured allocation path taken by the
5 State in regard to CARES Act funding. Having slipped the bonds of the
6 constitutional provisions requiring an appropriation and instead embarking on the
7 dubious spending route according to a ratified RPL process, the executive branch
8 now seeks to spend at will without regard to the specific requirements set forth in
9 the RPL, as ratified in HB 313.
10

11 In support of this doubtful proposition, the Alaska Attorney General's Office
12 seeks not only to circumvent the constitutionally mandated appropriation process
13 but also repudiate the criteria in the arguably unconstitutional spending scheme that
14 originated in the executive branch of government. What the judiciary is confronted
15 with in this situation is not just Forrer carping about "procedural and
16 implementation details," but a plea by the State to ignore mandated constitutional
17 provisions, skip over express criteria ratified by the legislature and instead allow the
18 executive branch to do with public funds as it desires.
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23 Denial of Forrer's request for equitable relief on the narrow point that the
24 executive branch may not expend public funds without a valid appropriation or at
25 least according to the standards embedded in HB 313 amounts to an affirmation of
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1 lawlessness. Alaska's government is one of limited form and constrained by the
2 Alaska Constitution and other standards set forth in statute and regulations.
3

4 The State's argument against application of the obvious constraints embodied
5 in HB 313 amount to a request for unfettered discretion. Confronted with obvious
6 standards limiting the expenditure of business relief expenditures manifest in HB
7 313, the State asks this court to sanction spending according to speculative "intent"
8 language instead of the express language proposed by the executive branch and
9 ratified by the legislature, an argument that ought to give pause to any jurist.
10
11

12 The notion that the State seems to advance that the literal language in the
13 Alaska Constitution requiring an "appropriation" can be ignored based on the need
14 for flexibility and expediency is bad enough but the position now advanced by the
15 State that the minimal standards applicable to business relief expenditures in HB 313
16 are without meaning borders on brazen. The State implicitly suggests the executive
17 branch is not bound by any standards at all under this new theory, that the executive
18 branch is able to divine the intent of HB 313 and thus allow the executive branch to
19 miraculously obliterate the obvious restrictions on expenditure of public funds.
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23 Based on the language in HB 313, the public interest requires the judiciary
24 to give meaning to the rule of law by adhering to actual text of the act, not some
25 shifting sentiment supposedly based on some ill-defined intent. If not here based
26 on the facts and literal language of the law ratified by the legislature, where does
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1 one draw the line on expenditure of public funds? The judiciary, as the interpreter
2 and guardian of the meaning of the Alaska Constitution and other law needs to give
3 meaning to the language that embodies a rule of law and not acquiesce to an
4 argument based on intent, the need for speed in distributing funds or other
5 arguments that shatter the normal and customary application of the law, as written,
6 instead of the wishful thinking notions advanced by the Alaska Attorney General's
7 office.
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11 As is amplified, below, Forrer not only has the ability to argue that the law is
12 being violated in this public interest case, he seeks a narrow equitable remedy
13 precluding the executive branch from deviating from the express standards adopted
14 in HB 313 pertaining to business relief expenditures using CARES Act funds.
15

16 **FACTUAL BACKGROUND**

17
18 The state has provided additional factual background in the State's
19 Opposition³ that provides other useful information that augments and expands on
20 the *Procedural & Factual Background* materials contained in the *Memorandum in*
21 *Support of a Preliminary Injunction* filed by Forrer on June 22, 2010. While some
22 of the additional material provided by the State contains useful facts or at least
23 expands on the process and procedures, the State has elected to insert argumentative
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28 ³ *State's Opposition*, pages 2-11.

1
2 into the factual portion of the Opposition.⁴ Forrer also notes the portion of the
3 factual recitation of the State's Opposition relies on an incomplete and selective
4 review of statements made by public officials in support of the notion that the literal
5 language of HB 313 should be ignored or overlooked.⁵
6

7 The State's quest to find a few facts, based on recitation of a portion of the
8 LB&A proceedings, that will magically allow the judiciary to overlook the express
9 eligibility criteria proposed by the executive branch in regard to the business relief
10 funds and then ratified by the legislature is one of desperation. As a matter of fact,
11 either the words of the eligibility requirements embodied in HB 313 mean what they
12 say or they are essentially meaningless, a position that portends on Orwellian future.
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15 As a matter of fact, here are how a variety of Alaskan residents⁶ viewed the
16 eligibility criteria for business relief according to the RPL developed by the
17 executive branch:
18

19 "The rules don't match up with the needs. Unless we plan on returning
20 over \$200 million to the federal government, we need to make changes
21

22 ⁴ See, e.g., *State's Opposition*, pages 9 (States characterization that HB 313 was a "curative"
23 piece of legislation when Governor signed the measure.).

24 ⁵ See, e.g., *State's Opposition*, page 7 (Where the Attorney General's office asserts that
25 "Commissioner Anderson responded that the [business relief] program would be flexible and
26 intended to help as many small businesses as possible," but then uses a direct quote by the
27 Commissioner that indicates some apprehension about "gaps" and "guidelines and eligibility,
28 a quotation that provides the fantastically faint underpinning for a wholesale rejection of the
express eligibility requirements actually embedded in HB 313).

⁶ *Business Owners, Economic Experts Highlight Problems with AK CARES Act* Press
Release, July 1, 2020 <http://akhouse.org/2020/07/01/business-owners-economic-development-experts-highlight-problems-with-ak-cares-act/> [Attached as **Exhibit A**].

1
2 now.”

3 – *Tim Dillon, Kenai Peninsula Economic Development District*

4
5 “What we’re facing is destruction of our economy, where nothing will
6 be left standing if we do not take extraordinary steps to get the hundreds
7 of millions of dollars sitting there inches away from helping.”

8 – *Bill Popp, Executive Director, Anchorage Economic Development
9 Corporation*

10 “There are 609 fishing permits issued to Cordovans, which means over
11 half of Cordova’s businesses are ineligible from AK CARES grants.
12 Please include commercial fishermen for the AK CARES Grant
13 program.”

14 – *Chelsea Haisman, Executive Director, Cordova District Fishermen*

15 “We live in a rural area, and we rely 100 percent on the cruise ships. We
16 received some PPP funds, but it has run out. We urge the legislature to
17 open up the AK CARES Grant program.”

18 – *Stephanie Brenner, Owner, Brenner Fine Clothing and Gifts in
19 Hoonah*

20 “Many businesses will not survive. We’re not going to be made whole,
21 and we’re not even asking to be. But we need to open up the restrictions
22 on the AK CARES Grant program.”

23 – *Debbie Speakman, Executive Director, Kenai Peninsula Tourism
24 and Marketing Council*

25 As a matter of perceived fact, at least according to the individuals who are
26 quoted above, the business relief portion of the CARES Act funds proposed by
27 the executive branch and ratified by the legislature were a problem. This problem
28

1 with the eligibility criteria was belatedly noted by the executive branch which
2 then embarked on a search to fix the problem of their own making by resort to a
3 specious intent theory, as argued *infra*. [See *Affidavit of Christopher Scott Tuck*,
4 Chairman of the LB&A Committee, attached].
5

7 ARGUMENT

8 **A. Forrer has Standing to Challenge the Unilateral Change to the Terms** 9 **of the Business Relief Grants RPL Ratified by the Legislature**

10
11 The State argues Forrer has no standing to challenge the implementation
12 of the small business relief program.⁷ In support of the theory that Forrer lacks
13 standing to require that public funds be spent according to valid standards,
14 including standards expressly found in the Alaska Constitution and HB 313, the
15 Attorney General's Office suggests Forrer must show that the case is of public
16 significance and that he is an appropriate plaintiff.⁸ Implicit in the position
17 advanced by the Alaska Attorney General's Office that Forrer somehow lacks
18 standing is the notion that he is not an appropriate plaintiff and that the matters
19 about which he seeks judicial relief are of no public significance
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22

23 That this dispute is about public funds and the Alaska Constitutional
24 provisions related to how public funds are appropriated and expended is
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27 ⁷ *State's Opposition*, pages 12 - 15.

28 ⁸ *Id.* at page 14.

1 something that the Attorney General's Office is either intentionally overlooking
2 or desires to ignore. The issue presented by Forrer's most recent request for
3 limited equitable relief essentially request that eligibility standards expressly
4 adopted in HB 313 be followed – a matter of obvious public significance.
5 Integral to this issue is the question of whether the executive branch can
6 magically waive away express eligibility standards contained in HB 313
7 according to their interpretation of what the law ought to be instead of as written.
8 This topic is more than a matter "purely a question of statutory interpretation."
9

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11
12 But even assuming that this aspect of this case is a question of statutory
13 interpretation, why is Forrer incapable of challenging the executive branches'
14 apparent intention to ignore express eligibility requirements pertaining to the
15 expenditure of public funds?
16

17
18 The government of Alaska is one of limited powers. Forrer, being a
19 citizen of Alaska has a constitutional right to challenge the improper
20 implementation of a law.⁹ From Forrer's perspective, he not only has the ability
21 to challenge the peculiar manner in which the allocation of public funds was
22 made, he has every right to call into question why the business relief standards
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24

25
26 ⁹ See, e.g., *Alaska Constitution Article I, Section 2* (Source of Government – All political
27 power is inherent in the people. All government originates with the people, is founded upon
28 their will only, and is instituted solely for the good of the people as a whole; see also, *Meyer v. Alaskans for Better Elections*, ___ P.3d ___, (Alaska 2020), Opinion 7460, June 12, 2020 at page1 – 2.

