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

KEVIN F. McCOY and MARY C. GEDDES,

Plaintiffs,

vs.

MICHAEL J. DUNLEAVY, Governor of the State of Alaska,

Defendant.

NO. 3AN-19-08301CI

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION REQUEST

I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

Plaintiffs Kevin F. McCoy and Mary C. Geddes, proceeding *pro* se, submit this memorandum of law in support of their motion for a preliminary injunction that seeks to:

1. Enjoin defendant Dunleavy from ordering the Alaska Legislature to convene at a location other than the Capital without the Legislature's agreement;

2. Enjoin defendant Dunleavy from implementing his 182 line-item vetoes of the FY2020 state operating budget until the expiration of such time as is allowed by the Alaska Constitution for the Legislature to consider and vote on whether to override any of the Governor's vetoes; that is, until after the fifth day of the next regular or lawfully proclaimed special session of the Legislature;.

Plaintiffs seek a preliminary injunction only until such time as the court can render a decision on the merits as to the lawfulness of the Governor's June 13, 2019, Executive Proclamation.

II. STATEMENT OF FACTS

A. Defendant Dunleavy's June 13, 2019 Executive Proclamation to address the Permanent Fund Dividend.

On June 13, 2019, defendant Dunleavy issued an executive proclamation calling the Thirty-First Legislature of the State of Alaska into its second special session to address legislation related to the permanent fund dividend. The proclamation ordered that the second special session be convened in Wasilla, Alaska at 1:00 p.m. on July 8, 2019 and recommended Wasilla Middle School as an appropriate venue.

B. The Legislature's Lack of Agreement to Wasilla as the location for the Second Special Session.

The governor did not consult with the Speaker or the Senate President or the Legislature as a body before issuing the executive proclamation setting venue in Wasilla, and the Legislature as a separate branch of government never agreed to Wasilla as the location.

C. Defendant Dunleavy's 182 line-item state budget vetoes totalled $444 Million.

On June 28, 2019, defendant Dunleavy vetoed 182 line-items from the FY2020 state operating budget passed by the Alaska State Legislature. The funds vetoed from the operating budget totaled 444 million dollars and included:

- $130 million cut from the University of Alaska
- $50 million cut from Medicaid
- 20.7 million cut from senior benefits
- $48.9 million cut from School Bond Debt Reimbursement
- $6.0 million cut from the Village Public Safety Officer Program
- $3.4 million from the Ocean Ranger Program

D. Defendant Dunleavy's unprecedented unilateral venue directive confounded and confused the Legislature.

Defendant Dunleavy's unilateral proclamation ordering the legislature to convene in Wasilla caused great confusion among legislators and citizens. Some concluded the Governor's unprecedented venue directive violated the Separation of Powers Doctrine and Article II, Section 9 of the Alaska Constitution. These legislators and citizens believed only the legislature could effectively determine where and how it could most effectively fulfill is constitutional responsibilities. Others legislators and citizens believed defendant Dunleavy had the authority to unilaterallly designate the location of the special session.

E. Defendant Dunleavy's unlawful proclamation adversely affected the Legislature's ability to meet its Constitutional obligations.

The ensuing confusion caused entirely by defendant Dunleavy's unlawful Executive Proclamation resulted in competing proceedings. Senate President Catherine Giessel and Speaker of the House Bryce Edgmon sought to commence a joint legislative session in the capital beginning on July 8, 2019. Slightly less than two thirds of the legislators (the Juneau group) attended proceedings in the capital. The Juneau group achieved a quorum and gaveled in to address defendant Dunleavy's 182 line-item vetoes. However, because the full legislature did not convene in Juneau, the Juneau group was wholly unable to meaningfully fulfill its constitutional responsibilities. It lacked the requisite of 45 members constitutionally necessary to override a governor's veto.

This was because approximately one-third of the legislators (the Wasilla group) appeared instead in Wasilla at the Wasilla Middle School Gymnasium, on July 8, 2019. The Wasilla group, because it lacked a quorum, could not gavel in to conduct business.

