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

American Civil Liberties Union of Alaska, **Bonnie L. Jack**, and **John D. Kauffman**, Plaintiffs, v. **Michael J. Dunleavy**, in his official capacity as Governor of Alaska; and the **State of Alaska**, Defendants.	Case No. 3AN-19-08349CI **Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment**

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Plaintiffs have moved this Court for summary judgment on their claims that Governor Dunleavy's veto of the Appellate Courts' budget is unconstitutional. Plaintiffs demonstrated in their summary judgment memorandum how the governor's veto breaches the separation of powers by impermissibly intruding on the independence of the

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judiciary, and how the veto effects an illegal reallocation of an appropriation. Plaintiffs seek an order from this Court declaring that the governor's veto violates the Alaska Constitution and directing Defendants to return the vetoed funds to the Appellate Courts as soon as practicable so that the Appellate Courts may use those funds before the fiscal year ends on June 30, 2020.

Defendants oppose Plaintiffs' motion and have moved for summary judgment dismissing the case. But Defendants' arguments are unfounded and fail to address the significant attack on judicial independence that the governor's retaliatory veto represents. Defendants primarily assert that Plaintiffs challenge the "content" of the governor's veto message, and that applying a "minimum of coherence" standard should lead to dismissal of the case. The governor's veto message was clear and its content is undisputed: the veto explicitly punishes the Appellate Courts for the Supreme Court's *Planned Parenthood* decision.

Defendants' argument misrepresents Plaintiffs' claims, and the Court should reject Defendants' attempt to mischaracterize the nature of this action. This case is not some skirmish about the adequacy of the language the governor used to explain his actions. This case is about

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Governor Dunleavy's broadside attack on judicial independence, executed by his retaliatory defunding of the court system, taken in direct response to a constitutional holding that the governor didn't like.

Defendants' other principal argument asserts that the governor's veto passes constitutional muster under a "traditional test" for evaluating separation of powers claims. But the "test" on which Defendants rely is only appropriate in resolving cases where one branch of government assumes the powers or functions of another branch. Such a test is inapplicable where the executive makes a direct, punitive strike against the courts by raiding the judiciary's budget. Nevertheless, even applying the test that Defendants urge, Governor Dunleavy's veto cannot be upheld because it stands as a serious encroachment on the court system by the executive branch.

Defendants' other arguments are equally unpersuasive. Defendants assert that a "new constitutional standard" would result if the Court were to strike down the veto. But there is nothing "new" about the concepts of judicial independence or preserving the separation of powers, which have been in existence since before the founding of our country. On the other hand, it would be quite novel indeed for the Court to give its constitutional blessing to the practice of

surrendering a portion of its budget every time it made a decision that was unpopular with the governor or the legislature.

Defendants also assert that granting the injunction Plaintiffs seek—return to the Appellate Courts the vetoed sum of $334,700—would exceed the Court's inherent powers. But again, Defendants miss the point. This Court is not called on to address a budget shortfall preventing it from fulfilling its "constitutional duties." Rather, it must defend its integrity and independence against a deliberate retaliatory and coercive attack. The only way to appropriately remedy the governor's confiscation of the court system's funds is to have the funds fully restored.

Finally, Defendants argue that the governor's veto does not represent a reallocation of an appropriation because it does not add funds to another agency's budget. But this ignores another practical effect of the veto, which is to pay for what the governor has termed "elective abortions" out of the judiciary's budget. And such a move would "alter the legislature's purpose" for those funds, a result that the Alaska Supreme Court had found to exceed the governor's veto authority.

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I. Governor Dunleavy's Veto Is Retaliatory, Punitive, and Coercive, and the Adequacy of His Words Used to Explain the Veto is Irrelevant.

