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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 **Memorandum in Support of Motion for Summary Judgment**

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Plaintiffs American Civil Liberties Union of Alaska, Bonnie L. Jack, and John D. Kauffman have moved the Court for summary judgment on their claim that Governor Dunleavy violated the Alaska Constitution when he defunded the court system with the explicit intent to punish and retaliate against the Alaska Supreme Court for a decision it issued that he did not like. The governor's reprisal is a

manifest attack on the court system's independence and integrity that stands as an unparalleled affront to the doctrine of separation of powers. Nowhere in reported American jurisprudence has another branch of government so significantly interfered with the functions of the judiciary. This Court has the inherent authority and duty to defend its integrity and independence by declaring the governor's action to be illegal and ordering the funding restored as a remedy for this unprecedented constitutional breach.

Plaintiffs also seek summary judgment on their claim that the governor's veto violates Article IV, section 15 of the Alaska Constitution by impermissibly diverting legislatively appropriated funds from the purpose for which they were intended. The diminution of the court system's budget to pay for a cost the executive must bear to comply with a court decision—that is, to provide Medicaid coverage of medically necessary abortions for low-income Alaskans—diverts funds from one purpose to another. Because the governor's veto power allows him to strike or reduce—but not reallocate—appropriations, the veto exceeds his constitutional authority.

For these reasons, and for all of the reasons that follow, this Court should grant Plaintiffs' Motion for Summary Judgment and

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order Governor Dunleavy and the State of Alaska to reinstate the diminished funds to the appellate courts at the earliest practicable time.

I. Facts

On June 28, 2019, Governor Dunleavy issued a line-item veto defunding the appellate courts of the Alaska Court System by $334,700. Office of Management and Budget, Veto Change Record Details, June 28, 2019, at 122, accessed at https://omb.alaska.gov/fiscal-year-2020-enacted-budget/. The reduction of the appellate courts' budget was a direct retaliatory response to the Alaska Supreme Court's decision in *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019). The plaintiff in *Planned Parenthood* had challenged, on equal protection grounds, the constitutionality of a state statute and regulation that narrowly defined which abortions could be considered "medically necessary" in order to be eligible for Medicaid reimbursement. On February 15, 2019, the Alaska Supreme Court held that the statute and regulation violated the equal protection clause of the Alaska Constitution because they imposed Medicaid eligibility criteria on women seeking abortions that were more onerous than eligibility criteria applied to women who sought to carry a pregnancy to

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term. The State argued that it had a compelling interest in limiting Medicaid expenditures to ensure "the financial viability of the Medicaid program as a whole." *Id.* at 1003. But the Court found this argument to be unsupported, noting that the State had been unable to conclude that the statute and regulation would result in any cost savings, particularly in light of the fact that the cost of an abortion is significantly less than the costs of carrying a pregnancy to term. *Id.*

In his "statement of his objections" accompanying his June 28 veto, Governor Dunleavy left no doubt that he was reducing the appellate courts' funding as an executive act of reprisal for the Supreme Court's exercise of its constitutional mandate in *Planned Parenthood*. The governor explained his veto: "The Legislative and Executive Branch 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." Pls.' Compl. ¶ 25; Defs.' Ans. ¶ 25; *see also* Office of Management and Budget, Veto Change Record Details, June 28, 2019, at 122, accessed at https://omb.alaska.gov/fiscal-year-2020-enacted-budget/.

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The veto was not overridden, and thus became law, permanently reducing the appellate courts' fiscal year 2020 budget by $334,700. Pls.' Compl. ¶ 26; Defs.' Ans. ¶ 26. This had a significant impact on the courts' functions. According to testimony of the Alaska Court System's deputy administrative director before the House Judiciary Finance Subcommittee:

> 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.

Governor Dunleavy's June 28 veto was not the only retaliatory step he has taken to punish the appellate courts for the *Planned Parenthood* decision. On December 11, 2019, Governor Dunleavy again sought to reduce the appellate courts' funding by the same $344,700 for fiscal year 2021 when he forward his proposed budget to the legislature. Office of Management and Budget, Alaska Court System FY2021 Proposed Budget, Change Record Detail at 1, accessed at

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https://omb.alaska.gov/html/budget-report/department-table.html?dept=ACS&fy=21&type=Proposed. The governor explained the reduction using the same language that he used to support his June 28 veto, making it clear that he intended that the appellate courts remain liable for the annual costs he believed the State incurs for Medicaid funded abortions.

