IN THE 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 DUNLEAVY, in his official capacity as Governor of Alaska, and the STATE OF ALASKA, *Defendants*.	Case No. 3AN-19-08349 CI

ORDER DENYING MOTION TO DISMISS

This matter is before the Court on Defendants' *Motion to Dismiss*. Plaintiffs, the American Civil Liberties Union of Alaska (ACLU), Ms. Jack, and Mr. Kauffman, allege that Governor Dunleavy violated the separation of powers doctrine and unconstitutionally reallocated state funds when he vetoed certain funds from the appellate court budget due specifically to disagreement with the Alaska Supreme Court's decisions related to abortion. Defendants move to dismiss these claims, contending that: (1) Plaintiffs lack standing to bring the claims; (2) the political question doctrine prevents the Court from hearing the claims; and, in the alternative, (3) the Court should deny Plaintiffs' claim for declaratory relief. The motion has been fully briefed, and the Court heard oral argument on November 5, 2019. Because applicable Alaska precedent establishes that Plaintiffs do have citizen-taxpayer standing, and that the Court is the appropriate entity to determine whether the veto in question complies with the Alaska Constitution, the Court denies Defendants' motion.

I. FACTUAL HISTORY

At the outset, the Court notes that the merits of this case are not yet before it for decision. Rather, at this time, the Court must only determine whether Plaintiffs meet the

minimum requirements to bring their claims and whether the Court may hear those claims. In assessing these issues, the Court must accept as true the factual assertions stated in Plaintiffs' complaint.[1] Nevertheless, many of the facts pertinent to Defendants' motion are undisputed. On June 28, 2019, the Governor vetoed $334,700 from the state budget for the appellate courts.[2] In making this veto, the Governor stated:

> The Legislative and Executive Branch [sic] are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction.[3]

Days following the veto, on July 3, 2019, the Alaska Supreme Court released a "Statement Regarding Recent Budget Cuts."[4] In it, the Supreme Court stated, "We assure all Alaskans that the Alaska Court System will continue to render independent court decisions based on the rule of law, without regard to the politics of the day."[5] On July 8, 2019, the legislature convened a special session but ultimately did not override the veto.[6]

In response to the Governor's veto, Plaintiffs seek a declaration that the veto is unconstitutional because it violates the separation of powers doctrine and reallocates state funds.[7] Along with this declaratory relief, Plaintiffs seek an order directing Defendants "to refrain from any further intrusion or interference with the judiciary [sic] branch" and returning the vetoed funds to the appellate court budget.[8]

II. DISCUSSION

Defendants move to dismiss all of Plaintiffs' claims based upon what they contend is Plaintiffs' "failure to state a claim upon which relief can be granted."[9] Such a motion

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[1] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1092 (Alaska 2014).
[2] Plaintiffs' *Complaint*, p. 7 (July 17, 2019).
[3] *Id.*
[4] *Alaska Supreme Court Statement Regarding Recent Budget Cuts*, https://public.courts.alaska.gov/web/media/docs/budget-cuts.pdf (July 3, 2019). At oral argument, the parties agreed that the Court may consider the Supreme Court's statement, without converting Defendants' motion into one for summary judgment.
[5] *Id.*
[6] *Compl.*, p. 8.
[7] *Id.*, p. 11.
[8] *Id.*
[9] AK R. Civ. P. 12(b)(6).

requires the Court to "test[] the legal sufficiency" of Plaintiffs' claims,[10] while assuming as true the facts stated in support of those claims.[11] Although Defendants contend that Plaintiffs lack standing to bring this suit, that the suit invites the Court to decide a political question, and that the Court should regardless decline Plaintiffs' request for declaratory relief, the Court concludes, to the contrary, that Alaska case law requires that this case proceed to its merits.

A. Plaintiffs Have Citizen-Taxpayer Standing.

Addressing Defendants' first argument, the Court concludes that Plaintiffs have citizen-taxpayer standing to bring this case. Standing is a threshold determination of whether a plaintiff is "a proper party to seek adjudication of a particular issue."[12] A plaintiff must have standing to seek declaratory or other relief.[13] Unlike in other jurisdictions, standing is "interpreted broadly in Alaska" with an emphasis on "increased accessibility to judicial forums."[14] One particularly broad form of standing is citizen-taxpayer standing.[15] Where a plaintiff can establish this form of standing, the case may proceed to the merits and the court need not consider any other form of standing.[16]

