IN THE SUPREME COURT OF THE STATE OF ALASKA

HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, Appellant, v. THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Appellee.	Supreme Court No.: S-18003

Trial Court Case No. 1JU-20-00938 CI

APPEAL FROM THE SUPERIOR COURT,
FIRST JUDICIAL DISTRICT AT JUNEAU,
THE HONORABLE PHILIP M. PALLENBERG, JUDGE

BRIEF OF APPELLEE THE ALASKA LEGISLATIVE COUNCIL

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Constitutional Provisions

Alaska Const. Art. II, sec. 12

The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members. Each shall keep a journal of its proceedings. A majority of the membership of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day and may compel attendance of absent members. The legislature shall regulate lobbying.

Alaska Const. Art. III, sec. 25

The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Alaska Const. Art. III, sec. 26

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

Alaska Const. Art. III, sec. 27

The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

Alaska Const. Art. XV, sec. 1

All laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed.

Alaska Laws

AS 39.05.070 — 39.05.200

It is the purpose of AS 39.05.070 — 39.05.200 to provide procedural uniformity in the exercise of appointive powers conferred by the legislature to eliminate, insofar as possible, recess or interim appointments except in the event of death, resignation, inability to act, or other removal from office and the exercise, insofar as possible, of appointive powers only when the legislature is in session.

AS 39.05.080

Sec. 39.05.080. Procedure for all appointments. Except as otherwise provided in a law relating to the positions or memberships on a specific board or commission, appointment to a position or membership shall be made in the following manner:

(1) Each governor shall present to the legislature the names of the persons appointed by that governor; each governor may present the name of a person appointed by a previous governor; only presentment that occurs during the time that the legislature is in regular session constitutes presentment under this section. The governor shall, within the first 15 days after the legislature convenes in regular session, present to the legislature for confirmation the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature, and (B) persons to be appointed to fill a position or membership the term of which will expire on or before March 1 during that session of the legislature. If an appointment is made after the first 15 days after the convening of the regular session but while the legislature is in regular session, the governor shall immediately present to the legislature for confirmation the name of the person appointed.

(2) When appointments are presented to the legislature for confirmation,

(A) the presiding officer of each house shall assign the name of each appointee to a standing committee of that house for a hearing, report, and recommendation; standing committees of

the two houses assigned the same person's name for consideration may meet jointly to consider the qualifications of the person appointed and may issue either a separate or a joint report and recommendation concerning that person; then

(B) the legislature shall, before the end of the regular session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.

(3) When the legislature declines to confirm an appointment, the legislature shall notify the governor of its action and a vacancy in the position or membership exists which the governor shall fill by making a new appointment. The governor may not appoint again the same person whose confirmation was refused for the same position or membership during the regular session of the legislature at which confirmation was refused. The person whose name is refused for appointment by the legislature may not thereafter be appointed to the same position or membership during the interim between regular legislative sessions. Failure of the legislature to act to confirm or decline to confirm an appointment during the regular session in which the appointment was presented is tantamount to a declination of confirmation on the day the regular session adjourns.

(4) Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, have the powers, and be charged with the duties prescribed by law for the appointive positions or membership. However, the duration of an appointment made during the time period between regular sessions of the legislature by a person who is not still the governor on the first day of the next regular session ends on the date during the next regular session that the sitting governor presents for confirmation an appointment to the office. For the purpose of applying laws that limit the number of terms or parts of terms that may be served by a member of a board or commission, the part of the term of office that is served under an interim appointment immediately before the member is reappointed under this paragraph is considered to be merged with the part of the term of office that is served immediately after reappointment so that the two periods of service constitute only one part of a term. The duration of an appointment made during a regular session of the legislature and not presented to the legislature by the governor during that session ends no later than the last day of that session. The duration of an appointment made during an interim by a governor who is not in office at the beginning of the next regular session of the legislature ends no later than the last day of that regular

session unless the governor who is in office during that session presents the person's name for confirmation. The same governor may not appoint the same person to the same position or membership if the person's appointment ends because of the governor's failure to present the person's name for confirmation.

Ch. 1, SLA 1964

AN ACT relating to the confirmation of appointments by the legislature; and providing for an effective date.

Section 1. AS 39.05.080(1) is amended to read:
(1) The appointing authority shall, within 14 calendar days of the convening of the legislature in regular or special session, present to the legislature for confirmation the names of all persons
(A) appointed to a position or membership which have not previously been confirmed by the legislature or either house of it;
(B) appointed by him subject to confirmation to fill an existing position or membership vacancy;
(C) to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature.

Sec. 2. AS 39.05.080(2) is amended to read:
(2) When appointments are presented to the legislature for confirmation, the legislature shall, before the end of the session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.

Sec. 3. AS 39.05.080(3) is amended to read:
(3) When the legislature declines to confirm an appointment, the legislature shall notify the appointing authority of its action and a vacancy in the position or membership exists which the appointing authority shall fill by making a new appointment. The new appointment shall be presented for confirmation to the legislature within 20 calendar days following receipt by the appointing authority of the legislature's notification of its refusal to confirm the prior appointment. If the name of a person is submitted and is not confirmed, the appointing authority may not, upon resubmission of appointments, submit again the name of the person whose confirmation was refused for the same position or membership during the session of the

legislature at which confirmation was refused. The person whose name is refused for appointment by the legislature may not thereafter be appointed to the position or membership during the interim between legislative sessions. Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns.

Sec. 4. This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

Approved February 6, 1964

Ch. 64, SLA 1955

AN ACT to provide procedural uniformity in the appointments of certain Territorial Administrative and Executive officers, and certain members of Territorial boards, commissions, authorities, councils, and committees; prescribing an additional qualification for appointments; repealing prior inconsistent Acts; and declaring an emergency.

Section 1. **Declaration of intent.** Whereas the Governor of Alaska, as an appointive Federal official, has had conferred on him by the Territorial Legislature certain powers of appointment, it is the intent and purpose of said Legislature, in the passage of this Act, to achieve procedural uniformity in the exercise of those and other appointive powers conferred by the Alaska Legislature, the elimination, insofar as possible, of recess or interim appointments except in the event of death, resignation, inability to act or other removal from office and the exercise, insofar as possible, of such appointive powers only at such times as the Legislature is in session duly assembled.

Section 2. **Definitions.** As used in this Act; (a) "confirmation" shall mean confirmation or approval by the Legislature or either House thereof, of any name submitted for appointment to any position or membership; and (b) "position or membership" shall mean any executive position, or membership on any Territorial board, commission, authority, council or committee which by law requires appointment by the Governor of Alaska or other appointing authority and confirmation by the Legislature or of either House thereof.

Section 3. **Professional Group Recommendations.** The time limitations concerning the submission and re-submission of names as prescribed in Section 4, shall not be applicable to those appointments which by law require recommendations by professional groups.

