

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STANLEY ALLEN VEZEY ,)

Plaintiff,)

vs.)

BRYCE EDGMON, Speaker of the)
Alaska State House of Representatives,)
and CATHERINE A. GIESSEL,)
President of the Alaska State Senate,)
individually,)

Defendants.)

FILED in the Trial Courts
State of Alaska Fourth District

NOV 29 2019

By _____ Deputy

CASE NO. 4FA-19-02233CI

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' SUPPLEMENTAL BRIEF ON STANDING ISSUE**

This court requested *sua sponte* to be briefed by the parties on the issue of Plaintiff's standing to sue for declaratory judgment.¹

Defendants' Supplemental Brief on Standing Issue argues for the dismissal of Plaintiff's case principally by avoiding any and all discussion of the obvious interest-injury and citizen-taxpayer standing that reasonably could be asserted. For example, Plaintiff and the public have an anticipated economic injury when the appropriations of HB 2001 and SB 2002, including the Permanent Fund Dividend [PFD], become legally challenged as being constitutionally void (interest-injury standing). Also, Plaintiff has standing as a public interest litigant to challenge Defendants' illegal conduct on matters of significant public concern, including Defendants' holding a July 8, 2019, meeting of legislators in Juneau in violation of

¹ Amended Request for Supplemental Briefing on the Issue of the Plaintiff's Standing, November 5, 2019.

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the Constitution and in defiance of Governor Dunleavy's Proclamation where the governor called for the second special session to take place in Wasilla on July 8, 2019 (citizen-taxpayer standing).

Rather than undertake any discussion of Plaintiff's apparent standing to bring a declaratory relief action, Defendants, instead, focus on the imagined injury to the legislators, themselves, although the legislators eventually all participated in the second special sessions hearings in Juneau beginning July 17, 2019, in the which the "passage" of the appropriations was finalized in spite of not having conformed to the detailed procedures for law passage in the Alaska Constitution.² As the Court succinctly stated, "The Legislature is not free to ignore these requirements."³

To be clear, Plaintiff is not litigating in behalf of the legislators and is not alleging they have been injured whatsoever. It is patently obvious that none of the legislators in either house can litigate for declaratory relief on the basis that the appropriations – which the two bodies "passed" – did not conform to constitutional law passage procedures, although as sham plaintiffs some legislators might file suit inasmuch as they are, in reality, advocates for Defendants' stated position in this matter.⁴ If any legislator did entertain private thoughts of challenging Defendants' illegal conduct, that legislator would have a very great incentive for not bringing suit and earning the ire of fellow legislators and

² See Alaska Const. at: Art. 2, § 9, Special Sessions; Article 3, § 17, Convening Legislature; Art. 2 § 10, Adjournment; Art. 2, § 14, Passage of Bills.

³ *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 779 (Alaska 1980).

⁴ Defendants' Motion to Dismiss Pursuant to Legislative Immunity; Civil Rule 12(b)(2); Nonjusticiability; and Civil Rule 12(b)(6), at Part E, beginning on page 23, contends that, under the separation of powers doctrine, the governor may not dictate the location of a special session and that, absent the Legislature's assent, the special session shall be held at the capital, and also arguing that AS 24.05.100, Special Sessions, is unconstitutional.

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suffering acts of retribution, diminishing that representative's effectiveness in representing constituents.⁵

Defendants segue from their unsustainable proposition that the legislators are better positioned as plaintiffs and contend next that *Keller v. French*⁶ is dispositive.⁷ It is not. In fact, Superior Court Judge Garton issued a well-reasoned Order Regarding Defendant's Motion to Dismiss [Order] highlighting in what ways *Keller v. French* is distinguishable from the very issues also now pending before this court.

Attached hereto is a copy of Judge Garton's November 22, 2019, Order in *McCoy et al. v. Dunleavy*, Case No. 3AN-19-08301CI. Judge Garton's Order is not controlling here, but effectively cites to applicable authorities and imparts persuasive value to the issues in the above-captioned matter.⁸

Judge Garton's Order cites *Trustees for Alaska v. State*⁹ for the *Trustees* Court's holding that, in Alaska, taxpayer-citizen status is a sufficient basis on which to challenge allegedly illegal government conduct on matters of significant

⁵ For example, see Appendix 1, E. McGroarty, "Rep. Wilson Leaves House Majority Coalition; Faced Penalty by Group," Fairbanks Daily News-Miner, July 11, 2019. Similarly, Senator Mia Costello, Senate Majority Leader, was stripped of her title by Defendant Giessel, and was also removed from the Senate Rules Committee due to Sen. Costello's attendance at the second special session in Wasilla on July 8, 2019. See Appendix 2, R. Wilson, "Alaska Political Mess has Legislators Divided Over Meeting Place," The Hill, July 9, 2019, online at: <https://thehill.com/homenews/state-watch/452270-alaska-political-mess-has-legislators-divided-over-meeting-place> (last visited November 27, 2019); see Appendix 3, S. Downing, "Legislative Entropy Continues," Must Read Alaska, July 9, 2019, online at: <https://mustreadalaska.com/legislative-entropy-continues/> (last visited November 27, 2019); See Appendix 4, Senate Journal July 8, 2019, at pages 1338 and 1339.

⁶ *Keller v. French*, 205 P.3d 299 (Alaska 2009).

⁷ Defendants' Supplemental Brief on Standing Issue at page 2.

⁸ See Appendix 5. *McCoy et al. v. Dunleavy* is an active suit brought by two Alaskans challenging the constitutionality of AS 24.05.100(b) and asserting that Governor Dunleavy's June 13, 2019, Proclamation violated the separation of powers for naming the location of the second special session. Judge Garton's Order decided that (1) the public interest exception to the mootness doctrine applies; (2) the plaintiffs have citizen-taxpayer standing; (3) the plaintiffs have stated a claim upon which relief can be granted in the form of declaratory judgment; and, (4) the issue is justiciable.

⁹ *Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987).

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public concern.¹⁰ Judge Garton's Order analyzes the *Trustees for Alaska* factors establishing citizen-taxpayer standing. In Judge Garton's courtroom, as is being done here, the Defendant argues that the plaintiffs do not have standing because there are plaintiffs purportedly more directly affected by the challenged conduct, i.e. that the legislators are more directly affected by the action taken pursuant to AS 24.05.100(b).¹¹

However, in deciding that Plaintiffs McCoy and Geddes are appropriate plaintiffs and do have standing to sue, Judge Garton's Order correctly notes that *Keller v. French* is distinguishable from *McCoy et al. v. Dunleavy*. It is submitted that *Keller v. French* is, for the same reasons, distinguishable in the above-captioned matter. The Order states as follows:

The *Keller* plaintiffs, a group of state legislators that were not investigated by a legislative committee were less affected than people who were actually being investigated. The parties that were being investigated had filed a separate lawsuit from that of the plaintiffs before the court alleging similar, if not identical, claims against the same defendant. The court ruled that the named plaintiffs were not appropriate plaintiffs because the most directly affected potential plaintiffs had filed suit alleging similar, if not identical, claims. Unlike *Keller*, here, neither the Plaintiffs nor the Defendant has shown that the more directly affected potential plaintiffs, the Alaska Legislature or any of its members, are likely to file or have filed suit against the Defendant. McCoy and Geddes are appropriate plaintiffs.¹²

Here, also unlike *Keller*, there are no potential plaintiffs more directly affected than is Plaintiff Vezey. The Defendants' illegal conduct and mistaken argument that AS 24.05.100(b) is unconstitutional have placed in jeopardy the appropriations set forth in HB 2001 and SB 2002, detrimentally impacting

¹⁰ Appendix 2 at 16.

¹¹ Appendix 2 at 16-18.

¹² Appendix 2 at 21.

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Plaintiff's economic and beneficial interests. Essentially, the Defendants have written a bad check. At any time an agent for the State could deprive Plaintiff of the benefits of the appropriations by successfully challenging the validity of the legislative procedures. Defendants' illegal conduct of forsaking their duty to attend the second special session in Wasilla and in conducting, instead, a pseudo-legislative session in Juneau beginning on July 8, 2019, and, moreover, in not adhering to numerous detailed procedures for law passage contained in the Alaska Constitution have drastically undermined Plaintiff and the public's expectation of being governed by a republican form of government¹³ and have detrimentally affected confidence in Defendants and in the legislative process. These are matters of the utmost significance and public concern.

Even more far afield is Defendants' reliance on *Law Project for Psychiatric Rights, Inc. v. State*.¹⁴ Unlike Plaintiff's direct interest-injury and citizen-taxpayer standing, Law Project for Psychiatric Rights, Inc. [LPPR] sought to establish a personal constitutional right on behalf of an unknown number of minors through citizen-taxpayer standing. The Supreme Court stated, "But LPPR offers no persuasive argument to permit substituting citizen-taxpayer standing for third-party standing in this case."¹⁵ The Court went on to state, "LPPR fails to satisfy the elements of citizen-taxpayer standing in any event. As the State contends, even assuming the issues raised are of public significance for citizen-taxpayer standing, an individual (or group) directly affected by the State's administration of

¹³ See Public Law 85-508, 85th Congress, H.R. 7999, July 7, 1958, also known as the Alaska Statehood Act.

¹⁴ Defendants' Supplemental Brief on Standing Issue at 6.

¹⁵ *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255-56 (Alaska 2010).

psychotropic drugs to minors would be the appropriate litigant.”¹⁶

Unlike LPPR, Plaintiff Vezey has direct interest-injury standing and possesses citizen-taxpayer standing to request declaratory judgment concerning Defendants’ challenged conduct.

Conclusion

Defendants have entirely failed to explain in what ways the Alaska legislators would be better potential plaintiffs. To the contrary, as discussed *supra*, the legislators are least likely of all Alaskans to sue on the basis of Plaintiff’s claims. There is no potential plaintiff more directly affected by Defendants’ conduct than Plaintiff Vezey. To date, no other suit has alleged Plaintiff’s claims. Clearly, Plaintiff has both interest-injury standing, as well as citizen-taxpayer standing, as set forth in Plaintiff’s Supplemental Brief Re Standing. The case should not be dismissed.

DATED this 29 day of November, 2019.

THE LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

By: _____

William R. Satterberg, Jr.
Alaska Bar No. 7610126
Attorney for Stanley Allen Vezey

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¹⁶ *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d at 1256.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of
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This 29 day of 11, 2019

LAW OFFICE OF WILLIAM R. SATTERBERG, JR.

By: _____

http://www.newsminer.com/news/local_news/rep-wilson-leaves-house-majority-coalition-faced-penalty-by-group/article_4b155f32-a42e-11e9-8ba9-2b2849149a48.html

Rep. Wilson leaves House Majority Coalition; faced penalty by group

By Erin McGroarty, emcgroarty@newsminer.com Jul 11, 2019

North Pole Republican Rep. Tammie Wilson, R-North Pole is no longer a member of the House Majority Coalition, leaving five months after shocking conservative constituents by joining the bipartisan organization, it was announced today.

"The Alaska House Majority thanks Rep. Tammie Wilson for the leadership role she played in our caucus this year, but today she left our organization. We look forward to continuing to work with Rep. Wilson and all members of the Legislature on the important tasks ahead," reads a statement posted to the Alaska House Majority's official Twitter account Thursday afternoon.