In their Memorandum in Support of their Motion for Summary Judgment (Pls.' Mem.), Plaintiffs describe how Governor Dunleavy's act of defunding the Appellate Courts was not simply an exercise of the governor's constitutional authority to perform a line item veto. Pls.' Mem. at 20-25. Plaintiffs describe how the governor issued his veto after the Alaska Supreme Court's decision in *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019). *Id.* at 3-4. Parsing the language in the governor's statement of objections on the veto, Plaintiffs demonstrated that the veto retaliates against the Court for making its decision. *Id.* at 22-24. Plaintiffs also confirmed that the governor's retaliation is ongoing, since he has attempted to defund the Appellate Courts in the same amount, and for the same explicit reasons, in the court system's fiscal year 2021 budget. *Id.* at 5-6.

Unquestionably, the governor would not have issued his veto if *Planned Parenthood* had been decided differently. Had the Court found the statute and regulation to be constitutional, the State would have been able to deny most Medicaid reimbursements for abortions, and the

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"annual cost" cited in the governor's veto message would have been nonexistent. What's more, the governor's attempt to further defund the court system in fiscal year 2021 and, presumably, beyond—in the same amount and for the same explicit reasons—underscores the coercive nature of the veto. The governor's actions send the unmistakable message that, should the Court revisit the issue and reverse itself, the withheld funding would be restored. Also inherent in this abuse of authority is the implication that the governor can impose new fiscal pain on the court system at any time in the future should a court rule in a way he doesn't like, or rule against him or the State of Alaska in any of the many cases against them. The very nature of the veto was one of classic retaliation—a coercive act that punishes and threatens the judiciary.

Defendants have said nothing in response to this. Defendants do not counter the argument that the veto is retaliatory. Nowhere in their memorandum do they deny that the veto threatens or coerces the courts. Defendants' silence on this point speaks loudly, for if there was any basis on which to argue the contrary, Defendants would have done so. *See Alaska State Employees Ass'n v. Alaska Pub. Employees Ass'n,*

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813 P.2d 669, 671 (Alaska 1991) (arguments not raised before party's reply are abandoned).

Instead, Defendants would have the Court ignore the obvious by attempting to couch Plaintiffs' lawsuit as one challenging "the content of the governor's veto message," and urging the Court to apply no more than a "minimum of coherence" standard to the governor's veto. State of Alaska's Opposition to Motion for Summary Judgment and Cross-Motion For Summary Judgment And Memorandum In Support (hereinafter Defs.' Mem.) at 10. At best, this argument represents a fundamental misunderstanding of Plaintiffs' case. Plaintiffs challenge the governor's unconstitutional retaliatory defunding of the court system, as achieved through his otherwise valid veto authority, as an impermissible intrusion into the functions of the judiciary and a violation of the separation of powers. It is not the governor's veto message or statement of objections that is under review; it is the actual effects and impacts that the veto has had and will continue to have.

Furthermore, the cases Defendants cite, Defs.' Mem. at 10-13, are challenges to the *adequacy* of the governors' explanations for their vetoes. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 369 (Alaska 2001) (resolving question of whether governor "adequately explain[ed]

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his vetoes"); *Romer v. Colorado Gen. Assembly*, 840 P.2d 1081, 1083 (Colo. 1992) ("objections must inform about the reasons underlying the veto"); *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 40 (1938) ("veto message is not complete unless it contains . . . the *reasons* for vetoing the particular act"); *Cascade Tel. Co. v. Tax Comm'n of Washington*, 176 Wash. 616, 620, 30 P.2d 976, 978 (1934) (addressing whether governor "adequately [gave] his reasons" for veto). But in this case, the governor has spoken loudly and clearly; there is nothing inadequate about his message. Governor Dunleavy's reasons for his veto are unmistakable: he disapproves of women's access to Medicaid funding for abortions, and the Appellate Courts should be punished for the Supreme Court's "insist[ence]" on upholding that constitutional right. Defendants' characterization of Plaintiffs' case as a challenge to the "content of the veto message" misses the mark, and the cases Defendants use to support it are inapt. The Court should reject Defendants' attempts to make this case about something it is not. Defendants have not disagreed that the veto was retaliatory, punitive, and coercive, and the Court must address the impacts and effects of that action on the judiciary's independence.

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II. There Is No Traditional Test for Executive Retaliatory Action, but the Governor's Veto Violates the Separation of Powers Under Any Standard.

