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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.	Case No. 3AN-19-08301CI

PLAINTIFFS' OPPOSITION TO CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND REPLY TO OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Plaintiffs, Kevin F. McCoy and Mary C. Geddes, proceeding *pro se*, oppose the governor's cross-motion for judgment on the pleadings and reply to his opposition to their motion for judgment on the pleadings. This memorandum will demonstrate: why the Alaska Constitution does not permit the governor to call special sessions away from the capital in any circumstance; why AS 24.05.100(b)

was unconstitutional as applied in the governor's 2019 Wasilla special-session call; why the *Bradner*[1] and the *Fairbanks North Star Borough*[2] decisions are dispositive of the separation of power violations alleged in the First Amended Complaint; and why AS 24.05.100(b) concentrates too much power in the executive at the expense of the legislature.

Plaintiffs challenge only that portion of AS 24.05.100(b) which states: "A special session may be held at any location in the state. If a special session called [by the governor] is to be convened at a location other than at the capital, the governor shall designate the location in the proclamation."

II. ARGUMENT

A. The Statute Is Facially Unconstitutional Because There Are No Circumstances In Which The Governor Can Call A Special Session Away From The Capital.

The governor contends that plaintiffs' facial challenge to AS 24.05.100(b) fails because the Alaska Constitution allows the governor to designate special session locations away from the capital. (CMJOP at 9-16). He makes two alternative arguments. First, since the Alaska Constitution lacks the specific directive that the legislature must convene its sessions at the capital, he says the Constitution is silent on the matter and the legislature is free to enact a statute

[1] *Bradner v. Hammond* 536 P.2d 1 (Alaska 1976).
[2] *State v. Fairbanks North Star Borough* 736 P.2d 1140 (Alaska 1987).

that allows the executive to locate special sessions anywhere in the state. [CMJOP at 12-16] Alternatively, he says the Constitution *expressly* grants this power to him because his power "to call" special sessions necessarily includes location-choosing authority. [CMJOP at 9-11]

Both arguments are unpersuasive.

In Article XV section 20, the Alaska state Constitution designated a capital, and its framers intended that the state's legislatures would meet there for all its sessions, regular and special.

How does a court weigh the significance of that capital designation and discern the intent of the framers? Interpreting the meaning of "'a constitutional provision begins with, and remains grounded in, the words of the provision itself.'"[3] Courts should "look to the plain meaning and the purpose of the provision and the intent of the framers."[4] Out of deference to the people who ratified the constitution, courts must be "reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning".[5] "Legislative history and historical contexts, including events preceding ratification, help define the constitution."[6]

Here, the plain language of and purpose of a capital designation considered along with pre-enactment legislative history unambiguously evinces the framers' intent. The delegates of the Constitutional Convention, our framers,

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[3] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017), *quoting Hickel v. Cowper*, 874 P.2d 922, 927 -28 (Alaska 1994).
[4] *Wielechowski*, 403 P.3d at 926, *quoting ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992, *citing Kochutin v. State*, 739 P.2d 170, 171(Alaska 1987).
[5] *Id.*
[6] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

selected Juneau as the capital.[7] A capital is the seat of government.[8] Their designation of a capital was purposeful.[9] The minutes of the Constitutional Convention[10] confirm that delegates expected that all legislative sessions would be held in Juneau unless and until the capital was changed and that both regular[11] and special[12] sessions would be held there, in the capital they designated.

Historical context for the Constitutional Convention demonstrates the framers' intent. Convention delegates were familiar with Alaska's territorial government including its legislature and they had experience with governor-called

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[7] Alaska Const. Art. XV, § 20 (The capital of the State of Alaska shall be at Juneau).

[8] Merriam Webster Dictionary, (online) https://www.merriam-webster.com/dictionary/capital?src=search-dict-box. *See also Starr v. Hagglund*, 374 P.2d 316, 318 (Alaska 1962)(identifying a place as the capital allows it to serve as a seat of government).

[9] See Minutes of the Alaska Constitutional Convention Proceedings (hereinafter "CC Minutes"), e.g., at (Delegate Ralph J. Rivers: "without the designation, there would be a question as to the capital's location").

[10] *NB: The* governor has also cited Constitutional Convention minutes but employs the abbreviation "PACC" to so designate. [See, e.g., CMJOP at 18 n. 18]

[11] *Hagglund,* 374 P.2d at 318 (although capital designation can be changed by law and is not subject to the Article XII amendment process, it was reasonable for framers to identify capital to serve as "a seat of government where the newly created legislature could deliberate and act."). *See also* CC Minutes, e.g., Delegate Robert McNealy at 3026 ("Mr. President, [Juneau] should be retained, first, that there be a seat of government in the constitution as mentioned here, so the legislature will at least know where to have a place to meet.")