Wilson was the only one of 38 lawmakers, a mix of House and Senate Democrats and Republicans, to vote against an override of Gov. Mike Dunleavy's budget vetoes during a joint session in Juneau on Wednesday. In a floor speech, Wilson noted she felt funding issues would be better taken up as supplemental budgets or through capital budget funding.

House Majority Leader Steve Thompson, R-Fairbanks, said Thursday afternoon that the majority tried to work with Wilson following her appearance with legislators in Wasilla and again after her vote against the override in Juneau, but ultimately her position did not fit with the ideals to which the caucus had agreed.

"The Majority felt like we had agreed to come down here to Juneau and she went to Wasilla instead," Thompson told the Daily News-Miner in a Thursday afternoon phone call. "We felt like that wasn't great, and then we as a caucus had agreed we would vote for the budget on the floor, well she voted yes on the budget, but with the governor's vetoes we had come up to vote to override the vetoes and she voted no on overriding them."

Thompson added that after discussions with Wilson, caucus leaders removed her as co-chair of the House Finance Committee but offered her the position of vice chairman in the committee as long as she agreed to stay in the caucus, an offer which Thompson said Wilson declined.

APPENDIX 1

A spokesman for House Speaker Bryce Edgmon noted that "Rep. Wilson voluntarily left the House Majority."

Wilson said she felt she was being punished for her choices.

"That's what happens when you try to follow the law I guess," Wilson said in an interview with the News-Miner. "They're punishing me for following the Constitution and going to Mat-Su on Monday and then further punishing me because I represented my district yesterday."

The District 3 representative said she had been clear with the caucus that she did not support an override.

"They knew months ago that I was not going to override the vetoes," she said. "They knew that going in but they said nothing about that being punishable."

Like many other lawmakers, Wilson has been receiving a flood of feedback from constituents and Alaska residents on the governor's contentious budget vetoes and said that by voting against the override she was sticking with what her district asked her to do.

"I don't represent the caucus, I represent my constituents," she said. "They've been saying they want to see some reductions. So what I suggested on the floor (Wednesday) was that we should look at each and every one of the vetoes and approach them individually and carefully."

Wilson added that her "no" vote represented her position that the Legislature should work to reach a compromise between dueling opinions on issues pertaining to state-funded services and the Alaska Permanent Fund dividend.

"My vote was to say that I'm not going to blanket override, but I would look into each and every one of them so we could still try to get as close to the governor's goal," Wilson said. "It's called compromise."

Wilson was packing her office in the Juneau Capitol building Thursday afternoon with plans to catch the evening flight home to the Fairbanks area. She noted that she has not decided whether she will travel to Wasilla to meet with the minority Republicans but added that they had already reached out.

Thompson stated clearly Wilson not only lost her seat as House Finance co-chair but has been removed from the committee altogether.

According to Thompson, the Committee on Committees has Anchorage Republican Rep. Jennifer Johnston, who is already a member of the Finance committee, as a co-chair. Given that the committee will be one member short following Wilson's departure, Thompson said it's likely Fairbanks Democratic Rep. Adam Wool will fill the empty seat, but he clarified that while the Committee on Committees has approved both replacements, the entire caucus must vote to approve the changes.

Contact staff writer Erin McGroarty at 459-7544. Follow her on Twitter: @FDNMpolitics.

MORE INFORMATION

Veto override fails after strong criticism of governor's cuts; revote possible

Q&A: Here's what some Interior lawmakers have to say about veto overrides

Attempt at veto override ends; lawmakers look for budget compromise



Alaska political mess has legis divided over meeting place

BY REID WILSON - 07/09/19 04:43 PM EDT

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— 48M 48S AGO

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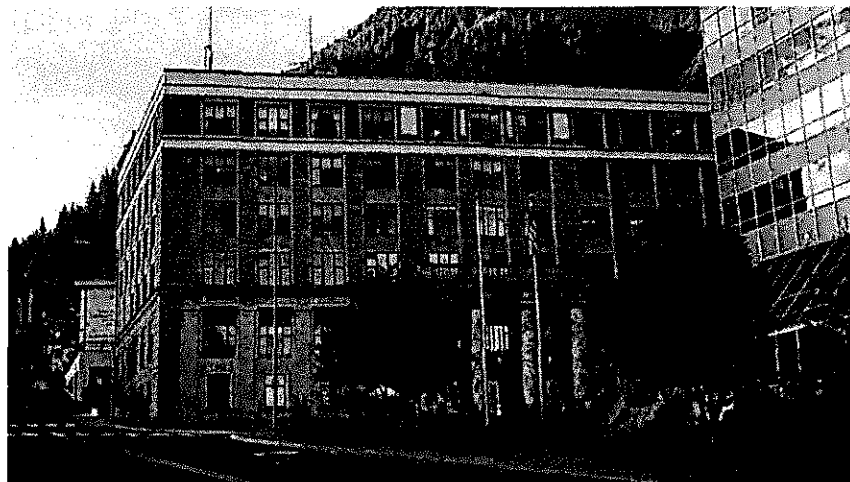
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STATE WATCH — 1H 19M AGO

Poll: Men more likely to say they feel comfortable talking politics with friends and family

RIISING — 1H 34M AGO



A deep divide over budget cuts in Alaska has become so acrimonious that two feuding factions of legislators cannot even agree on where they are supposed to meet, the latest twist in what may be the nation's oddest political climate.

About two-thirds of lawmakers in Alaska's state House and Senate met for a second day Tuesday in Juneau, the state capital. The rest held meetings in Wasilla, more than 500 miles away. The legislature is so torn that the state Senate majority leader, who joined the rump faction in Wasilla, was stripped of her official position.

Alaska political observers say the two groups are a reflection of a divide within the Republican Party, between hardliners who want the government out of the way and more Chamber of Commerce-type Republicans who see value in state spending on some services.

"We just have weird politics up here," said Jim Lottsfeldt, a longtime Alaska lobbyist who has worked for both Democratic and Republican politicians such as Sen. Lisa Murkowski (R), former Gov. Sarah Palin (R) and former Sen. Mark Begich (D).

At stake are more than \$400 million in budget cuts ordered by Gov. Mike Dunleavy (R), just eight months into his first term. The cuts include a 40 percent reduction in funding to the University of Alaska system, a \$50 million cut to state Medicaid spending and tens of millions more in reductions for senior benefits and public assistance to the blind and disabled.

APPENDIX 2

Prosecutors say college student was killed after ignoring man's catcalls

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— 1H 37M AGO

What America's Thinking: November 27, 2019

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Dunleavy even cut \$3.4 million for inspectors who monitor cruise ship pollution — money that was funded through fees from passengers and the cruise lines, not state tax dollars.

The cuts to the state's public university system were an unexpected blow, according to observers. The University of Alaska has three main schools -- based in Anchorage, Fairbanks and Juneau -- that each have several subsidiary campuses in smaller cities. Such severe cuts will almost certainly require the schools to cut staff, and may require them to close campuses.

The governor called the legislature back into special session this month to consider his proposal to give Alaskans \$3,000 each as part of the state's annual Permanent Fund dividend, a check every state resident receives from severance taxes paid by the oil and gas industry.

The debate over the size of the annual Permanent Fund dividend has roiled Alaska politics all year. The new governor says his predecessor, Gov. Bill Walker (I), shortchanged Alaskans with amounts that were smaller than they deserved. Most legislators, aside from the hardline conservatives who want the larger distribution, favor a \$1,600 dividend this year.

"They are all wrapped around, 'We need a permanent fund,'" Lottsfeldt said of the Wasilla faction. "If that means you're going to destroy the university or get rid of Medicaid, that's OK, it's our money."

Making the situation more unusual, Dunleavy's call for a special session ordered the legislature to meet in Wasilla, in the heart of Alaska's most conservative region, the Matanuska-Susitna Valley.

Legislators who oppose Dunleavy's cuts and who want a smaller Permanent Fund dividend acknowledge the governor has the authority to call them back into special session, but they say he does not have the right to dictate where they meet.

"This is all part of why Alaskans have lost trust in their lawmakers," Dunleavy said in a statement last month, as legislative leaders tried to move the session back to Juneau. "How can we with a straight face expect people to follow the law when the legislative leadership ignores, breaks, and skirts the law at every turn?"

The Republican divide has already caused havoc in Juneau. Earlier this year, the two factions of Republicans in the state House could not agree on a consensus candidate to be Speaker, delaying the start of legislative business by a month.

The stalemate ended when some of the more centrist Republicans eventually backed state Rep. Bryce Edgmon, a Democrat-turned-independent, for the position, even though Republicans hold a majority of the seats in the state House.

Now Edgmon and state Senate President Cathy Giessel (R) are leading the faction of legislators who want to overturn Dunleavy's steep budget cuts, the 37 members camped out in Juneau. The arch-conservatives who favor maintaining the cuts, 21 in all, met at Wasilla Middle School.

One of those conservatives in Wasilla was state Sen. Mia Costello, an Anchorage Republican and the state Senate majority leader. In retaliation, Senate Republicans meeting in Juneau stripped Costello of her title and removed her from the Senate Rules Committee.

By state law, all 60 of Alaska's state legislators meet together during special sessions. They need a total of 31 members to reach a quorum, but 45 votes to overturn a governor's veto. By Tuesday, the coalition opposing the cuts was eight votes short of reaching the override threshold.

Time is not on the Juneau faction's side. They must vote to override any of Dunleavy's vetoes by the end of the day Friday.

Both factions say they have public opinion on their side. The conservatives meeting in Wasilla had a boisterous crowd of supporters cheering them on, but legislators in Juneau pointed to loud protesters outside the Capitol who want the cuts restored, a crowd the Anchorage Daily News estimated at more than 700.

At the same time, Alaska is in the midst of an unprecedented heat wave. The temperature in Anchorage hit 90 degrees last week for the first time in history. A wildfire nearby has sent smoke wafting over the city, and the state canceled fireworks displays over the July 4th holiday because of the threat of more conflagrations around the state.

"We're having fires, we're having record heat, the salmon are running. This is the time of year when no one cares about politics, and legislators are getting thousands and thousands of letters and emails saying stop all this," Lottsfeldt said.

Much is at stake for Dunleavy, a former member of the conservative faction in the state legislature. He easily beat a more centrist Republican in the 2018 primary election, then beat Begich and Walker in the general election with 51 percent of the vote.

In Juneau, he struck a combative stand in an effort to wholly reshape government through both cuts and a higher dividend, a key campaign promise.

But there are signs that his popularity has taken a hit. A poll conducted by the Portland-based Democratic polling firm Patinkin Research Strategies, Dunleavy's approval rating stood at 41 percent, while 57 percent disapproved of the job he was doing. After Dunleavy's budget cuts, his approval rating fell to just 31 percent.

If Dunleavy's vetoes stand, it "creates real political danger for him going forward," said one veteran Alaska political operative, who asked not to be named. "The state may like the rhetoric of budget cuts, but the biggest employer in the state is the federal government and the second-biggest employer is the state government."