1
2 pertaining to business relief adopted in HB 313 can be summarily ditched by the
3 executive branch. is a principled individual who believes he and any other
4 citizens have both the right and even a duty to challenge what he believes an
5 obviously incorrect, even willful, misinterpretation of the law. ¹⁰
6

7 The cases cited by the State in support of the proposition that Forrer lacks
8 standing are inapposite of the general standards long articulated by the Alaska
9 Supreme Court and recently outlined in *Kanuk v. State, Dept. of Natural*
10 *Resource*, ¹¹ an interesting case in which the court found the plaintiffs had
11 standing to seek a litigate issues related to global warming and climate change.
12 In *Kanuk*, the court noted that a standing inquiry asks whether the plaintiff is
13 "a proper party to request an adjudication of a particular issue," ¹² and went
14 on to state [W]e interpret the concept broadly in favor of "increased accessibility
15 to judicial forums." ¹³
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22 ¹⁰ See, *Alaska Constitution Article I, Section 1* (Inherent Rights – This constitution is
23 dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of
24 happiness, and the enjoyment of the rewards of their own industry; that all persons are equal
25 and entitled to equal rights, opportunities, and protection under the law; and that *all persons*
26 *have a corresponding obligations to the people and to the State.*(emphasis added).

27 ¹¹ 335 P. 3d 1088 (Alaska 2014).

28 ¹² *Id.*, at 1092, citing *Trs. for Alaska v. State, Dep't of Natural Res.*, 736 P.2d 324, 327
(Alaska 1987) (quoting *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska 1976)) (internal
quotation marks omitted).

¹³ *Id.*, at 1092, (quoting *Moore v. State* , 553 P.2d at 23 (Alaska 1976)) (internal quotation
marks omitted).

1
2 The court in *Kanuk* went on to recognize two types of standing: interest-
3 injury standing and citizen-taxpayer standing.¹⁴ The plaintiffs in the *Kanuk*
4 claimed interest-injury standing, which meant they were required to show a
5 "sufficient personal stake in the outcome of the controversy to ensure the
6 requisite adversity."¹⁵ "[T]he degree of injury to interest need not be
7 great: identifiable trifle is enough for standing to fight out a question of
8 principle." "The affected interest may be economic or intangible, such as an
9 aesthetic or environmental interest: an identifiable trifle is enough for standing
10 to fight out a question of principle."¹⁶ "The affected interest may be economic
11 or intangible, such as an aesthetic or environmental interest."¹⁷

12
13
14 In the case at bar, Forrer seeks to enforce the terms of the Alaska
15 Constitution and HB 313 with regard to the proper expenditure of public funds,
16 matters that can hardly be considered as trifling. Forrer has standing to advance
17 his claims in this public interest litigation.
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22 ¹⁴ *Id.* at 1092 (citing *Larson v. State, Dep't of Corr.*, 284 p.3d 1, 12 (Alaska 2012)).

23 ¹⁵ *Id.* at 1092 (quoting *Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 526 (Alaska
24 1993)) (internal quotation marks omitted). (quoting *Bowers Office Prods., Inc. v. Univ. of*
25 *Alaska*, 755 P.2d 1095, 1097 (Alaska 1988)) (internal quotation marks omitted). *See also, Trs.*
26 *for Alaska*, 736 P.2d at 327 ("[T]he trifle is the basis for standing and the principle
27 supplies the motivation." (quoting *Wagstaff v. Super. Ct., Family Ct. Div.* 535 P.2d 1220,
28 1225 n.7 (Alaska 1975)) (internal quotation marks omitted)).

¹⁶ *Id.* at 1092 (quoting *Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 526 (Alaska
1993)) (internal quotation marks omitted).

¹⁷ *Friends of Willow Lake v. State, Dep't of Transp. & Pub. Facilities, Div. of Aviation &*
Airports, 280 P.3d 542, 547 (Alaska 2012) (citing *Trs. for Alaska*, 736 P.2d at 327).

1
2 **B. The Administration's Unauthorized, Unilateral Attempts to Change**
3 **the Small Business Grants RPL Require Injunctive Relief**

4 The Court should enjoin the administration from unilaterally altering the
5 terms of the small business grants program. Forrer brought this lawsuit after the
6 executive branch proposed to unilaterally make discretionary spending
7 determinations of COVID-19 relief funds received from the federal government
8 without regard to the constitutional appropriation requirements in the Alaska
9 Constitution. The CARES Act federal funds became state funds when placed in
10 the treasury of the State and can only be expended according to a valid
11 appropriation as is required by the Alaska Constitution.
12

13
14 The attempt by the executive branch to use the RPL process to allocate the
15 CARES Act funds is an effort to circumvent the legislature's appropriation
16 authority and responsibilities under the Alaska Constitution and violates the
17 doctrine of separation of powers. ¹⁸

18
19 Despite concerns of many legislators then that the chief executive's actions
20 violated the constitution, ¹⁹ and disregarding the counsel from lawyers within the
21
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24 ¹⁸ See Forrer's *Second Amended Complaint*, January 22, 2020; paragraphs 24-37.

25 ¹⁹ See, e.g., See, e.g., James Brooks, *Legal Concerns Tie Up Coronavirus Aid in Alaska*
26 *Legislature*, ANCHORAGE DAILY NEWS, available at [https://www.adn.com/politics/alaska-](https://www.adn.com/politics/alaska-legislature/2020/05/06/legal-disputes-tie-up-coronavirus-aid-in-alaska-legislature/)
27 *legislature/2020/05/06/legal-disputes-tie-up-coronavirus-aid-in-alaska-legislature/* (May 6,
28 2020); Leg. Budget & Audit Comm. Meeting, 5:59:45PM-9:02:11PM, 31st Leg. 2d Sess. (May 11, 2020) (demonstrating member concerns over constitutionality of the governor's RPL's and discussion by finance advisors and legal counsel); KTOO Gavel Alaska, Alaska Senate Democrats Press Availability, available at <https://www.ktoo.org/gavel/video/?clientID=2147483647&eventID=2020051027> (May 19,

1
2 Legislative Affairs Agency that at least a portion of the RPL's proposed by the
3 chief executive were unconstitutional, ²⁰ of faction of the fraction of the
4 legislature adopted the chief executives RPL allocation scheme. This adoption of
5 the chief executive's RPL allocation was completed not by the legislature as a
6 whole and according to the appropriation process but instead by the LB&A, the
7 10-member joint House and Senate legislative committee tasked under AS
8 37.07.080(h) with review and approval of RPL's, among other statutory tasks.
9
10 The LB&A authorized the constitutionally dubious RPL proposals on May 11,
11 2020. At the time, the 120-day legislative session had not yet expired. ²¹ In short
12 order and apparently only because Forrer filed a lawsuit calling into question the
13 legality of allocating public funds via the RPL process, legislative leadership
14 decided to reconvene the entire legislature in an attempt to "ratify" the actions of
15 the governor and LB&A. ²²

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20 2020) (exhibiting caucus members' belief that RPL's were unconstitutional violation of the
21 legislature's appropriations authority).

22 ²⁰ See, e.g., Megan A. Wallace, Director, Legal Services Division – Legislative Affairs
23 Agency, *Cares Act RPL's – May 1st Submission (Work Order No. 31-LS1806)* (May 5, 2020)
24 (**Exhibit B**, attached); Leg. Budget & Audit Comm. Meeting, 5:59:45PM-9:02:11PM, 31st
25 Leg. 2d Sess. (May 11, 2020). The Plaintiff notes that his theory of the unconstitutionality of
26 the RPL actions do not necessarily coincide with the rationale provided by the Legal Services
27 Division as presented in the legal memorandum; legislative counsel also advised that the
28 "ratification" would cure constitutional defects, a position with which Forrer disagrees.

²¹ *Alaska Constitution*, Article II, Section 8.

²² See James Brooks, *Alaska Legislature Prepares to Reconvene, Spurred by Lawsuit Over
Coronavirus Relief Money*, ANCHORAGE DAILY NEWS, available at
<https://www.adn.com/politics/alaska-legislature/2020/05/15/alaska-legislature-prepares-to-reconvene-spurred-by-lawsuit-over-coronavirus-relief-money/> (May 15, 2020).

1
2 The terms of the RPL related to business relief are unambiguous.²³ During
3 committee hearings, based on administration testimony and legislative
4 questioning, the explicit terms related to business relief and with regard to
5 eligibility to obtain relief expenditures were confirmed as the express intent of the
6 governor and the Department of Commerce, Community, and Economic
7 Development (DCCED).²⁴
8

9
10 After the legislative ratification of the RPL's drawn up by the executive
11 branch as embodied in HB 313, DCCED apparently balked at the language
12 submitted by the executive branch and decided to unilaterally modify the terms of
13 the ratified RPL addressing business relief.²⁵
14

15 Forrer believes this attempt to unilaterally alter the express terms of the
16 business relief RPL presents multiple legal issues. Foremost is that fact that the
17 business relief allocation was not made according to an appropriation act, a fact
18
19

20 ²³ See *State's Opposition*, pages 23-24.