[12] *Ibid, and* Alaska Const. Art. XV, § 14 (mandating the governor's call of a special session of the first state legislature within thirty days after the presidential proclamation [of statehood] unless a regular session of the legislature falls within that period). *See also, e.g.,* CC Minutes at 1686 (Delegate Ralph J. Rivers: "I don't believe in saying that when you only have a *30-day extraordinary session* and you go to the expense of bringing your legislators together and *taking them to the capital* that they should be prevented from exercising their full legislative powers.")

special ("extraordinary") sessions.[13] Indeed, between 1913 and May 1955, the year in which the Constitutional Convention convened, twenty-two legislatures had convened;[14] four of those legislatures had special sessions.[15] All sessions were held in the territorial capital of Juneau.[16]

During the drafting of the state Constitution, delegates departed from the territorial model. For example, delegates chose to allow the Legislature, not just the governor, to call special sessions.[17] Yet notably they did not depart from the past practice of using the capital as the designated location for legislative sessions. This is another indication that the drafters intended to keep the meeting place for all legislative sessions in the capital.

Not only did delegates have their own territorial experiences[18] and legal

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[13] See, e.g. CC Minutes. at 1663-1664 (Delegates James Doogan and Warren A. Taylor discussing territorial sessions), at 1664 (Delegate Ralph Robertson) and at 1685-86 (Delegate Ralph Rivers).

[14] See 100 Years of the Alaska Legislature: From Territorial Days to Today," available at https://akleg.gov/100years/legislature.

[15] According to House and Senate Journals for the Territorial Legislature, there were four extraordinary sessions: the Thirteenth Legislature was in extraordinary session between March 7-April 2, 1939; the Seventeenth Legislature was in extraordinary session from March 4, 1946-April 2, 1946; the Nineteenth Legislature was in extraordinary session from January 6-January 22, 1949, and the Twenty-Second Legislature was in session between March 28-April 7, 1955. All were convened in Juneau.

[16] Ibid.

[17] Gordon Scott Harrison, Ph.D, *Alaska's Constitution: A Citizen's Guide* (5th ed. 2018), at 57-58. Dr. Harrison's Guide is published by the Alaska Legislative Affairs Agency. http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.

[18] See fn. 13.

expertise to draw upon,[19] delegates were provided by consultants with a wealth of materials; these included a model state constitution, all other states' constitutions, and recent drafting efforts from the Territory of Hawaii and the Commonwealth of Puerto Rico.[20] Significantly, although some states' constitutions do permit the calling of special sessions away from the capital in emergency situations,[21] no

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[19] Delegate Ralph Rivers had served as Attorney General. CC Minutes at 1686. See also V. Fisher, *Alaska's Constitutional Convention* (1955) at 12-13 (re: efforts made by former AG Thomas Stewart to prepare for constitution making).

[20] *Handbook for Delegates to the Alaska Constitutional Convention at College, Alaska*, November 8, 1955 at 4. The materials listed here were gathered by the Public Administration Service of Chicago: PSA was contracted by the Statehood Committee to provide technical assistance.

[21] *Ibid* (Constitutional Convention delegates had access to all states' constitutions). Unfortunately, Constitutional Convention archives do not contain those particular documents. But a January 10, 2013 summary by the National Conference of States Legislatures (NCSL), a source cited by the governor [CMJOP at 7 n.4], of state constitutional provisions specifically concerning "Special or Extraordinary Sessions" indicate that about a dozen states allow governors to call special sessions to locations other than the capital/seat of government. However, all condition the designation of a non-capital location upon an emergency (usually war or contagion). NCSL lists: Alabama Const. Art. IV, sec. 48 (when it is "impossible or dangerous to meet" there) and sec. 122 (when it is "dangerous from an enemy, insurrection, or other lawless outbreak, or from any infectious or contagious disease"); Arkansas Const. Art. VI, sec. 19 (when "dangerous from an enemy or contagious disease"); Connecticut Const. Art. III, sec. 2 (when there is a "special emergency"); Indiana Const. Art. 5, sec. 20 (when "dangerous from disease or a common enemy"); Kentucky Const. sec. 80 (if "dangerous from an enemy or contagious disease"); Maryland Const. Art. III, sec. 16 (whenever unsafe from "the presence of an enemy or from any other cause"); Michigan, Const. Art. IV, sec. 15-16 ("when dangerous from any cause"); and Rhode Island Const. Art. VI, sec. 9 (unsafe from "the casualties of war or contagious disease"); Texas Const. Art. 3, sec. 5 (if "in possessions of the public enemy or in case of the prevalence of disease"); Wisconsin Const. Art. V, sec. 4("in case of invasion or danger from the prevalence of contagious disease"); and Wyoming, Art. III, sec. 7 ("in times of war or grave emergency by law defined"). Cf. Maine Const. Art. V, part 1,sec. 13 (allowing relocation for a danger from the "place where the legislature is next to convene")

such proposal was made by delegates nor inserted into our Constitution.

Legislation adopted immediately after statehood is also highly relevant and useful in constitutional interpretation because, according to the Alaska Supreme Court, it "often illuminates the intent of the framers."[22] The first set of state law enactments in 1959 included this directive.