In order to establish citizen-taxpayer standing, a plaintiff must satisfy two prongs: "the question [at issue] must be one of public significance" and "the plaintiff must be appropriate in several respects."[17] Regarding the first prong, a "plaintiff raising constitutional issues is likely to meet the [public significance] requirement."[18] As to the second prong, a plaintiff is appropriate unless "there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit[;] there is no true

[10] *Dworkin v. First Nat. Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968).
[11] *Kanuk*, 335 P.3d at 1092.
[12] *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010).
[13] *Id.* at 1254; *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (Alaska 2009).
[14] *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (internal quotation omitted).
[15] *See id.* at 327, 329 (also noting that "taxpayer-citizen standing cannot be claimed in all cases as a matter of right").
[16] *Sonneman v. State*, 969 P.2d 632, 636 (Alaska 1998).
[17] *Trustees for Alaska*, 736 P.3d at 329.
[18] *Sonneman*, 969 P.2d at 636; *Trustees for Alaska*, 736 P.3d at 329 ("On[e] measure of significance may be that specific constitutional limitations are at issue . . . .").

adversity of interest[; or] the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted."[19] There is no requirement that a plaintiff suffer any injury to establish citizen-taxpayer standing.[20]

Here, Plaintiffs satisfy the first prong because the issue of whether or not the veto in question complies with the Alaska Constitution is an issue of public significance. Plaintiffs allege that the veto violated multiple provisions of the Alaska Constitution, and this, in itself, is one marker of an issue of public significance.[21] Although Defendants contend that the veto must have had some greater pragmatic and/or financial impact in order to be considered "significant," that argument is simply not supported by the weight of authority.

The Alaska Supreme Court has found that issues with constitutional implications are significant, even when they have little to no direct financial impact on the state. In *Sonneman v. State*, the Supreme Court found that the order of candidates on a ballot was an issue of public significance, because it implicated the constitutional right to vote and the integrity and fairness of elections, despite the fact that any monetary impact amounted to $64,024 at most.[22] Similarly, in *Baxley v. State*, the Supreme Court found that a law amending certain oil and gas leases was an issue of public significance, because it allegedly violated the Constitution and the public trust, and undermined the public's confidence in the process, even though any reductions to State income were speculative.[23] Like the plaintiffs in these two cases, Plaintiffs here allege that the Governor's veto not only violated the Constitution but also threatens the public's perception of the courts.[24] Thus, Plaintiffs raise an issue of public significance, without any reference to the financial impact of the veto.

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[19] *Trustees for Alaska*, 736 P.2d at 329–30.

[20] *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998) ("The citizen-taxpayer standing requirements ensure that the plaintiff will serve as a true and strong adversary, even if the conduct in question did not directly affect the plaintiff.").

[21] *Sonneman*, 969 P.2d at 636; *Trustees for Alaska*, 736 P.3d at 329.

[22] *Sonneman*, 969 P.2d at 635.

[23] *Baxley*, 958 P.2d at 428–29.

[24] *Compl.*, p. 9.

The Alaska Supreme Court has only used the magnitude of an issue's financial impact as a measure of the issue's significance in the context of state land transactions.[25] For example, in *Longwith v. Department of Natural Resources et al.*, the Supreme Court affirmed citizen-taxpayer standing to challenge a state land transaction because the "parcel at issue [was] roughly 585 acres, which is 'significant' in comparison to 20 acres."[26] If courts did not consider the magnitude of state land transactions for the purposes of standing, then all taxpayers would have standing to challenge all state land transactions, no matter how small.[27] No such concerns are present in the instant case, so Plaintiffs are not obligated to show that the veto will have a financial impact on the State.

Nevertheless, to the extent an issue must have a financial impact in order to be significant, that impact is present here: as Defendants acknowledge, the appellate courts' budget is about five percent smaller as a result of the Governor's veto.[28] Accepting factual inferences in favor of Plaintiffs for purposes of this motion, this reduction is likely to have some negative impact on the appellate courts. Thus, given the constitutional dimension of the Plaintiffs' claims, the alleged non-financial impacts, and the actual financial impacts of the veto, the Court holds that Plaintiffs' suit raises an issue of public significance for the purposes of citizen-taxpayer standing.

Defendants' citation of the Alaska Supreme Court's statement in response to the Governor's veto in no way diminishes the significance of the issue raised by Plaintiffs. That is, the Alaska Supreme Court's reassurance that Alaska's judiciary will maintain its independence, and will continue to decide cases based upon the rule of law rather than upon the politics of the day, does not—as Defendants argue—somehow render insignificant the issue of whether the veto violated the Alaska Constitution. Such reassurance also does not diminish the significance of the impacts alleged by Plaintiffs.