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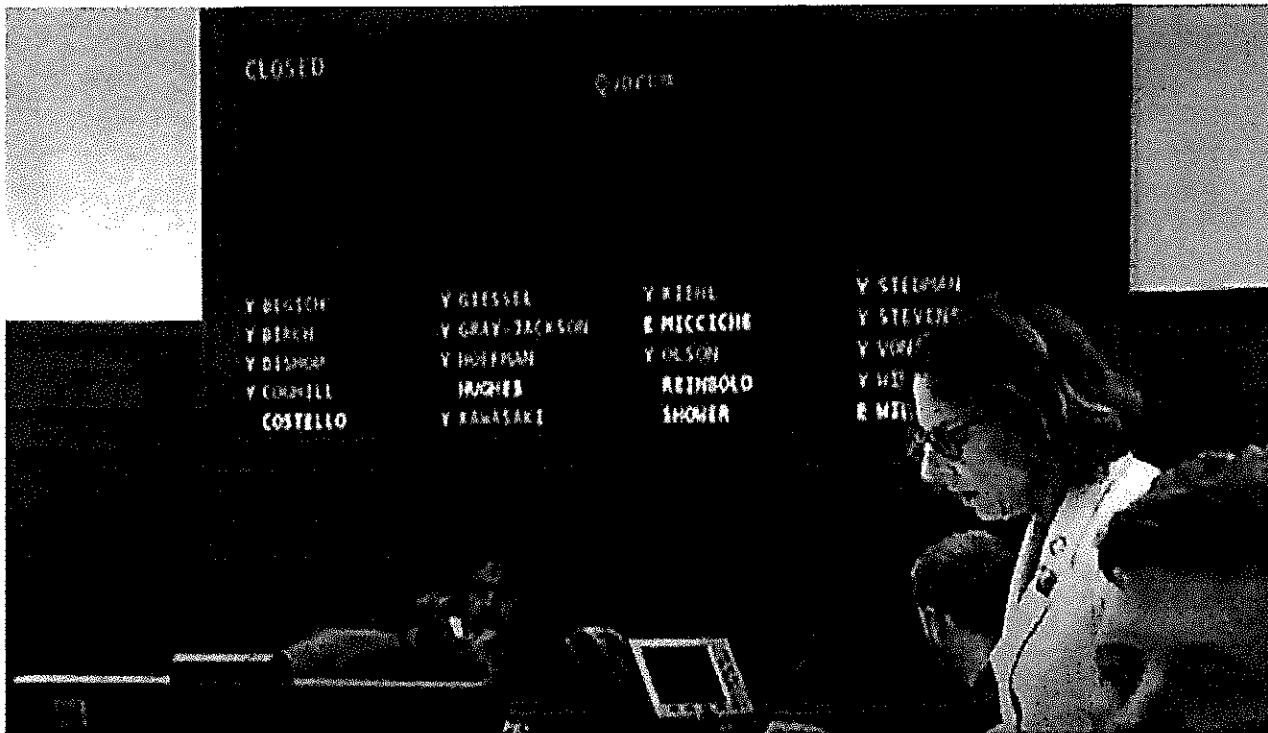
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JULY 9, 2019 / AUTHOR: SUZANNE DOWNING / 89 COMMENTS

Legislative entropy continues




SENATE FRACTURES, REPUBLICANS INSTALL DEMOCRAT AS MAJORITY LEADER

The second special session in Juneau was eventful, even though on the surface it looked like nothing really got done in the hour that the House and Senate met.



APPENDIX 3

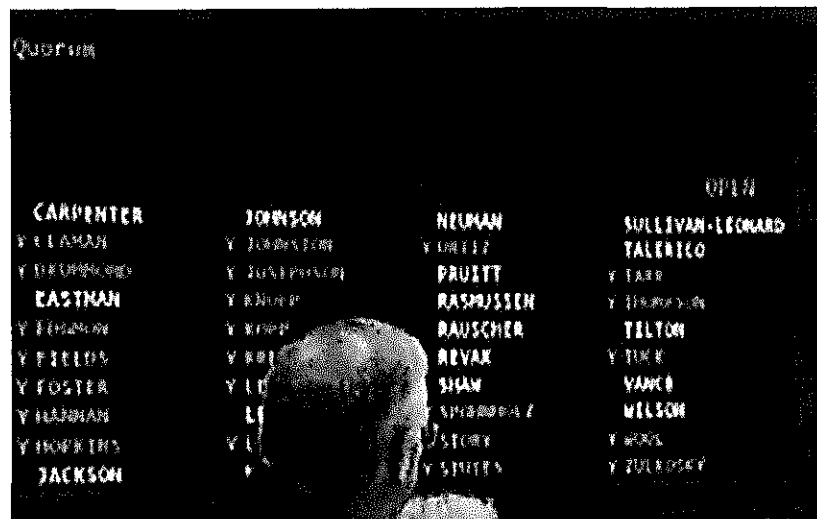
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Guests were introduced, including former House member Justin Parish, introduced by Juneau Rep. Andi Story, the Democrat who ran for and won Parish's seat after he served just one term before bowing out under pressure from women colleagues.

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Parish took the microphone briefly, as it is customary to allow former House members to do. He encouraged the members to override the governor's vetoes. They politely applauded.



Speaker Bryce Edgmon looks at the attendance board. Members of the House whose names are in green were present in Juneau. The names in white were in Wasilla, with the exception of Rep. Rauscher, who is on a mission with Samaritan's Purse.


The only items on the call of the Special Session is to fund the Permanent Fund dividend for Alaskans and to pass specific capital budget items, but what seemed to be on the minds of legislators present in Juneau was overriding the governor's vetoes.

The House and Senate plan to have that override vote on Wednesday, which is the third day of Special Session. They have, by law, five days to override the vetoes, and they've burned up one day. After their Wednesday vote, they'll be down to two days, although the session itself is called for 30 days.

While they were busy introducing guests in the House and attempting to present their proceedings as perfectly normal, over in the Senate, 14 of the 20 members were present in Juneau at what some Alaskans have deemed an illegal special session that may end up in the Alaska Supreme Court.

The main item of business in the Senate on Monday was to remove Sen. Mia Costello from her role as Majority Leader since she attended the special session gathering in Wasilla, where four other Senators also

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Although the Senate majority had cautiously organized in January to ensure that no Democrat had a leadership role in their organization, on Monday they quickly installed Democrat Sen. Alyson Hoffman of Bethel as Majority Leader, and also replaced Costello with Hoffman on the Rules Committee.

NEWSLETTER SHOP
WAITING IN WASILLA

Costello said Monday that she went to Wasilla because she believes the best way to move forward is to work with the governor cooperatively, not against him. She said she felt settled about her decision because she wanted to follow the Alaska Constitution and statute.



Sen. Mia Costello, former Senate Majority Leader, and House Minority Leader Lance Pruitt speak to the media and about 350 Alaskans who gathered to witness the "other" Special Session gathering in Wasilla on Monday.

The senator from the Sand Lake area of Anchorage acknowledged the legislators waiting in Wasilla were in unusual circumstances.

"I know it can seem like a lot of fighting with each other for no reason, and that increases the public's frustration with a legislature that hasn't been able to get the job done so far. Other senators and House members are convening something in Juneau at this very moment...so why are we not with them?" Costello said in her remarks during a press conference at Wasilla Middle School.

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be called by two-thirds of the legislature. But they have to be called," she said.

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VETO OVERRIDE VOTE AHEAD

[NEWSLETTER](#)[SHOP](#)

The House and Senate in Juneau on Wednesday will take up the matter of attempting to override the governor's vetoes. They need 45 votes, but have only 37 members present, which has caused observers to ask why they are going to bother with a vote, since they don't have enough lawmakers in Juneau.

The answer, it appears, is for the coming election cycle, when all House members will stand for re-election and some in the Senate will also need to ask voters to send them back to Juneau for another term. Having voted to override the vetoes, even if it's simply an exercise in futility, will inoculate some of the legislators who serve in moderate or liberal districts. This is about setting up their campaigns.

Notably absent in Juneau were the more conservative arms of the House and Senate. Sen. David Wilson was out of state at a training seminar and Sen. Peter Micciche was working his commercial fishing permit, which he must do to support his family, and which has a limited season.

Valley Sens. Shelley Hughes and Mike Shower were in Wasilla, along with Sen. Lora Reinbold and Sen. Costello.

It's almost a certainty that those gathering in Wasilla would not vote to override the governor's vetoes.

16 House Republicans went to Wasilla, including House Finance Co-Chair Tammie Wilson. Thus far, there is no indication in Juneau that the House Democrat-led Majority will take out punishment on her the way the Senate Republicans has done on Sen. Costello.

The Wasilla gathering took place in a room set up by volunteers, with printed name plates for all 60 legislators.

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ALASKA STATE LEGISLATURE
THIRTY-FIRST LEGISLATURE
SECOND SPECIAL SESSION

Juneau, Alaska

Monday

July 8, 2019

First Day

Pursuant to art. II, sec. 9 and art. III, sec. 17 of the Alaska Constitution the Senate was called to order by President Giessel at 1:04 p.m.

The roll showed fourteen members present. Senators Micciche, Wilson were excused from a call of the Senate. Senators Costello, Hughes, Reinbold, Shower were absent.

The prayer was offered by the Chaplain, Senator Bishop. Senator Hoffman moved and asked unanimous consent the prayer be spread. Without objection, it was so ordered.

Dear Heavenly Father, thank You for Goodness and Peace.
Please guide us, Your children. Unite us as Your people, we
pray. Unite us as one people who, with joy, serve You and
the Greater Good.

Lead us in a way that helps and serves others. When we
suffer, grant us strength and understanding of Your will.
Help us remember to honor the burdens others carry and
recognize that theirs may be greater than our own.

Help us remember that pain shared is pain divided ... and joy
shared is joy multiplied.

As is said in *The Epistle of James*, chapter 1, verses 2 and 3:

Consider it pure joy, my brothers and sisters, whenever you
face trials of many kinds. Know that the testing of faith
produces perseverance.

In Your name,

Amen.

Senator Begich led the Senate in the Pledge of Allegiance.

Certification

Senator Coghill, Acting Majority Leader, moved and asked unanimous consent the journal for the twenty-ninth legislative day of the first special session, Senate Journal Supplement No. 4 and House and Senate Joint Journal Supplement No. 9 be approved as certified by the Secretary. Without objection, it was so ordered.

Messages from the Governor

Executive Proclamation

Under the authority of Article II, Section 9, and Article III, Section 17, Constitution of the State of Alaska and in the public interest, I call the Thirty-First Legislature of the State of Alaska into its second special session in Wasilla, Alaska, at 1:00 p.m., on July 8, 2019, at the recommended venue of Wasilla Middle School, to consider passage of bills on the following subject:

An appropriation bill that transfers the amount authorized under AS 37.13.145 (b) from the earning reserve account (AS 37.13.145) to the dividend fund (AS 43.23.045 (a)) for the payment of permanent fund dividends and for administrative and associated costs for the fiscal year ending June 30, 2020.

Dated this 13th day of June, 2019 at 11:00 a.m.

/s/

Michael J. Dunleavy
Governor

Senator Coghill, Acting Majority Leader, moved and asked unanimous consent the Second Special Session of the Thirty-first Legislature be convened in Juneau. There being no objection, the Second Special Session convened in Juneau.

SB 10

Message was received stating the Governor signed the following bill on June 26 and transmitted the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

SENATE BILL NO. 10 "An Act extending the termination date of the Statewide Suicide Prevention Council; and providing for an effective date."