> *The legislature shall convene at the capital* each year on the fourth Monday in January at 10:00 a.m. Pacific Standard Time. Each legislature shall have a duration of two years and shall consist of a "First Regular Session" which shall meet in the odd-numbered years and a "Second Regular Session" which shall meet in the even-numbered years and *any special sessions or sessions which the governor or legislature may find necessary to call.*[23]

This statehood-era statute, describing the legislature as including regular and special sessions and requiring assembly at the capital, further confirms the significance of the capital designation and the framers' intent that all legislative sessions, including special sessions, be held in the capital.[24] Thus, the court should reject the governor's argument that there is an "absence of constitutional direction on the location of a special session." [CMJOP at 12]

Alternatively, the governor argues that that his own constitutional authority to set special sessions in locations away from the capital is evident from a plain language and common-sense reading of Article II section 9 ("special sessions

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[22] *Ketchikan Gateway Borough*, 366 P.3d at 90, *citing Bradner*, 553 P.2d at 4 n. 4.
[23] SLA 1959, ch. 157, § 9.now codified at AS 24.05.090.
[24] See also CC Minutes at 1677-78 (Delegates Ralph Rivers and John McNees discussing that committees of the whole, but not a legislative body, might travel outside the capital)..

may be called")[25] and Article III, section 17 (the governor "may convene")[26] and, therefore "Alaska Statute 24.05.100(b) merely implements the Alaska Constitution." [CMJOP at 9] Thus, the governor asks the court to read such location-setting authority into his powers "to call" and "to convene" sessions of the legislature.

This argument should be rejected. First, nothing in these constitutional sections expressly provides location-setting authority. Second, the framers had no need to explicate the meaning of "may be called"[27] or 'may convene" beyond their plain meaning,[28] as they reasonably expected that legislators would be *summoned* to the capital and that all legislative sessions would *assemble* in the capital.

A facial constitutional challenge requires the proponent to demonstrate that there are no set of circumstances under which the statute could be applied which are consistent with the constitution.[29] Because the pertinent language of AS 24.05.100(b) provides that "special sessions can be held in any location in the state," the language would therefore seem to allow for only one constitutionally-

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[25] Article II, § 9 provides in the pertinent part: "Special sessions may be *called* by the Governor or by vote of the legislators."

[26] Article III, § 17 provides: "Whenever the governor considers in the public interest, he may convene the legislature, either house, or the two houses in joint session.

[27] "Call," in its verb form, is only defined in Black's as "summon." Black's Law Dictionary (10th ed. 2009).

[28] "Convene" in its verb form, is defined as "To call together, esp. for a formal meeting; to cause to assemble." Black's Law Dictionary (10th ed. 2009).

[29] State v. American Civil Liberties Union of Alaska, 204 P.3d 364, 372 (Alaska 2009).

permissible location – the capital, Juneau. This interpretation does not make sense when read in conjunction with the statute which precedes it. As previously noted, AS 24.05.090 provided that special sessions shall convene at the capital. Because AS 24.05.090 already authorized legislative sessions at the capital, the intended meaning of AS 24.05.100(b), then, is to allow special sessions at locations *other than the capital.*

The statute's legislative history absolutely confirms this was its purpose.[30] HB 184 was filed in 1981 by Representative Terry Martin. He sought an advisory vote asking if the Legislature should "enact laws [sic] to permit the convening of special sessions of the legislature at any location in the state."[31] Martin sought the advisory vote, he said, because in 1980 Governor Jay Hammond's Attorney General advised that the executive could not call a special session away from the

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[30] When courts construe a statute, "we look at both its plain language and at its legislative history and, whenever possible, we construe a statute in light of its purpose." *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192-193 (Alaska 2007)(cites omitted).

[31] HB 184 ("An act authorizing an advisory vote by the qualified voters of the state on convening special sessions of the legislature at any location in the state") was filed on February 19, 1981 but was not heard in committee until January 28, 1982. (Committee minutes) The bill was passed out on January 29 (Committee Minutes) and moved to House Judiciary.

capital[32] and Martin thought there should be some flexibility in the event of a natural disaster in Juneau.[33] Martin was persuaded by his colleagues on the House Judiciary to amend his bill and propose a law change instead.[34] There is nothing in subsequent committee minutes or audiorecordings that suggest any change in legislative intent prior to enactment. Thus the manifest legislative intent of AS 24.05.100(b) was to allow special session locations away from the capital; construing the statute otherwise does violence to legislative intent.