Section 4. **Procedure for All Appointments.** Notwithstanding the provisions of any other law on appointments to any executive position or to membership on any Territorial board, commission, authority, council, or committee which by law are required to be made by the Governor of Alaska or other appointing authority subject to confirmation by the Legislature or either House thereof, all appointments shall, from and after the effective date of this Act, be made in the following manner:
(a) Within three calendar days following the passage and approval of this Act, the appointing authority shall present to the Legislature for confirmation the names of all persons:
(1) appointed to any "position or membership" which names have not heretofore been confirmed by the Legislature or either House thereof:
(2) by him appointed subject to confirmation to fill any existing "position or membership" vacancy;
(3) to be appointed subject to confirmation to fill any "position or membership" the term of which shall expire on or before July 1, 1955.
(b) At every succeeding regular or special session of the Legislature the appointing authority shall, within five calendar days of the convening of the Legislature, present to the Legislature for confirmation the names of all persons:
(1) appointed to any "position or membership" which names have not theretofore been confirmed by the Legislature or either House thereof;
(2) by him appointed subject to confirmation to fill any existing "position or membership" vacancy;
(3) to be appointed subject to confirmation to fill any "position or membership" the term of which shall expire on or before July 1, following such session of the Legislature.
(c) Whenever appointments are presented to the Legislature for confirmation, the Legislature shall, in joint session assembled, act thereon within three days following receipt of the names so presented, by confirming or declining to confirm by a majority vote of all of the members thereof the appointments so made and presented;
(d) Whenever the Legislature shall decline to confirm any or all appointments so made and presented to it for confirmation, the Legislature shall notify the appointing authority of its action and a vacancy in such "position or membership" shall thereupon

exist which the appointing authority shall fill by making a new appointment, which new appointment shall be presented for confirmation to the Legislature within twenty calendar days following receipt by the appointing authority of the Legislature's notification aforesaid. If the name of any person has been submitted and has not been confirmed, the appointing authority shall not, upon re-submission of appointments as required by this Act, submit again the name of the person not confirmed for the same "position or membership" during that session of the Legislature; nor shall such person whose name has been refused or rejected for appointment by the Legislature be thereafter appointed to such "position or membership" during the interim between legislative sessions.
(e) Pending confirmation or rejection of appointment by the Legislature, persons so appointed shall exercise all of the functions, have all of the powers and be charged with all of the duties by law prescribed for such appointive "positions or memberships."

Section 5. **Appointee Shall be a Qualified Voter in Alaska.** In addition to any other statutory qualifications, persons appointed to any Board or Commission of the Territorial Government, shall have the qualifications necessary to vote in Alaska.

Section 6. **Inconsistent Laws Repealed.** All laws or parts of laws in conflict with the provisions of this Act are hereby repealed to the extent of such conflict.

Section 7. **Emergency.** An emergency is hereby declared and this Act shall take effect and be in force from and after its passage and approval, or upon its becoming law without such approval, and it is so enacted.

Ch. 9, SLA 2020 (HB 309)

AN ACT relating to the procedure for confirmation of the governor's appointments; relating to the board of the Mental Health Trust Authority; and providing for an effective date.

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:
TIME FOR CONFIRMING GOVERNOR APPOINTMENTS. (a) Notwithstanding AS 39.05.080, for appointments presented by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature,

(1) the legislature shall, in joint session assembled, act on the appointments at any time by confirming or declining to confirm the appointments by a majority vote of all of the members on the appointments presented; and
(2) if the legislature does not act to confirm or decline to confirm an appointment, the failure of the legislature to act to confirm or decline to confirm an appointment presented is not tantamount to a declination of confirmation on the day the Second Regular Session of the Thirty-First Alaska State Legislature adjourns.
(b) The failure of the legislature to act to confirm or decline to confirm an appointment presented by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature will be tantamount to a declination of confirmation on the earlier of
(1) January 18, 2021; or
(2) 30 days after
(A) expiration of the declaration of a public health disaster emergency issued by the governor on March 11, 2020; or
(B) issuance of a proclamation that the public health disaster emergency identified in the declaration issued by the governor on March 11, 2020, no longer exists.
(c) Notwithstanding AS 47.30.021(a), a member of the board of the Alaska Mental Health Trust Authority whose term expires March 1, 2020, may not continue to serve until a successor is confirmed. A person appointed to the board of the Alaska Mental Health Trust Authority and presented to the legislature by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature shall serve as successor to a member whose appointment expired on March 1, 2020, and exercise the functions, have the powers, and be charged with the duties prescribed by law for the appointment pending confirmation or declination under (a) or (b) of this section.
(d) If, after the Second Regular Session of the Thirty-First Alaska State Legislature adjourns, a person whose appointment is still awaiting confirmation or declination of confirmation resigns that person's appointment, or the position or membership of that person becomes vacant for any reason other than the expiration of the person's term of office, the governor may not appoint that person to the same position or membership until the First Regular Session of the Thirty-Second Alaska State Legislature convenes.

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

ISSUES PRESENTED

Legislative power of confirmation. The legislature has the power of confirmation under art. III, secs. 25 and 26 of the Alaska Constitution. Do art. III, secs. 25 and 26 prohibit the legislature from establishing by law the procedures for carrying out its legislative power of confirmation?

Governor's power to make a recess appointment of a person declined by the legislature. Under art. III, sec. 27 of the Alaska Constitution, the governor may make a recess appointment. If the legislature declines to confirm a gubernatorial appointee, may the governor reappoint that same person in the interim after the regular session ends?

INTRODUCTION

This case involves a challenge to Governor Dunleavy's attempt to continue the appointments of appointees presented for confirmation to the legislature during the Second Regular Session of the Thirty-First Alaska State Legislature, in violation of art. III, secs. 25 and 26 of the Alaska Constitution, AS 39.05.080(3), and chapter 9, SLA 2020 ("HB 309").

This case implicates the doctrine of separation of powers and the system of checks and balances that is considered in

determining the scope of the separation of powers doctrine.[1] These doctrines are intended to avoid the "tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers" and to "[protect] the electorate from tyranny."[2]

For over half a century, Alaska law has provided that, if the legislature does not either confirm or decline to confirm a gubernatorial appointment during the regular legislative session in which the appointment was presented, the appointment is deemed rejected. AS 39.05.080(3), enacted in 1964, expressly provides that "[f]ailure of the legislature to act to confirm or decline to confirm an appointment during the regular session in which the appointment was presented is tantamount to a declination of confirmation on the day the regular session adjourns." When Governor Dunleavy transmitted his appointments to the Second Regular Session of the Thirty-First Alaska State Legislature, he knew that the appointees would be declined under AS 39.05.080(3) if the legislature did not "act to confirm or decline to confirm" the appointments during the regular session. When the governor signed HB 309 into law, he knew that HB 309 extended the legislature's deadline to "act to confirm or decline to confirm" the governor's appointments, but maintained

[1] *Bradner v. Hammond*, 553 P.2d 1, 5 - 6 (Alaska 1976).

[2] *Id.*

the status quo: inaction by the legislature is tantamount to declination of confirmation. The governor now asks this Court to upset the system of checks and balances that has been in existence for decades and judicially decide that the legislature must affirmatively vote to effectuate rejection of an appointment. The governor also contends that until that affirmative vote occurs, the governor's appointees may continue to serve indefinitely without confirmation. The governor also asks this Court to rule that under art III, sec. 27 of the Alaska Constitution, the legislature may not prohibit the governor from reappointing in the interim individuals who were rejected by the legislature during the regular legislative session in which the appointment was made, fundamentally altering the longstanding system of checks and balances.

The governor's position is contrary to the procedure on appointments that has been in existence since before statehood, contrary to the decisions of state courts that have addressed this issue under similar factual circumstances, and upsets the well-established system of checks and balances that has been used for decades in balancing the governor's appointive power and the legislature's power to prescribe by law the procedure for carrying out its legislative power of confirmation. The governor bears the burden of demonstrating a constitutional

violation in this case,[3] and he has failed to meet that burden. Legislative Council respectfully requests that the Court affirm the superior court's thoughtful and well-reasoned decision in this case that AS 39.05.080(3) and HB 309 are constitutional, that the governor's appointees in question were rejected effective December 15, 2020, and that the governor's attempted recess appointments were prohibited by law.