Defendants assert that "Alaska courts" use the four-factor test articulated in *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007) (*AKPIRG*), to determine whether a violation of the separation of powers has occurred.[1] Defs.' Mem. at 15-18. But Defendants overstate the case for a broadly applied "test," much less one that is applicable here. This "test" has been articulated only once by the Alaska Supreme Court, in *AKPIRG*, and had its origins in *Bradner v. Hammond*, 553 P.2d 1, 6–7 (Alaska 1976). In both those cases the Supreme Court was faced with a situation that was very different from the one before this Court.

In *AKPIRG*, the plaintiffs challenged the legislature's creation of the Workers' Compensation Appeals Commission because it established a "court" in the executive branch, thereby removing jurisdiction from the superior court. *Id.* at 32. The plaintiffs contended that the Appeals

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[1] Citing *AKPIRG,* Defendants describe the factors evaluated in this test as "the nature of the power at issue; which branch of government is assigned this power in the constitution; whether the constitution suggests that the power is to be shared by two branches; and whether the limits of any express grant have been exceeded or present an encroachment on another branch." Defs.' Mem. at 15.

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Commission performed functions that were reserved to another branch of government—the judiciary. In announcing the "test" on which Defendants rely, the Court specified that it was being applied to determine "whether creation of the Appeals Commission violate[d] the separation of powers . . . ." *Id.* at 35.

In *Hammond*, the Supreme Court addressed an analogous circumstance. There, the Court was called upon to determine "whether the legislature may by statute require [legislative] confirmation of [certain] high-level, policy-making officials within the executive branch" who were not otherwise subject to confirmation in the Alaska Constitution. 553 P.2d at 4. As in *AKPIRG*, the issue in *Hammond* was whether one branch of government was assuming powers that intruded on the constitutionally delegated functions of another. The *Hammond* court did not announce any broadly applicable analysis to be used in all circumstances where a separation of powers issue might arise; rather, it evaluated certain factors that were relevant to the way in which the separation of powers doctrine was alleged to have been violated.

This case is nothing like those addressed by the Supreme Court in *Hammond* or *AKPIRG*, and any "test" articulated in those opinions is entirely inapplicable here. This "traditional test," as Defendants

would call it, evaluates whether the powers being exercised by one branch are those typically reserved to another. There is no test for when a governor uses an otherwise constitutional power to retaliate against, punish, and coerce the court system. By vetoing the Appellate Courts' budget, the governor has not assumed the powers or functions of the judiciary. Instead, he has attempted to bend the court to his will by exacting a price for a decision he does not like. One needs no "test" to determine that such actions violate the separation of powers.[2]

Instead, as Plaintiffs explained in their summary judgment memorandum, the logical application of the principles of judicial independence compel the Court to conclude that an executive action that punishes the court for performing its constitutional duty to "say

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[2] One aspect of Defendants' "test," whether there has been an "encroachment" on another branch, could be relevant here as that term is arguably synonymous with the executive's undermining of judicial independence. But Defendants mischaracterize even this aspect of the analysis. Defendants assert that the governor's veto does not "interfere with the judiciary's ability to perform its constitutional duties." Defs.' Mem. at 17. But the encroachment identified by the Alaska Supreme Court need not rise to nearly such a level. Actions that could lead to "potentially serious encroachments" on another branch could violate the separation of powers. *Bradner v. Hammond*, 553 P.2d 1, 8 (Alaska 1976).

what the law is" must not be allowed to stand. Plaintiffs cite to numerous cases in their summary judgment memorandum, from Alaska and other states, in which courts have identified threats to their independence based on the intrinsic nature of those threats. Of particular concern are those threats that "strike[ ] at the heart of judicial independence" by imposing "financial consequences" for a court's "legally correct but unpopular decisions." *Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110, 1112, (N.Y. 2007).