21 ²⁴ The State argues that the legislature intended otherwise. State's Opposition, pages 20-25.
22 First, this position wrongly presupposes that legislative intent would even govern a process
23 that with significant constitutional flaws and then is centered on the governor's intent.
24 Second, the legislative record does not demonstrate what the State contends evidences
25 legislative intent. Forrer's counter arguments on this point are discussed *supra*.

26 ²⁵ See James Brooks, *Alaska Changes Rules for Coronavirus Aid Program that Locked Out*
27 *Many Businesses*, ANCHORAGE DAILY NEWS, available at
28 <https://www.adn.com/politics/alaska-legislature/2020/05/15/alaska-legislature-prepares-to-reconvene-spurred-by-lawsuit-over-coronavirus-relief-money/> (Updated June 18, 2020). See also James Brooks, *Businesses, Legislators Say Alaska's New Grant Program Excludes Many*, ANCHORAGE DAILY NEWS, available at <https://www.adn.com/business-economy/2020/06/16/legislators-businesses-say-alaskas-new-grant-program-excludes-many/> (June 16, 2020).

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2 “admitted” by the State. ²⁶ But even setting aside the obvious constitutional
3 infirmity of the business relief portion of HB 313 that is raised by the failure to
4 properly appropriate the funds, the fact that the executive branch admits that a
5 change to the terms of the program is necessary in order to implement a different
6 spending scheme represents a concession that the alterations run contrary to the
7 terms of the RPL. ²⁷
8
9

10 The language in the RPL was the executive branches plan, one that branch
11 of government conceived of and brought to the legislature for approval. The
12 executive branches’ RPL criteria were then ratified. The belated recognition by
13 the executive branch in recognizing the problems that have arisen due to
14 inadequate terms and arguably overly narrow eligibility criteria reflects sloppy
15 administrative technique and inadequate management. While the standards
16 presented by the executive branch and then approved and ratified by the
17 legislative branch of government have meaning. The executive branch is
18 responsible for the shortsighted terms and needs to administer the business relief
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23 ²⁶ The State was asked on May 22, 2020, as part of a discovery request to “Admit that the
24 presiding officer of the Alaska Senate stated during the floor proceedings that took place on
25 May 20, 2020 where the Alaska Senate adopted HB 313 that the measure was not an
26 appropriations bill.” The State not having responded to the admission request or contested
27 the validity of the statement, the matter is deemed admitted.

28 ²⁷ See James Brooks, *Alaska Changes Rules for Coronavirus Aid Program that Locked Out
Many Businesses*, ANCHORAGE DAILY NEWS, available at
<https://www.adn.com/politics/alaska-legislature/2020/05/15/alaska-legislature-prepares-to-reconvene-spurred-by-lawsuit-over-coronavirus-relief-money/> (Updated June 18, 2020).

1
2 criteria they were responsible for and not seek to “expand” those terms.²⁸ Words
3 have meaning, including and (in this case especially), with regard to eligibility
4 standards for business relief incorporated in the RPL’s contained in HB 313. The
5 executive branch must be required to follow those standards. Or change the
6 contents for business relief by amending the criteria as a matter of law and not
7 according to some fanciful “intent” theory cooked up after the fact by lawyers
8 and bureaucrats seeking to circumvent the plain meaning of the standards they
9 were responsible for creating.
10
11

12 While Forrer disagrees that the ratification measure that was the subject of
13 HB 313 cured the failure by the legislature to appropriate the funds,²⁹ he
14 adamantly believes an injunction must issue requiring the executive branch to
15 expend public funds for business relief be based on the terms of the language in
16 HB 313. Forrer seeks a narrowly tailored injunction based on the actual business
17 relief language in the business relief portion of the RPL ratified by HB 313,
18 nothing more and nothing less. Forrer is not seeking to restrict any of the other
19 CARES Act funding expenditures and instead asking the court for prospective
20 relief. But allowing the executive branch to ignore the actual language that branch
21 crafted in regard to business relief eligibility only serve to accelerate further
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27 ²⁸ See *State’s Opposition* at page 11; DCCED Press Release, CARES Act Funding for
28 Alaska Businesses to be Expanded (June 17, 2020). [State’s Exhibit. F].

²⁹ Forrer’s *Second Amended Complaint* at paragraph 35.

1 degradation to our constitutional and legal principles and risk confidence in
2 Alaska's democratic institutions.
3

4 The State accepts no responsibility for the acts of the executive branch in
5 regard to the bungled business relief RPL criteria in their Opposition to Forrer's
6 request for narrowly tailored equitable relief. Instead, the Office of the Attorney
7 General would the Court believe that Forrer seeks to destroy Alaska's small
8 businesses suffering because of a pandemic,³⁰ and pretends that "[t]his new claim
9 . . . is not a constitutional claim."³¹
10
11

12 In reality and is made obvious in the pleadings, the concerns Forrer raise in
13 this case have broader constitutional and public interest implications than the State
14 allows. Forrer is confident the Court apprehends the constitutional magnitude of
15 the claims in issue in this dispute and how vital a just resolution is to protect the
16 integrity of the public interest. For reasons that are mystifying, at least to Forrer's
17 counsel, the Office of the Attorney General appears committed to denial,
18 obfuscation and reducing Forrer's essential and underlying claims, including
19 characterizing the dispute that is the subject of his request for limited equitable
20 relief as merely a case of statutory interpretation, seeking to end the suit based on
21 procedural grounds, including mootness and now standing.
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27 ³⁰ See *State's Opposition*, pages 25, 28-29.

28 ³¹ *Id.* at 13.

1
2 Believing that the RPL process, particularly as was used in this dispute,
3 presents a clear danger to the Alaska Constitution because it shifts enormous
4 power to the executive branch, Forrer acted as any red-blooded patriot with desire
5 to protect the essential framework of the constitution would – he asked the
6 judiciary to interpret the law. The Alaska Constitution is widely acknowledged
7 as giving the executive branch considerable powers and makes the governor of
8 Alaska arguably the chief executive of the various states and territories in America
9 with the most authority to govern. But the executive branch authority is not
10 without constraints, especially with regard to the expenditure of public funds.
11

12
13 It is a truism but still useful to meditate on the old political bromide that
14 governor's propose in regard to budgetary and fiscal manners but legislatures
15 dispose when it comes to appropriating public funds. In Alaska, the governor
16 proposes a budget. The legislature then adopts a budget via the appropriation
17 process after which the governor has not only the ability veto particular
18 appropriations in the budget but also to reduce individual appropriations enacted
19 by the legislature.
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22
23 None of these tried and true constitutional procedures were followed in
24 regard to the CARES Act allocation. Instead, the executive branch worked up a
25 spending plan using the peculiar RPL process, jammed it through the LB&A
26 committee and then the entire allocation, including the ill-conceived business
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28

1 relief portion of funds was ratified by the legislature. It doesn't take a grizzled
2 political operative to see where this truncated allocation process may well go in
3 the future and how it will benefit the executive branch or even despotic tendencies.
4

5 Forrer foresees that if the administration is given even judicial license to
6 move beyond the technical RPL process by sanctioned by statute in AS 37.07.080
7 (h), more than mischief will take place. The entire RPL process is in some ways
8 fraught and possibly constitutes and impermissible delegation of duties under
9 Alaska Constitution. Whether this deeper issue is submerged below the
10 immediate claim Forrer asks the Court to deal with based on equitable principles.
11 But the Court should consider the impact of sanctioning the expansive use of the
12 RPL procedures when dealing with public funds significantly in excess of a billion
13 dollars, particularly where there is no underlying appropriation that gives
14 plausible justification of increasing funding for a defined program.
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19 Forrer continues to believe that the ratification of the RPL's via HB 313
20 was better than not ratifying the entire package, even if the ratification procedure
21 did not really cure the constitutional infirmity on which he grounded his lawsuit.
22 But at least the entire legislature ratified business relief standards in the executive
23 branches' RPL, standards and criteria the executive branch now seeks to discard.
24
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26 The potential shift in the balance of power between the legislature and the
27 executive branch presented by an expansive view of how the RPL procedures can
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1
2 be utilized is significant. It not hyperbole to point out that the separation of
3 powers mandated by the Alaska Constitution is implicated in this case. How the
4 Court rules in this case will be studied and used as a template for allocating public
5 funds in the future. Sanctioning a shift that facilitates use of the RPL process to
6 allocate public funds will diminish the powers of the legislative branch and
7 augment the already formidable power of the executive branch.
8

9
10 In the obvious worst case scenario where the judiciary sanctions untethered
11 use of the RPL process without legislative ratification, all that would be required
12 for the Governor to expend public money would be a proposal by the executive
13 branch for the expenditure of public funds and approval by a simple majority of
14 the LB&A committee, a process that would require only six individuals
15 approval.³² Even in the problematic scenario where ratification takes place, all it
16 would take is for six individuals on the LB&A Committee to acquiesce to a
17 spending plan originating in the executive branch followed by ratification at some
18 later date by a simple majority of the legislative branch. In either scenario, the
19 idea that the governor and small sub-set of the legislature can devise a spending
20 scheme could effectively mean there are no genuine limits to the governor's
21 discretionary spending authority.
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27 ³² And the possibility that the LB&A need not approve a proposal to expend public funds
28 according to the statutory RPL process exists. *See, e.g.,* AS 37.07.080 (h) (2).