STATEMENT OF THE CASE

Since 1955, Alaska law has provided that, if the legislature does not either confirm or decline to confirm a gubernatorial appointee, the appointee is considered to have been rejected by the legislature.[4] [Exc. 0001 - 0004]. During the Second Regular Session of the Thirty-First Alaska State Legislature, the governor made various appointments under art. III, secs. 25 and 26 of the Alaska Constitution and presented those names to the legislature for confirmation in accordance with the procedure set forth under AS 39.05.080. [R. 000155 - 000174]. When faced with a once-in-a-century pandemic stemming from COVID-19, the legislature was forced into an extended recess before it could meet in joint session to act on the governor's appointments. [R. 000191].

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[3] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (quoting *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998).

[4] *Munson v. Territory of Alaska*, 16 Alaska 580, 590 (D. Alaska 1956).

Before going on the extended recess, the legislature passed HB 309, which extended the time for the legislature to confirm or decline to confirm an appointment presented to the legislature by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature. The extension language was added to HB 309 during the Senate Rules committee hearing, after Senator Tom Begich expressed concern that the legislature may not meet or may even be prohibited from meeting in joint session. [R. 000175 - 000188]. The legislature explicitly intended HB 309 to "prevent the possibility of appointees not being subject to confirmation by this legislature." [R. 000181]. Thus, HB 309, sec. 1(b) provides:

> (b) The failure of the legislature to act to confirm or decline to confirm an appointment presented by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature will be tantamount to a declination of confirmation on the earlier of
> (1) January 18, 2021; or
> (2) 30 days after
> (A) expiration of the declaration of a public health disaster emergency issued by the governor on March 11, 2020; or
> (B) issuance of a proclamation that the public health disaster emergency identified in the declaration issued by the governor on March 11, 2020, no longer exists. [R. 000150 - 000152].

In passing HB 309, the legislature envisioned there to be an automatic declination of confirmation upon the earlier of: (1) January 18, 2021; (2) 30 days after expiration of the

disaster declaration issued by the governor on March 11, 2020; or (3) 30 days after issuance of a proclamation that the public health disaster emergency no longer exists. [R. 000175 - 000188].

After the recess, the Thirty-First Alaska State Legislature did not reconvene, and despite repeated requests to do so, the governor refused to call the legislature into special session to address the expiring disaster declaration, to which his appointees were attached. [R. 000085, 000085 – 000090]. As a result, the governor's appointees in question were rejected by the Thirty-First Alaska State Legislature by operation of law, effective December 15, 2020, upon expiration of the declaration of a public health disaster emergency issued by the governor on March 11, 2020. [R. 000281].

Despite the plain language of HB 309, through letters dated December 16, 2020, addressed to Senate President Cathy Giessel and Speaker of the House Bryce Edgmon, the governor advised the legislature that, in his opinion, "Executive Branch Department heads and Boards and Commissions appointees to Executive Branch Boards, who have not received a confirmation vote, continue to serve under valid appointments." [R. 000153 - 000154]. The governor also announced that he was "exercising [his] constitutional authority under Alaska Constitution, Article III,

Section 27 to continue their appointments." [R. 000153 - 000154].

Based on this unprecedented usurpation of the legislature's confirmation power, Legislative Council voted to file suit against the governor and, on December 23, 2020, Legislative Council initiated this suit. [R. 000189 - 000195]. The governor filed his counterclaims on December 31, 2020, alleging—for the first time—that the provisions of AS 39.05.080(3) and HB 309 were unconstitutional. [R. 000070 - 000075].

Upon the parties' filing of cross-motions for summary judgment, the superior court granted the Legislature's request for summary judgment, holding that AS 39.05.080(3) and HB 309 represented a valid exercise of the legislature's power to prescribe by law the procedures for carrying out the legislative power of confirmation of executive branch appointees. [R. 000267 - 000281]. The superior court also held that the governor's appointees in question were rejected effective December 15, 2020, and the governor's attempted recess appointments were prohibited by AS 39.05.080(3). [R. 000282 - 000288]. The governor initiated this appeal.

STANDARD OF REVIEW

Questions of constitutional and statutory interpretation, including the constitutionality of a law, are questions of law

to which this Court applies its independent judgment.[5] When interpreting the Alaska Constitution, analysis "begins with, and remains grounded in, the words of the provision itself."[6] This Court is "not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[7] Instead, this Court must "look to the plain meaning and purpose of the provision and the intent of the framers."[8] "Legislative history and the historical context, including events preceding ratification, help define the constitution."[9]

"A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[10] "[A] party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation."[11]

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[5] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

[6] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017)(quoting *Hickel v. Cowper,* 874 P.2d 922, 926-28 (Alaska 1994).

[7] *Id.* at 1146(quoting *Hickel*, 874 P.2d at 927–28)(alteration in original).

[8] *Id.*(quoting *Hickel*, 874 P.2d at 926).

[9] *Id.* at 1147 (citing *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016)); *see also State v. Alex*, 646 P.2d 203, 208 (Alaska 1982); *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 800, 804 (Alaska 1975).

[10] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007)(quoting *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

[11] *Id.*

ARGUMENT

I. AS 39.05.080(3) and HB 309 do not violate art. III, secs. 25 and 26 of the Alaska Constitution.

The legislature has, through AS 39.05.080 and HB 309, enacted laws to establish procedures for exercising its power of confirmation.[12] Over fifty years after enactment, the governor now contends these laws violate the Alaska Constitution.[13] He asserts art. III, secs. 25 and 26 of the Alaska Constitution require the legislature to affirmatively vote to effectuate rejection of an appointment.[14] The governor also contends that until that affirmative vote occurs, the governor's appointees may continue to serve indefinitely without confirmation.[15]

This is incorrect. The legislature may constitutionally decline to confirm appointees by vote or by not considering the appointees at all. If the legislature does not consider an appointment, under AS 39.05.080(3), the appointee's appointment is considered rejected on the last day of the regular legislative session. AS 39.05.080(3) was originally enacted in ch. 1, SLA 1964, and with respect to the relevant provision at

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[12] *See Cook v. Botelho*, 921 P.2d 1126, 1130 (Alaska 1996) ("Alaska Statute 39.05.080 sets the procedural steps to be followed during the legislative function of confirmation.").

[13] Brief of Appellant at 13.

[14] *Id.* at 14 - 18.

[15] *Id.* at 17.

issue in this case, it has remained largely unchanged since enactment.[16] [Exc. 0005].

HB 309 set out procedures for confirmation of the governor's appointments presented during the Second Regular Session of the Thirty-First Alaska State Legislature. The primary effect of HB 309 was to extend AS 39.05.080(3)'s declination of confirmation date from "the day the regular session adjourns" to December 15, 2020.[17]

Nothing in the text of the Alaska Constitution conflicts with these statutes, and nothing in the deliberations of the constitutional convention supports the governor's position that these statutes are unconstitutional. Further, the Alaska Constitution does not mandate that the legislature vote on the governor's appointees. AS 39.05.080(3) and HB 309 are consistent with how similar constitutional provisions are interpreted in other states, and do not expand the legislature's power of confirmation in contradiction of the Alaska Supreme Court's decision in *Bradner v. Hammond*. The governor may disagree with the underlying policy choices the legislature made in passing AS 39.05.080(3) and HB 309, but it is the

[16] Section 3, ch. 1, SLA 1964, provides, in relevant part: "Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns."

[17] Modeled after AS 39.05.080(3), it provides that the legislature's failure to act would be "tantamount to declination." [R. 000150 - 000152].

legislature's role to establish policy in the state and to control its own procedures regarding voting or convening a joint session. Finally, the governor contends AS 39.05.080(3) and HB 309 are inconsistent with AS 39.05.080(2) and AS 39.05.070, but this issue was not raised in the superior court, it is not an issue on appeal, and it is not necessary for the Court to decide this issue in determining whether AS 39.05.080(3) and HB 309 are constitutional.