Because the statute's plain meaning allows the governor to set special sessions away from the capital, and because it conflicts with the Constitutional designation of the capital defined by the framers as the place where the

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[32] The House Judiciary Committee file on HB 184 includes two clippings from an unidentified newspaper or newspapers. The first is a newspaper editorial from July 7, 1980 titled "Special session" which urges the governor or the legislature to call a special session to repeal income taxes. The other is an undated Associated Press news story titled "Special Session Outside Juneau May Be Illegal."("The state attorney general's office says there could be "a legal question" if this summer's special legislative session is conducted anywhere other than Juneau.") These items were likely brought by Martin to the House Judiciary Committee's attention; the clippings are notated in a hand other than that belonging to Chair Ramona Barnes and some of the underlined information in the article was mentioned by Martin.

[33] Audiotape of Rep. Terry Miller at 1/28/82 House State Affairs Committee meeting. http://www.akleg.gov/ftr/archives/1982/HSTA/B82R35-HSTA-06-820126-810128.mp3 at 2:04-2:18 (approximately),

[34]The Committee Substitute for HB 184 (CSHJUD 184) was filed 3/8/82. House Judiciary Committee minutes for March 4, 1982, state that the substitute bill was drafted by Legislative Legal Services and that the bill "[a]dds a subsection (b) [to then AS 24.05.100 that says a special session can be held anywhere. If it is called by the Governor, he designates the place. If the Legislature calls the special session, they designate the place." The amended bill was then passed out of committee.

legislature convenes to conduct legislative business, the challenged portion of AS 24.05.100(b) is facially unconstitutional.

B. The Statute Was Unconstitutional As Applied Because the Governor Relied on AS 24.05.100(b) to Set the Special Session in Wasilla

Assuming *arguendo* that AS 24.05.100(b) could have constitutional application, the statute was unconstitutional as applied by the governor last summer when he announced the special session in Wasilla and particularly from July 8-17, 2019, when he failed to change the designated location to the capital.[35]

As previously shown, the Alaska Constitution does not empower the governor to call special sessions away from the capital. Certainly, the confusion created by the governor's unconstitutional proclamation physically split the legislature between two locations and likely resulted in inefficiencies and unnecessary expenditures of state money. But the most damaging executive interference with the legislative function commenced on July 8 when the majority of legislators gathered in the capital for the purpose of commencing the special session and the governor refused to recognize the lawfulness of their assembly. [Amended Complaint ¶¶ 7,8,9,10,12,13,14; Answer ¶¶ 7,8,9,10,12,13,14]

The governor's continuing insistence on the Wasilla location from July 8 through July 17 (when he finally amended his proclamation) deprived the legislature as a duly-assembled deliberative body of the five-day period permitted

[35] See Amended Complaint, ¶¶ 7, 9; Answer ¶¶ 7, 9. For a statute to be unconstitutional as applied, a particular set of facts must *actually* apply to those facts. Reasner v. State, Dept. of Health and Social Services, 394 P.3d 610, 618 (Alaska 2017) ("."). (Emphasis in the original).

for reconsideration of his vetoes under Article II section 16, and of the maximum thirty-day period allowed the Legislature at the start of its special sessions under Article II section 9. Accordingly, AS 24.05.100(b) as applied in the governor's Proclamation violated the constitution.

C. *Bradner* Controls The Governor's Power To Call Special Sessions Because It Intrudes Upon An Inherently Legislative Function.

The governor argues that his Article II section 9 "'special session calling power'" is not a shared executive-legislative power to be analyzed under *Bradner* and the separation of powers doctrine.[36] [CMJOP at 6-9] It's not a shared power, he contends, because the legislature has its own "parallel and equivalent" special-session calling power in Article II, section 9 [CMJOP at 8] and because he has an independent source of authority in Article III, section 17. [CMJOP at 6-9] He thus concludes that his power to call a special session away from the capital is not inherently a legislative functio [CMJOP at 7] and consequently the *Bradner* analytical framework has no application here. [CMJOP at 7].

The governor misses the point. It does not matter if the power "to call" is characterized as shared or parallel as between the executive and the legislature. The relevant power for the *Bradner* analysis is the legislature's power to conduct special sessions. In *Bradner*, the legislature had a piece of executive appointive power,[37] i.e. a limited power to confirm cabinet level appointments. In this situation, the governor has a piece of the legislative power[38] to conduct the

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[36] Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).
[37] Under Article III (the executive article).
[38] Under Article II (the legislative article).

people's business in special session(s). But the governor's concededly "narrow procedural power" [CMJOP at 17] is to announce the proposed topic for the special session and to summon the legislature to attend. He cannot determine its rules of procedure, run the meeting, vote, determine how or even if the legislature will act with respect to his proposed agenda, nor can he prevent them adjourning minutes after convening.[39] Thus the *Bradner* case remains central to plaintiffs' constitutional challenge precisely because "it goes to the heart of [a] delicate constitutional balance between the powers of two coordinate branches of government."[40]

In determining whether AS 24.05.100(b), as it pertains to the governor's narrow procedural power, violates separation of power principles under *Bradner*, the court must answer a threshold question: is the conduct of a special session a legislative function or an executive function?[41]

Plaintiffs respectfully submit that the conduct of a special session must be characterized as a legislative function for the following reasons. First, the governor's power to call a special session does not exist or have meaning apart from the legislature's constitutional authority to conduct business in special session as a separate branch of government. Second, it is particularly significant

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[39] The Legislature is entitled to control its own processes without interference from another branch of government. *See Abood v. League of Women Voters*, 743 P.2d 333, 338 (Alaska 1987); *Abood v. Gorsuch,* 703 P.2d 1158, (1985); *Malone v. Meekins*, 650 P.2d 351, 357 (Alaska 1982), *citing Baker v. Carr*, 369 U.S.186, 217 (1962).