As a direct consequence of defendant Dunleavy's venue directive, the confusion over the lawfully correct location of the second special session kept the legislature, as a body, from meeting, debating, and evaluating whether or not the 182 line-item vetoes should be overridden by the fifth day of the second special session as required by Article II, Section 16 of the Alaska Constitution.

III. ARGUMENT

A. Plaintiffs have standing to challenge defendant Dunleavy's unlawful executive proclamation.

The Plaintiffs have standing to challenge the lawfulness of defendant Dunleavy's June 13, 2013 Executive Proclamation compelling the legislature to convene the second special session in Wasilla, Alaska because they are citizens and residents of Alaska, the case involves matters of great public interest, and their interests are adversely affected by the defendant's actions in this case. For example, the Plaintiffs own their own home and have received notice that municipal property taxes are likely to increase due to the state budget's failure to fund local school debt reimbursement. Their home community has seen a surge in drug addiction and homelessness and they are informed that the governor's

vetoes will drastically cut Medicaid funding for treatment and programs offering housing assistance.

Alaska Trial Courts are instructed to broadly construe standing particularly in public interest litigation, by adopting an approach "favoring increased accessibility to judicial forums." *Trustees for Alaska v. State, Dep't of Natural Resources*, 736 P.2d 324, 327-329 (Alaska 1987). *Coghill v. Boucher*, 511 P.2d 1297, 1299 (Alaska 1973) provides more direct authority. In *Coghill*, Alaska recognized that its citizens have standing to challenge voting regulations promulgated by a lieutenant governor prior to election. Cf. *Moore v. State*, 553 P.2d 8, 23-25 (Alaska 1976) in which the Court allowed private citizens to challenge the state's failure to consult with local agencies prior to sale of oil leases.

Accordingly, Plaintiffs have the requisite standing necessary to challenge defendant's unlawful Executive Proclamation.

B. <u>The Court should grant the requested preliminary injunctive relief.</u>

1. There are two alternative tests for issuance of a preliminary injunction.

This Court has jurisdiction under AS 22.10.020 to issue preliminary injunctions. See also Alaska Rule of Civil Procedure 65. A plaintiff may obtain a preliminary injunction by meeting either of two standards: the "balance of hardship" and the "probable success on the merits." *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014). The Plaintiffs can satisfy both tests.

2. Plaintiffs are entitled to the requested preliminary injunction under the balance of hardships test.

Plaintiffs may obtain a preliminary injunction by balancing the harm plaintiffs will suffer without the injunction against the harm the injunction will impose on the defendant. A preliminary injunction is warranted when the following three factors are present. First, the plaintiff must be faced with irreparable harm. Second, the opposing parties must be adequately protected. And finally, plaintiffs must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. *Alsworth,* 323 P.3d at 54 (quotation omitted).

a. Plaintiffs confront irreparable harm without injunctive relief.

Plaintiffs will be irreparably harmed if the preliminary injunctive relief is not granted. First, the confusion sown by defendant Dunleavy's unlawful venue proclamation interfered with, intruded upon, and wholly frustrated the Alaska State Legislature from meeting, debating, and voting as a body in a single location on whether or not defendant Dunleavy's 182 line -tem vetoes should be overridden within the five-day limit imposed by Article 11, Section 16 of the Constitution.

Without a preliminary injunction and as a direct consequence of the unlawful venue proclamation, defendant Dunleavy will implement and effectuate the 182 line-item vetoes totaling 444 million dollars. These cuts will include:

- $130 million cut from the University of Alaska
- $50 million cut from Medicaid
- 20.7 million cut from senior benefits
- $48.9 million cut from School Bond Debt Reimbursement
- $6.0 million cut from the Village Public Safety Officer Program
- $3.4 million from the Ocean Ranger Program

These cuts to the state operating budget are devastating to the continued viability of the University of Alaska, will greatly restrict access to lifesaving medical care, end or severely restrict school bond debt reimbursement, and make rural Alaska Villages less safe. Homelessness in Alaska's urban centers will increase and become more problematic. Municipal property taxes will increase and property values will decline and Alaska will lose access to Federal matching funds.