1
2 Given the now apparent plan by the executive branch to change the RPL
3 eligibility standards for business relief ratified in HB 313, Forrer believes the
4 judiciary should consider intent of the executive branch as a prelude to political
5 maneuvering that will likely have significant constitutional consequences. In this
6 instance the executive branch seeks to alter the terms of an RPL to lower the
7 threshold for eligibility for small business grants, which would open the funds'
8 access to many more recipients. ³³ Forrer does not disagree that the newly
9 proposed recipients likely should have been accounted for by the RPL, but to
10 exclude them was neither the fault of the businesses or the fault of Forrer. The
11 RPL was the work product of the executive branch and needs to be binding. The
12 standards are the standards, drafted by the executive branch and ratified by the
13 legislature. The Governor, as the chief executive officer of the executive branch
14 must be held accountable for the law as written, not as he or other members of the
15 executive branch wish they would have crafted the RPL language pertaining to
16 business relief. Follow the rules or change them is the common sense answer to
17 this self-inflicted wound. The Court should apply the rule of law here and enjoin
18 any attempt to deviate from the eligibility criteria set out in HB 313. If the
19 executive branch is free to change these particular terms in this specific situation,
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28 ³³ See *State's Opposition* at 28.

1
2 this and future administration will take the ruling as license to do nearly anything
3 with public funds according to the RPL process.

4 Perhaps the Court thinks Forrer is being excessively harsh about how the
5 RPL process might be abused. A short review of contemporary deliberations is
6 instructive. Last week, the House Labor and Commerce Committee held a
7 hearing to receive public testimony “on the need to fix [the] COVID-19 [small
8 business] grant program.”³⁴ From the dozens of Alaskans who testified on the
9 flaws of the RPL business relief program, the committee discovered at least three
10 problems, in addition to the obvious problem surrounding the eligibility for
11 business relief topic, (sometimes referred to as the provision to prevent “double
12 dipping”),³⁵ The “major problems” noted by the committee were:

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16 1. Commercial fisherman are ineligible for the relief because the
17 RPL required possession of a “business license,” but commercial
18 fishermen operate under “permits,” and;

19 2. Trade organizations and chambers of commerce cannot access
20 the grants as 501(c)(6) entities, and

21 3. “[d]ue to the way grant guidelines were written by the
22 administration, [DCCED] is unable to make even minor regulatory
23 changes to get funding out in a timely fashion”; and (4), the central
24 issue to this motion before the Court, that businesses who previously
25 received any relief from federal programs cannot access the grants.³⁶

26 ³⁴ See Alaska House Majority, *Business Owners, Economic Development Experts Highlight*
27 *Problem with AK CARES Act* (July 1, 2020). [Exhibit A, attached].

28 ³⁵ *Id.*

³⁶ *Id.*

1
2 If the Court were to rule in the State's favor under the vague premise that
3 the RPL program was "clearly directed at keeping small businesses afloat," ³⁷ the
4 executive branch would be unrestrained from implementing additional changes to
5 account for problems identified *post hoc*, but also other issues, including
6 unidentified matters or problems that might not actually be problems according to
7 objective standards. Where will this move away from articulated standards
8 adopted in HB 313 wind up? Are we really going to untether the executive branch
9 and allow for the expenditure of public funds according to no standards at all? To
10 do so is asking for government according to arbitrary standards.
11
12

13
14 For a contextual example, in this case the State asks the Court to permit the
15 grants to be made available purportedly to recipients who received "less than
16 \$5,000" in direct federal relief, instead of the literal language that precludes any
17 recipient from receiving state CARES Act funds allocated for business relief of
18 the entity had previously obtain relief funding from the federal government. A
19 judicial decision enabling the State's preferred outcome according to the
20 arguments advanced by the Attorney General's Office would esseintally mean the
21 administration could continually adjust the \$5,000 threshold at will, perhaps to
22 accommodate small businesses who received \$5,001 or \$10,000 or \$75,000 in
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28 ³⁷ *State's Opposition* at page 24.

1
2 direct federal relief.³⁸ Where will this erosion of the express standards embedded
3 in the RPL for business relief ratified in HB 313 end? Probably when all the
4 money is expended and then badly if the care in drafting the RPL exhibited by the
5 executive branch is a harbinger of the future, something that the Court should
6 consider and a factor that argues for injunctive relief as requested by Forrer.

7
8 It seems obvious to Forrer that a court decision that would allow the
9 executive branch to deviate from the eligibility requirements set by the RPL
10 ratified in HB 313 would serve as a grant of expansive discretionary authority that
11 could be applied to other desired modifications. Such result would allow the
12 executive branch to address other funding considerations that could be predicted
13 in advance but are ignored, a scenario which could dissuade this and future
14 administrations from engaging in rigorous planning and vetting processes. In
15 effect, the State is asking for a ruling that will encourage careless decision-
16 making with the state's financial resources.. And more discomfoting, that ruling
17 could provide an administration with expansive authority to decide different
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23 ³⁸ In other words, the threshold amount DCCED now apparently proposes should be the
24 eligibility standard appears arbitrary and could be subject to attack by federal aid recipients
25 of more than \$5,000 in loans. Seemingly, DCCED should have realized the flaws in its plan
26 to exclude small businesses who received any amount of federal loans from obtaining state
27 grants of money; after all, DCCED is supposedly familiar with the administration of grants.
28 In any event, it is not surprising that Alaska businesses who received any amount in the
federal pandemic relief loan program, would now be clamoring to obtain state grants with
no strings attached. Based on the RPL language related to business relief prepared by the
executive branch, these businesses are precluded from obtaining State CARES Act business
relief funding.

1
2 program terms that might inappropriately confer benefits to recipients in
3 circumstances against the public interest, or even serve a private interest. The
4 predictable outcome of sanctioning a deviation from the literal criteria in HB 313
5 will be an allocation process that is more opaque, less accountable and
6 inconsistent with the considered public interest.
7

8 The fact that the terms of the RPL were egregiously faulty is additional
9 evidence that following the legislative constitutional appropriations process was
10 both necessary and likely would have resulted in a superior allocation of public
11 funds. ³⁹ When the legislature acts under its constitutional duty as the
12 appropriating body, ⁴⁰ a bill for appropriations is introduced that is scrutinized
13 through a methodical, deliberative legislative process that includes committee
14 hearings conducted separately by each house of the legislature, receiving public
15 testimony, and three floor readings to provide public notice. ⁴¹ Sixty legislators
16 serving their districts are empowered to seek and obtain the advice of
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22 ³⁹ For example, only 167 of 1,947 small business entity applications have been awarded \$6.3
23 million, roughly 2.0% of the CARES Act funds allotted to the program. Alaska House Majority,
24 *Business Owners, Economic Development Experts Highlight Problem with AK CARES Act* (July
25 1, 2020) [**Exhibit A**, attached]. The remaining unpaid entities apparently do not meet the RPL
26 eligibility requirements.

27 ⁴⁰ *Alaska Constitution*, Article II, Sections 13 & 14.

28 ⁴¹ See *Alaska Constitution*, Article II, Section 14; see also, e.g., THE ALASKA STATE
LEGISLATURE, *31st Legislature Bill History/Action for Legislature – HB 205*,
http://www.akleg.gov/basis/Bill/Detail/31?Root=hb%20205#tab6_4 (exhibiting actions and
process of the legislature on the 2020 session fiscal year 21 operating budget bill).

1 professionals, experts, and members of the public about various proposals
2 contained in the appropriation bill. Sixty legislators representing the interests of
3 their constituents, their communities, and the state carefully examining funding
4 proposals in order to best serve those interests would have likely recognized the
5 deficiencies of the proposed business relief plan and corrected the eligibility
6 criteria for the program was set in law. ⁴² In fact, somewhat analogously, the
7 House Labor & Commerce meeting held last week to receive public testimony
8 about the flaws of the RPL small business grant program is illustrative of the sort
9 of hearing that would have been held during consideration of an appropriations
10 bill to determine defects *before* finalizing the legal eligibility criteria. ⁴³
11 (emphasis added).

12
13 To prevent further harm to the institutions erected by the Alaska
14 Constitution, and to preserve separation of powers and the system of checks and
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20 ⁴² For example, where commercial fisherman are ineligible for the program because “their
21 permits do not qualify as business licenses,” which has “deeply distress[ed]” Representative
22 Louise Stutes of Kodiak, it is observed that through an appropriations process, commercial
23 fishing constituents would have apprised their legislators of the defective plan. *See* Alaska
24 House Majority, *Business Owners, Economic Development Experts Highlight Problem with*
25 *AK CARES Act* (July 1, 2020). [**Exhibit A**, attached].

26 ⁴³ *See, e.g.*, HFIN Comm. Meeting on HB 205, 31st Alaska Leg. 2d Sess., *available at*
27 <http://www.akleg.gov/basis/Meeting/Detail?Meeting=HFIN%202020-02-21%2017:00:00>
28 (demonstrating House Finance Committee public testimony of Alaskans on HB 205, the 2020
legislative session fiscal year 21 operating budget bill); SFIN Comm. Meeting on HB 205,
31st Alaska Leg. 2d Sess., *available at*
<http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202020-03-18%2013:00:00>
(demonstrating Senate Finance Committee public testimony of Alaskans on HB 205, the 2020
legislative session fiscal year 21 operating budget bill).

1
2 balances built into our constitutional form of government, the executive branch
3 must be enjoined from unilaterally altering the terms of the small business grants
4 RPL.