[40] *Legislative Council v. Knowles,* 988 P.2d 604, 605 (Alaska 1999).

[41] *Bradner,* 553 P.2d at 6.

that the constitutional framers chose to place the governor's special session authority in Article II, which established the legislative function, rather than Article III, which established the executive function.[42] Third, the framers chose narrow, not expansive, terms to describe the special session authority granted to the executive.[43] Thus under Bradner the express power granted in Article II section 9 represents the "outer limits" and "full reach" of his power.[44] To put it another way, the governor's power is limited to what Article II, § 9 expressly authorizes.

The governor also argues that his constitutional authority to call a special session necessarily encompasses the authority of specifying "a time and place" for the assemblage. [CMJOP at 9] The plaintiffs disagree that the inherently legislative and narrow procedural power of announcing a special session can be

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[42] Convention archives show that delegates were assigned to various committees for the purpose of developing specific proposals. Each branch of government had its own committee but some topics were concerned two branches and so committee members met together to determine what subjects should be in which Article of the Constitution. *See,* e.g., Minutes of 11th Meeting, November 29, 1955, VIII/Executive Branch/10. In this Executive Branch Committee meeting, the Chair of the Legislative Branch Committee was also present. Subjects discussed were the governor's veto power and the governor's authority to call special sessions of the legislature. VIII/Executive Branch/C.P. 10. Notably, both of these topics discussed in the Executive Branch Committee were ultimately placed in Article II(The Legislature") of the Constitution at sections 16 and 9.

[43] Certainly, there was reason for such limitation. For example, delegate Ralph J. Rivers cited recent interference by the territorial governor with the legislature's conduct of their special sessions. CC Minutes at 1685-1686, 1692. Rivers complained at length about the governor's position that he could unilaterally restrict the length of territorial special sessions to 3 or 5 days. See also CC Minutes at 1693 (delegate and Legislative Committee Chairman McCutcheon seeking to quiet concerns that the 30-day maximum period proposed for special sessions under the Alaska Constitution could not be unilaterally shortened by a governor).

[44] *Bradner,* 553 P.2d at 7.

construed to include location-setting away from the capital. Also, careful application of separation of power principles does not permit expansive definitions of "call," like those urged by the governor. This is so because "the blending of constitutional powers will not be inferred in the absence of an express constitutional provision."[45]

Finally, the governor's citation to Article III section 17 concerning his right "to convene the legislature, either house or both houses in joint session"[46] does nothing to change this calculus. While not in obvious conflict with Article II section 9 (the legislative provision), Article III section 17 does not provide an independent source of authority for the executive's power to call a special session.[47] The executive section does not reference special sessions, does not limit the subject-matter that may be considered, and does not contain a thirty-day special session

[45] *Bradner,* 536 P.2d at 7.

[46] This provision empowers the governor to "convene the legislature, either house, or the two houses in joint session" if he or she considers it "in the public interest." AK.Const., Art. III, section 17.

[47] Dr. Gordon Harrison, whose authority is also relied upon by the Governor [CMJOP at 7, fn. 3], has written, "While it is clear that this section permits the governor to get both houses of the legislature to meet jointly, or to get one or both houses to meet separately, while a session of the legislature is underway, it is not clear that this section is an independent source of power for the governor to convene meetings of the legislature if it is not already in session." *A Citizens' Guide, supra*, at 57- 58. See also Gerald A. McBeath, *The Alaska State Constitution: A Reference Guide* (1977) at 77. ("The relationship between Article III section 17 and the special session powers of the governor and legislature (Article II, section 9) is not entirely clear").

limit.[48]

For all these reasons, the *Bradner* case remains central to this court's evaluation of plaintiffs' challenge to the governor's Article II, § 9 special session calling power and to the constitutionality of AS 24.05.100(b). A governor's legislative power 'to call' a special session is necessarily constrained by separation of powers principles. The express power, narrowly construed within the legislative context, means the governor may only order that legislators assemble. Because the enactment of AS 24.05.100(b) granted the governor an additional power to choose any location within the state for that special session, the statute is unconstitutional under *Bradner.*

D. *Fairbanks North Star Borough* Is Dispositive Because Alaska Statute 24.05.100(B) Unconstitutionally Delegates Legislative Authority To The Governor