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[25] *Hoblit v. Comm'r of Nat. Res.*, 678 P.2d 1337, 1340–41 (Alaska 1984) (*citing State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977)); *Gilman v. Martin*, 662 P.2d 120, 123 (Alaska 1983)); *but see Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 986 (Alaska 2008) (considering the financial impact of a tobacco tax).

[26] *Longwith v. State, Dep't of Nat. Res.*, 848 P.2d 257, 262 (Alaska 1992).

[27] *Hoblit*, 678 P.3d at 1341.

[28] Defendants' *Motion and Memorandum in Support of Motion to Dismiss*, p. 13 (July 26, 2019).

To the contrary, while this Court's denial of Defendants' motion to dismiss does not rely upon the July 3rd statement, the presence of a statement by the Alaska Supreme Court regarding or in response to an issue would tend to support, rather than detract from, the significance of the issue. Because Defendants' suggestion otherwise is unpersuasive, and because Plaintiffs have raised an issue with constitutional, financial, and non-financial implications, the Court holds that Plaintiffs have raised an issue of public significance such that they have met the first requirement for establishing citizen-taxpayer standing.

Regarding the second prong of citizen-taxpayer standing, Plaintiffs have also established that they are appropriate plaintiffs to bring these claims. Defendants do not contest Plaintiffs' adversity or capacity.[29] Instead, Defendants argue that Plaintiffs are inappropriate for the purposes of asserting citizen-taxpayer standing because there are more appropriate plaintiffs, such as litigants, attorneys, or judges who are concerned about the repercussions of the Governor's veto.[30] Defendants cite *Keller v. French* for the proposition that a plaintiff is inappropriate when there are any alternate plaintiffs who are more directly affected and capable of suing. This reading of *Keller* is overbroad.

In *Keller*, the Alaska Supreme Court focused on the fact that alternate plaintiffs had already sued[31] and that the plaintiffs before the Supreme Court were inappropriate because they were "attempting to assert the individual rights [of others]."[32] Thus, the *Keller* Court actually held that whether or not alternate plaintiffs are capable of suing, plaintiffs are inappropriate when they attempt to assert the constitutional rights of others.[33] In this way, *Keller* is consistent with prior cases that consider just whose rights

[29] *Trustees for Alaska*, 736 P.2d at 329–30.
[30] Defendants' *Motion*, p. 15.
[31] *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009).
[32] *Id.* at 304.
[33] *Id.* at 303 ("That individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an *inappropriate* plaintiff." (emphasis added)); *Id.* at 305 ("[A] litigant generally lacks standing to assert the personal constitutional rights of another.") (Winfree, J., concurring); *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010) (interpreting *Keller* and denying standing because the plaintiff sought "to establish a personal constitutional right on behalf of [others] through citizen-taxpayer standing").

the plaintiffs are asserting.[34] *Keller* also does not disturb those rulings that determined the appropriateness of the plaintiffs by considering whether alternate appropriate plaintiffs had sued or were likely to sue.[35]

In this case, Plaintiffs are not asserting anyone else's individual constitutional rights. The interests they assert—in maintaining the separation of powers between the branches of government, and in maintaining a constitutional appropriations process—are generally held. These rights contrast with the constitutional right to fair and just treatment at issue in *Keller*, which is an individual right.[36] Because Plaintiffs are not seeking to assert the individual constitutional rights of others, *Keller* is distinguishable from the instant case and does not preclude citizen-taxpayer standing in this case.

Additionally, there is no indication that alternate plaintiffs have sued or appear likely to sue regarding the issue raised by Plaintiffs. Indeed, Defendants' attempt to identify alternate plaintiffs serves mainly to reinforce the appropriateness of the present plaintiffs. Defendants point to litigants, attorneys, and judges as potential alternate plaintiffs. The Court notes that all of the present plaintiffs are, by definition, litigants and at least one of them, Mr. Kauffman, is an attorney. Thus, under Defendants' own theory, Plaintiffs are appropriate plaintiffs because they are litigants and attorneys concerned about the repercussions of the Governor's veto. Furthermore, although not specifically argued by Plaintiffs, it is logical that the ACLU and Mr. Kauffman in particular could be directly affected by delays in the appeals process—however slight—as a result of the veto and the associated reduction in appellate court funding. The Court also notes that to the extent Defendants suggest that the Court System or a judge would be a more

[34] *Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 526 (Alaska 1993) (denying standing because the "remaining employees are certainly in [a] better position" to assert the rights at issue); *Fannon*, 192 P.3d at 986 ("[The defendant] appears to argue that only the *most* directly affected parties may bring a claim, otherwise the court *must* deny standing. That is not the law.").