There are other ways, too, in which the threat of prospective financial consequences represents an obvious breach of the separation of powers. For example, in *Stilp v. Com.*, 588 Pa. 539 (Pa. 2006), the court considered a challenge to a statute that provided for unvouchered expense reimbursements to legislators—a provision of dubious constitutionality—that also included compensation provision for the judiciary, which appeared constitutionally sound. *Id.* at 640-43. The Pennsylvania legislature had included a non-severability clause in the statute so that if one provision of the law was struck down, the entire statute would fail. The court recognized that such a non-severability clause "may be employed as a sword against the" court, and where such a "provision appears to be aimed at securing a coercive effect upon the

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[j]udiciary, it necessarily implicates the separation of powers." *Id.* at 640. The court held "the potential 'retribution' . . . built into the statute" to be an unacceptable intrusion on the independence of the judiciary that violated the separation of powers and struck down the non-severability clause.[3] *Id.* at 643.

What *Stilp* and the cases cited in Plaintiffs' summary judgment memorandum demonstrate is that when another branch of government imposes, or threatens to impose financial harm to the judiciary in a retaliatory or coercive way, it violates the separation of powers, and

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[3] Defendants cite to *Solomon v. State*, 303 Kan. 512, 550 (2015), to support their argument that the Court should avoid ruling on the constitutionality of the governor's veto. Defs.' Mem. at 22-23. Defendants assert that *Solomon* stands as an example of a court refusing to rule on the viability of a non-severability clause in order to avoid a constitutional showdown. *Id.* But Defendants omit crucial facts about the *Solomon* case that render this argument misleading and inaccurate. Specifically, the court noted that "[n]either party ha[d] challenged the validity of" the non-severability clause, and for that reason it declined to address it. *Solomon* at 550. Furthermore, among other concurrent events, a separate legal challenge to the non-severability clause was pending at the time *Solomon* was decided. https://www.brennancenter.org/our-work/analysis-opinion/judges-challenge-law-could-defund-entire-kansas-judicial-branch. And finally, the court did "jump into a constitutional fight" because it held, as Defendants acknowledge, that the Kansas legislature's attempt to dictate how chief judges were appointed was unconstitutional.

courts must act to defend their independence when such violations occur.

III. The Court's Defense of its Independence and Integrity is not a "New" Constitutional Standard and its Inherent Authority Compels it to Issue Plaintiffs' Requested Injunction.

Defendants assert that Plaintiffs seek to establish a "new constitutional standard" in asking the Court to strike down the governor's veto. Defs.' Mem. at 19, 22. But there is nothing "new" about the concepts of judicial independence or preserving the separation of powers, which have existed since before the adoption of the United States Constitution. Pls.' Mem. at 9-10. Defendants also assert that ordering a return of the vetoed sum of $344,700 to the Appellate Courts would exceed the Court's inherent powers. But this is not a case of the court seeking funds. It is a matter of the court defending its integrity and independence by ordering the return of already-appropriated money that was taken in a deliberate retaliatory and coercive attack.

Defendants attempt to bolster their arguments by citing to the various provisions for the court's independence in the Alaska Constitution. But these protections underscore, rather than undermine, the need for relief. It would be illogical to conclude that the framers of Alaska's constitution would provide for such robust judicial

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independence while subjecting the court to forfeiture of a portion of its budget every time it made an unpopular decision.

Furthermore, the Alaska Supreme Court has held that even actions that have the potential to result in encroachments on one branch by another will violate the separation of powers. *Bradner v. Hammond*, 553 P.2d 1, 8 (Alaska 1976). The *Bradner* court struck down the legislature's attempt to subject certain gubernatorial appointments to confirmation because "[t]o hold otherwise would . . . result in potentially serious encroachments upon the executive by the legislative branch, because there would be no logical termination point to the legislature's confirmation of executive appointments." *Id.*

Defendants also downplay the financial impact to the Appellate Courts in an attempt to minimize the effects of the veto, but this argument too misses the mark. The size of the reduction is irrelevant to the principles offended when the reduction violates the constitution by intruding on the independence of the court. In a persuasive holding, the Illinois Supreme Court has described how an unconstitutional budget veto cannot be explained away by trivializing the amount of money at stake. In *Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (Ill. 2004), after the governor vetoed cost of living adjustments (COLAs) to judicial salaries,

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the action was challenged as an unconstitutional diminution of judicial compensation. As Defendants do here, the Illinois governor tried to "minimize the effects withholding COLAs [would] have on the judiciary. *Id.* at 313-14. But the court found those effects to be "beside the point." *Id.* at 314. The court defined the issue as "the very independence of the judiciary and the preservation of separation of powers." *Id.* As the court explained,

> [i]f the executive branch possessed the authority to withhold judicial salaries in violation of the constitution, there would be nothing to constrain it from withholding funding for other necessary expenses incurred by the judicial branch and mandated by law. Today the Governor may decide judges are paid too much. Tomorrow he may decide there are too many judges. Eventually he may decide the state would be better off without judges at all.