5
6 In summary, based on the arguments and materials presented in Forrer's
7 initial application for injunctive relief and as further supplemented in this reply,
8 the probability of success on the merits related to stopping the deviation of the
9 business relief portion of the allocation of public funds in HB 313 has been
10 established. The executive branch must be required to use the express language
11 they drafted and as ratified by the legislature.
12

13
14 The State's mischaracterization of the slender legislative record and the
15 bulk of their arguments about "intent" are misplaced, or, in any event, highly
16 suspect because the arguments made by the Attorney General's office rest on a
17 flawed RPL process that the State now seeks to unilaterally alter based on the
18 supposed intent and sentiments held by executive branch officials. This is nothing
19 more than *post hoc* rationalization. Given that the operative language pertaining
20 to business relief expenditures was ratified by the legislature in HB 313, there is
21 virtually no genuine legislative intent supporting the executive branch position
22 that the legislature did anything other than summarily review the express language
23 in the RPL's drafted by the administration after which the legislature rubber-
24 stamped the allocation criteria before adjourning.
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1
2 And finally, the notion floated by the State in its opposition that DCCED
3 has some fabulous and incontrovertible expertise regarding statutory
4 interpretation is suspect because it first depends on an admission that the
5 Department realized its original explicitly termed plan was flawed, thereby
6 requiring a “re-interpretation” by the same department. This kind of self-serving
7 argument is undercut as a matter of logic when one inquires along the following
8 lines:
9
10

- 11 ✓ If DCCED has specialized, technical expertise in regard to
12 grants why did the RPL language submitted by the executive
13 branch not reflect and apply there considered understanding
14 about the need to assist Alaskan businesses?
- 15 ✓ DCCED suggested during proceedings before the LB&A to
16 have done research on small Alaskan businesses who
17 received federal funds as part of their formulation of the
18 business relief portion of the RPL which the agency now
19 seeks to junk, undercutting the idea that they have special
20 knowledge and understanding to reinterpret the RPL.
- 21 ✓ The terms for business relief proposed by the executive
22 branch are remarkably easy to understand and unambiguous.
23 Many potentially impacted businesses in Alaska who are
24 negatively impacted by the RPL language started howling
25 shortly after the eligibility criteria was exposed. No technical
26 expertise is really required to “interpret” the business relief
27 eligibility criteria differently; DCCED and the executive
28 branch instead desire to abandon the terms they created and
substitute new language.

- 1
- 2 ✓ The eligibility requirements for business relief were
- 3 explicitly discussed several times during LB&A hearings and
- 4 yet those discussions did not lead DCCED—the supposed
- 5 technical experts—to propose alternative language that
- 6 would have expanded the eligibility criteria.
- 7
- 8 ✓ The inference made by the State that DCCED has the ability
- 9 to divine the intent of the eligibility criteria for business relief
- 10 based on longstanding interpretation of grant administration
- 11 programs might have some limited appeal if this program
- 12 was based on historic practices. The program is new; the
- 13 actual language in the RPL pertaining to business relief
- 14 eligibility are the only objective standards the agency can
- 15 apply when expending public funds.

16 CONCLUSION

17 The public interest in this case is best served by enjoining the attempt by

18 the executive branch to repudiate the express terms for business relief drafted by

19 that branch and as ratified by the legislature. The only, ascertainable objective

20 criteria that presently exist for distributing the business relief portion of the

21 CARES Act funding held by the State are expressed in HB 313. The standards

22 ratified by the legislature, not some new concoction to be determined by the

23 executive branch based on subjective intent must prevail.

24

25 In the event the court elects not to grant equitable relief according to the

26 narrow request submitted by Forrer, the Court should preserve Forrer's ability to

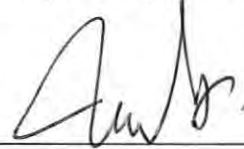
27 argue prospectively that the unilateral alteration of any allocation made by the

28

1
2 RPL process after LB&A approval or legislative ratification is inconsistent with
3 the Alaska Constitution and the rule of law.
4

5 **DATED** this 6th day of July, 2020 at Juneau, Alaska.

6 **LAW OFFICE OF**
7 **JOSEPH W. GELDHOF**

8 

9
10 Joseph W. Geldhof
11 Alaska Bar # 8111097
12
13
14

15 **Certification**

16 I certify that a copy of this reply document,
17 and Exhibits A & B, together with the
18 *Affidavit of Christopher Scott Tuck*
19 were hand delivered to:
20 the Alaska Attorney General's office in
21 Juneau, Alaska.
22

23
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DATED: 

By: 

Joseph W. Geldhof

Alaska House Majority

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Business owners, economic development experts highlight problems with AK CARES Act

 Covid-19, Press

House Labor and Commerce Committee hears testimony on the need to fix COVID-19 grant program

ANCHORAGE – Small business owners and economic development experts detailed a host of problems with the AK CARES Grant Program today during a hearing of the House Labor and Commerce Committee.

The program was established with funding provided to the State of Alaska for pandemic relief through the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act. Eligible businesses can receive between \$5,000 and \$100,000 in grants through the program.

As of June 29, however, only 167 of 1,947 applications, 8.5 percent, have been approved. \$6.3 million – just 2 percent of the available funding – is in the hands of Alaska businesses.

Four major problems were highlighted by testifiers:

1. Commercial fishermen are not eligible for relief because their permits do not qualify as business licenses.
2. Trade organizations and chambers of commerce are ineligible for relief as they are registered as 501(c)6 entities.
3. Due to the way grant guidelines were written by the administration, the Department of Community, Commerce, and Economic Development is unable to make even minor regulatory changes to get funding out in a timely fashion.
4. Businesses that previously received other pandemic relief funding from the federal government are still struggling to access AK CARES

Privacy - Terms

EXHIBIT "A" PAGE 1 OF 2

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"I want to thank the dozens of Alaskans who testified about the need to remove bureaucratic barriers to AK CARES grant eligibility," said **Rep. Ivy Spohnholz** (D-Anchorage), chair of the Labor and Commerce Committee. "They made a clear case for the Legislature and governor to quickly make the AK CARES Grant Program work better for Alaskan businesses, non-profits, trade associations, and commercial fishing operators hurt by the pandemic. We must act now."

"Commercial fishermen are the backbone of our state's most important industry and represent Alaska's original small business," added **Rep. Louise Stutes** (R-Kodiak), vice chair of the committee. "I am deeply distressed that CFEC permit holders are currently excluded from eligibility under the AK CARES small businesses grant program. These are small businesses by any measure, and we must address this issue swiftly to support this vital sector of our economy."

Below are several comments made by Alaskans during the hearing. People who were unable to testify are welcome to email testimony to hfac@akleg.gov.

"The rules don't match up with the needs. Unless we plan on returning over \$200 million to the federal government, we need to make changes now."

– Tim Dillon, Kenai Peninsula Economic Development District

"While it's a relief to have a cash cushion, what small businesses like ours need is not loans but grants."

– Mandy Hawes, Owner, Get Lost Travel Vans

"What we're facing is destruction of our economy, where nothing will be left standing if we do not take extraordinary steps to get the hundreds of millions of dollars sitting there inches away from helping."

– Bill Popp, Executive Director, Anchorage Economic Development Corporation

"There are 609 fishing permits issued to Cordovans, which means over half of Cordova's businesses are ineligible from AK CARES grants. Please include commercial fishermen for the AK CARES Grant program."

– Chelsea Haisman, Executive Director, Cordova District Fishermen

"We live in a rural area, and we rely 100 percent on the cruise ships. We received some PPP funds, but it has run out. We urge the legislature to open up the AK CARES Grant program."

– Stephanie Brenner, Owner, Brenner Fine Clothing and Gifts in Hoonah

"Many businesses will not survive. We're not going to be made whole, and we're not even asking to be. But we need to open up the restrictions on the AK CARES Grant program."

– Debbie Speakman, Executive Director, Kenai Peninsula Tourism and Marketing Council

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MEMORANDUM

May 5, 2020

SUBJECT: Cares Act RPLs – May 1st submission
(Work Order No. 31-LS1806)

TO: Representative Chris Tuck
Attn: Aurora Hauke

FROM: Megan A. Wallace *MAW*
Director

You have asked for a review of the RPLs submitted by the governor on May 1, 2020.¹

RPL Analysis

1) RPL #08-2020-0250 - Community Assistance Payments - \$257,548,754²

The governor originally cited an FY 20 appropriation to the Department of Commerce, Community, and Economic Development (DCCED), community and regional affairs, as appropriation authority.³ This appropriation contains federal receipt authority. The governor could not rely on a community assistance appropriation as the appropriation authority for the RPL, because there is no FY 20 community assistance appropriation,⁴ and the FY 21 community assistance appropriation contains no federal funding that would make it eligible for the RPL process. The FY 20 appropriation to the DCCED, community and regional affairs essentially funds the Division of Community and Regional Affairs' operations. As part of that appropriation and allocation, there was \$636,900 allocated for the following grants:

- Alaska Maritime Safety Education, Boat Receipts - \$196.9

¹ On May 1, 2020, the Legislative Budget and Audit Committee (LB&A) approved RPLs # 05-2020-0074, 05-2020-0075, 05-2020-0076, 12-2020-4049, 25-2020-8766, and 45-2020-0002.