Alaska Supreme Court Chief Justice Joel Bolger objected to the governor's proposed reduction as an unprecedented incursion into the judiciary's constitutionally delegated authority to establish its own budget. Letter from Chief Justice Joel Bolger to Governor Mike Dunleavy, December 13, 2019, accessed at http://www.akleg.gov/basis/Meeting/Detail?Meeting=HJSC%202020-02-07%2012:00:00#tab4_4. Noting that the doctrine of the separation of powers has been recognized as applicable to the court system's budget process since 1967, the chief justice reminded the governor that the Alaska Constitution "grants the supreme court the authority to administer the judicial branch of Alaska's government. The constitutional directive to administer the judicial branch includes the authority to formulate the judiciary's budget, as the budget has a direct

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and immediate impact on the Alaska Court System's ability to perform its constitutionally mandated functions." *Id.* at 1.

The chief justice cited and appended to his letter a 1975 memorandum prepared by the court system's then-staff counsel addressing earlier executive attempts to influence the development of the court system's budget. The memorandum states, in relevant part, that

> [t]he governor's constitutional authority with regard to the budget process is necessarily limited by the constitutional grant of self-administration to the judiciary. It takes no particular effort to conclude that "administration" in this constitutional context includes fiscal management and that fiscal management necessarily includes the formulation and preparation of proposed expenditures and their presentation to the legislature in the form of a budget document. If the governor were to make his own recommendations to the legislature concerning the judiciary's budget, he would in effect be usurping the authority granted in the constitution to the Chief Justice and the Supreme Court to supervise, through the Administrative Director, the administrative operations of the judicial system.

Id., Attachment: Memorandum from Susan Burke to Arthur H. Snowden, II, October 13, 1975, at 6–7.

In response to the chief justice's objections, Governor Dunleavy agreed to restore the $344,700 to the judiciary's fiscal year 2021 budget for consideration by the legislature. Letter from Governor Mike

Dunleavy to Chief Justice Joel Bolger, December 30, 2019, accessed at http://www.akleg.gov/basis/Meeting/Detail?Meeting=HJSC%202020-02-07%2012:00:00#tab4_4. The governor noted, however, that he would revisit cuts to the judiciary's budget using the line-item veto as he had done with the fiscal year 2020 budget. *Id.*

II. Argument

The governor's reduction of the appellate courts' budget violates the Constitution in two independent and significant ways. First, as is made obvious by the specified purpose of the veto, the reduction violates the doctrine of separation of powers by impermissibly intruding on the independence of the judiciary. It, in essence, gives the executive the power to punish the court for an unpopular decision. Imposing such consequences on a court for issuing decisions that, under Alaska's tripartite form of government, are to be impartial and free from political influence robs the judiciary of its integrity and compromises its autonomy to a degree so offensive to the separation of powers doctrine that it violates core constitutional principles.

Second, by assessing against the appellate courts what he believes to be the specific cost of Medicaid-funded abortions, Governor Dunleavy exceeded explicit constitutional limitations on gubernatorial

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veto power. Article II, section 15 of the Alaska Constitution authorizes the governor to strike or reduce items, but it does not allow the diversion for other purposes of specific appropriations enacted by the legislature. Such diversion is an impermissible reallocation of resources, a function reserved solely to the legislative branch of government.

A. Governor Dunleavy's Court System Veto Violates the Doctrine of Separation of Powers

1. Judicial Independence is Necessary to Preserve the Separation Of Powers

From the beginning of our American democracy, the independence of the judiciary has been revered as an essential component of our constitutional form of government. In 1788, Alexander Hamilton famously wrote in support of the ratification of the United States Constitution, agreeing with the 18th century political philosopher Montesquieu, that there can be "no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Alexander Hamilton). Hamilton foresaw that "[t]he complete independence of the courts of justice [would be] peculiarly essential in a limited constitution," where courts are often called on to rule on the constitutionality of the acts of the other two

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branches. *Id.* Hamilton recognized judicial independence as especially important in guarding against the oppression of the rights of the minority by a tyrannous majority. *Id.*

Hamilton was also wary of the formidable "power of the purse" that the other two branches of government held over the judiciary. In support of the constitutional provision safeguarding the salaries of judicial officers from diminution, Hamilton understood that judicial independence from the executive and legislative could never be maintained "in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter." The Federalist No. 79 (Alexander Hamilton). These principles became enshrined in Article III, section 1 of the United States Constitution, and have been acknowledged as foundations of democratic government. As one court has said,

> The constitutional guarantees of tenure during good behavior and of protection against reduction in compensation are the bulwarks of independence of the federal judiciary against reprisal, fear of reprisal or undue influence from any quarter and particularly from the other branches of the federal government. Judicial independence is crucial to the preservation of our system of government as has been demonstrated throughout the history of the Republic.