Id.

Although this case is about the diminution of the court system's budget, and not judicial salaries, the principles expressed by the *Jorgensen* court are exactly the same and apply with equal force here. Defendants cannot justify the governor's veto by attempting to

minimize the size of the fiscal impact to the court because such effects are "beside the point."[4]

What's more, what *Bradner* and *Jorgensen* make clear is that it is entirely within this Court's inherent authority to order the return of the vetoed funds to the judiciary. In order to effectively address even potential encroachments that might violate the separation of powers, the court must be in a position to remedy the present violation, or "there would be nothing to constrain" the governor or legislature from continuing the practice of fiscal retribution. *Jorgensen,* 211 Ill. 2d at 314. The independence of the judiciary is a

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[4] Although not relevant to the analysis, Defendants selectively quote from statements of the Alaska Court System's deputy administrative director on this point to falsely claim that "the veto did not significantly impact the court system's operations. Defs.' Mem. at 18. As described in Plaintiffs' summary judgment memorandum, the deputy administrative director said, as to the impact of the veto:

> We had to reduce our pro-tem judges that we use to resolve cases not only in the trial courts but also, significantly, in the appellate courts. The loss of this money has contributed to the delay in resolving both types of cases. This is a big hit for the court of appeals, for the appellate court line, and we would very much like that money back.

House Judiciary Finance Subcommittee Proceedings, February 7, 2020, (Testimony of Doug Wooliver), accessed at http://www.akleg.gov/basis/Meeting/Detail?Meeting=HJSC%202020-02-07%2012:00:00#tab2_4, at 14:45–15:20. This statement, which Defendants ignore, gives the lie to any assertion that the reduction has not been "significant."

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principle "too central to our constitutional scheme to risk [its] incremental erosion." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 861 (1986) (Brennan, J., dissenting).

IV. A Line Veto Need Not Add Funds to Effect a Reallocation.

Defendants argue that the governor's veto does not reallocate an appropriation because it does not add funds to another agency's budget. This ignores the practical effect of the veto, which is to pay for what the governor has termed "elective abortions" out of the judiciary's budget. As such, the veto "alter[s] the legislature's purpose" for those funds, a result that the Alaska Supreme Court has found to exceed the governor's veto authority. *Wielechowski v. State*, 403 P.3d 1141, 1153 (Alaska 2017).

The Alaska Supreme Court has not required that funds be added to another agency for a veto to violate Article II § 15 of the Alaska Constitution's limits on gubernatorial veto power. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001), the Court found that the governor's striking of limiting language in an appropriation amounted to "a de facto re-appropriation," *id.* at 374, because it "diverte[ed] for other purposes" appropriations enacted by the legislature. *Id.* at 371. There was no attempt to add funds; indeed, as

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the Court noted, the Alaska Constitution makes clear that the governor is without power to do so. *Id.* at 372. Simply put, Defendants read the term "reallocate" too narrowly, in a way that would shield the veto from scrutiny under Article II § 15, and the Court should reject their attempt to do so.

Conclusion

For the above reasons, and for all of the reasons stated in Plaintiffs' Memorandum in Support of Motion for Summary Judgment, the Court should grant Plaintiffs' Motion, deny Defendants' Motion, declare Governor Dunleavy's veto to be an unconstitutional violation of the separation of powers, and order Defendants to immediately return the $344,700 to the Appellate Courts' fiscal year 2020 budget.

Dated April 3, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, the foregoing was filed by fax to (907) 264-0495 and served on the following via electronic mail:

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