The governor asks this court to reject plaintiffs' unconstitutional delegation claim for three reasons.[49] First, the governor says the challenged portion of AS 24.05.100(b) failed to delegate any legislative authority because "the Legislature has no greater authority over session location than the Governor does." [CMJOP at 16] Second, the governor criticizes the "so-called 'delegation doctrine'" as "a

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[48] Id. Since 1987, Article III section 16 has been cited in tandem with Article II section 9 by three governors in announcements of special sessions. However, the legal relationship between the two sections is "ambiguous," according to Dr. Harrison, *A Citizen's Guide,* at 57-58. No court has ever considered whether the provision has an actual application in the special session context. *See also* post-convention and pre-statehood "Report on the Legislature," December 1958, Publication No. 23-6, prepared for the 1st Legislature (listing circumstances in which joint sessions are required but not discussing special sessions).

[49] Plaintiffs' unconstitutional delegation arguments can be found in plaintiffs' motion for judgment on the pleadings. [P-MJOP at 14 – 21]

little used doctrine of federal law" and suggests that the Alaska delegation cases[50] are completely irrelevant because they deal with the delegation of "lawmaking power" rather than what the governor says might have happened in this case - the delegation of "a narrow procedural power" related to special session location. [CMJOP at 16-17] Finally, the governor says plaintiffs' delegation argument must fail because while "[t]he Governor can choose the location of a special session ... he can't force the Legislature to do anything, and the Legislature can always adjourn or call its own special session (or amend the statute such that the Governor can no longer choose the location.)" [CMJOP at 17]

These arguments do not withstand careful analysis.

First, the governor's "no delegation argument" should be rejected because, as established in Part A above, the framers intended the legislature to meet in Juneau by designating it to be the capital and the seat of government. Nothing in

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[50] The Alaska delegation cases are: *Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n.*, 839 P.2d 1080, 1086 (Alaska 1992)(law mandating binding arbitration conducted by private third party arbitrator constituted lawful delegation of municipal legislative authority); *Usibelli Coal Mine, Inc. v. State*, 921 P.2d 1134, 1144 (Alaska 1987)(delegation of state land leasing authority to the Alaska Department of Natural Resources lawful because agency had particular expertise in narrowly defined and highly regulated field); *State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (Legislature's delegation of appropriation authority violated separation of powers doctrine); *Walker v. Alaska State Mortgage Ass'n*, 416 P.2d 245, 254 (Alaska 1966)(act creating State Mortgage Association constituted lawful delegation of legislative power because purpose of act was explicit and association's powers and limits were specific); *DeArmond v. Alaska State Development Corp.*, 376 P.2d 245, 254 (Alaska 1962)(Act's statement of purpose and the general limitations placed on loans issued by the corporation were sufficient to guide the board in adopting regulations and procedures); *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1969)(holding that Alcoholic Control Beverage Control Board setting of bar closing hours not an unconstitutional delegation).

Article II, Section 9 or Article III, Section 17 of the Alaska Constitution empowers the governor to call special sessions away from the capital. The "no delegation argument" also must be rejected because, as explained in Part C above, the governor fails to acknowledge that the executive's so-called power to call a special session away from the capital must be reconciled under separation of power principles with the legislature's power as a coordinate branch of government to conduct a special session.

Second, the governor's criticism of plaintiffs' delegation argument as "a little used doctrine of federal law" [CMJOP at 22] is misleading because it overlooks the Alaska Supreme Court's endorsement of the federal delegation analysis found in *Synar v. United States*[51] when it decided *State v. Fairbanks North Star Borough.*[52] The *Fairbanks North Star Borough* court expressly adopted the test for evaluating unconstitutional delegation challenges by quoting directly from *Synar.*

> "When the scope increases to immense proportions . . . the standards must be correspondingly precise." The essential inquiry is whether the specified guidance "sufficiently marks the field within which the administrator is to act so it may be known where he has kept within it in compliance with the legislative will."[53]

Synar upheld a delegation of appropriation powers to the executive while *Fairbanks North Star Borough* did not. The *Synar* court found the delegation of appropriation powers lawful because "[t]he Act provided explicit direction as to the

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[51] 626 F.Supp. 1374 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

[52] 736 P.2d 1140 (Alaska 1987).

[53] *State v. Fairbanks North Star Borough*, 736 P.2d at 1143, *quoting Synar*, 626 F.Supp. at 1386-87, *quoting Yakus v. United States*, 321 U.S. 414, 426 (1944).

procedures to be followed and established basic assumptions, definitions, and criteria to guide the administrators."[54] In contrast, the *Fairbanks North Star Borough* court found the delegation of appropriation powers unlawful because "the legislature has articulated no principles, intelligible or otherwise to guide the executive."[55]

As *Synar* and the Alaska delegation cases make clear, while the legislative delegation is a recognized necessity in modern society, a constitutional delegation of legislative power always requires readily ascertainable objective standards to guide the executive and to guard against the arbitrary unguided exercise of the delegated authority.[56] Strict adherence to the delegation standards in this context is especially important because special sessions have over the years becoming

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[54] *Fairbanks North Star Borough*, 736 P.2d at 1143, *citing Synar*, 626 F.Supp. at 1387-89.