² The original amount of this RPL was \$562,500,000.

³ See sec. 1, ch. 1, FSSLA 2019, page 5, line 28.

⁴ The governor vetoed the \$30,000,000 FY 20 community assistance appropriation on three separate occasions. See sec. 33(a), ch. 1, FSSLA 2019, sec. 11(a), ch. 2, SSSLA 2019, and sec. 16(c), ch. 7, SLA 2020.

EXHIBIT "B"
PAGE 1 OF 8

- Kawerak, Inc. for Essential Air Service to Little Diomed - \$200.0
- Rural Utility Business Assistance Program - \$160.0
- Life Alaska Donor Services, Anatomical Gift Awareness Fund - \$30.0
- Unavailable Revenue to grant to Life Alaska Donor Services due to reduced annual donation trends to the fund - \$50.0

The appropriation cited as authority for this RPL provides no community assistance function; therefore the purpose of the RPL is not the same as the appropriation it seeks to increase. Because the RPL process may not be used to establish a new appropriation or change the purpose of an existing appropriation, it does not comply with AS 37.07.080(h).

The governor has added AS 44.33.020(a)(20) as statutory authority for this expenditure.⁵ AS 44.33.020(a)(20) provides:

(a) The Department of Commerce, Community, and Economic Development shall . . .

(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;

While the above provision appears to give DCCED sufficient authority to disburse CARES Act funds to local governments as community assistance payments, the statute does not set out any specific distribution criteria, and there is none elsewhere in the Alaska Statutes. Based on testimony by OMB before the House Finance Committee on April 24, 2020, the governor modified the formula for community assistance payments the legislature established in AS 29.60.850 - 29.60.879. Instead of relying on the existing statutory formula the governor developed a new formula by applying portion of the statutory community assistance payment formula, adjusted by selected data collected by DCCED. It is my understanding that this formula was further adjusted for certain communities under the May 1, 2020 RPLs.⁶ The governor has cited no authority, and there does not appear to be any, that would allow for the governor to develop the new community assistance payment formula used in this RPL, absent legislative action.

⁵ The governor previously cited AS 29.60.850 - 29.60.879 (community assistance) and AS 37.05.315 (grants to municipalities) as statutory authority for this RPL.

⁶ The governor also submitted new RPLs #08-2020-0260 - 08-2020-0382 for COVID-19 Community Directs Costs for a total of \$311,024,132. Each of these RPLs uses the same appropriation and statutory authority discussed above for RPL #08-2020-0250. For the same reasons, RPLs #08-2020-0260 - 08-2020-0382 do not comply with AS 37.07.080(h).

Based on the foregoing, in my opinion, this RPL does not comply with AS 37.07.080(h), as it is not an increase to an existing appropriation item, but instead attempts to create a new appropriation, which requires legislative action.⁷

2) RPL #08-2020-0251 - Small Business Relief - \$290,000,000

The governor continues to cite DCCED, investments, as the appropriation authority for this RPL. These appropriations contain no federal receipt authority. Therefore, there is no federal receipt authority to increase by RPL and for that reason alone this RPL does not comply with AS 37.07.080(h).

Further, the purpose of this appropriation does not appear to be for providing small business loans, especially to the extent proposed. The RPL now proposes:

The Investments Section of the Department of Commerce, Community and Economic Development in cooperation with the Alaska Industrial Development and Export Authority (AIDEA), the existing Sustaining Alaska's Future Economy (AK SAFE) program, and Alaska Regional Development Organizations (ARDORs) will provide assistance to Alaska businesses based on the size, assets, resources, financial history, and needs of the business in the form of grants.

ARDORs will be allocated \$750,000.00 of the total amount for the purpose of facilitating the grant program and assisting small businesses in applying for State programs. Information related to how the ARDORs facilitated the grant process and assisted businesses in accessing resources made available by the State will be included in the annual ARDOR report, required under AS 44.33.896(e).

While the RPL provides that ARDORs will be allocated \$750,000, it does not specify where the remaining funds will be allocated. Will the remaining funds go to the AK SAFE program, or will they remain in DCCED? In addition, if AIDEA is going to make loans, the legislature might consider instead appropriating funds directly to those entities.⁸

⁷ As previously advised, any CARES Act funds appropriated to municipalities "must be used for actions taken to respond to the public health emergency." As of May 5, 2020, U.S. Treasury guidance continues to advise that "[f]und payments may not be used for government revenue replacement." See <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

⁸ The CARES Act guidance from the U.S. Department of Treasury specifically authorizes payments to small businesses, noting that eligible expenditures include those "related to

Nevertheless, this RPL does not comply with AS 37.07.080(h), and appears to create a new appropriation, which requires legislative action.

3) RPL #08-2020-0054 - COVID - 19 Economic Stimulus for Alaskan Fisheries - \$100,000,000

The governor continues to cite DCCED, executive administration, commissioner's office, as the appropriation authority. There is no federal funding attached to these appropriations to which the CARES Act funds may be added and no federal receipt authority. In addition, the funding for this allocation is primarily for personal services funded from interagency receipts. There is no money appropriated to the grants line. It is not clear why the governor cited this as appropriation authority. Therefore, this RPL does not comply with AS 37.07.080(h).

The legislature did not contemplate and did not provide authority for the commissioner to make these types of stimulus payments.⁹ The statutory authority cited, AS 44.33.020, only provides the general duties of the department. Because there is no statutory authority specifically outlining a program for fishery stimulus payments, the legislature may need to specifically determine how these funds are to be distributed. In my opinion, this RPL attempts to create a new appropriation, which requires legislative action.

4) RPL #25-2020-8771 - Statewide Aviation and Rural Airport System CARES FAA Funding - \$49,000,000

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of \$49 million.¹⁰ According to the RPL, "CARES Act Airport Grants will be used for statewide aviation and rural airport system operating and maintenance expenses, where additional expenditure needs have occurred due to the COVID-19 public health emergency." The RPL provides that the federal funds will increase the funding allocated

the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures." Therefore, the CARES Act funds can ultimately be used to provide small business loan, but probably not through the RPL process.

⁹ Indeed, other fishery disaster funds have been appropriated to the Department of Fish and Game in the capital budget. See sec. 1, ch. 3, FSSLA 2019, page 4, lines 6 - 10 (Pacific Coastal Salmon Recover Fund; Pink Salmon Disaster - 2106 Gulf of Alaska). Therefore, I doubt the legislature contemplated the commissioner of DCCED would be distributing fishery disaster funds.

¹⁰ See sec. 1, ch. 1, FSSLA 2019, page 32, lines 30 - 31; sec. 1, ch. 8, SLA 2020, page 32, lines 24 - 25.

to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to state owned airports. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

As statutory authority for the RPL, the governor cites AS 37.20.010 and AS 44.42.060.¹¹ While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. The purposes of the appropriations cited in this RPL do not appear to provide for operating and maintenance expenses associated with state owned airports. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. The funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient appropriation authority to support the RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

**5) RPL #25-2020-8772 - MSCVC & Whittier Access and Tunnel 5001(d)
CARES funding - \$3,034,100**

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of \$3,034,100.¹² According to the RPL, "[f]unding will be used to cover unbudgeted and unanticipated personal services costs and expenditures related to ensuring continuity of operations and program delivery within this appropriation." The RPL provides that the federal funds will increase the funding allocated to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to measurement

¹¹ AS 37.20.010 provides:

The governor is authorized to accept on behalf of the state all federal grants and transfers of property of an emergency, transitional, or omnibus nature upon conditions imposed by the federal government.

AS 44.42.060 provides:

The commissioner may apply for and accept, on behalf of the state, grants from the federal government or an agency of it, or from another state, a foundation, or any person, for any of the functions or purposes of the department.

¹² See sec. 1, ch. 1, FSSLA 2019, page 32, line 31; sec. 1, ch. 8, SLA 2020, page 32, line 25.

standards and commercial vehicle compliance (MS/CVC), northern region highway and aviation, and Whittier access and tunnel. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

The governor cites AS 37.20.010 and AS 44.42.060 as statutory authority. While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. Expenses related to MS/CVC, northern region highway and aviation, and Whittier access and tunnel do not appear to be within the scope of the appropriations cited in the RPL. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. The funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient appropriation authority to support the RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

Other Legal Issues

If, despite the legal issues described above, LB&A approves these RPLs or the governor moves forward and expends funds after the 45-day waiting period under AS 37.07.080(h), that expenditure would likely constitute an unconstitutional delegation of the legislature's power of appropriation.

In *State v. Fairbanks North Star Borough*, an Alaska law that authorized the governor to administratively reduce the amount of an appropriation was found to be an unconstitutional delegation of legislative power.¹³ AS 37.07.080(g)(2), which has since been repealed, read:

- (g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that
 - (1) the planned expenditures can no longer be made due to factors outside the control of the state which make the expenditure factually impossible;
 - or
 - (2) estimated receipts and surpluses will be insufficient to provide for appropriations.