Plaintiffs respectfully submit that their interests as citizens of Alaska will be irreparably harmed if defendant Dunleavy's June 13, 2010 Executive Proclamation is allowed to stand and the requested preliminary injunctive relief is not granted.

b. The defendant can be adequately protected if preliminary injunctive relief is granted.

Plaintiffs respectfully submit that the defendant will be adequately protected if the requested preliminary injunctive relief is granted. Defendant Dunleavy remains fully empowered to issue at any time an Executive

Proclamation convening special session in Juneau and affording the Alaska Legislature, as a body, the full and fair opportunity to assess whether to override the 182 line-item vetoes under Article II, Section 16 of the Constitution, all without the venue cloud. See Alaska Const., art. II, sec. 9, and AS 24.05.100(b). Preliminary injunctive relief will set aside the venue question for alternate locations only temporarily without disabling defendant Dunleavy or the Legislature from expeditiously continuing to perform their constitutional duties for the citizens of Alaska.

c. Plaintiffs' Complaint presents serious and substantial questions that go to the merits of the case and that are not obviously frivolous or meritless.

The gravamen of plaintiffs' complaint is that defendant Dunleavy's June 13, 2019 Executive Proclamation violated the doctrine of Separation of Powers and exceeded the scope of his authority under Article II, Section 9 of the Constitution. Plaintiff's lawsuit raises serious and substantial questions about the power of a governor to compel the legislature to convene at a location hundreds of miles from the capital without the Legislature's agreement. The question presented is not obviously frivolous or meritless.

i. The Governor and the Legislature have some shared powers under the Constitution.

The Governor and the Legislature have shared Constitutional power when it comes to convening the legislature into special session. Article II, Section 9 provides:

> Special sessions may be called by the governor or by vote of two-thirds of the legislators. The vote may be conducted by the legislative council or as prescribed by law. At special sessions called by the governor, legislation shall be limited to subjects designated in his proclamation calling the session, to subjects presented by him, and the reconsideration of bills vetoed by him after adjournment of the last regular session. Special Sessions are limited to 30 days.

ii. Courts narrowly construe shared Executive and Legislative powers.

However, Alaska Courts have previously construed shared executive and legislative powers narrowly to insure the independence of each branch and to prevent arbitrary interference in the functioning of a co-equal branch of government.

In *Bradner v. Hammond,* 553 P.2d 1 (Alaska 1976), the court addressed a dispute between the Alaska Legislature and the Executive Branch. The Alaska Constitution authorizes the governor to appoint the "head of each principal department . . . subject to confirmation by a majority of the members of the legislature in joint session." Alaska Const., art. II, sec. 25. During Governor Hammond's term and over his veto, the Legislature enacted a law requiring legislative confirmation of subcabinet officials. A declaratory judgment action followed. The Supreme Court determined that the statute purporting to authorize legislative confirmation of subcabinet officials violated the doctrine of Separation of Powers. The Court also determined that the Legislature unconstitutionally exceeded its authority under the Constitution when it tried to assert confirmation

authority over Executive Branch officials when that authority was not expressly identified in the Constitution.

iii. Defendant Dunleavy does not have the authority to compel the Legislature to meet at any location away from the capital.

Bradner represents persuasive authority for the proposition that defendant Dunleavy's purported authority for directing the Alaska Legislature to convene at locations away from the capital without the Legislature's agreement violates the doctrine of Separation of Powers. Likewise, *Bradner* is persuasive authority for the proposition that Article II Section 9 of the Constitution does not empower defendant Dunleavy to compel the legislature to convene at locations away from the capital.

Just as the Legislature cannot legislate that it has confirmation authority over Executive branch officials not identified in the Constitution, defendant Dunleavy cannot compel the Legislature to convene at locations away from the capital in the absence of express constitutional authorization.