Chapter 8, SLA 2019
Effective Date: 6/27/19

HB 104

Message was received stating the Governor signed the following bill on June 28 and transmitted the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

CS FOR HOUSE BILL NO. 104(L&C) am S "An Act relating to exemptions from mortgage lender, mortgage broker, and mortgage loan originator licensing requirements; and providing for an effective date."

Chapter 9, SLA 2019
Effective Date: See Chapter

HB 39

Message dated June 28 was received stating:

Dear President Giessel:

On this date, I have signed, with line-item vetoes, the following bill passed during the First Special Session of the Thirty-First Alaska State Legislature and am transmitting the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

CONFERENCE CS FOR SPONSOR SUBSTITUTE
FOR HOUSE BILL NO. 39 "An Act making appropriations for the operating and loan program expenses of state government and for certain

programs; capitalizing funds; amending appropriations; making supplemental appropriations and reappropriations; and providing for an effective date."

Chapter No.1, FSSLA 2019
[Effective Date: See Chapter]

For the past several years, the State of Alaska has attempted to operate business as usual under a radically changing revenue picture. Based on Alaska's fiscal reality, fundamental changes to our budgetary process have to be implemented in order to align state expenditures and state revenues. That is what this budget does.

With the state of Alaska now pointed in the right direction, this budget moves us halfway toward a balanced budget. With an overall reduction of \$678.8 million this year, next year we can close the state's remaining deficit of \$730 million. This two-year process will put Alaska in a position of balancing the budget without new taxes or a reduction of the traditional Permanent Fund Dividend.

The budget goals and priorities for my administration have been very clear from the beginning: maintain and protect our reserves, expenditures cannot exceed existing revenues, the budget is built on core functions, and no additional taxes on Alaskans. In short, the budget must be sustainable, predictable, and affordable. The operating budget I transmitted on February 13, 2019 for legislative consideration was designed to meet those goals. I appreciate the work and careful deliberation that went into the final passage of HB 39.

The attached reports summarize the line-item vetoes. In total, 182 items have been vetoed from the operating and mental health budgets totaling \$361.1 million in unrestricted general funds (UGF), \$17.7 million in designated general funds (DGF), \$12.4 million in other funds, and \$22.5 million in Federal funds. With these vetoes, the FY2020 operating budget, including mental health appropriations made in HB 40, is \$4,045.2 UGF, \$855.2 DGF, \$700.4 other funds, and \$2,698.2 Federal funds. Included in the items vetoed in this bill are the appropriations for FY2021 K-12 Foundation and Pupil Transportation funding. Per guidance from the Attorney General

appropriations of future general fund revenues are not valid. These items have been vetoed to prevent an unconstitutional dedication of funds.

Based on the five principles outlined at the time of my initial budget proposal, and a sincere effort to end the cycle of unsustainable deficit spending, my administration worked to make a number of difficult, but necessary decisions, including a veto of the unconstitutional dedication of funds for FY2021 education spending. This budget was thoroughly evaluated, and my policies were applied consistently across the board. No one region, community, or legislative district was singled out or held to any other threshold. It is critical that we get our fiscal house in order and provide a secure and stable future for Alaskans.

This budget focuses on the state's basic responsibilities while understanding our fiscal constraints. This is one step in the right direction – setting Alaska on the path to fiscal certainty while acknowledging additional actions, over multiple years, are needed. With this act, we have eliminated nearly 50 percent of the state's deficit; more work will be needed in the months ahead and during the next legislative session.

I am committed to working with the legislature to address our state's spending, to eliminate our deficit over time, and to move Alaska forward.

Sincerely,

/s/

Michael J. Dunleavy

Governor

HB 40

Message date June 28 was received:

Dear President Giessel:

On this date, I have signed, with line-item vetoes, the following bill passed during the First Special Session of the Thirty-First Alaska State Legislature and am transmitting the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

CONFERENCE CS FOR SPONSOR SUBSTITUTE
FOR HOUSE BILL NO. 40 "An Act making
appropriations for the operating and capital expenses
of the state's integrated comprehensive mental health
program; and providing for an effective date."

Chapter No. 2, FSSLA 2019
Effective Date: 7/1/19

My administration worked to identify what items were a priority based on the principles I have established during my time in office. This budget was thoroughly evaluated, and my policies were applied consistently across the board. We must evaluate all programs based on how effective they are in achieving the desired outcome. Going forward, it will be necessary for the Mental Health Trust to assess program needs and utilize the Trust's earnings to fund any increases in financial support.

With this in mind, reductions were made to the Mental Health Capital and Operating budget. These vetoes are in line with the guiding principles I outlined on day one of my administration. Reports are attached detailing vetoes to the mental health operating budget, in addition \$11.7 million in unrestricted general funds (UGF) were vetoed from the mental health capital budget for projects that are not core functions of the state. We must work together to prioritize State funded programs, and programs funded at the local level.

Sincerely,

/s/

Michael J. Dunleavy
Governor

SR 1

Message dated June 13 was received stating the Governor read the following resolution and transmitted the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

SENATE RESOLUTION NO. 1 Establishing a
Senate Special Committee on the Railbelt Electric
System.

Senate Resolve No. 1

Messages from the House

Message dated July 8 was read stating:

The Senate is invited to meet with the House for the purpose of a joint session on Wednesday, July 10, 2019 at 11:30 a.m. for the purpose of voting to override the Governor's vetoes to House Bill 39 (Approp: Operating Budget/Loans/Funds) and HB 40 (Approp: Mental Health Budget).

Senator Coghill, Acting Majority Leader, moved and asked unanimous consent the Senate accept the House invitation to meet in Joint Session. Without objection, it was so ordered.

The Secretary was requested to notify the House.

Communications

Message dated June 24 was received from President Giessel and Speaker Edgmon stating in accordance with art. XV, sec. 20 of the Constitution of the State of Alaska and in the public interest, the Second Special Session of the Thirty-first Legislature will convene in Juneau, Alaska at 1:00 p.m., July 8, 2019, in the Alaska Capitol Building to consider the item under the call issued by Governor Michael J. Dunleavy.

The following reports are on file in the Office of the Secretary of the Senate:

Department of Health and Social Services
Office of Substance Misuse and Addiction Prevention
Voluntary Nonopioid Directive
Voluntary Nonopioid Directive Information Sheet

Alaska Vaccine Assessment Program
Annual Report 2018-2019
in accordance with AS 18.09.210

Special Committee Reports

In accordance with Uniform Rule 1(e) President Giessel made the following change to the Committee on Committees:

Committee on Committees

Senator Hoffman replaces Senator Costello

Recess

Senator Coghill, Acting Majority Leader, moved and asked unanimous consent the Senate stand in recess to a Committee on Committees meeting. Without objection, the Senate recessed at 1:11 p.m.

After Recess

The Senate reconvened at 1:18 p.m.

Special Committee Reports (continued)

Committee on Committees Report

Report dated July 8 was read stating:

Madam President:

Your Committee on Committees has met and submits to the Senate for its consideration the following change to the Committee on Committees reports adopted January 15, 2019 and February 5, 2019:

Rules Committee

Senator Hoffman replaces Senator Costello

Signing the report: Senator Giessel, Chair; Senators von Imhof, Hoffman, Coghill, Begich.

Senator Coghill, Acting Majority Leader, moved and asked unanimous consent to adopt the Committee on Committees report. Without objection, it was so ordered.

Unfinished Business

President Giessel announced Senator Hoffman will serve as majority leader effective July 9.

Announcements

Rule 23(d) of the Alaska State Legislature Uniform Rules is currently in effect.

Announcements are at the end of the journal.

Enrollment**SB 10**

SENATE BILL NO. 10 "An Act extending the termination date of the Statewide Suicide Prevention Council; and providing for an effective date" was enrolled, signed by the President and Secretary, Speaker and Chief Clerk and the engrossed and enrolled copies transmitted to the Office of the Governor at 1:30 p.m., June 20, 2019.

SB 16

HOUSE CS FOR CS FOR SENATE BILL NO. 16(FIN) am H "An Act relating to certain alcoholic beverage licenses and permits; relating to the bond requirement for certain alcoholic beverage license holders; and providing for an effective date" was enrolled, signed by the President and Secretary, Speaker and Chief Clerk and the engrossed and enrolled copies transmitted to the Office of the Governor at 9:53 a.m., July 1, 2019.

Memorandum from the Division of Legal and Research Services, Legislative Affairs Agency, reporting the following manifest errors in HOUSE CS FOR CS FOR SENATE BILL NO. 16(FIN) am H, which have been corrected in enrolling:

Page 2, line 1:

Delete "displays of arts and crafts."

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Page 2, lines 7 - 31:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 27:

Delete "AS 43.60"

Insert "this chapter"

Page 4, line 4:

Delete "board"

Insert "Alcoholic Beverage Control Board"

Page 4, line 11:

Delete "board"

Insert "Alcoholic Beverage Control Board"

An additional memorandum from the Division of Legal and Research Services reporting the following manifest errors in HOUSE CS FOR CS FOR SENATE BILL NO. 16(FIN) am H, which have been corrected in enrolling and require a brief explanation:

In addition to more minor technical errors discovered in enrolling the above bill, bill sections 2 and 3 have been deleted to correct an oversight as a result of an amendment adopted on the House floor (amendment No. 5). The amendment deleted references to a new license under title 04 of the Alaska Statutes that would have authorized the sale of alcoholic beverages at licensed performing arts theaters. Bill sections 2 and 3 were retained in engrossing, which both related to performing arts theater licenses that no longer exist. Bill section 2 added a cross reference to new subsection "(j)" to AS 04.16.049(a)(4) that would have been added by bill section 3 to allow persons under 21 years of age but at least 16 years of age on licensed premises of a performing arts theater. Because amendment number 5 removed all references to a performing arts theater license, bill secs. 2 and 3 have been removed in enrolling for consistency with the amendment.

SB 19

HOUSE CS FOR CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 19(FIN) am H(brf sup maj fld H) "An Act making appropriations, including capital appropriations, supplemental appropriations, reappropriations, and other appropriations; amending appropriations; making appropriations to capitalize funds; and providing for an effective date" was enrolled, signed by the President and Secretary, Speaker and Chief Clerk and the engrossed and enrolled copies transmitted to the Office of the Governor at 11:45 a.m., June 17, 2019.

Memorandum from the Division of Legal and Research Services, Legislative Affairs Agency, reporting the following manifest errors in HOUSE CS FOR CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 19(FIN) am H(brf sup maj fld H), which have been corrected in enrolling:

Page 21, line 15:

Delete "AS 37.05.146(c)(21)"

Insert "AS 37.05.146(c)(20)"

Page 26, line 25:

Delete "Veterans"

Insert "Veterans"

Page 27, line 30:

Delete "or"

Insert "and"

Adjournment

Senator Coghill, Acting Majority Leader, moved and asked unanimous consent the Senate stand in adjournment until 11:00 a.m., July 9, 2019. Without objection, the Senate adjourned at 1:21 p.m.

Liz Clark
Secretary of the Senate

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Announcements

Americans with Disabilities Act Notice - Persons with disabilities who require special accommodation or alternative communication formats to access committee meetings may contact the appropriate committee office or the Legislative Information Office in their community. Reasonable advance notice is needed to accommodate the request. For further information, call the ADA Coordinator at 465-3854 Voice/465-4980 TDD.