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1039 (7th Cir. 1984).

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These principles of judicial independence were similarly considered to be indispensible to the framers of the Alaska Constitution. Indeed, "[t]here is no doubt that judicial independence was a paramount concern of the delegates" at Alaska's Constitutional Convention. *Buckalew v. Holloway*, 604 P.2d 240, 245 (Alaska 1979). The delegates sought to ensure that Alaska had an "impartial judiciary" free from "political pressures." *Id. See also Hudson v. Johnstone*, 660 P.2d 1180, 1185 (Alaska 1983) ("That the drafters of Alaska's constitution sought to insulate the judiciary from political pressure that might interfere with its impartiality is clear . . . ."). There was particular concern that "executive patronage" could "affect the outcome of particular cases in contravention of the dictates of the law . . . ." *Buckalew*, 604 P.2d at 246. The delegates therefore adopted strong measures to insulate the judiciary from the vagaries of the political process, in particular eschewing a judicial selection method that would allow for the election of judges or depend on a "simple gubernatorial appointment system . . . ." *Id.* at 245–46.

The authority and independence of the Alaska's judicial branch of government is manifested in the Alaska Constitution in certain explicit

ways. Article IV, section 1 vests the exclusive power of the judiciary with the courts:

> The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

As a complement to this power, the Alaska Supreme Court is granted the sole authority under the Constitution to "make and promulgate rules governing the administration of all courts," subject only to change by a two-thirds vote of the legislature. Article IV, section 15. And the Chief Justice of the Alaska Supreme Court acts as "the administrative head of all courts," with the authority to appoint an administrative director for the Court System. Article IV, section 16.

In addition to these enumerated powers, the Supreme Court also possesses "inherent powers" that are not explicit in the constitutional text. Inherent powers are those which courts possess to "maintain their dignity, transact their business, [and] accomplish the purposes of their existence." *State v. Cannon*, 221 N.W. 603, 603 (Wis. 1928). As explained below, these powers are crucial to maintaining the court's independence.

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Equally important to the courts' independence, and also inherent in the Alaska Constitution, is the doctrine of the separation of powers, which "is derived from the distribution of power among the three branches of government." *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 34–35 (Alaska 2007). *See also Pub. Def. Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975) (Although the separation of powers doctrine is not explicit in the its text, "what is implied is as much a part of the constitution as what is expressed."). The Alaska Supreme Court has described "the underlying rationale" of the doctrine as "the avoidance of tyrannical aggrandizement of power by a single branch of government." *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976). Most importantly, the separation of powers "limits the authority of each branch to interfere in the powers that have been delegated to the other branches." *Alaska Pub. Interest Research Grp.*, 167 P.3d at 35. At its core, the doctrine exists to "preclude the exercise of arbitrary power and to safeguard the independence of each branch of government." *Id.*

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2. *Courts Must Exercise their Inherent Powers to Protect Judicial Independence and Maintain the Separation of Powers*

The separation of powers and the independence of the courts is not a self-executing proposition. The judiciary's independence may be threatened by incursions into its functions by the other branches of government. Courts are thus often called upon to defend their independence and integrity through the exercise of their inherent powers, and must act in such situations to preserve their constitutional autonomy if they are to remain a truly co-equal branch of government.

Courts in most states recognize that their inherent powers derive from the judiciary's existence "as a separate, independent, and co-equal branch of government . . . ." *Folsom v. Wynn*, 631 So. 2d 890, 899 (Ala. 1993) (citing cases). The ability to protect its independence and integrity is crucial "to the court's autonomy and to its functional existence . . . ." *Matter of Alamance Cty. Court Facilities*, 329 N.C. 84, 94 (1991). A court's inherent powers therefore include all of the powers that are reasonably necessary "to protect its dignity, independence, and integrity, and to make its lawful actions effective." *Pena v. Dist. Court of Second Judicial Dist. In & For City & Cty. of Denver*, 681 P.2d 953, 956 (Colo. 1984); *Matter of Spike*, 99 Misc. 2d 178, 181, 415 N.Y.S.2d

762, 765 (N.Y. Co. Ct. 1979); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 399 (Tex. 1979). In exercising its inherent powers, a court "may protect its own jurisdiction, its own process, its own proceedings, its own orders, and its own judgments; and may, in cases pending before it, prohibit or restrain the performance of any act which might interfere with the proper exercise of its rightful jurisdiction in such cases." *Solomon v. State*, 303 Kan. 512, 525–26 (2015).