A. AS 39.05.080(3) and HB 309 do not conflict with the text of the Alaska Constitution.

Article III, secs. 25 and 26 of the Alaska Constitution provide that gubernatorial appointments are "subject to confirmation by a majority of the members of the legislature in joint session." Contrary to the governor's contentions, the plain language of art. III, secs. 25 and 26 does not require the legislature to first meet in joint session or take a vote to decline confirmation. Article III does not provide that appointees are "subject to confirmation or declination." Unlike the constitutions of some states, the Alaska Constitution does not require the legislature to first meet in joint session or take a vote to decline confirmation.[18] It only must meet in joint session and take a vote to confirm an appointee.

[18] *See, e.g.*, art. 4, sec. 8 of the Pennsylvania Constitution, which provides, in relevant part:

Article III, secs. 25 and 26 of the Alaska Constitution give the power of confirmation to the legislature. The legislature has, through AS 39.05.080 and HB 309, enacted laws to establish procedures for exercising its power of confirmation.[19] The legislature's inaction on the governor's appointments rests on its constitutional authority to confirm gubernatorial appointments. The governor's interpretation reduces the legislature's constitutional "power of confirmation" to merely a "power of declination." As stated by Delegate Victor C. Rivers at the Constitutional Convention, "We vest in the governor the appointive power for the heads of these

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> The Governor shall fill vacancies in offices to which he appoints by nominating to the Senate a proper person to fill the vacancy within 90 days of the first day of the vacancy and not thereafter. The Senate shall act on each executive nomination within 25 legislative days of its submission. If the Senate has not voted upon a nomination within 15 legislative days following such submission, any five members of the Senate may, in writing, request the presiding officer of the Senate to place the nomination before the entire Senate body whereby the nomination must be voted upon prior to the expiration of five legislative days or 25 legislative days following submission by the Governor, whichever occurs first. If the nomination is made during a recess or after adjournment sine die, the Senate shall act upon it within 25 legislative days after its return or reconvening. If the Senate for any reason fails to act upon a nomination submitted to it within the required 25 legislative days, the nominee shall take office as if the appointment had been consented to by the Senate.

[19] See *Cook v. Botelho*, 921 P.2d 1126, 1130 (Alaska 1996) ("Alaska Statute 39.05.080 sets the procedural steps to be followed during the legislative function of confirmation.").

departments. That is *subject to* confirmation by the houses of the legislature meeting in joint session."[20]

The governor cites *Hickel v. Cowper*,[21] in support of his assertion that the legislature cannot redefine constitutional language by statute.[22] The legislature is not redefining constitutional language. The plain language of art. III, secs. 25 and 26 does not require the legislature to first meet in joint session and take a vote to decline confirmation. When interpreting the Alaska Constitution, the Court gives words "their natural, obvious and ordinary meaning" unless the context suggests otherwise.[23] The dictionary definitions of the words provide a helpful starting point.[24] As the governor observed, the meaning of "subject to" was considered by the Court in *Hendricks-Pearce v. State, Dept. of Corrections*.[25] The dissenting justices noted Black's Law Dictionary defines "subject to" as "[l]iable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for[,]" and Webster's New International Dictionary

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[20] Proceedings of the Alaska Constitutional Convention (PACC) 1988 (Jan. 13, 1956) (emphasis added).

[21] 874 P.2d 922 (Alaska 1994).

[22] Brief of Appellant at 15.

[23] *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056 n. 7 (Alaska 1981).

[24] *Hickel*, 874 P.2d at 928.

[25] 323 P.3d 30 (Alaska 2014).

defines it as, "Being under the contingency of; dependent upon or exposed to (some contingent action);—with *to*."[26] Black's Law Dictionary defines "confirmation," in relevant part, as: "The act of giving formal approval; the ratification or strengthening of an earlier act <Senate confirmation hearings>."[27] These definitions support Legislative Council's position that the governor's appointments are "subordinate to" the legislature's confirmation of them, the appointments may be "governed by" procedures the legislature establishes for confirmation of such appointments, and the appointments are "dependent upon" "formal approval" by the legislature.

In contrast, the governor's interpretation would add in a "missing term,"[28] namely, that "subject to confirmation" means "subject to confirmation or declination." This reading would require a complete restructuring of the established procedure for legislative confirmation and upset the system of checks and balances that has been in existence since before statehood.

An act of the legislature is presumed to be constitutional and the governor bears the burden of proving that the legislature violated the constitution when it passed AS

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[26] *Id.* at n. 10 (emphasis in original).

[27] Black's Law Dictionary (10th ed. 2014).

[28] *Hickel*, 874 P.2d at 927.

39.05.080(3) and HB 309. The presumption has been explained as follows:

> The courts frequently reiterate that in the exercise of this authority [to determine the constitutionality of the enactment] they begin with a presumption in favor of validity, and that a court is not empowered to substitute its judgment for that of the legislature on matters of policy, nor to strike down a statute which is not manifestly unconstitutional even though the court may consider it unwise.[29]

The Alaska Supreme Court has adopted this presumption in holding that "[t]he burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality."[30] The governor has plainly failed to meet his burden in this case.

B. The deliberations of the constitutional convention support Legislative Council's position that AS 39.05.080(3) and HB 309 are constitutional.

In 1955, to provide procedural uniformity in gubernatorial appointments, the territorial legislature passed a law which provided, in relevant part:

> (c) Whenever appointments are presented to the Legislature for confirmation, the Legislature shall, in joint session assembled, act thereon within three days following receipt of the names so presented, by confirming or declining to confirm by a majority vote of all of the members thereof the appointments so made and presented.
> (d) Whenever the Legislature shall decline to confirm any or all appointments so made and presented to it

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[29] 1 Sands, Sutherland Statutory Construction § 2.01 at 13 (4th Ed. 1972).

[30] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 379 (Alaska 2001); *see also State v. Albert*, 899 P.2d 103, 113 n.15 (Alaska 1995); *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979).

> for confirmation, the Legislature shall notify the appointing authority of its action and a vacancy in such "position or membership" shall thereupon exist which the appointing authority shall fill by making a new appointment, which new appointment shall be presented for confirmation to the Legislature within twenty calendar days following receipt by the appointing authority of the Legislature's notification aforesaid. If the name of any person has been submitted and has not been confirmed, the appointing authority shall not, upon re-submission of appointments as required by this Act, submit again the name of the person not confirmed for the same "position or membership" during that session of the Legislature; nor shall such person whose name has been refused or rejected for appointment by the Legislature be thereafter appointed to such "position or membership" during the interim between legislative sessions.
>
> (e) Pending confirmation or rejection of appointment by the Legislature, persons so appointed shall exercise all of the functions, have all of the powers and be charged with all of the duties by law prescribed for such appointive "positions or memberships."[31] [Exc. 0003].

When Alaska became a state, the 1955 statute became the law of Alaska and was codified in AS 39.05.080.[32] In *Munson v. Territory of Alaska*, the territorial statute was interpreted to provide that failure to vote on confirmation of a gubernatorial appointee is considered rejection of the appointee.[33] In *Munson*, the court considered whether the territorial legislature had a duty to consider the governor's appointee to the Alaska

[31] Ch. 64, SLA 1955.

[32] Article XV, section 1 of the Alaska Constitution provides that, upon admission of Alaska into the Union, all then-existing Territorial laws carry forward and become the law of the new State.

[33] 16 Alaska 580, 590 (D. Alaska 1956).