STANDING COMMITTEES

+ indicates teleconference

= indicates bill previously heard/scheduled

FINANCE

Jul 09	Tuesday	Senate Finance 532	9:00 AM
+	Legislative Finance: Fiscal Overview - Budget & Fiscal Review & Updates by David Teal, Legislative Finance Director		
Jul 09	Tuesday	Senate Finance 532	1:30 PM
+	Legislative Audit: Constitutional Budget Reserve & Reverse Sweep by Kris Curtis, Legislative Auditor & Megan Wallace, Legislative Legal Services Director		

JOINT COMMITTEES

BICAMERAL PERMANENT FUND WORKING GROUP

Jul 08	Monday	Senate Finance 532	9:00 AM
+	Presentations from Working Group Teams **Streamed live on AKL.tv**		

OTHER MEETINGS

JOINT SESSION

Jul 10	Wednesday	House Chamber	11:30 AM
Consideration of Governor's Vetoes to HB 39 and HB 40			

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Kevin F. McCoy and
Mary C. Geddes,
Plaintiffs,
v.
Michael J. Dunleavy, Governor of
the State of Alaska,
Defendant.

Case No. 3AN-19-08301CI

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

Introduction

Governor Dunleavy called a special session of the Alaska Legislature in Wasilla on June 13, 2019 to meet on July 8, 2019. Legislators traveled to both Wasilla and Juneau on July 8, and on July 15 the Plaintiffs filed this suit for declaratory and injunctive relief. The Plaintiffs argued that the Governor's proclamation calling a special legislative session outside of Juneau pursuant to AS 24.05.100(b) violated the constitutional doctrine of separation of powers. Subsequently, the Governor changed the location of the special legislative session to Juneau. A quorum was reached to conduct the special legislative session on July 18 in Juneau.

After the special session adjourned, the Plaintiffs amended their complaint, now seeking only a declaratory judgment from this court. The Defendant has filed a motion to dismiss, arguing that: 1) the matter is moot and this court should not review it under the public interest exception to the mootness doctrine; 2) the Plaintiffs do not meet the requirements for citizen-taxpayer standing, and; 3) the Plaintiffs failed to state a claim

upon which relief can be granted¹ because AS 24.05.100(b) does not violate separation of powers.

The Defendant's Motion to Dismiss is denied because 1) the claims brought by the Plaintiffs fall within the public interest exception to the mootness doctrine; 2) the Plaintiffs have citizen-taxpayer standing; and 3) the Plaintiffs have successfully stated a claim upon which relief can be granted.

Factual Background

On June 13, 2019, Governor Michael Dunleavy issued a proclamation calling the Alaska Legislature into a second special session to be held in Wasilla on July 8, 2019 at 1:00 p.m. at the recommended venue of Wasilla Middle School.² The proclamation directed the Legislature to consider an appropriations bill for payment of Permanent Fund Dividends.³ On June 28, 2019, Governor Dunleavy vetoed a series of line items from the Fiscal Year 2020 state operating budget.⁴ As a result, reconsideration of the vetoed line items were also to be considered at the special session.⁵

On July 8, 2019 some legislators met in Wasilla pursuant to the Governor's special session proclamation, but not enough to constitute a quorum to do business.⁶ Most legislators met in Juneau, where there were enough present to constitute a quorum, but still shy of the amount which would have been required to override any veto issued by the Governor.⁷ On July 10, the legislators in Juneau cast a vote on whether to

¹ Alaska R. Civ. P. 12(b)(6).

² Defendant's Motion to Dismiss at *1 (filed 8/23/2019) ("Motion"); Plaintiffs' Opposition to Motion to Dismiss at *3 (filed 9/9/2019) ("Opposition").

³ Motion at *1-2.

⁴ *Id.*

⁵ Alaska Const. art. II § 9.

⁶ *Id.*; Opposition at *3.

⁷ Opposition at *3. According to the Alaska Constitution, Article II, section 16, any action taken by the legislature to override a veto by the Governor must be completed within five days of the start of the special legislative session.

override the Governor's budget vetoes, but did not garner the votes necessary to do so.⁸ On July 17, the Governor issued a supplemental proclamation changing the location of the special session to Juneau.⁹ On July 18, the legislative session continued meeting in Juneau with the arrival of the legislators who had convened in Wasilla.¹⁰

On July 15, Plaintiffs sued, alleging that AS 24.05.100(b) is facially unconstitutional and unconstitutional as applied because it violates article II, section 9 of the Alaska Constitution and the doctrine of separation of powers.¹¹ Plaintiffs requested and sought expedited consideration of an injunction, which the Defendant opposed and this court denied.¹² Plaintiffs amended their complaint after Governor Dunleavy's second proclamation changing the location of the special session to Juneau.¹³ Plaintiffs no longer seek injunctive relief. Instead, they now ask this court to issue a declaratory judgment that:

1) AS 24.05.100(b) is facially unconstitutional as it pertains to the Governor's authority to call a special session at a location other than the capital because it violates article II, section 9 of the Alaska Constitution and the doctrine of separation of powers;

2) AS 24.05.100(b) is unconstitutional as applied as it pertains to the Governor's authority to call a special session at a location other than the capital because it violates article II, section 9 of the Alaska Constitution and the doctrine of separation of powers, unless it is construed to require legislative agreement;

⁸ Motion at *2.

⁹ *Id.* at *3; Opposition at *3-4; First Supplemental Proclamation by Governor Michael Dunleavy (July 17, 2019).

¹⁰ Motion at *2-3.

¹¹ Complaint for Declaratory Judgment and Injunctive Relief at *9-10 (filed 7/15/2019).

¹² Plaintiffs' Motion for Preliminary Injunction (filed 7/15/2019); Defendant's Opposition to Motion for Expedited Consideration (filed 7/18/2019); Order on Motion for Expedited Consideration of Plaintiffs' Motion for Preliminary Injunction (entered 7/18/2019).

¹³ First Amended Complaint for Declaratory Judgment (filed 7/22/2019).

3) the Governor's June 13, 2019 executive proclamation calling for the special legislative to be held in Wasilla violated article II, section 9 of the Alaska Constitution and the doctrine of separation of powers.¹⁴

In lieu of filing an answer, the Defendant has filed a Motion to Dismiss. This court held oral argument on the motion on October 28, 2019.

Discussion

Alaska Statute 24.05.100 governs special sessions of the legislature. Under AS 24.05.100(a)(1), the governor may call the legislature into special session. Under AS 24.05.100(a)(2), the legislature may call itself into special session. Alaska Statute 24.05.100(b) provides, in pertinent part:

A special session may be held at any location in the state. If a special session called under (a)(1) of this section is to be convened at a location other than at the capital, the governor shall designate the location in the proclamation. If a special session called under (a)(2) of this section is to be convened at a location other than at the capital, the presiding officers shall agree to and designate the location in the poll conducted of the members of both houses.^[15]

Plaintiffs' lawsuit concerns the constitutionality of AS 24.05.100(b), and in particular, of the statute's grant of authority to the Governor to call special sessions at locations other than the capital.

The Defendant raises three separate and independent arguments in support of its Motion to Dismiss. The Defendants allege that the Plaintiffs' complaint should be dismissed because 1) the claims made by the Plaintiffs are moot; 2) the Plaintiffs do not have citizen-taxpayer standing; and 3) the Plaintiffs' claims should be dismissed

¹⁴ *Id.* at *6-7.

¹⁵ AS 24.05.100(b).

pursuant to Alaska Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. This court denies the Defendant's Motion to Dismiss.

1. The public interest exception to the mootness doctrine applies.

Both parties agree that this issue is moot because the Governor ultimately amended the proclamation, moving the special session to Juneau, and because the session was held.¹⁶ The Defendant urges this court not to exercise its discretion to decide this case pursuant to the public interest exception to the mootness doctrine, arguing that the court should not interfere in "a political dispute between coordinate branches of government."¹⁷ Plaintiffs argue that all prongs of the public interest exception to the mootness doctrine are present, and that this court should therefore not dismiss this matter despite its mootness.¹⁸

Courts resolve issues of "standing and mootness using ... independent judgment because they are questions of law involving matters of judicial policy."¹⁹ Courts will "refrain from deciding questions where events have rendered the legal issue moot."²⁰ "A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."²¹ "Mootness can also occur when 'a party no longer has a personal stake in the controversy and has, in essence, been divested of standing.'"²² "The basic requirement for standing in Alaska is adversity."²³

¹⁶ Motion at *4; Opposition at *15-16.

¹⁷ Motion at *5.

¹⁸ Opposition at *15-24.

¹⁹ *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

²⁰ *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995).

²¹ *Fairbanks Fire Fighters Ass'n, Local 1324*, 48 P.3d at 1167 (Alaska 2002).

²² *Id.*

²³ *Trustees for Alaska v. State* 736 P.2d 324, 327 (Alaska 1987) (citing *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska 1976)).

There is a "long recognized 'public interest' exception to the mootness doctrine."²⁴ The court applies three factors when determining whether to apply the public interest exception: 1) whether the disputed issues are capable of repetition; 2) if the mootness doctrine were applied, would the legal issue repeatedly circumvent review; and 3) whether the issues presented are as important to the public interest as to justify overriding the mootness doctrine.²⁵ None of the individual factors is dispositive; rather, the court must use its discretion to determine whether the public interest dictates that immediate review of a moot issue is appropriate.²⁶

With respect to the first requirement, courts "have refused to apply the public interest exception to unusual factual circumstances that were unlikely to repeat themselves or situations where the applicable statute or regulation was no longer in force."²⁷ The Alaska Supreme Court has concluded that the first factor of the public interest exception is not satisfied where the statute or regulation that was at the heart of the litigation has been amended, changed, or repealed prior to the court's decision.²⁸ For example, in *Alaska Community Action on Toxics v. Hartig*,²⁹ the Court held that the expiration of a two-year herbicide application permit granted by the Department of Environmental Conservation prior to the Alaska Supreme Court's decision on the matter rendered the specific factual and legal circumstances unlikely to repeat themselves.³⁰

But when the statute, law, or regulation that is at the heart of the litigation pending before the court remains unchanged from the moment the first pleading was

²⁴ *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).

²⁵ *Id.*

²⁶ *Fairbanks Fire Fighters Ass'n, Local 1324*, 48 P.3d at 1168.

²⁷ *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 367-68 (Alaska 2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

filed to the present, the legal issue is capable of repetition and satisfies the first factor of the public interest exception.³¹ In *Legislative Council v. Knowles*,³² the court held that a legal issue arising under a provision of the Alaska Constitution that remained unchanged from the time the first pleading was filed to the time the case was heard before the Alaska Supreme Court was capable of repetition and satisfied the first public interest exception factor.³³

The second requirement of the public interest exception is whether the legal issue will continuously evade judicial review. The Alaska Supreme Court has analyzed the second factor under the public interest exception to mootness by “comparing the time it takes to bring the appeal with the time it takes for the appeal to become moot.”³⁴ Courts have ruled that permits and plans that are valid for periods of time ranging from as long as two to five years are capable of evading judicial review.³⁵ In *Copeland v. Ballard*,³⁶ the plaintiffs sought to appeal a contingency plan approved by the Department of Environmental Conservation that was valid for five years. However, the case was not decided by the Alaska Supreme Court until more than six years after the contingency plan went into effect.³⁷ The court found that even though the contingency plan was valid for five years, because the appeal did not reach the Alaska Supreme Court until after the plan expired, the issue was likely to evade review and satisfied the second prong of the public interest exception.³⁸

³¹ See *Legislative Council v. Knowles*, 998 P.2d 604, 606-08 (Alaska 1999).