Consistent with these principles, Alaska courts have exercised their inherent powers on several occasions to rebuff incursions into their autonomy that they have found to violate the separation of powers. For example, in *State v. Williams*, 356 P.3d 804 (Alaska Ct. App. 2015), the Alaska Court of Appeals rejected attempts to dilute its contempt power. The State in *Williams* argued that executive branch prosecutors had the authority to pursue contempt proceedings against persons who violated court orders, including "the authority to require the court to adjudicate the contempt charge, regardless of how the court views the matter." *Id.* at 805. The court found this position to be an untenable violation of the separation of powers. The Alaska Supreme Court had previously determined that contempt power is "an inherent power of the judiciary." *Cont'l Ins. Companies v. Bayless & Roberts,*

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Inc., 548 P.2d 398, 408 (Alaska 1976). Therefore, the Court of Appeals held that allowing state prosecutors to decide whether a person should be held in contempt would usurp that inherent power, "undermine judicial independence," and "seriously shift the balance of power between the executive and judicial branches of government." *Williams*, 356 P.3d at 811.

The Alaska Supreme Court confronted a similar threat when its authority to regulate the practice of law was compromised by a statute addressing procedures for attorney discipline. The statute compelled the court to adopt without deviation recommendations for discipline made by the Alaska Bar Association's Board of Governors in specific cases. *In re MacKay*, 416 P.2d 823 (Alaska 1964). The Court found the statute "unconstitutional for being an invasion of the inherent power of the court to discipline and disbar members of the Alaska Bar Association." *Id.* at 829.

And in *Citizens Coal. for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162 (Alaska 1991), the Alaska Supreme Court's authority to promulgate court rules was challenged by an organization seeking to place an initiative on the ballot that would limit the amount of attorney's fees that could be awarded in personal injury cases. The

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Court upheld the lieutenant governor's rejection of the initiative on the basis that Article XI, section 7 of the Alaska Constitution "precludes use of the initiative to prescribe such a rule of court." *Id.* at 172. In so holding, the Court emphasized its inherent rulemaking authority under Article IV, section 1, referencing its power to regulate the admission to the practice of law and to control the professional conduct of attorneys. *Id.* at 165. *See In re Stephenson,* 511 P.2d 136 (Alaska 1973); *Miller v. Paul,* 615 P.2d 615 (Alaska 1980).

Before now, Alaska courts have not been called upon to exercise their inherent powers to fend off executive or legislative fiscal attacks that compromise their abilities to carry out their mandated duties. But courts in other jurisdictions have had occasion to recognize the significance of such threats and to compel payment of funds that are reasonably necessary for their proper functioning.

For example, in *Carlson v. State ex rel. Stodola*, 247 Ind. 631 (1966), the city council of Hammond, Indiana, reduced the city court's requested fiscal year 1965 budget by almost 25%. The judge of the city court sued to get the money back, and the Indiana Supreme Court upheld a lower court's exercise of its inherent powers to order a return of the diminished funds. *Id.* at 638. The court particularly noted that "a

court is not free if it is under financial pressure" from those who may be affected by its decisions. *Id.* at 633–34. "[C]ourts frequently have to rule upon the acts or refusal to act of those controlling the purse strings in rendering justice" and they cannot allow "[t]hreats of retaliation or fears of strangulation [to] hang over such judicial functions." *Id.* at 638.

Similarly, the County Court of Yates County, New York, addressed the county's refusal to continue to pay for adequate courthouse security services in *Matter of Spike*, 99 Misc. 2d 178, 415 N.Y.S.2d 762 (N.Y. Co. Ct. 1979). Relying on its inherent powers, the court ordered the reinstatement of security personnel in the courthouse. *Id.* at 182. The court held that, "[u]nder the inherent powers doctrine, a court has all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity and to make its lawful actions effective." *Id.* at 181.