[55] *Fairbanks North Star Borough*, 736 P.2d at 1143.

[56] *Synar,* 626 F.Supp. at 1384, *quoting Yakus v. United States*, 321 U.S. 414, 425-26(1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain the will of Congress has been obeyed, would we be justified in overriding its choice for effecting its declared purpose . . .); *Fairbanks North Star Borough*, 736 P.2d at 1143, *quoting State ex.rel. Holmes v. State Board of Finance*, 367 P.2d 926, 932 (1961). (As we read [the challenged delegation), the grant is absolute and totally devoid of restraints, directions or rules. Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what was omitted).

increasingly common.[57]

The governor's assertion that the Alaska delegation cases do not apply because a legislature's lawmaking powers are different from its rulemaking powers is wrong. [CMJOP at 16-1] At the end of the day, whether the legislature is delegating lawmaking powers or rule making powers, both result in conventions that have the force of law. For example, in the judicial context, venue rules are procedural but courts routinely enforce such rules just vigorously as they enforce laws.[58] The so-called "narrow procedural power" [CMJOP at 17] in this case involves determining precisely where sixty Alaskans - forty representatives and twenty senators - will gather to meet their constitutional responsibilities as they confront the most pressing statewide issues of the day under constitutional time constraints. Plaintiffs respectfully submit that where the legislature conducts business is just as procedural as how it conducts business and that the alleged difference between lawmaking and rulemaking under the Alaska delegation cases is imagined.

Finally, the governor's posture that he "can't force the Legislature to do anything" with the authority he claims under Article II Section 9 and Article III

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[57] In the first ten years of statehood, only two special sessions were called. In each of the two decades that followed, four were called. Since 1991, at least ten sessions have been called each decade. See "100 Years of the Alaska Legislature: From Territorial Days to Today," available at https://akleg.gov. All but eight of the forty-six special sessions since statehood have been called by the Governor. Sources: https://akleg.gov, Harrison, *supra*, at 58, Susan Haymes, Manager, *Legislative Research Services Report 17.104*, February 2017, and House and Senate Journals for 2017-2019..

[58] Alaska Rule Civil Procedure 3.

Section 17 because the legislature can always travel to the disputed location and adjourn and call its own session [CMJOP at 17] is a shockingly cynical response given the obvious inefficiency and cost suggested by such an exercise. But more importantly, the governor's suggestion is illusory; it completely ignores the harm his actions can, and in this case did, cause. Article II, § 16 provides that '[b]ills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next ...special session of that legislature."[59] This means that a legislature cannot adjourn the governor's special session set in an unconstitutional location without missing the opportunity to reconsider his vetoes. In practical terms, the governor's adjournment/call your own special session proposal would have required the legislature to abdicate its mandatory veto reconsideration responsibility.

In the final analysis, the governor's control over special session location under AS 24.05.100(b) is at least as broad and as intrusive as that condemned in the *Fairbanks North Star Borough* case. There, a statute gave the governor "sweeping power" over the budget appropriated by the legislature;[60] here, the statute gave the governor sweeping power over the location of special sessions called at his instance under Article II, Section 9 and Article III, Section 17. This is precisely the sort of broad uncontrolled discretionary power to govern that should be condemned under separation of power principles.

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[59] Alaska Const., Art. II, sec. 16 (emphasis added).
[60] 736 P.2d at 1142.

E. AS 24.05.100(B) Concentrates Too Much Power In The Governor At The Expense Of Legislative Independence

In the last section of his cross-motion, the governor makes a number of arguments why AS 24.05.100(b) - permitting the governor to select special sessions locations away from the capital - does not concentrate too much power in the executive at the expense of legislature [CMJOP at 18-22]. Each argument necessitates a response, at the risk of some repetitiveness.

The governor first repeats the claim that "although the Governor can command the Legislature to meet, he can never force it to pass legislation, so he can never control the exercise of its legislative power." [CMJOP18] But as previously explained, this argument overlooks the fact that the governor's conduct forced the legislature to choose between an unconstitutional special session location and the Article II, Section 16 direction that "[b]ills vetoed after adjournment of the first regular session of the legislature *shall* be reconsidered by the legislature *sitting as one body* no later than the fifth day of the next . . . special session."[61] The governor's single-minded insistence on the Wasilla setting undermined the legislative function.