[35] *Keller*, 205 P.3d at 302 (considering whether "there was another potential plaintiff more directly affected by the challenged conduct who had sued or was likely to sue"); *Fannon*, 192 P.3d at 986 (considering whether alternate plaintiffs are "likely to bring suit" and noting that "the mere possibility that [a more appropriate plaintiff] may sue does not mean that appellants are inappropriate plaintiffs") (*quoting Trustees for Alaska*, 736 P.2d at 330)).

[36] *Keller*, 205 P.3d at 304.

appropriate plaintiff in this case, such a lawsuit by a member of the judiciary against Defendants could further impact the public perception of the courts, which is one of the harms alleged by Plaintiffs. Regardless, because Defendants have not identified any alternate plaintiffs who have brought suit or who are likely to bring suit, Plaintiffs are appropriate for the purposes of asserting citizen-taxpayer standing. Accordingly, under Alaska law and in light of its emphasis on accessibility,[37] Plaintiffs have citizen-taxpayer standing.

B. Plaintiffs' Claims are Justiciable.

Having addressed the first threshold issue, standing, the Court turns to the next threshold issue, whether Plaintiffs' claims are justiciable under the political question doctrine. Defendants argue that the Court cannot hear Plaintiffs' claims because these claims raise inherently political questions. In accord with a robust line of Alaska precedent, however, the Court finds that it is the appropriate arbiter of whether or not governmental actions, including executive vetoes, comply with the Alaska Constitution.

Under the political question doctrine, courts deem claims non-justiciable if deciding them "would require [the court] to answer questions that are better directed to the legislative or executive branches of government."[38] Constitutional claims, however, are generally justiciable, despite the political question doctrine.[39] While this principle in itself may provide sufficient justification for the Court to consider Plaintiffs' constitutional claims, Alaska case law is actually much more explicit in its consideration of litigation over executive vetoes: in at least five cases, the Alaska Supreme Court has considered the constitutionality of executive vetoes.[40] Accordingly, Plaintiffs may

[37] *Trustees for Alaska*, 736 P.2d at 327.

[38] *Kanuk ex rel. Kanuk*, 335 P.3d at 1096 (*citing Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[39] *Id.* at 1099 ("The *Baker* factors for identifying non-justiciable issues do not apply to judicial interpretations of the constitution."); *Abood v. Gorsuch*, 703 P.2d 1158, 1161 (Alaska 1985) (making it "clear that the nonjusticiability doctrine would not apply to cases involving our constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution" (cleaned up)).

[40] *Wielechowski v. State*, 403 P.3d 1141, 1143 (Alaska 2017); *Simpson v. Murkowski*, 129 P.3d 435, 437 (Alaska 2006); *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 892 (Alaska 2004); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 369 (Alaska 2001); *Thomas v. Rosen*, 569 P.2d 793, 794 (Alaska 1977)

challenge the constitutionality of the Governor's veto in this case, even though the circumstances giving rise to the case are attended by political disagreement.

Both parties observe that the political question doctrine was not raised in any of the Alaska Supreme Court's prior veto-related decisions.[41] Defendants contend that the issue simply was not raised previously, but could be raised here. The better explanation, however, is that the Alaska Supreme Court did not find that the political question doctrine barred its consideration of constitutional challenges to executive vetoes. In fact, these cases indicate that courts must consider these challenges, despite their "inherently political" nature, in order for courts to fulfill their duty under the Constitution.[42]

Most recently and most relevantly, the Alaska Supreme Court considered a constitutional challenge to an executive veto in *Wielechowski v. State*. The Supreme Court considered the plaintiff's claims for declaratory and injunctive relief, even though the legislature had failed to override the veto at issue.[43] Although it ultimately upheld the veto, the Supreme Court began its opinion by emphasizing:

> This appeal provides another opportunity to remind Alaskans that, of the three branches of our state government, we are entrusted with the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution. This sometimes requires us to answer constitutional questions surrounded by political disagreement.[44]

This statement strongly suggests that courts may—or even must—consider constitutional challenges to vetoes, despite the political implications.