³² *Id.*

³³ *Id.*

³⁴ *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009).

³⁵ *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 367-68 (Alaska 2014); *Copeland*, 210 P.3d at 1202.

³⁶ *Copeland*, 210 P.3d at 1202.

³⁷ *Id.*

³⁸ *Id.*

In addition, the Alaska Supreme Court has also found the matter is not likely to evade review in scenarios where legal issues may be capable of repetition, but there is an independent right to appeal established by statute or case law. In *Clark v. State, Department of Corrections*³⁹ the court determined that the Department of Correction's decision to transfer Clark from a prison in Alaska to a prison in Arizona was not likely to "repeatedly circumvent review" because Alaska Supreme Court precedent guarantees prisoners an independent right to Superior Court review of each of their transfers.⁴⁰

The third public interest exception factor requires that the issue be a matter of public interest so important to justify overriding the mootness doctrine.⁴¹ The Alaska Supreme Court has stated "we have found this prong met when the case involved concepts of fairness underlying the right to procedural due process ... or situations, otherwise moot, where the legal power of public officials was in question."⁴² Cases construing the power of public officials have explained that the scope of a public official's power is an issue of public interest⁴³ as well as issues that pertain to the "balance between the powers of two coordinate branches of government."⁴⁴ The Alaska Supreme Court has explicitly granted review pursuant to the public interest exception when a case "pits the political branches of our state government in a fundamental separation of powers confrontation."⁴⁵

In *Legislative Council*, the court concluded that the resolution of a controversy involving the interpretation of a constitutional provision preventing the Governor from

³⁹ See *Clark v. State, Dept. of Corrections*, 156 P.3d 384 (Alaska 2007).

⁴⁰ *Id.* at 388.

⁴¹ *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 368 (Alaska 2014).

⁴² *Copeland*, 210 P.3d at 1203.

⁴³ *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995).

⁴⁴ *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).

⁴⁵ *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977).

suing the Legislature was unquestionably “an issue of great public importance” because it dealt with the separation of powers doctrine and remained intact at the time the case was heard by the Court.⁴⁶ However, in *Alaska Community Action on Toxics*, the court found that the legal issue was no longer so important to override the mootness doctrine because the legal dispute dealt with a state agency’s prior application of herbicides pursuant to an expired permit.⁴⁷ Similarly, in *Ahtna Tene Nene v. State, Department of Fish & Game*⁴⁸ the Court ruled that because the permitting scheme under review had been significantly changed since the lawsuit was originally filed, it was no longer so important to satisfy the public interest exception to the mootness doctrine.⁴⁹

A. The issue is capable of repetition because the Governor can call another special legislative session without legislative consent in a location other than Juneau pursuant to AS 24.05.100(b).

In its Reply, the State concedes the issue at the heart of the current litigation is “capable of repetition because the Governor may again call the Legislature in to special session outside of Juneau without legislative consent.”⁵⁰ Relying on *Alaska Community on Toxics*, the State argues that a case “is not to be considered capable of repetition where hypothetical future uses of the challenged law would not likely present the same factual and legal context as the case at hand.”⁵¹ According to the State, because the specific facts of this case (the Governor’s line item vetoes shortly before the special session and the decision of some legislators to travel to Wasilla and some to Juneau for the special session) are unlikely to recur, this court should not find that issue is not

⁴⁶ *Legislative Council*, 988 P.2d at 606.

⁴⁷ *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 368 (Alaska 2014).

⁴⁸ See *Ahtna Tene Nene v. State, Dept. of Fish & Game*, 288 P.3d 452 (Alaska 2012).

⁴⁹ *Id.* at 458.

⁵⁰ Reply to Opposition to Defendant’s Motion to Dismiss at *3 (filed 9/17/2019)(“Reply”).

⁵¹ *Id.*

capable of repetition such that the court should exercise its discretion to review the constitutionality of AS 24.05.100(b).⁵²

However, in *Alaska Community on Toxics*, the Alaska Supreme Court ruled that the legal issue was not capable of repetition because the regulations under which the Department of Environmental Conservation issued the herbicide application permit were revised and replaced by significantly different regulations by the time the Court heard the case. Because the regulations that dictated the parameters of the herbicide application permit that the plaintiffs challenged were no longer in effect the Court found that the issue was not capable of repetition. Here, AS 24.05.100(b) remains in effect. As the State concedes in its Reply, the Governor could call the Legislature into a special session outside of Juneau at any time without legislative consent pursuant to AS 24.05.100(b). Special sessions called by the Governor are not rare events.⁵³ The fact that the precise factual or political context of a future special session may not be identical to the calling of the special session at issue here does not preclude repetition.

In *Legislative Council*, the Governor sued the Legislature on the grounds that the Legislature overruled a veto by the Governor in an untimely fashion. The Legislature argued that the Governor violated a provision of Alaska Constitution that forbids the Governor from bringing a lawsuit directly against the Legislature.⁵⁴ By the time the issue reached the Alaska Supreme Court the previously vetoed bill that had given rise to the lawsuit had become obsolete because the Legislature subsequently passed and the

⁵² *Id.*

⁵³ Plaintiffs' Additional Exhibits Relating to Their Request for Judicial Notice, Exhibit G (filed 10/28/2019). The court takes judicial notice of the number of special sessions held between 1959 and 2018 (Exhibit G), the number of special sessions held by May 2008 and whether the sessions were called by the governor or the legislature (Exhibit H), and of the first days and locations of six special sessions called by the Governor between 2017 and 2019 (Exhibit I).

⁵⁴ Alaska Const. art. III, § 16.

Governor subsequently signed into law another "bill covering essentially the same subject matter" ⁵⁵ as the previously vetoed bill. Even so, the Court held that the issue was capable of repetition because the provision of the Alaska Constitution that the Governor allegedly violated remained in effect and unchanged.⁵⁶

Here, the specific conflict between the Governor and the Legislature that led the Plaintiffs to file this lawsuit has been resolved.⁵⁷ However, the statute at issue, AS 24.05.100(b), remains unchanged and in effect. The Governor can call another special session outside of Juneau pursuant to AS 24.05.100(b) without legislative consent. Because AS 24.05.100(b) remains unchanged and in effect since the commencement of the litigation, the same exact legal issue, whether AS 24.05.100(b) violates the doctrine of separation of powers, may come before the court in the future. The constitutionality of the statute is not a fact-specific question. The legal issues are capable of repetition, satisfying the first factor of the public interest exception to the mootness doctrine.

B. The issue will evade judicial review because it is likely to become moot before it can be fully adjudicated.

Pursuant to AS 24.05.100(b) and Alaska Constitution article II, section 9 the Governor must give at least 30 days' notice to the Legislature when he calls a special session without the consent of the Legislature. Each special session is to last a maximum of 30 days.⁵⁸ The State argues that the issue is unlikely to evade review because there is adequate time for the Superior Court to decide a case from the time a special session is announced by the Governor pursuant to AS 24.05.100(b) and the

⁵⁵ *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).

⁵⁶ *Id.* at 606-07.

⁵⁷ Motion at *7.

⁵⁸ AS 24.05.100(b); Alaska Const. art. II § 9.

adjournment of that special session.⁵⁹ But if AS 24.05.100(b) does violate separation of powers, at least a portion of the harm guarded against may occur when the session begins, not when it is adjourned.⁶⁰ The State also argues that because the Superior Court has the power to hear motions on an expedited basis and issue preliminary injunctions when the requisite conditions are satisfied that the issue will not evade review.⁶¹ But the Superior Court is not the court of last resort in the State of Alaska and the constitutional issues raised by the Plaintiffs in the case are not issues that can be fully resolved by a preliminary injunction.⁶²

Even if the harm guarded against is only complete when the session is adjourned, that still does not provide sufficient time for review. Issues can evade review even when the court system has up to five years to resolve a dispute.⁶³ In *Alaska Community Action on Toxics* the court ruled that full judicial review was unlikely to occur within the two year duration of the permit issued by the Department of Environmental Conservation which was subject to the pending litigation.⁶⁴ In *Copeland*, the court found that it was not likely that full judicial review would occur within the five year duration of a contingency plan issued by the Department of Conservation.⁶⁵ These cases indicate that issues brought before the court have been found to evade review even if the litigants and the courts have up to five years to resolve the dispute. Here, a Governor

⁵⁹ Reply at *3-4.

⁶⁰ Cf. *Legislative Council v. Knowles*, 998 P.2d 604, 606-08 (Alaska 1999). Legislation vetoed when the legislature is not in session may only be reconsidered by the legislature within the first five days of a special session held following a veto (Alaska Const art. II, § 16).

⁶¹ Reply at *3-4.

⁶² See *Ulmer v. Alaska Restaurant & Beverage Ass'n*, 33 P.3d 773, 778 (2001) (analyzing whether issue is likely to evade review by comparing time required to bring challenge and obtain appellate review of decision).

⁶³ *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009).

⁶⁴ *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 368 (Alaska 2014).

⁶⁵ *Copeland*, 210 P.3d at 1202.

would have to call a special session at least two, potentially five, years before the special session is to take place in order to prevent this issue from evading review.⁶⁶

C. The constitutionality of AS 24.05.100(b) is a matter of public interest so important as to justify overriding the mootness doctrine.

In *Legislative Council*, the Alaska Supreme Court held that a question that went "to the heart of the delicate constitutional balance between the powers of two coordinate branches of government" was "unquestionably an issue of great public importance."⁶⁷ Even so, the Defendant argues that the issue before the court is not sufficiently a matter of public interest to warrant judicial review. First, the Defendant argues that the public interest "affirmatively favors the court staying out of this dispute between the political branches of government," and "notions of respect for the coordinate branches of government caution against unnecessary judicial intervention."⁶⁸ Second, the Defendant attempts to distinguish the present case from *Legislative Council*, arguing that this case does not involve a matter of public interest because the public has its own recourse through political measures, "including the ballot box, protests, and contact with legislators and the Governor's office."⁶⁹

The Alaska Supreme Court has held that matters involving the doctrine of separation of powers and determining the scope of a public official's power are significant matters of public interest to justify overriding the mootness doctrine.⁷⁰ The case before the court clearly raises questions regarding the separation of powers and the scope of a public official's power. First, this matter raises an issue of separation of

⁶⁶ AS 24.05.100(b); Alaska Const. art. III, § 16.

⁶⁷ *Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).

⁶⁸ Motion at *7.

⁶⁹ Reply at *4.

⁷⁰ *Legislative Council*, 998 P.2d at 606; *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995); see also *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (review of constitutionality of governor's exercise of line-item veto matter of public interest).

powers regarding the Governor's authority to dictate where the Legislature is required to meet without the Legislature's consent.⁷¹ Whether AS 24.05.100(b) impermissibly delegates a legislative power to the executive branch clearly raises a question regarding the doctrine of separation of powers. In *Legislative Council*, the court held that a dispute regarding the Governor's authority to sue the Legislature raised a separation of powers question that easily satisfied the third requirement of the public interest exception to the mootness doctrine.⁷² Like in *Legislative Council*, because the issue before the court raises a question as to whether AS 24.05.100(b) impermissibly allows the Governor to infringe on the autonomy and self-governance of the Legislature, the case raises a separation of powers issue that qualifies as a matter of public interest such that the overriding of the mootness doctrine is warranted.