The governor also revisits plaintiffs' facial and as-applied challenges to AS 24.05.100(b). [CMJOP at 18 – 22] As to the facial challenge, the governor speculates "there are many sets of circumstances in which a Governor could designate special session's location without obstructing the Legislature's lawmaking power." [CMJOP at 19]. Regarding the as-applied challenge, the

[61] Alaska Const. Art. II, Sec. 16 (emphases added)

governor posits that "[e]ven without the legislature's consent, the Governor could choose a session location that is both feasible and compatible with the legislative function." [CMJOP at 20] These complaints lack substance for the reasons previously explained in part A above, as neither Article II, Section 9 nor Article III, Section 17 were ever intended to empower the governor to call special sessions away from the capital.[62] But the governor's facial and as-applied arguments beg the very questions right at the heart of this unconstitutional delegation challenge. Unless the governor designates Juneau, what precisely are the "many sets of circumstances" where the special session location is sure not to obstruct legislative lawmaking power? What locations away from the capital are both feasible and compatible with the legislative function? The statute fails to provide guidance and standards by which to answer such questions.

Although the governor promises the court that he "would [never] call a special session in an impractical location because governors usually call special sessions when they want the legislature to act," [CMJOP at 20] this limitation is self-imposed, and self-imposed limits will not save AS 24.05.100(b) from an unlawful delegation challenge. This is so because "the issue . . . is not what has been done under the statute; rather it is what can be done."[63]

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[62] Furthermore, the governor's suggestion that the location of special sessions can be changed by statute to "anywhere in the state" [CMJOP at 15] turns the framers' constitutional capital designation process on its head. See Starr v. Hagglund, 374 P.2d at 1318 (capital change not subject to the amendment process). Followed to its logical conclusion, this argument would legitimize a statute permitting the governor to unilaterally designate the capital "anywhere in the state" without guidelines, standards, or policy statements.

[63] *Fairbanks North Star Borough*, 736 at 1144.

> [W]e find nothing in [the statute] whatsoever to indicate that the legislature was granting the authority to be exercised only in the circumstances and under the conditions which respondent says it has imposed on itself. As we read the section, the grant is absolute and totally devoid of restraints, direction or rules. Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted.[64]

Alaska Statute 24.05.100(b) is not a law that "plainly has legitimate sweep" notwithstanding "occasional problems it might create in its specific application."[65] The governor's self-serving promise to cabin the exercise of his authority cannot save the statute.

The governor's next suggestion, that plaintiffs' as-applied challenge might refer to "hypothetical situations," [CMJOP at 21] is an unhelpful distraction. Plaintiffs' as-applied challenge to the statute centers exclusively on the governor's June 13, 2019, Wasilla location designation. And, as already explained, the governor's initial Wasilla designation and his intransigence between July 8-17 to alter that designation adversely impacted the legislative function in two ways: it prevented the legislature from meeting its constitutional responsibility as a duly-assembled deliberative body to reconsider vetoes during the first five days of the special session, and it deprived the legislature of the full 30 days allotted for

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[64] *Id., quoting State ex. rel. Holmes v. State Board of Finance*, 367 P.2d 926, 932 (N.M. 1961).

[65] *Planned Parenthood of the Great Northwest*, 436 P.3d at 992, *citing State v. Planned Parenthood (Planned Parenthood 2007)*, 171 P.3d 577, 581 (Alaska 2007)

special sessions by Article II, Section 9.[66]

Finally, the governor suggests that the legislature's failure to intervene in this case is somehow dispositive of the as-applied claim because it demonstrates that the Wasilla Middle School gymnasium special session location was feasible and compatible with the legislative function. [CMJOP at 20]. Nothing in the pleadings establishes that the legislature's failure to intervene proves that the Wasilla Middle School was feasible and compatible with the legislative function. Plaintiffs' have never conceded that the Wasilla Middle School was an appropriate special session location and, of course, the pleadings establish that nearly two-thirds of the legislature defied the governor and heeded the call of their leadership to meet in the capital. [Amended Complaint ¶¶ 8, 12; Answer ¶¶ 8, 12.]

For all these reasons, AS 24.05.100(b) concentrates too much power in the executive at the expense of the legislative branch and plaintiffs' facial and as-applied challenges to the pertinent part of the statute establish violations of the separation of powers doctrine.

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III. CONCLUSION

For these reasons, the Court should deny the governor's cross-motion for judgment on the pleadings, grant plaintiffs' motion for judgment on the pleadings, and enter judgment for plaintiffs declaring:

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[66] Article II, Section 16 provides in the pertinent part: "Bills vetoed after adjournment of the first regular session of the legislature **shall be reconsidered** by the legislature sitting as one body no later than the fifth day of the next . . . special session of that legislature." (emphasis added).

1. AS 24.05.100(b), on its face, as it pertains to the governor's authority to call special sessions at a location other than the capital violates Article II, Section 9 of the Alaska Constitution and the doctrine of separation of powers;

2. AS 24.05.100(b), as applied in the governor's June 13, 2019 Executive Proclamation violated Article II, Section 9 of the Alaska Constitution and the doctrine of separation of powers; and

3. The governor's June 13, 2019 Executive Proclamation requiring the legislature to meet in special session Wasilla violated Article II, Section 9 and the doctrine of separation of powers.

Dated at Anchorage, Alaska this 31st day of January, 2020.

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