Offering no true distinction between the justiciability of issues in this case and those in the *Wielechowski* case, Defendants encourage the Court to consider the

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[41] *Id.* Nor, incidentally, was standing. *See, e.g., Thomas*, 569 P.2d at 794 (where the plaintiff challenging the constitutionality of the governor's veto was merely a "taxpayer and registered voter [who] sought declaratory judgment and injunctive relief").

[42] *Alaska Legislative Council v. Knowles*, 21 P.3d at 376 (describing how a veto statement "forces the governor to reveal his or her reasoning, so that both the Legislature and the people might know whether or not he [or she] was motivated by conscientious convictions . . ." (internal quotation omitted)); *Thomas*, 569 P.2d at 795 ("The case at bar is one of great constitutional moment. It pits the political branches of our state government in a fundamental separation of powers confrontation.").

[43] *Wielechowski*, 403 P.3d at 1143.

[44] *Id.* at 1142–43 (quotation and citation omitted).

"minimum of coherence" standard for reviewing governors' objections to vetoes, as set out in *Alaska Legislative Council v. Knowles*.[45] The existence of such a standard, however, only reinforces the general premise that courts may review executive vetoes for constitutional compliance. The "minimum of coherence" standard does not suggest that courts should dismiss constitutional challenges before reaching the merits, whether due to the political question doctrine or any other reason. Rather, courts should review vetoes, under the applicable standard, even though this review is necessarily "surrounded by political disagreement."[46] Given *Knowles*, *Wielechowski*, and additional precedent establishing the courts as the appropriate forum for addressing the constitutionality of governmental action, including executive vetoes, this Court will proceed to undertake the necessary review, without dismissing this case on political question grounds.

C. <u>The Court Need Not Rule on Declaratory Judgment at This Time.</u>

Finally, Defendants argue that even if the Court finds this case justiciable, it should nevertheless exercise its discretion to deny Plaintiffs' request for declaratory relief. Although the Court does have discretion to decline declaratory relief,[47] it is not persuaded to do so here. The primary justifications advanced by Defendants—namely, that the Alaska Supreme Court's July 3rd statement somehow indicates that there is no issue of public significance, and that Plaintiffs' claims raise political questions—have been addressed above. To the extent Defendants advance different justifications, the Court declines the invitation to dismiss Plaintiffs' request for declaratory relief at this time, for multiple reasons. First, the trial and appellate courts have considered declaratory relief under similar circumstances in the past.[48] Second, and more importantly, Plaintiffs seek more than just declaratory relief; they seek injunctive relief as well. Even if the

[45] 21 P.3d at 376. Defendants also cite *Ninetieth Minnesota State Senate v. Dayton*, in which the Supreme Court of Minnesota declined to determine the constitutionality of an executive veto. 903 N.W.2d 609, 613 (Minn. 2017). Besides being out-of-state, this case is distinguishable because the court found the legislature and the governor could address the conflict in a future political process, which is not an option in the instant case. *Id.* at 624.

[46] *Wielechowski*, 403 P.3d at 1143.

[47] *Lowell v. Hayes*, 117 P.3d 745, 755–56 (Alaska 2005).

[48] *E.g.*, *Wielechowski*, 403 P.3d at 1152.

Court were to deny declaratory relief at this time, that would not dispose of all of Plaintiffs' claims. Having decided that this matter should move forward to address the substance of Plaintiffs' claims, the Court anticipates further litigation about the respective forms of relief sought, and declines to simply dismiss claims on discretionary grounds, given the reasoning above. Accordingly, without ruling on Plaintiffs' request for declaratory relief, the Court declines to dismiss Plaintiffs' claims.

For these reasons, Defendants' *Motion to Dismiss* is DENIED. Under applicable Alaska case law, Plaintiffs have citizen-taxpayer standing and have alleged justiciable claims, and the case shall proceed forward. Given the Court's denial of the *Motion to Dismiss*, the case appears procedurally ready for Defendants to file an answer to Plaintiffs' complaint. The Court does not schedule a further hearing at this time, but may do so at the invitation of either or both of the parties.

DATED at Anchorage, Alaska this 12th day of December, 2019.

JENNIFER S. HENDERSON
Superior Court Judge

I certify that on 12/12/19
a copy of the above was mailed to: J. Decker; S. Koteff; J. Leeah; L. Harrison

Secretary/Deputy Clerk