In support of its decision that AS 37.07.080(g)(2) was an unconstitutional delegation of legislative power to the executive branch, the Alaska Supreme Court found that the statute would permit the governor to cut the entire budget for a particular department or

¹³ *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987).

project and the governor could effectively veto a project by using the process in AS 37.07.080(g)(2) even when the legislature had overridden the governor's veto.¹⁴

Similarly, if the governor asserts that AS 37.07.080(h) authorizes the expenditure of funds in the manner set out in the RPLs described above, if challenged, a court would likely find that the governor's interpretation of AS 37.07.080(h) would result in an unconstitutional delegation of the legislature's power of appropriation. AS 37.07.080(h) allows the governor to increase an existing appropriation but does not permit the creation of a new appropriation or change the purpose of an existing appropriation. As described above, these RPLs attempt to create new appropriations because the appropriations cited to increase federal receipts are inconsistent with existing authority and the purpose for the proposed expenditures. If the governor expends funds in accordance with the RPLs and those expenditures are challenged, a court would likely find that the RPLs do not comply with AS 37.07.080(h). Further, a court would likely find that if AS 37.07.080(h) allowed the governor to create a new appropriation, as proposed in the RPL, the statute itself would be an unconstitutional delegation of the legislature's power of appropriation.

If LB&A were to approve the above RPLs, I strongly recommend that the legislature ratify those expenditures at a later date if the legislature supports the appropriations. In 1987, the legislature retroactively ratified the actions of Governor Sheffield in impounding the appropriations previously discussed. Governor Sheffield impounded ten percent of funds intended for municipalities under AS 37.07.080(g), which became the subject of litigation. Later, the legislature went back and considered each of the impoundments and ratified Governor Sheffield's actions. The municipalities challenged the ratification, and the Alaska Supreme Court upheld the power of the legislature to retroactively ratify the actions of Governor Sheffield.¹⁵ In *Fairbanks North Star Borough*, the court explained:

A curative statute is

a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.¹⁶

The Court also held that:

¹⁴ *Id.* at 1143.

¹⁵ *Fairbanks North Star Borough v. State*, 753 P.2d 1158 (Alaska 1988).

¹⁶ *Id.* at 1159 - 1160.

Courts have uniformly upheld the validity of curative legislation where (1) the legislature originally had the power to authorize the acts done, and (2) there is no unconstitutional impairment of vested rights as a result of the act's passage.¹⁷

While ratification may be an option, it is also not without risk. Just as Governor Sheffield's impoundment was challenged (successfully), if LB&A approves the RPLs or if the governor moves forward with expenditures after the 45-day wait period, the expenditures may still be subject to challenge and litigation until the legislature ratifies the expenditures.¹⁸ Further, if the legislature fails to subsequently ratify the expenditures, the expenditures will be subject to challenge.

If you have any questions, please advise.

MAW:mjt
20-149.mjt

¹⁷ *Id.* at 1160.

¹⁸ If the expenditures were challenged, the legislature may consider reconvening to approve the expenditures.

EXHIBIT "B"

PAGE 8 OF 8

1
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**SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU**

ERIC FORRER)
Plaintiff,)

vs.)

STATE OF ALASKA)
and LUCINDA MAHONEY,)
Commissioner of the Alaska)
Department of Revenue and)
JULIE ANDERSON,)
Commissioner of the Alaska)
of Commerce, both)
in their capacity as officials of)
the State of Alaska.)
Defendants.)

1JU-20-00644 Civil

AFFIDAVIT OF CHRISTOPHER SCOTT TUCK

State of Alaska)
Third Judicial District) ss.

Christopher Scott Tuck, being first duly sworn and on my oath, states as follows:

1. I reside in City of Anchorage, Alaska.
2. I am currently the elected representative for District 23 in the Alaska State Legislature.

Affidavit of Christopher Scott Tuck
July 6, 2020
Forrer v. State of Alaska, et al
1JU-29-00644 Civil

3. I was elected to the Alaska House of Representatives in the Alaska State Legislature in 2008 and have served in the House since taking office in January of 2009.
4. Currently, I am the Chairman of the Legislative Budget & Audit Committee (LBAC), an interim joint committee of the Alaska Legislature.
5. The facts and matters I am providing testimony about in this affidavit are based on my personal observations, experience, review of available public information and true to the best of my knowledge.
6. In February and March of this year, it was apparent that our nation and state were facing a significant health challenge as a result of the COVID-19 virus.
7. In March of this year, it was also obvious that the steps necessary to deal with the COVID-19 virus would have an extraordinary impact on the economy of Alaska.
8. In late March of this year, just before the Alaska State Legislature recessed, the Congress of the United States passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act funding bill that allocated money for the relief of the COVID-19 pandemic.
9. The CARES Act funds directed to the State of Alaska included money for a variety of purposes, including mitigating the impact on health care workers, delivery of services for individuals impacted by the COVID-19 virus and to assist businesses and other organizations impacted by the measures adopted to deal with the virus pandemic.
10. Alaska was allocated approximately \$1.5 billion, and the federal funds would have been sent to Alaska after the appropriation bill by Congress

1
2 was signed into law on March 27, 2020, and after the Alaska State
3 Legislature recessed on March 29, 2020. The funds were deposited prior
4 to the expected disbursal date of April 24, 2020.

5 11. On April 21, 2020, Governor Mike Dunleavy announced in a press briefing
6 how his administration planned to allocate and expend the CARES Act
7 funds that the State of Alaska received.

8 12. Also on April 21, 2020, shortly following the governor's announcement,
9 the Director of the Office of Management and Budget transmitted several
10 Revised Programs – Legislative (RPL) requests to me in my role as the
11 chair of the LBAC.

12 13. Although I was aware as the chair of LBAC that any request to make
13 expenditures via the RPL process would come through the committee, I
14 was not made aware of the announcement of the RPLs until shortly before
15 the press briefing had started.

16 14. There was no communication between me and anyone in the Dunleavy
17 administration about how the funds would be allocated or the criteria that
18 would be used to expend the funds.

19 15. I had several legal concerns about using the RPL process to allocate such
20 a large sum of federal funding.

21 16. On April 22, 2020, I sent a letter acknowledging receipt of the RPLs to
22 Governor Dunleavy. The initial paragraphs of the letter read: "The
23 Legislative Budget and Audit Committee is in receipt of the revised
24 program – legislative (RPL) requests dated April 21, 2020, for the
25 distribution of federal CARES Act funds. The RPLs are currently being
26 reviewed by the Legislative Finance Division and [Legislative Legal
27

1
2 Services]. As Chair of the Committee, I appreciate the need to expedite the
3 distribution of funds and I assure you we will do so quickly and in a manner
4 consistent with our legal obligations.” I had distributed the letter to
5 members of the LBAC and upon their advice had removed the following
6 language: “The RPLs are currently being reviewed by the Legislative
7 Finance Division and the Legislative Legal Division. Many of the items
8 included in the RPL packet are likely outside of the narrow confines of
9 what the LBAC is able to legally consider under the RPL process and
10 require the attention of the full Alaska State Legislature as the
11 appropriating body of the State of Alaska. In addition, although we are still
12 awaiting official guidance (expected on April 28) on how the states may
13 use the CARES Acts funds, some of the items in the packet are contrary to
14 early guidance. It would be imprudent to distribute funds outside of
15 allowable uses and end up owing that money back to the federal
16 government, especially in these uncertain fiscal times. It appears that those
17 items will be allowable under the second round of federal stimulus funding
18 that is being considered currently.”

19 17. Because I had concerns, my staff and I consulted with Legislative Legal
20 Services for guidance throughout the months of April and May 2020. I
21 received both written and verbal advice. Through these discussions, it
22 became apparent that some of my concerns were valid and some were not.
23 For instance, I learned that although the LBAC is an “Interim Committee,”
24 that phrase doesn’t mean it can’t act during session, it means that the
25 committee has the specific authority to act during the interim between
26 legislative sessions, when other committees may not act. Therefore, the
27

1
2 status of the legislative session was not a determining factor in whether the
3 RPL process could be used. The determining factor was whether or not the
4 operating budget had been passed, which it had.

5 18. The proposals changed throughout the process and it was clear that the
6 administration was developing the plan as they went through the process.

7 19. Based on some preliminary designations by the executive branch on how
8 the CARES Act funds should be allocated according to the RPL process
9 and working with the Legislative Finance Division and Legislative Legal
10 Services, it appeared to me that the administration's expenditure proposal
11 could be slotted into three broad categories:
12

13 CATEGORY I

14
15 Category I are funds that did not require an RPL because they had
16 been previously authorized through open-ended receipt authority in
17 the operating budget. This included **\$381 million** in Health and
18 Social Services costs, including about \$50 million targeted for
19 nonprofits.
20

21 CATEGORY II

22 Category II are funds that are appropriate for the RPL process as
23 outlined in AS 37.07.080(h) because they were additional federal
24 funds directed existing budget items. This included **\$125 million**
25 pertaining to allocations for education, public safety, transportation
26 and University of Alaska activities related to the COVID-19 health
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2 crisis. In addition, several RPLs required minor revisions by the
3 administration to be included in this category, including **\$52 million**
4 for the Alaska Department of Transportation & Public Facilities
5 focused on airport support and work related to the Whittier Tunnel
6 and **\$10 million** for homelessness prevention via the Alaska
7 Housing Finance Corporation.
8

9 CATEGORY III

10 Category III are funds that fell outside of the RPL process. This
11 included the sum of **\$958 million** in CARES Act funding to
12 programs for which authorization or appropriations by the Alaska
13 Legislature did not already exist. The allocation proposed by the
14 executive branch in this category of funding for which no
15 appropriation or federal receipt authority existed was broken down
16 in the following manner: Up to **\$100 million** to assist the
17 commercial, charter and subsistence fishing industry; plus **\$290**
18 **million** for small business relief; and **\$568 million** in municipal
19 assistance.
20

21
22 20. With the exception of funds that fell into Category I, as outlined in
23 paragraph 19, above, the Dunleavy administration was proposing to
24 allocate all the CARES Act funds received from the federal government
25 via the RPL process.