Fisheries Board, and explicitly held that "the failure of the legislature to act on [that] appointment is, in effect, rejection. To rule otherwise would place this court out of the general line of authority and against the specific declared intent of the legislature."[34] The court further reasoned that "[t]he legislature indicated that if they fail to confirm the 'nominee' he is ineligible to hold the position. It is difficult to see how they could be more explicit in indicating their own interpretation of the importance of confirmation."[35]

The governor attempts to distinguish *Munson* on the basis that the appointee at issue in *Munson* argued that the legislature's failure to act should be considered tacit confirmation.[36] However, the *Munson* court explained the actual issue to be determined was as follows: "what effect did silence and inaction on the part of the legislature have on the attempted reappointment by the Governor of Mr. Rothwell, that is, was such inaction tantamount to confirmation, rejection, or was it without any legal effect whatsoever."[37] The *Munson* court expressly found that the legislature's "silence and inaction"

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[34] *Id.* at 590.

[35] *Id.* at 589.

[36] *Id.* at 580.

[37] *Id.* at 584.

was "in effect, rejection."[38] In other words, the legislature tacitly rejected the governor's appointment.[39]

In 1964, the legislature amended AS 39.05.080(3) to provide:

> (3) When the legislature declines to confirm an appointment, the legislature shall notify the appointing authority of its action and a vacancy in the position or membership exists which the appointing authority shall fill by making a new appointment. The new appointment shall be presented for confirmation to the legislature within 20 calendar days following receipt by the appointing authority of the legislature's notification of its refusal to confirm the prior appointment. If the name of a person is submitted and is not confirmed, the appointing authority may not, upon resubmission of appointments, submit again the name of the person whose confirmation was refused for the same position or membership during the session of the legislature at which confirmation was refused. The person whose name is refused for appointment by the legislature may not thereafter be appointed to the position or membership during the interim between legislative sessions. *Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns.*[40] [Exc. 0005].

The last sentence added to AS 39.05.080(3) closely follows the court's holding in *Munson* that, "failure of the legislature

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[38] *Id.* at 590.

[39] Black's Law Dictionary defines "tacit," in relevant part, as: ""implied but not actually expressed; implied by silence or silent acquiescence." Black's Law Dictionary (10th ed. 2014).

[40] Emphasis added.

to act on [an appointment] is, in effect, rejection."[41] When the Legislature passed HB 309 in 2020, the legislature effectively extended AS 39.05.080(3)'s declination of confirmation date from "the day the regular session adjourns" to December 15, 2020.

While the Alaska Constitution gives the governor appointive power, this power is not without limits. Moreover, contrary to the governor's contention, the legislature's confirmation power is more than a "small component"[42] and is instead "a specific attribute of the appointive power of the executive."[43]

During the Constitutional Convention, standing committees submitted proposed constitutional articles for the delegates' consideration.[44] Delegate Victor C. Rivers discussed the Committee on the Executive Branch's report about the governor's appointive power and stated:

> We vest in the governor the appointive power for the heads of these departments. That is *subject to* confirmation by the houses of the legislature meeting in joint session. All the way through here you will note that we have given the power of approval of the governor's appointments to a joint session of the legislature. We did so after checking with the department on the legislative which was following a similar procedure in the matter of approval of

[41] *Munson*, 16 Alaska at 590.

[42] Brief of Appellant at 13.

[43] *Bradner v. Hammond,* 553 P.2d 1, 15 (Alaska 1976) (citing *Myers v. United States,* 272 U.S. 52, 169, 47 S. Ct. 21, 43, 71 L. Ed. 160, 187 (1926), where the Supreme Court termed confirmation a power "super added" to those possessed by the legislature).

[44] PACC 1980, 2167 (Jan. 13, 1956).

> appointments. I might also add that the approval of appointments has been done in Alaska in that manner for many years by a joint session of both houses.[45]

Although the delegates did not directly address the issue of "inaction on an appointment equals rejection of the appointment," the delegates did appear to recognize that inaction would mean rejection. As the superior court found, the Committee on the Executive Branch's initial committee draft of the recess appointment section had language setting out specific procedures for recess appointments. The committee submitted its proposal on January 12, 1956. [Appellant Exc. 0005]. The language of this proposal, though ultimately not adopted, would have provided as follows:

> After the end of the session no ad interim appointment to the same office shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have adjourned without confirming or rejecting it. No person nominated for any office shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate. [Appellant Exc. 0012].

On January 13, 1956, Delegate Victor C. Rivers discussed the committee's intent with regard to the governor's appointive power and stated:

> Now we have given the governor the power to fill any vacancy occurring during a recess. You will notice there are certain limits upon his power to fill those

[45] *Id.* at 1988 - 1989(emphasis added).

> vacancies. If at the end of the session any of his ad interim appointments expire, or at the end of the next regular session is the way we have put it, but if he nominates somebody and they are sent down for confirmation to the legislature, the legislature does not confirm them during the session, then he may not nominate that same man for an interim appointment after the legislature has adjourned. We felt it was necessary there to have that restriction in order that the governor might not bypass the approving power of the legislature and make an ad interim appointment of somebody the legislature had refused to approve and did not confirm.[46]

Three days later, on January 16, 1956, when discussing the governor's appointive power more in-depth, Delegate Victor Fischer moved to strike the recess appointment provision, explaining:

> *[W]e presently have a law to this effect on our statute books. It was enacted by the last session of the legislature.* I do not see why we must enact things like this which we have in our regular enactments of the legislature, why we must include them in the constitution. I think the discussion here has shown the difficulties and problems that may arise out of bringing in this kind of *detailed procedure*. I think that the subject can be *very adequately covered by legislation*.[47]

The "law to this effect ... enacted by the last session of the legislature" clearly refers to Ch. 64, SLA 1955. Delegate Mildred Herman further explained, in support of striking the recess provision, that:

> [W]e are, apparently, all of the opinion that we should have a strong executive and we have therefore

[46] *Id.* at 1989.

[47] *Id.* at 2264 (emphasis added).

> given to the governor the power of appointment not only of the boards but of all of his officers of principal departments and minor departments. I think the mere statement that this is the law that we have at the present time is sufficient to describe it as a statutory measure and as a statutory measure it does not belong in the constitution. Any attempt to put into the constitution, a law, an actual statute that is already in effect, can only be construed to mean that we are substituting statutory law for fundamental law, which is what the constitution should contain. That is why I seconded the motion.[48]

The delegates voted to strike the provision, but immediately expressed concerns with deleting it.[49] The delegates then engaged in the following exchange:

> PRESIDENT EGAN: The Chair has been thinking about that since Mrs. Nordale asked the question. *There is a statutory provision at the present time that covers that and the transitional measures, I mean, if that is the wish of the body in striking Section 18, the transitional measures will probably call for the adoption of all Territorial laws, laws on the statutes to become the law of the state*. Mr. Buckalew.
>
> BUCKALEW: I am a little worried about Section 18. I doubt seriously if the governor would have authority to make a recess appointment.
>
> PRESIDENT EGAN: Mr. Buckalew, *isn't it true there is a statutory provision that gives the governor of Alaska a right to make interim appointments now and that if the laws are carried over into the new state government by the transitional measure, he will still have that authority*?
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> BUCKALEW: The only thing that worries me is, suppose we don't carry over that particular statute? Suppose we don't adopt that statute?

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[48] *Id.* at 2265.

[49] *Id.* at 2265 - 2268.

> PRESIDENT EGAN: It seems to me we would be in trouble more ways than one. Mr. Victor Rivers.[50]

Delegate George Sundborg then proposed adding the following provision: "The Governor may fill any vacancy occurring in any office during a recess of the Legislature, as may be prescribed by law."[51] Delegate Rivers expressed his concern regarding reappointments of the same person, stating:

> That amendment does nothing more than give [the Governor] an implied power that is already here. It doesn't take care of an appointment he may make. Suppose the governor makes an appointment of 'Joe Doaks' to be a secretary of some department, or head of some department, the legislature does not confirm him. The governor submits no new name; the legislature goes out of session; the governor then turns around and reappoints 'Joe Doaks' interim head until the next session of the legislature meets. By our wording we have taken care of that. *By this wording it takes care of nothing that is not already an implied power. The legislature already has the power to provide by law.*[52]

Nowhere in the delegates' discussion is there any expressed intention that the legislature's power to reject an appointment may only be exercised in joint session, by voting. Nowhere is there any intent for the Alaska Constitution to limit the legislature's power to establish procedures for exercising its power of confirmation. Legislative Council agrees with the governor that the delegates intended *confirmation* of an

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[50] *Id.* at 2267 (emphasis added).