Plaintiff's challenge to AS 24.05.100(b)'s grant of authority to the Governor to unilaterally designate the meeting location of the Legislature without their consent also creates a question regarding the scope of the Governor's power and authority. In *Kodiak Seafood Processors Association*, the court held that questions as to the scope of authority of the Commissioner of the Alaska Department of Fish and Game to issue exploratory fishing permits was a matter of public interest significant enough to override the mootness doctrine.⁷³ Like in *Kodiak Seafood Processors Association*, here, this matter raises a question regarding the scope of the Governor's power and satisfies the third requirement of the public interest exception to the mootness doctrine.⁷⁴

⁷¹ AS 24.05.100(b).

⁷² *Legislative Council*, 988 P.2d at 606.

⁷³ *Kodiak Seafood Processors Ass'n*, 900 P.2d at 1196.

⁷⁴ *Id.*

This matter is not sufficiently distinguishable from *Legislative Council* to persuade this court to decline to review it. In *Legislative Council*, the separation of powers issue raised dealt with the "unique nature of the protection embodied in Article III, § 16."⁷⁵ The State argues that the court's decision to override the mootness doctrine was based on the fact that the public did not have a political remedy, such as heading to the ballot box, meeting with legislators, or protesting.⁷⁶ But the court's determination that the issue in *Legislative Council* was a matter of great public importance was because the matter "[went] to the heart of the delicate constitutional balance between the powers of two coordinate branches of government,"⁷⁷ not because it did not involve determination of the constitutionality of a statute.⁷⁸

This court is not persuaded by the Defendant's argument that "notions of respect for the coordinate branches of government" weigh against judicial review of an issue that is otherwise a matter of great public importance. As the Defendant concedes, the constitutionality of the statute or its application does not present nonjusticiable political questions.⁷⁹ In this case, the Governor called the special session in Juneau after attempting to direct the session be held in Wasilla.⁸⁰ But the question as to whether AS 24.05.100(b) is constitutional remains and does not turn on action by the Governor or the Legislature. A decision by a court regarding the constitutionality of the statute does

⁷⁵ *Legislative Council*, 988 P.2d at 606-07.

⁷⁶ Reply at *4.

⁷⁷ *Legislative Council*, 988 P.2d at 606.

⁷⁸ In any event, both the Alaska Constitution and the Alaska Statutes can be modified by the Legislature, albeit by different processes. Alaska Const. art. II, § 14; Alaska Const. art. XIII, § 1. The fact that a constitutional amendment requires more legislators and Alaskans to agree than does the passage of a bill does not render the ballot box a deficient remedy.

⁷⁹ See *Abood v. Gorsuch*, 703 P.2d 1158, 1160 (Alaska 1985) (courts will decline to adjudicate questions involving coordinate branches of government where there is a textually demonstrable commitment of the issue to a coordinate political department, it is impossible for a court to undertake an independent review of the case without expressing lack of respect due coordinate branches of government and a need to adhere to a political decision already made).

⁸⁰ Motion at *2.

not fail to accord the respect due the coordinate branches of government. Accordingly, the court denies the Motion to Dismiss on the grounds that the matter is moot.

2. The Plaintiffs have standing as citizen-taxpayers.

In Alaska "standing questions are limited to whether the litigant is a 'proper party to request an adjudication of a particular issue....'"⁸¹ Standing in Alaska courts is "not a constitutional doctrine; rather it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions."⁸² The concept of standing has been interpreted broadly in Alaska. We have "departed from a restrictive interpretation of the standing requirement."⁸³ The Alaskan courts have adopted an approach "favoring increased accessibility to judicial forums."⁸⁴ At the heart of the standing inquiry "is whether the litigant is a proper party to seek adjudication of a particular issue" and that the parties have an "adversity of interests."⁸⁵

There are two established types of standing in Alaska – interest injury standing and citizen-taxpayer standing.⁸⁶ Here, the Plaintiffs claim citizen-taxpayer standing. Citizen-taxpayer standing is "a sufficient basis on which to challenge allegedly illegal government conduct on matters of significant public concern."⁸⁷ There are two criteria that litigants must satisfy in order to establish citizen-taxpayer standing: 1) the case must be one of public significance; and 2) the plaintiff must be "appropriate."⁸⁸ In the Motion to Dismiss, the Defendant does not contest whether this case is one of public

⁸¹ *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska 1976)(quoting *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968)).

⁸² *Trustees for Alaska v. State* 736 P.2d 324, 327 (Alaska 1987).

⁸³ *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska 1973).

⁸⁴ *Moore*, 553 P.2d at 23.

⁸⁵ *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010).

⁸⁶ *Trustees for Alaska*, 736 P.2d at 327.

⁸⁷ *Id.* at 329.

⁸⁸ *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 985 (Alaska 2008).

significance.⁸⁹ But Defendant argues that these plaintiffs are not appropriate because other potential plaintiffs, specifically legislators, are more directly affected.

To be an appropriate plaintiff: 1) the plaintiff must not be a "sham plaintiff" with no true adversity of interest; 2) the plaintiff must be capable of competently advocating his or her position; and 3) the plaintiff may be denied standing if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit.⁹⁰ The Defendant has not argued that the Plaintiffs here are sham plaintiffs or that they are not capable of competently advocating their position.⁹¹ The Defendant's argument focuses on the third factor.

Defendant argues that these Plaintiffs do not have standing because there are plaintiffs more directly affected by the challenged conduct. The Alaska Supreme Court has held that "if another party is more directly affected by the outcome, the plaintiff may be denied standing."⁹² Plaintiffs may be denied standing "when a more directly affected plaintiff had already filed suit based on closely related claims, even though the claims were not identical."⁹³ But "the mere possibility that another party might sue...does not necessarily justify a denial of standing."⁹⁴ The crucial inquiry is "whether the more directly concerned potential plaintiff has sued or seems likely to sue in the foreseeable

⁸⁹ See *id.* (implementation of new taxes on tobacco products by the Matanuska-Susitna Borough is a matter of public significance); see *Baxley v. State*, 958 P.2d 422, 427-28 (Alaska 1998) (alleged violations of the Uniform Application Clause and the Public Notice Clause of the Alaska Constitution constituted matters of public significance for citizen-taxpayer standing purposes).

⁹⁰ *Baxley*, 958 P.2d at 428.

⁹¹ See *Trustees for Alaska*, 736 P.2d at 329-30 (holding that plaintiffs had standing because they were not sham plaintiffs as their sincerity in opposing the challenged action was unquestioned and there were no questions regarding their capability of competently advocating the position they asserted); see also Plaintiffs' Submission of Materials Supporting Requests for Judicial Notice, Ex. A (filed 10/23/2019).

⁹² *North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 640 (Alaska 1993).

⁹³ *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009) (citing *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004)).

⁹⁴ *Baxley*, 958 P.2d at 429.

future.”⁹⁵ “The mere possibility that [a more appropriate plaintiff] may sue does not mean that appellants are inappropriate plaintiffs.”⁹⁶

In *Trustees for Alaska v. State*,⁹⁷ the court concluded that even though the Attorney General of the United States had a statutory right to bring an action against the State, it did not preclude other plaintiffs from bringing a claim on the basis that they were not the most directly affected potential plaintiff. The court held that other less directly concerned plaintiffs, specifically a coalition of environmental, Native and fishing groups were sufficiently “appropriate” within the citizen-taxpayer framework.⁹⁸ The lack of evidence indicating that the Attorney General was likely to file suit weighed in favor of the plaintiffs’ appropriateness.⁹⁹ In *Fannon v. Matanuska-Borough*,¹⁰⁰ the court held that even though retailers and distributors of tobacco products were more directly affected by the excise tax enacted by the Borough, their failure to file suit did not preclude the plaintiffs, Borough residents who were taxpayers and tobacco users, from being considered appropriate plaintiffs.¹⁰¹ In *Baxley v. State*,¹⁰² the court held that even though a competing oil company, rather than a citizen-taxpayer, may have been a more directly affected plaintiff in a suit challenging the constitutionality of the adjustment of net profit shares governing oil leases in the Northstar Oil Field did not require the court to find that the citizen-taxpayer plaintiff was an inappropriate plaintiff.¹⁰³

⁹⁵ *Trustees for Alaska*, 736 P.2d at 330.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 329-30.

⁹⁹ *Id.*

¹⁰⁰ *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982 (Alaska 2008).

¹⁰¹ *Id.* at 986.

¹⁰² *Baxley v. State*, 958 P.2d 422 (Alaska 1998).

¹⁰³ *Id.* at 429-30.

By contrast, in *Keller v. French*,¹⁰⁴ the court held that the plaintiffs, a group of five state legislators, investigating the Governor's dismissal of the Public Safety Commissioner, were not appropriate plaintiffs because a separate group of seven state employees (the Kiesel plaintiffs) that were actively being investigated brought identical claims in a separate lawsuit against the same defendants as the Keller plaintiffs.¹⁰⁵ Similarly in *Ruckle v. Anchorage School District*,¹⁰⁶ the court held that a plaintiff who filed identical claims after another plaintiff who filed suit that was more directly affected by the Anchorage School District's alleged violation of the Alaska Procurement Code did not have citizen-taxpayer standing.¹⁰⁷

A. The Plaintiffs are "appropriate plaintiffs."

The Defendant argues that because the Legislature or its members are more directly affected by action taken pursuant to AS 24.05.100(b), Plaintiffs are not appropriate and lack standing.¹⁰⁸ But these plaintiffs do not lack standing because no other potential plaintiff that may be more directly affected by the conduct at issue has filed similar or identical claims as the Plaintiffs. Nor is there any indication that a more directly affected party is likely to bring suit in the near future. While it is at least arguable that the Alaska Legislature or its members itself may be more directly affected by the alleged unconstitutionality of AS 24.05.100(b) than the current Plaintiffs, this does not preclude the Plaintiffs from attaining citizen-taxpayer standing. Unless the Alaska Legislature or legislators bring similar or identical claims in a separate lawsuit or there is reason to believe that they will, there is no basis for this court to consider

¹⁰⁴ *Keller v. French*, 205 P.3d 299 (Alaska 2009).

¹⁰⁵ *Id.* at 302-03.

¹⁰⁶ *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004).

¹⁰⁷ *Id.* at 1037.

¹⁰⁸ Motion at *8.

whether those hypothetical plaintiffs are more directly affected. Even assuming Plaintiffs are not the most directly affected potential plaintiff to bring a suit alleging the unconstitutionality of AS 24.05.100(b), McCoy and Geddes are citizens and taxpayers of the State of Alaska who are affected by constitutional issues concerning the separation of powers doctrine.