26 21. Although some of the RPLs initially submitted in Category II, as set out in
27 paragraph 19, above, required technical corrections, I had very few

1
2 concerns about using the RPL process. In consultation with the Legislative
3 Finance Division and Legislative Legal Services, it was determined that
4 there was preexisting authority passed by the Legislature that probably
5 meant an RPL increasing funding for the identified projects might be
6 consistent with authorization from the legislature.

7 22. My biggest concern about using the RPL process to allocate CARES Act
8 funding received from the federal government was centered on the
9 proposal by the executive branch to fund the items in Category III set out
10 in paragraph 19, above.

11 23. The Legislative Finance Division and Legislative Legal Services
12 indicated that there was no underlying appropriation in any budget that had
13 been passed by the Alaska State Legislature and signed by the Governor
14 that would provide a realistic base by which the LBAC could validly
15 approve the proposed allocation using the RPL process Category III
16 allocations proposed by the executive branch.

17 24. It is my understanding that the RPL process was established to provide for
18 an avenue to accept additional unexpected funding from the federal
19 government or program receipts that were discovered after the budget had
20 been passed. Sometimes we don't know exactly how much the state is
21 going to receive from the federal government for a program because there
22 are differences in the budget cycle. This process allows the governor to
23 accept those funds without needing specific appropriation authority from
24 the Legislature. However, the statute doesn't allow for the creation of
25 entirely new programs through the RPL process, which is very clearly and
26 specifically about receiving additional funds to existing programs. I also
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1
2 believe that the creators of the RPL process did not contemplate the
3 process being used for such a large amount of funding, only discrepancies
4 in expected funding.

5 25. There were problems with convening the Legislature that were due in large
6 part to the pandemic and concern about the health of members and staff.
7 In addition, there was concern that organizational issues and other topics
8 would prevent the Legislature from dealing with the CARES Act funds
9 efficiently and there was immense pressure to get these funds out as
10 quickly as possible.

11 26. Personally, given the large amount of money the state received through
12 the CARES Act appropriation and the fact that the appropriation authority
13 for the State of Alaska lies with the Legislature, I thought it would be more
14 appropriate for the entire Legislature to take up the appropriation of the
15 federal funds.

16 27. Because it was apparent that the Legislature was not likely to reconvene
17 to appropriate the CARES Act funds, the executive branch kept working
18 on various RPL proposals to allocate the federal funds.

19 28. The Office of Management and Budget submitted RPLs to the LBAC on
20 three separate occasions: the initial submission on April 21, 2020; an
21 additional submission on May 1, 2020, on the same day that LBAC was
22 scheduled to meet to address RPLs; and a final submission on May 11,
23 2020, again on the same day that LBAC was scheduled to meet to address
24 RPLs.

25 29. The LBAC met on May 1, 2020, and May 11, 2020, to address the RPLs.
26
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2 30. On May 1, 2020, the LBAC approved over \$124,000,000 in RPLs,
3 allowing the immediate distribution of funds to the Department of
4 Education and Early Development, the Department of Public Safety, the
5 Department of Transportation and Public Facilities, and the University of
6 Alaska. These were RPLs that fell clearly within Category II as outlined in
7 paragraph 19, above. Because revised RPLs had been received only hours
8 before the meeting and had not had a chance to be reviewed by the
9 Legislative Finance Division and Legislative Legal Services, the RPL
10 packet that was submitted on May 1, 2020, was not addressed by the LBAC
11 on that date.

12 31. On May 11, 2020, the LBAC met and approved for immediate distribution
13 RPLs in two batches: one batch for RPLs that fell within category II,
14 outlined in paragraph 19, above; and one batch for RPLs that fell within
15 category III, outlined in paragraph 19, above. This meeting dispatched of
16 all RPLs that had been received by the LBAC by that date.

17 32. All RPLs addressed by the LBAC were approved unanimously. During
18 the May 11, 2020, meeting, I ruled the second batch of RPLs out of order
19 because advice provided by Legislative Legal Services indicated that they
20 were not appropriate for the RPL process. This ruling was appealed and
21 overturned by a vote of seven to three.

22 33. The RPL regarding small business relief that was submitted on April 21
23 proposed to allocate \$300,000,000 in business relief funding from the
24 CARES Act funds in a loan program.

25 34. In the May 1 submission, the business relief RPL proposed to distribute
26 grants instead of loans, and the proposed amount had been reduced to
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1
2 \$290,000,000, with the \$10,000,000 going toward homelessness
3 prevention programs administered by the Alaska Housing Finance
4 Corporation (AHFC).

5 35. On May 11, 2020, the administration submitted another revised RPL
6 regarding business relief that outlined in great detail the grant program,
7 including specific restrictions on eligibility.

8 36. There was discussion during the May 11, 2020 LBAC meeting about how
9 the CARES Act funds would be expended under the RPL, and inquiries
10 were made by LBAC members of executive branch officials.

11 37. Although the detailed program exempted businesses who had received
12 financial assistance through federal COVID-19 relief programs, at least
13 two members of the LBAC, including myself, specifically noted to
14 Department of Commerce, Community and Economic Development
15 Commissioner Julie Anderson on May 11, 2020, that it was important for
16 Alaskan businesses who had obtained some financial assistance through
17 federal COVID-19 relief programs to be allowed to participate in the grant
18 program because they might have chosen not to apply for the federal
19 assistance had they known this was going to be an option.

20 38. The executive branch did not make any changes to their proposed
21 allocation or the eligibility standards for allocating the CARES Act funds
22 reviewed by the LBAC Committee on May 11, 2020.

23 39. According to the RPL statute, AS 37.07.080(h), the governor submits an
24 RPL to the LBAC for review. If the LBAC does nothing, the funds may be
25 expended after 45 days. If the LBAC disapproves of the RPL, the governor
26 may still expend the funds, but must provide further explanation for doing
27

1
2 so. There is no provision allowing the LBAC to deny or amend RPLs.
3 Although members of the LBAC might have wished to change the
4 eligibility criteria, there was no opportunity to do so given the limitations
5 of the RPL statute.

6 40. In reviewing the RPLs, there was concern about the criteria used for
7 distributing funds, which resulted in what could be considered an unequal
8 or unfair distribution.

9 41. For example, by reverse engineering the allocation formula for the
10 municipal assistance portion of the CARES Act funds in Category III,
11 paragraph 19, above, it appears that communities that levy and collect sales
12 tax were allocated a significantly greater share of the available CARES
13 Act funding than places with low or no sales tax.

14 42. What this means, when applied as a formula, is that places like Fairbanks
15 received a smaller per capita allocation because of a small sales tax rate
16 while places like Skagway which has a small population, but high sales tax
17 rate based on summer tourism got a more significant portion of the CARES
18 Act allocation.

19 43. The legislative process can be tedious and sometimes contentious but I
20 was convinced at the time the LBAC voted to approve the RPL's submitted
21 by the executive branch that the State would have been better served by
22 the Legislature passing both policy and appropriation bills that directed
23 and authorized the expenditure of the CARES Act funds. Using the
24 legislative process would have allowed each legislator to better represent
25 their district in the appropriation of CARES Act funds and resulted in
26 better criteria and a fairer allocation of public funds. The legislative
27

- 1
2 process also brings to surface what we call “unintended consequences”
3 because questions are asked and stakeholders are included in the process.
4 44. Using the RPL process for Category III funds as described in paragraph
5 19, above, almost immediately caused problems, including a lawsuit.
6 45. In response to the lawsuit, the Legislature reconvened on May 18, 2020,
7 and the next day, on May 19, 2020, passed House Bill 313, which ratified
8 the RPLs that had been approved by the LBAC, attempting to head off
9 claims that the Legislature had abrogated its power of appropriation.
10 46. In ratifying the RPLs, anything that was in the RPL became law, including
11 the details for the programs, and they could no longer be adjusted by the
12 administration to address unforeseen consequences.
13 47. For example, it quickly became apparent that Alaskan businesses that had
14 received funds from federal programs for relief due to the COVID-19
15 pandemic were shut out from receiving assistance through the CARES Act
16 business assistance grant program administered by the state. In June, the
17 administration announced a change to the eligibility criteria, allowing
18 businesses that had received less than \$5,000 in federal funds to be eligible
19 for the state grant program, citing legislative intent.
20 48. In addition, there was apparently no way to get CARES Act funds to day
21 care providers.
22 49. Alaskan fishermen were blocked from getting state business funding relief
23 unless they had a business license, which is not necessarily a requirement
24 for individuals who have a limited entry permit.
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2 50. Individuals who operate a business that is not their primary source of
3 income are not eligible for CARES Act assistance under the state's
4 eligibility criteria.

5 51. The eligibility criteria and standards for administering the CARES Act
6 relief funds are not working for Alaskans and Alaska businesses that need
7 help.

8
9 *Further the affiant sayeth naught.*

10
11 **DATED** this 6th day of July, 2020, at Anchorage, Alaska.

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14
15

Christopher Scott Tuck