[51] *Id.* at 2268.

[52] *Id.* at 2268 - 2269 (emphasis added).

appointee to be effectuated through a majority of the members of the legislature in joint session.[53] Legislative Council disagrees with the governor's contention that the delegates intended *rejection* of an appointee to be done only through a vote in joint session, or that the delegates "understood that the power of confirmation was something that could only be exercised in joint session, by voting."[54]

In fact, while the delegates agreed there should be a strong executive, including the power of appointment,[55] no delegate disputed that "detailed procedure" relating to appointments "can be very adequately covered by legislation"[56] because "the legislature already has the power to provide by law."[57] The delegates did not know at that time with certainty whether the 1955 law would carry over and become the law of the state.[58] The delegates recognized that because the legislature has the power to "provide by law," by removing explicit language allowing the governor to make a recess appointment, the governor would only be able to make such an appointment if the

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[53] Brief of Appellant at 15.

[54] *Id.*

[55] PACC 2265 (Jan. 16, 1956).

[56] *Id.* at 2264.

[57] *Id.* at 2268 - 2269.

[58] *Id.* at 2267.

legislature passed a statute allowing the governor to do so.[59] The delegates therefore subsequently decided to include language in the constitution explicitly allowing the governor to make a recess appointment. Nothing in their discussion indicates the delegates intended to take away the legislature's power to "provide by law" the procedures for exercising its power of confirmation.

C. The Alaska Constitution does not mandate that the legislature vote on the governor's appointees.

The Alaska Constitution states in plain language that appointments are made by the governor "subject to confirmation by a majority of the members of the legislature in joint session."[60] Nowhere in the Alaska Constitution does it mandate that the legislature take a vote on the governor's appointees. Indeed, this Court has long recognized that the legislature, and the legislature alone, decides whether or not to take a vote on the governor's appointees, noting that

> Although each house of the legislature may conduct such inquiry as it thinks desirable into the suitability of appointees whose confirmation is required, this power does not serve as a limitation on the power of the Governor to call a joint session. The plain text of the constitution grants convening power to the executive. *However, the constitution does not leave the Legislature powerless to defend its own prerogatives. While the Governor may call a joint session, his call does not determine the vote. Whether*

[59] *Id.* at 2265.

[60] Article III, secs. 25 and 26, Constitution of the State of Alaska.

> *a joint session has been called prematurely is a question that can be readily decided by a majority of the legislators.*[61]

Thus, as a fundamental issue, the legislature is *not required* to vote on the governor's appointees. Besides, the Alaska Constitution gives the legislature the power to adopt its own rules of procedure,[62] including, as explained above, the power to enact statutory procedures for exercising its power of confirmation. In the end, the legislature is not constitutionally required to act on the appointees, as suggested by the governor, and legislative inaction cannot serve as confirmation under the plain language of the Alaska Constitution.

D. AS 39.05.080(3) and HB 309 are consistent with how similar constitutional provisions are interpreted under federal law and in other states.

The legislature's practice of declination through legislative inaction is not novel to Alaska. It is a process used by both the federal government and other states. In *State ex rel. McCarthy v. Watson*, cited by the Alaska Supreme Court in *Munson*, the Connecticut Supreme Court considered the legislature's inaction on the governor's appointments.[63] Despite

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[61] *Abood v. Gorsuch*, 703 P.2d 1158, 1164 (Alaska 1985) (emphasis added).

[62] Article II, sec. 12, Constitution of the State of Alaska.

[63] 132 Conn. 518, 45 A.2d 716, 164 A.L.R. 1238 (1946).

express provisions of the applicable act which provided that the legislature must act on the name submitted by the governor, the legislature voted not to consider the appointment.[64] As in *Munson*, the defendant argued that the inaction of the legislature amounted to tacit confirmation.[65] But the Connecticut court held that the defendant's appointment was invalid:

> [I]n acting upon an appointment [the legislature] is not exercising a prerogative granted it in its own interest or that of its members; *there can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment*.[66]

In *State, ex rel. Oberly v. Troise*, the Delaware Supreme Court considered the validity of commissions issued by the governor without the consent of the Senate and after the Senate failed to act on the governor's nominations for a prolonged period of time.[67] The issue required the court to interpret art. III, sec. 9 of the Delaware Constitution, which allows the governor to appoint certain public officials based on majority consent of the Senate.[68] The Delaware Supreme Court ruled the commissions invalid, stating:

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[64] *Id.* at 521.

[65] *Id.* at 535-36.

[66] *Id.* at 536 (emphasis added).

[67] 526 A.2d 898 (Del. 1987).

[68] *Id.*

> Article III, § 9 clearly assigns the confirmation power to the Senate and to no other body. Appellees point out that the Senate is not acting in its legislative capacity in exercising its confirmation power. However, we see no justification for placing judicial limitations on the Senate's authority even though it has failed to act on a non-legislative duty assigned it by the State constitution. *In acting (or choosing not to act) on nominations, the Senate represents a coordinate branch of government to which the constitution has assigned a task consistent with a constitutional pattern of "checks and balances." The Senate's action, or inaction, on gubernatorial appointments rests on its constitutional authority to confirm gubernatorial appointments and even if, arguendo, such power is deemed administrative, it is not a ministerial duty which can be judicially enforced.* [69]

The governor contends federal law does not support Legislative Council's position because the President may make recess appointments of officials who were nominated but not confirmed.[70] However, this does not alter the fact that art. II, sec. 2 of the United States Constitution provides that the President must appoint officers of the United States "by and with the Advice and Consent of the Senate," and that the Uniform Rules of the Senate, Rule XXXI(6), provides that nominations neither confirmed nor rejected during the session at which they are made may not be acted on at any succeeding session without being again made to the Senate by the President. If the Senate adjourns or takes a recess for more than thirty days, all

[69] *Troise*, 526 A.2d at 905 (emphasis added).

[70] Brief of Appellant at 48.

nominations pending and not finally acted upon at the time of taking such adjournment or recess are returned by the Secretary to the President, and may not again be considered unless they are again made to the Senate by the President.[71] In other words, nominations the Senate fails to either confirm or reject during the session at which they are presented are considered tacitly rejected. Alaska's procedure is consistent with the federal procedure that has been in place for many years, and is consistent with the procedure followed in other states with similar provisions.

Significantly, the governor fails to cite a case from *any* state with a constitution that is silent on declination through legislative inaction that has adopted the governor's position on the issue. As the superior court found:

> It appears to be the unanimous rule, both under the United States Constitution and under all State Constitutions lacking express language providing otherwise, that failure of a legislative body to act on confirmation of an executive branch appointment is the equivalent of rejection. [R. 000274].

So while the governor argues that there is no broadly recognized rule on the issue,[72] the governor has identified no case supporting an alternative result.

[71] Uniform Rules of the Senate, Rule XXXI(6).

[72] Brief of Appellant at 29.

E. AS 39.05.080(3) and HB 309 do not expand the legislature's power of confirmation contrary to the Court's decision in *Bradner v. Hammond*.