And in Davenport, New York, after the town board significantly reduced the salary of the town justice, New York's intermediate appellate court determined the action "likely to affect or impinge upon the independence of the judiciary" and reversed the decision. *Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110, 1112 (N.Y. 2007). In

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so doing, the court observed that "[a] real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions." *Id.*

Finally, in *Smith v. Miller*, 384 P.2d 738 (Colo. 1963), county commissioners refused to approve the requested salaries of certain district court judges. The Supreme Court of Colorado held that the court had the inherent power to set judicial salaries, while the county commissioners possessed no more than a ministerial duty to approve the requests. *Id.* at 741. In reaching this conclusion, the court opined that

> It is not only axiomatic, it is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source. It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice. These principles, concepts, and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national polity.

Id.

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3. *Cutting a Court's Budget in Response to the Court's Rulings Threatens Judicial Independence and Violates the Separation Of Powers*

Cutting a court's budget in response to its rulings threatens the court's independence and violates the separation of powers. A court has the inherent authority to remedy the violation: the above cases show that courts are empowered to recognize and act on threats to their independence from reductions of resources effected by the other branches of government. In each of those cases the courts unambiguously concluded that the court system is threated if another branch is able to diminish the court's capacity.

In no reported case, however, has a court faced a circumstance where the executive or the legislative has attacked its fiscal independence in direct retaliation for the substance of one of its decisions. If defunding measures represent intrinsic incursions into courts' autonomy, then the executive act of taxing a court, in any amount, for exercising its duty to interpret and uphold the constitution stands as an existential threat to the court's independence and the separation of powers.

For well over two hundred years, it has been "emphatically the province and duty" of the courts "to say what the law is." *Marbury v.*

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Madison, 5 U.S. 137, 177 (1803). This authority is enshrined in Article IV, section 1 of the Alaska Constitution and gives the Alaska Supreme Court the ultimate power and obligation to rule on the constitutionality of statues and executive actions. *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982) (courts have "the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 972 (Alaska 1997) (supreme court "cannot defer to the legislature when infringement of a constitutional right results from legislative action").

This authority extends equally in cases where a court's ruling impacts state spending. "Indeed, constitutional legal rulings commonly affect state programs and funding." *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 914 (Alaska 2001). As the Alaska Supreme Court succinctly explained,

> we have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review. . . . Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have a duty, certainly since *Marbury v. Madison,* to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution. "This," in the words of Mr. Chief Justice Marshall, "is of the very essence of judicial duty."

Id. at 914–15 (quoting *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 641, 417 N.E.2d 387, 395 (1981) (some internal quotations omitted)).

But a court cannot be free to "say what the law is," especially if the impact of its decisions compels the expenditure of resources, when it is made to suffer financial consequences as retribution for those decisions. Such a result would wholly undermine the principle of judicial independence, putting judges on notice that there was a cost, imposed at the caprice of the executive, in fulfilling their constitutional obligation to be impartial arbiters of the law.

Defendants, in their Answer, have denied that the governor's June 28 veto was issued in retaliation for the Supreme Court's *Planned Parenthood* decision. Pls.' Compl. ¶ 35; Defs.' Ans. ¶ 35. But this ignores the plain text of Governor Dunleavy's veto message, which yields only one logical conclusion. The governor first asserts that "[t]he Legislative and Executive Branch are opposed to State funded elective abortions . . . ." This is to say that he believes a particular policy choice has been made by the political branches of state government. He then states that the Supreme Court's decision is at odds with this policy choice: "the only branch of government that insists on State funded

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elective abortions is the Supreme Court." Setting aside the mischaracterization of the Court's judicial power as "insisting" on a particular outcome, as if the court's decisions reflected the personal preferences of its judges, this statement is meant to underscore the governor's displeasure with the court's ruling in *Planned Parenthood* that the state is liable for abortion funding.[1] And then, of course, the payback: "The annual cost of elective abortions is reflected by this reduction." In other words, "you did that to me, I do

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[1] It is entirely possible that the Supreme Court's February 2019 *Planned Parenthood* decision is not the *sole* impetus for the governor's veto, since the Court has previously held that it is unconstitutional for the State to deny Medicaid coverage for medically necessary abortions. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 914 (Alaska 2001). Plaintiffs have alleged that the February 2019 *Planned Parenthood* decision forms the basis for the governor's retaliation, Pls.' Compl. ¶ 19, because his original budget proposal to the legislature on December 14, 2018, contained no such reductions, and his June 28 veto followed closely on the heels of the Supreme Court's February decision. *See VECO, Inc. v. Rosebrock*, 970 P.2d 906, 919 (Alaska 1999) (In employment cases, "[c]ausation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and [an] allegedly retaliatory discharge . . . ."). But whether it was this single decision or the Court's historical jurisprudence that motivated the governor is a distinction without a difference: the veto retaliates against the appellate courts because the Supreme Court has held that the State violates the Alaska Constitution's equal protection guarantees by restricting Medicaid coverage for abortions.

this to you." One cannot get closer to the definition of retaliation than that.