Stated simply, the authority to designate is wholly different from the authority to compel. Accordingly, AS 24.05.100(b) violates the doctrine of Separation of Powers, and Article II, Section 9 of the Alaska Constitution unless construed to require the legislature's agreement whenever a governor designates special sessions at locations away from the capital.

iv. Under the doctrine of Separation of Powers, the location of a special session outside the capital requires agreement by the Legislature.

While a governor may be authorized by AS 24.05.100(b) to designate the location of a special session if it is to be held outside the capital, his authority to compel the Legislature to meet there presents a separate legal question.

If the doctrine of Separation of Powers generally prevents the courts from interfering in matters of legislative procedure, *see Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987), then it should likewise prevent the governor from interfering with matters of legislative procedure. Apart from constitutional jurisprudence, the prohibition against interfering with matters of legislative procedure makes common sense. It is the legislature, and not the governor, that is best equipped to determine the location where it can best serve the citizens of Alaska when it discharges its constitutional responsibilities.

Indeed, the legislature must provide for and pay for infrastructure and staff necessary for it to accomplish its business, which may be easier to accomplish at some locations than others. The legislature's administrative power – its power to provide for chambers, meeting rooms, staff, offices, telephones, voting machines, networking, security and other necessary services – is essential to its functioning as an independent branch of government.

Furthermore, upon a careful reading of the statute, it seems wholly unlikely that the Legislature intended to cede unilateral authority to the Governor

with respect to the convening of a special session away from the capital. AS 24.05.100(a)(2) says that the Legislature may call itself into a special session outside the capital only after its members are polled and 2/3 of the members agree to it. Why would the legislature require that level of agreement among its membership as to a choice of location but not expect any deference from the Governor?

For all these reasons, Plaintiffs respectfully submits that his request for preliminary injunctive relief raises serious and substantial questions going to the merits of the case – issues that cannot be dismissed as frivolous or obviously without merit.

3. Plaintiffs are also entitled to the requested preliminary injunction under the probable success on the merits test.

A preliminary injunction should issue whenever the proponent makes a "clear showing of probable success on the merits."[1] Plaintiffs incorporate by reference the merits arguments set forth above in sections c – iii and c – iv above in support of their clear showing of probable success on the merits.

Defendant Dunleavy's unilateral venue directive in his June 13, 2019 Executive Proclamation was unconstitutional as a matter of law. It violated the doctrine of Separation of Powers because only the legislature is equipped, as a

[1] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978-79 (Alaska 2005), citing *State v. Kluti Kaah Native Vill.* of .Copper Ctr., 831 P.2d 1270, 1272 (Alaska 1992), quoting *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n,* 470 P.2d 537, 540 (Alaska 1970), modified in other respects, 483 P.2d 198 (Alaska 1971).

co-equal branch of government, to determine where it can best fulfill its constitutional responsibilities to the citizens of Alaska. Article II, Section 9 does not authorize the governor to compel the legislature to convene at locations away from the capital. Without such express authorization, the governor cannot compel the legislature to meet away from the Capital.

AS 24.05.100(b) does not impact the constitutional analysis. The power to designate is different than the power to compel. AS 24.05.100(b) can only withstand constitutional scrutiny if it is narrowly construed, allowing the governor to designate a location for a special session away from the capital only when he has the Legislature's agreement.

IV. CONCLUSION

For all these reasons, plaintiffs respectfully request the court to issue a preliminary injunction:

1. Enjoining defendant Dunleavy from ordering the Alaska Legislature to convene at a location other than the Capital without the legislature's assent;

2. Enjoining defendant Dunleavy from implementing his 182 line-item vetoes of the FY 2020 state operating budget until the expiration of such time as is allowed by the Alaska Constitution for the legislature to consider and vote on whether to override any of the Governor's vetoes; that is,

until after the fifth day of the next regular or lawfully proclaimed special session of the legislature;

Dated at Anchorage, Alaska this 15th day of July, 2019

KEVIN F. McCOY
Pro Se Plaintiff
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MARY C. GEDDES
Pro Se Plaintiff
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