The governor contends that, contrary to the Court's decision in *Bradner v. Hammond*,[73] the legislature has given itself extra ways to reject appointees not identified in secs. 25 and 26 of the Alaska Constitution.[74] The facts of *Bradner* make it distinguishable from this case. In *Bradner*, the legislature had passed a bill that expanded the number of executive branch positions subject to legislative confirmation. Governor Hammond believed that the bill impinged upon the executive appointment power because it would require subordinate executive officers to be confirmed by the legislature.

The question before the Alaska Supreme Court was whether the legislature had unconstitutionally wrested authority from the executive branch. Article III, secs. 25 and 26 require that department heads and members of regulatory or quasi-judicial agencies be nominated by the governor and confirmed by the legislature. In *Bradner*, the legislature passed a law that made many more executive branch employees subject to confirmation. Governor Hammond "vetoed the bill on the ground that [it] impinged upon the executive power of appointment," but the

[73] 553 P.2d 1 (Alaska 1976).

[74] Brief of Appellant at 19.

legislature overrode his veto.[75] In court, Governor Hammond argued that secs. 25 and 26 of art. III constitute the outer limit of the legislature's confirmation authority - the supreme court agreed with him, stating:

> In light of the nature of the legislature's power of confirmation, the question whether Sections 25 and 26 of Article III describe the outer limits of the legislature's confirmation authority, *or whether the legislature may by statute require confirmation of other high-level, policy making officials within the executive branch*, admits of but one resolution. *As to this issue*, we think the provisions of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government.[76]

In contrast to *Bradner*, this case involves AS 39.05.080(3) and sec. 1(b) of HB 309, two narrowly tailored laws the legislature passed to create a framework for it to fulfill its confirmation mandate. In *Bradner*, the legislature passed a law expanding the category of officials requiring legislative confirmation despite express language in the Alaska Constitution limiting the category to department heads and members of regulatory or quasi-judicial agencies.[77] Here, art. III, secs. 25 and 26 are silent on the manner in which the legislature may permissibly *decline* the governor's appointees. In discussing

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[75] *Bradner*, 553 P.2d at 3.

[76] *Id.* at 7 (emphasis added).

[77] *Id.*

the governor's appointive power, the delegates recognized that "detailed procedure" relating to appointments "can be very adequately covered by legislation"[78] because "the legislature already has the power to provide by law."[79] As the superior court recognized, AS 39.05.080(3) and HB 309 actually *narrow* the legislature's power of confirmation, because they impose a time limit on the legislature's power of confirmation. [R. 000279].

Neither AS 39.05.080(3) nor HB 309 strip any constitutional power from the executive branch or violate *Bradner*, as the governor now argues. Article III, secs. 25 and 26 provide that the governor's appointees are "subject to confirmation" not "subject to confirmation or declination." In choosing not to act on the governor's appointments, the legislature "represents a coordinate branch of government to which the constitution has assigned a task consistent with a constitutional pattern of 'checks and balances.'"[80] The legislature's failure to vote on the governor's appointees does not exceed "the full reach of the delegated, or shared, appointive function."[81] The legislature's inaction on the governor's appointments rests on its

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[78] PACC 2264 (Jan. 16, 1956).

[79] *Id.* at 2268 - 2269.

[80] *See, e.g.*, *Troise*, 526 A.2d at 905.

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

constitutional authority to confirm gubernatorial appointments.[82] Legislative Council agrees with the governor that "The Court should continue to maintain the balance of power between the executive and legislative branches here."[83] The Court should not upset the well-established balance of power that has been used for decades in balancing the governor's appointive power and the legislature's power to prescribe by law the procedure for carrying out its legislative power of confirmation.

F. It is the legislature's role to establish policy for the state.

The governor contends "reason and policy" support his position that the legislature must meet in joint session to reject an appointment, and cites various policy reasons in support of this contention.[84] However, it is the legislature's role to establish policy for the state. A "court is not empowered to substitute its judgment for that of the legislature on matters of policy, nor to strike down a statute which is not manifestly unconstitutional even though the court may consider it unwise."[85]

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[82] *See, e.g., Driscoll v. Hershberger,* 172 Kan. 145, 238 P.2d 493 (Kan. 1951).

[83] Brief of Appellant at 20.

[84] *Id.* at 20 - 25.

[85] *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1244 (Alaska 1992), *citing* 1 Sutherland Stat.Const. § 2.01 at 15–16 (4th Ed. 1985 Rev.).

The governor asserts that the legislature's actions are "deeply disruptive" and contends that, if this Court rules in Legislative Council's favor, the legislature will continue to shirk its constitutional responsibility due to the likelihood of "legislative inaction, exhaustion, or paralysis."[86] As recognized by the superior court, the legislature faults the governor for not exercising his power to call a special session on this subject, and the governor blames the legislature for not voting on confirmations before leaving the Capitol in March, or for not addressing the issue when returning briefly in May, or for not calling itself into special session later in the year. [R. 000281]. The legislature, however, was left without the votes to call itself into special session. [R. 000088 - 000090]. As the superior court summarized:

> Deciding who to blame for the impasse that exists is precisely the sort of political question that should be left to the political branches of government - and to the voters. Resolution of this question is not necessary to the court's decision, which merely requires the court to decide an issue of law. Given that, it would be inappropriate for the court to express a position on such political questions. [R. 000281].

[86] Brief of Appellant at 21. Legislative Council also takes issue with the governor's assertion that if the legislature were to prevail in this appeal, the legislature will forego confirmations for no reason at all, "because the legislature would like to work less." Brief of Appellant at 20. Rejection of the governor's appointees is a political issue and has nothing to do with the legislature wanting to do less work.

Ultimately, while the governor argues that the risk of "legislative inaction, exhaustion, or paralysis," require this Court to find in favor of the governor, the voters will decide who to blame for the governor and legislature's disagreement and the court need not resolve the issue.

The legislature has weighed the benefits and detriments to the public and has established procedures for exercising its power of confirmation that differ from the governor's proposed approach. The underlying policy choices relating to the legislature's procedures for exercising its power of confirmation are the legislature's to make.[87] Like in *Munson*, the legislature could not have been more explicit in AS 39.05.080(3) and HB 309 as to its intended procedures in the event of the failure of the legislature to meet in joint session to act on gubernatorial appointments. Therefore, this Court should affirm the superior court judgment that under HB 309, "the appointments presented by the [g]overnor ... became tantamount to a declination on December 15, 2020, and those appointments were rejected and no longer valid as of December 15, 2020." [Appellant's Exc. 0068].

[87] *See* art. II, sec. 12, Constitution of the State of Alaska.

G. Whether AS 39.05.080(3) and HB 309 are consistent with AS 39.05.080(2) and AS 39.05.070 is not an issue on appeal.

The governor asserts AS 39.05.080(3) and HB 309 are inconsistent with AS 39.05.080(2)[88] and AS 39.05.070.[89] However, this issue was not raised in the superior court, and the superior court did not address the question of whether AS 39.05.080(3) and HB 309 are consistent with AS 39.05.080(2) and AS 39.05.070. The governor's statement of points on appeal included the following issues:

> [The superior] court erred in concluding that (1) the provision of AS 39.05.080(3) and HB 309 that purport to authorize the legislature to reject gubernatorial appointments by inaction do not violate Article III, sections 26 and 27 of the Alaska Constitution; and (2) the governor's appointments of ninety-four executive branch officials was not a lawful exercise of the governor's recess appointment authority under Article III, section 27 of the Alaska Constitution.[90]

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[88] AS 39.05.080(2)(B) provides:

> When appointments are presented to the legislature for confirmation . . . the legislature shall, before the end of the regular session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.

[89] Brief of Appellant at 31 - 32. AS 39.05.070 provides:

> It is the purpose of AS 39.05.070 — 39.05.200 to provide procedural uniformity in the exercise of appointive powers conferred by the legislature to eliminate, insofar as possible, recess or interim appointments except in the event of death, resignation, inability to act, or other removal from office and the exercise, insofar as possible, of appointive powers only when the legislature is in session.