Defendants have also asserted that the June 28 veto is a valid exercise of the governor's authority under Article II, section 15 of the Alaska Constitution because he has the power to strike or reduce any item in an appropriations bill, even a line item in the appellate court's budget. That a governor has a general veto power over appropriations to the judiciary is simply not a viable defense to a specific act that strikes at the heart of the court's independence. There is no question that the governor has the authority to issue line vetoes, but this power must be wielded within the constitutional bounds of that authority.[2] It

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[2] The potential havoc the executive could wreak on the courts through its abuse of the line item veto was not lost on members of the federal judiciary when they raised the alarm over Congress's intent to pass legislation granting the president line item veto authority that would extend to the federal courts' budget. In a statement before a joint Senate and House committee on the proposed bill, Gilbert S. Merritt, Chief Judge of the Sixth Circuit and Chairman of the Executive Committee of the Judicial Conference of the United States, expressed the judiciary's "serious concerns" about the proposal. Statement Before the Sen. Comm. on Governmental Affairs and the House Comm. on Government Reform and Oversight, 104th Cong. (1995) available in 1995 WL 10418. Judge Merritt explained:

> The President and his Department of Justice litigate approximately half the cases before us. The Executive

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is the retaliatory essence of the veto, not the root of the power itself, that makes it an unconstitutional violation of the separation of powers.

Governor Dunleavy's veto of the appellate courts' budget, issued in explicit response to the Supreme Court's exercise of its constitutional duty to interpret and uphold the Alaska Constitution, is an unprecedented threat to the independence of the Alaska judiciary, and violates the separation of powers. The veto "strikes at the heart of judicial independence" because it imposes "financial consequences" for the Court's issuance of "legally correct but unpopular decisions." *Kelch v. Town Bd. of Town of Davenport*, 36 A.D.3d 1110, 1112, (N.Y. 2007). This Court must exercise its inherent powers to declare the veto action unconstitutional and order the governor and the State to refund the $344,700 to the appellate courts.

> Branch is often upset with our rulings. Many Presidents have gotten very upset with us. . . . Presidents, Attorneys General and Members of the Department of Justice have great power. To permit them to control the Judicial budget would endanger the integrity and fairness of the Judiciary. Litigants against the Department of Justice would legitimately doubt the capacity of the courts to dispense even-handed justice. This may further erode public trust in the courts. This is our concern.

Id.

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B. Governor Dunleavy's Veto Violates Article II § 15 of the Alaska Constitution's Limits on Gubernatorial Veto Power

Article II § 15 of the Alaska Constitution authorizes the governor to, "by veto, strike or reduce items in appropriation bills." But the authority to strike or reduce items does not include the authority to reallocate appropriations made by the Legislature. "The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature." *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001).

The governor's June 28 veto violates this proscription. The reduction, in the amount (the governor believes to be) equal to the annual cost to the state of Medicaid-funded abortions, is a reallocation of an appropriation because it removes funding for one purpose—court system functions—and redirects it to another purpose—Medicaid-covered abortions.

This is the most logical way to interpret the governor's action. The veto is not intended as a cost-cutting measure; as discussed above, the governor's reasons for the reduction make that clear. It is not related to a program or broad policy goals. It is a specific act of taking

money from its legislatively appropriated purpose—the functions of the judiciary—to pay for services administered by an agency in another branch of government. Because the governor's June 28 veto "divert[s] funds for a use the legislature did not approve," *id.* at 372, it violates Article II § 15 of the Alaska Constitution.

III. Conclusion

The governor's veto, couched in its explicit terms of retaliatory intent, cannot exist in any form other than an impermissible and significant intrusion into the independence of the court system. If the executive can reduce the judiciary's resources each time it renders an unpopular decision, it cannot retain its judicial independence.

The governor's veto violates the doctrine of separation of powers inherent in the Alaska Constitution and it violates Article II § 15 of the Alaska Constitution because it is an impermissible reallocation of an appropriation. This Court should exercise its inherent authority to reverse the governor's June 28, 2019, veto reducing the appellate courts' budget by $344,700, and order the funding restored.

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