In *Fannon*, where the Matanuska-Susitna Borough passed and implemented a new excise tax on tobacco products, the court held that even though the plaintiffs before the court, who were both residents, taxpayers, and tobacco users, were not the most affected potential plaintiffs, they still maintained citizen-taxpayer standing.¹⁰⁹ The court agreed with the Borough that the plaintiffs before the court were not the most directly affected plaintiffs.¹¹⁰ However, the court held that because the most directly affected potential plaintiffs, the distributors and retailers of tobacco products in the Borough, had not yet filed suit and there was no indication that the distributors or retailers were going to file suit, the plaintiffs before the court were “appropriate plaintiffs” even though they were not the most directly affected by the tax.¹¹¹ Similarly, here, the Plaintiffs before the court are arguably not the potential plaintiffs that are the most directly affected by the alleged unconstitutionality of AS 24.05.100(b); the Alaska Legislature and its members are the potential plaintiffs that are likely the most affected. However, there has been no showing by either the Plaintiffs or the Defendant that the Legislature or any of its members has or will likely bring claims that are similar or identical to those brought by McCoy and Geddes.¹¹² Without such a showing, and the fact that the Plaintiffs are

¹⁰⁹ *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 986-87 (Alaska 2008).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See generally Defendant's Reply to Opposition to Defendant's Motion to Dismiss.

residents and taxpayers of the State of Alaska who are inherently affected by a constitutional issue involving an alleged violation of the doctrine of separation of powers, McCoy and Geddes are "appropriate plaintiffs" and satisfy the third element of the "appropriate plaintiff" inquiry.

This case is distinguishable from *Keller*. In *Keller*, the court concluded that the plaintiffs were not the appropriate plaintiffs to bring suit because they were not the most directly affected plaintiffs.¹¹³ The *Keller* plaintiffs, a group of state legislators that were not investigated by a legislative committee were less affected than people who were actually being investigated. The parties that were being investigated had filed a separate lawsuit from that of the plaintiffs before the court alleging similar, if not identical, claims against the same defendant.¹¹⁴ The court ruled that the named plaintiffs were not appropriate plaintiffs because the most directly affected potential plaintiffs had filed suit alleging similar, if not identical, claims.¹¹⁵ Unlike *Keller*, here, neither the Plaintiffs nor the Defendant has shown that the more directly affected potential plaintiffs, the Alaska Legislature or any of its members, are likely to file or have filed suit against the Defendant. McCoy and Geddes are appropriate plaintiffs.

Because the Plaintiffs have raised an issue of "public significance" and are "appropriate plaintiffs" McCoy and Geddes have satisfied both requirements for citizen-taxpayer standing. Accordingly, the court denies Defendant's Motion to Dismiss for lack of standing.

3. The Plaintiffs have stated a claim on which relief can be granted by the court in the form of a declaratory judgment.

¹¹³ *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009).

¹¹⁴ *Id.* at 303-04.

¹¹⁵ *Id.*

Alaska Rule of Civil Procedure 12(b)(6) enables courts to dismiss a complaint "for failure to state a claim upon which relief can be granted." To survive a motion to dismiss pursuant to Rule 12(b)(6) a "complaint need only allege a set of facts consistent with and appropriate to some enforceable cause of action."¹¹⁶ "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief."¹¹⁷ "The court 'must presume all factual allegations of the complaint to be true and [make] all reasonable inferences...in favor of the non-moving party.'"¹¹⁸ "Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and, 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, the motion should be denied.'"¹¹⁹

In the context of declaratory judgements "the test of sufficiency is not whether the complaint demonstrates that the plaintiff will succeed but rather whether the allegations disclose that he is entitled to a declaration of rights."¹²⁰ A plaintiff can show that his or her allegations are sufficient for declaratory relief by showing that the court has jurisdiction and that there is an actual case or controversy.¹²¹ Such a showing is enough for a plaintiff's request for a declaratory judgment to survive as a 12(b)(6) motion to dismiss.

Here, the Plaintiffs have asked this court to issue a declaratory judgment that AS 24.05.100(b) is unconstitutional and violates the doctrine of the separation of powers on

¹¹⁶ *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 254 (Alaska 2000).

¹¹⁷ *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001).

¹¹⁸ *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988).

¹¹⁹ *Div. of Family and Youth Serv. v. Native Village of Curyung*, 151 P.3d 388, 396 (Alaska 2006).

¹²⁰ *Jefferson v. Asplund*, 458 P.2d 995, 1002 (Alaska 1969).

¹²¹ *Id.* (holding, inter alia, that the trial court erred in dismissing a claim that a statute giving the Anchorage Borough chairman veto power over actions of the assembly was illegal).

its face, as applied, and that the Governor's June 13, 2019 proclamation designating Wasilla as the site of the special session violated article II, section 9 of the Alaska Constitution and the doctrine of separation of powers.¹²² For the court to dismiss the Plaintiffs' claim pursuant to Rule 12(b)(6), the State must demonstrate beyond a reasonable doubt that the Plaintiffs have not made sufficient allegations for the court to grant any type of relief.

The Defendant asks this court to dismiss the Plaintiffs' complaint, arguing that he is entitled to dismissal because "plaintiffs are wrong on the merits."¹²³ In particular, the Defendant argues that AS 24.05.100(b) does not violate the constitutional doctrine of separation of powers because the "Governor's constitutional power to call a special session inherently includes the power to set a time and place for the session."¹²⁴ According to the Defendant, AS 24.05.100 merely "fleshes out procedural details" for the exercise of an authority implicitly vested in the Executive by virtue of article III, section 17 and article II, section 9.¹²⁵ For this argument the Defendant cites dictionary definitions, "common sense" and "ordinary speech."¹²⁶

The Alaska Supreme Court has held that the "state does recognize the separation of powers doctrine."¹²⁷ The underlying rationale of the doctrine of the separation of powers is "the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers."¹²⁸ The doctrine of separation of powers provides that "the blending of

¹²² First Amended Complaint for Declaratory Judgment at *6-7 (filed 7/22/2019).

¹²³ Motion at *9.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Motion at *11, Reply at *8.

¹²⁷ *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).

¹²⁸ *Id.*

governmental powers will not be inferred in the absence of an express constitutional provision."¹²⁹

In *Bradner v. Hammond*,¹³⁰ the Alaska Supreme Court held that a statute requiring that deputy heads of each executive department and nineteen directors of divisions appointed by the governor be subject to legislative confirmation violated the doctrine of separation of powers.¹³¹ According to article III, section 1, "[t]he executive power of the State is vested in the governor." Article III, sections 25 and 26 provide for the governor's appointment and legislative confirmation of the head of each principal department and members of certain boards and commissions. The court analyzed the issue by asking a threshold question: whether appointment of executive officers is a legislative or executive function.¹³² The court concluded that it was an executive function because the responsibilities conferred by article III, section 16 (which requires the governor to faithfully execute the laws) and the authority granted by article III, section 1 necessarily conferred on the governor the power to appoint subordinate executive officers.¹³³

Next the court considered the nature of the legislature's confirmation power, concluding that it was "a specific attribute of the appointive power of the executive."¹³⁴ In other words, the confirmation authority of the legislature was not a distinct power of the legislature, but rather a constitutional delegation of an executive function. The court concluded that "Sections 25 and 26 mark the full reach of the delegated or shared,

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 3-8.

¹³² *Id.* at 6.

¹³³ *Id.*

¹³⁴ *Id.* at 7..

appointive function to Alaska's legislative branch of government."¹³⁵ The court's holding was based on its determination that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."¹³⁶

Article II, section 1 of the Alaska Constitution provides that "[t]he legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty."¹³⁷ Article II, section 9 authorizes both the governor and the legislature to call special legislative sessions.¹³⁸ In addition, article III, section 17 provides that "[w]henever the governor considers it is in the public interest, he may convene the legislature, either house, or the two houses in joint session."¹³⁹

Thus, the plain text of the Alaska Constitution grants convening authority to the governor.¹⁴⁰ The question presented by the Defendant's Motion to Dismiss is whether this grant of convening authority necessarily and inherently includes the authority to determine the location of legislative sessions convened pursuant to that authority. The Defendant's Motion to Dismiss does not establish that it does.

The Defendant argues that *Bradner* does not govern this court's analysis because the constitutional provisions at issue here do not establish "a clear line in the constitution like the line between department heads and subordinate officials."¹⁴¹ The Defendant argues that because the constitution does not expressly establish the

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Alaska Const. art. II § 1.

¹³⁸ *See id.* art. II § 9.

¹³⁹ *See id.* art. III § 17.

¹⁴⁰ *See also Abood v. Gorsuch*, 703 P.2d 1158, 1164 (Alaska 1985).

¹⁴¹ Motion at *10.

location of special sessions or who may determine it, the governor's constitutional power to call a special session implicitly includes that authority as a matter of common sense.¹⁴² In addition, the Defendant argues that even if the constitution's grant of authority to the governor to convene a special session is ambiguous, the legislature voluntarily ceded its authority by passing AS 24.05.100(b).¹⁴³

This court cannot conclude that the Plaintiffs have demonstrated that there is no actual controversy whether the Governor's convening authority authorizes him to direct the legislature where to meet in special session. The shared power of convening the legislature could not exist independent of the legislative function and is thus an attribute of the legislative functions of article II. While convening authority is textually delegated to the Governor, this court cannot conclude, based on the briefing before this court, that such authority implicitly and necessarily includes the authority to determine the location of the session.¹⁴⁴ The Defendant has cited no precedent or constitutional history to support this argument. Article XV, section 20 of the Alaska Constitution establishes Juneau as the state capital. And *Bradner* cautions that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision"¹⁴⁵ Given the foregoing, this court cannot conclude that "common sense" compels the conclusion that the Governor's convening authority includes establishing the location of a special session.

In addition, this court cannot conclude that simply because the legislature passed the statute at issue, arguably ceding legislative authority, rather than attempting to

¹⁴² *Id.* at *10-11.

¹⁴³ *Id.*

¹⁴⁴ *Bradner v. Hammond*, 553 P.2d 1, 6-7 (Alaska 1976).

¹⁴⁵ *Id.* at 7.

capture executive authority, it does not violate separation of powers.¹⁴⁶ While it is not clear that the delegation of authority contained in AS 24.05.100(b) is as sweeping as that rejected in *State v. Fairbanks North Star Borough*,¹⁴⁷ the Defendant's argument on this point is not sufficient to convince the court that there is no controversy presented by the Plaintiffs' complaint.¹⁴⁸

The allegations made by the Plaintiffs in the present case satisfy the threshold that claims seeking declaratory judgments need to meet in order to survive Rule 12(b)(6) motions to dismiss. Here, the Plaintiffs' allegations disclose that they are entitled to a declaration of rights because their allegations show jurisdiction and the presence of an actual justiciable controversy.¹⁴⁹ Therefore, the Defendant's motion to dismiss pursuant to Rule 12(b)(6) is denied.

Conclusion

For the foregoing reasons the court DENIES the Defendant's Motion to Dismiss.

DATED at Anchorage, Alaska, this 22nd day of November 2019.


JOSIE GARTON
Superior Court Judge

¹⁴⁶ Motion at *11.

¹⁴⁷ See *State v. Fairbanks N. Star Borough*, 736 P.2d 1140 (Alaska 1987) (holding that statute authorizing governor to reduce appropriations when anticipated revenues appeared inadequate to meet appropriation levels violated separation of powers).

¹⁴⁸ *Jefferson v. Asplund*, 458 P.2d 995, 1002 (Alaska 1969).

¹⁴⁹ See *id.*