[90] Appellant Statement of Points on Appeal at 1.

A determination of whether AS 39.05.080(3) and HB 309 are consistent with AS 39.05.080(2) and AS 39.05.070 is not necessary to determine whether AS 39.05.080(3) and HB 309 are constitutional.

Even if this issue was properly before this Court, AS 39.05.080(3) and HB 309 are consistent with AS 39.05.080(2) and AS 39.05.070. The legislature does not dispute that it failed to meet in joint session to confirm or decline to confirm the governor's appointments as required by AS 39.05.080(2). The directive in AS 39.05.080(2) and the statement of purpose in AS 39.05.070 are statutory and not constitutional.[91] The legislature's failure to follow its own procedures in exercising its power of confirmation does not restrict the legislature's constitutional power to effect declination through inaction.

Munson supports Legislative Council's position that the legislature's failure to follow a statute directing the legislature to meet in joint session to act on a gubernatorial appointment and AS 39.05.070's statement of purpose do not prevent the legislature from rejecting the appointment through a failure to act. Similar to AS 39.05.070, sec. 1 of the 1955 statute stated that the purpose of the confirmation statutes was:

[91] AS 39.05.080(2)(B).

> to achieve procedural uniformity in the exercise of those and other appointive powers conferred by the Alaska Legislature, the elimination, insofar as possible, of recess or interim appointments except in the event of death, resignation, inability to act or other removal from office and the exercise, insofar as possible, of such appointive powers only at such times as the Legislature is in session duly assembled. [Exc. 0002].

Similar to AS 39.05.080(2), sec. 4(c) of the 1955 statute directly mandated that the legislature act on gubernatorial appointments. [Exc. 0003]. However, unlike AS 39.05.080, the 1955 law did not have an express provision that such a failure is tantamount to a declination of confirmation on the day the session adjourns. Despite this, the *Munson* court interpreted the 1955 confirmation statutes as not requiring an affirmative act of rejection, finding that the legislature intended that its failure to act to be, "in effect, rejection."[92]

In 1964, the 1955 statute was amended to explicitly recognize what was implicit in the 1955 law - that the legislature may fail to meet in joint session to confirm or decline to confirm a gubernatorial appointee. Alaska law now explicitly provides that such a failure, "is tantamount to a declination of confirmation on the day the session adjourns."[93]

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[92] *Munson*, 16 Alaska at 590.

[93] AS 39.05.080(3); HB 309, sec. 1(b).

II. The governor's attempted recess appointments under art. III, sec. 27 of the Alaska Constitution were prohibited by AS 39.05.080(3) and HB 309.

Article III, sec. 27 of the Alaska Constitution governs recess appointments and provides "[t]he governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature." Both AS 39.05.080(3) and HB 309 prohibited the governor from reappointing the appointees at issue during the interim between sessions.

As noted in I(B) above, on January 13, 1956, Delegate Rivers discussed the Committee on the Executive Branch's intended limits on the governor's power to make a recess appointment, explaining:

> [If the governor] *nominates somebody and they are sent down for confirmation to the legislature, the legislature does not confirm them during the session, then he may not nominate that same man for an interim appointment after the legislature has adjourned. We felt it was necessary there to have that restriction in order that the governor might not bypass the approving power of the legislature and make an ad interim appointment of somebody the legislature had refused to approve and did not confirm.*[94]

When discussing the recess appointment provision more in-depth a few days later, Delegate Fischer moved to strike the provision on the basis that "the subject can be very adequately

[94] *See supra* I(B); PACC 1989 (Jan. 13, 1956) (emphasis added).

covered by legislation."[95] In response, Delegate Rivers again expressed the Committee on the Executive Branch's intended limits on the governor's power to make a recess appointment, stating:

> It seems to us in the Committee, essential that we provide the power for making interim appointments when the legislature was not in session *and also provide that the governor could not make interim appointments, jump the time the legislature was in session and then make another interim appointment of the same man*. This does take care of that situation.[96]

The Committee on the Executive Branch plainly intended the recess appointment provision to accomplish two distinct goals: (1) provide the governor with the power to make interim appointments when the legislature was not in session; and (2) prohibit the governor from "[bypassing] the approving power of the legislature and make an ad interim appointment of somebody the legislature had refused to approve and did not confirm." Again, as discussed in I(B) above, Delegate Sundborg proposed adding a provision that the governor may fill any vacancy occurring during a recess "as may be prescribed by law."[97] Delegate Sundborg explained his amendment as follows:

> My amendment *would give the legislature the power to take care of that by whatever language or provision it desires*. It does give the governor the right to make

[95] PACC 2264 (Jan. 16, 1956).

[96] *Id.* at 2265 (emphasis added).

[97] *Id.* at 2268.

> an interim appointment and then it says that the rules governing such interim appointments shall be laid down by the legislature.[98]

After this explanation, which echoed the Committee on the Executive Branch's dual goals, the delegates adopted the provision.[99] A little later that day, Delegate Sundborg proposed another amendment, which is in substance existing art. III, sec. 27. Delegate Sundborg stated:

> Mr. President, a little while ago I submitted another amendment which *I thought accomplished what this says, but I was advised by some of the technical staff it did not actually accomplish what I had intended*, in that it *left the possibility present that the legislature could by law actually prohibit the governor from even making a recess appointment under the existing language*. This new section says that the governor may make a recess appointment but that the duration of the appointment shall be determined by the legislature.[100]

Delegate Sundborg's comments show that the amendment was a "technical" drafting revision, made so that the provision would accomplish the delegates' previously expressed dual goals.

Article III, sec. 27 and the delegates' discussion outlined in I(B) above establish that the legislature may set the rules for interim appointments by law, including rules restricting the governor from reappointing a person whose appointment was rejected by the legislature. Under AS 39.05.080(3) and HB 309,

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[98] *Id.* at 2269 (emphasis added).

[99] *Id.*

[100] *Id.* at 2284 - 2285 (emphasis added).

sec. 1(d), the governor was not permitted to reappoint persons whose appointments were considered "tantamount to a declination."

The governor contends art III, sec. 27 allows the legislature to set only durational limits on recess appointments, but not limits on whom a governor may appoint.[101] As discussed above, this is clearly not what the delegates intended. Additionally, under the governor's interpretation, if the legislature votes to reject a gubernatorial appointee,[102] the governor may reappoint that same person after the regular session ends. That appointee would then continue to serve until the legislature again voted to reject the appointee during the next legislative session, but the governor could just again reappoint that same person after the regular session ended - and this cycle could continue endlessly. Not only is the governor's interpretation contrary to the delegates' expressed intention to restrict the governor from reappointing a person who the legislature did not confirm, it completely guts the legislature's constitutional power of confirmation and its "power to provide by law"[103] the procedures for exercising it.

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[101] Brief of Appellant at 33.

[102] The Legislature commonly votes on appointees toward the end of session because of the time it takes to consider each appointee.

[103] PACC 2268 - 2269 (Jan. 16, 1956).

CONCLUSION

Although the legislature initiated this case in the superior court, the legislature is in the unusual position of not bearing the burden of proving as a matter of law that AS 39.05.080(3) and HB 309 are constitutional. The governor bears the burden of demonstrating a constitutional violation in this case, and he has failed to meet that burden. AS 39.05.080(3) and HB 309 are constitutional, the governor's appointees in question were rejected effective December 15, 2020, and the governor's attempted recess appointments under art. III, sec. 27 were prohibited by law.

For these reasons, this Court should affirm the decision of the superior court in favor of the Alaska Legislative Council.