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 PHILLIP J. PALLENBERG, JUDGE

BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS

Alaska Const. Art. III, § 25. Department Heads
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.
Editor's Note. Senate Joint Resolution No. 2, "changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.

Alaska Const. Art. III, § 26. Boards and Commissions
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, § 27. Recess Appointments
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 LAWS

. . .

AS 39.05.080(2)(B)
(2) When appointments are presented to the legislature for confirmation,

> . . .
> (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.

. . .

AS 39.05.080(3)
(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.

. . .

HB 309, SLA 2020

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 9 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).

PARTIES

The appellant is Michael J. Dunleavy, Governor of the State of Alaska. The appellee is the Alaska Legislative Council, on behalf of the Alaska State Legislature.

ISSUES PRESENTED

1. Legislative confirmation authority. Alaska's constitution vests executive power—which includes robust authority to appoint executive branch officials—in the governor. It also delegates a limited slice of the executive appointment power to the legislature by providing that certain appointments are "subject to confirmation by a majority of the members of the legislature in joint session." The legislature passed laws providing that rather than vote on appointments in joint session, it can just do nothing, and that its inaction is "tantamount to declination." Are these laws constitutional?

2. *Recess appointment authority*. Article III, § 27 of the Alaska Constitution authorizes the governor to fill vacancies occurring during a recess of the legislature in offices requiring legislative confirmation. It allows the legislature to limit these "recess appointments" in one way—by setting their "duration." Can the legislature further restrict recess appointments by barring the appointment of specific individuals? If so, can it bar recess reappointments of officials that it never voted to reject?

INTRODUCTION

In 2020, legislative inaction brought to a head a long-dormant separation-of-powers dispute when the legislature sought to remove an entire slate of executive branch appointees from office without holding a single confirmation vote. The Court must now decide whether the Alaska Constitution allows the legislature to do this—that is, to

behead the executive branch without lifting a finger. The Court should hold that it does not.

Alaska's constitutional convention delegates chose to create a strong executive, giving the governor broad authority over the executive branch and ensuring that state government—under any elected governor—remains responsive to voters and that the governor can meaningfully administer state affairs.[1] One critical component of this design is the governor's authority to appoint executive branch leaders.[2] The legislature has a limited say in these appointments—its confirmation authority.[3] And under *Bradner v. Hammond*,[4] the legislature may not bypass the hard limits on that authority. Executive appointees continue to serve the people of Alaska "subject to confirmation by a majority vote in joint session"—that is, until the legislature actually votes in joint session not to confirm them. The legislature's contrary position ignores the constitutional text, undermines the administration of government, forces a governor's needlessly repeated exercise of executive authority, and disrupts the balance of power.

In this case, the legislature seized greater executive appointment power than the limited confirmation "check" that the constitution explicitly grants it.[5] Rather than carrying out its obligation to vote on appointees in joint session, the legislature granted

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1 Alaska Const., Art. III, §§ 1, 16, 22, 24.

2 Alaska Const., Art. III, §§ 25-26.

3 *Id*.

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

5 *Id*. at 7-8.

itself statutory authority to adjourn without doing so. It also decreed that its *inaction*—in any year, for any reason, and for one appointee or a whole slate—is "tantamount to" an actual rejection vote that removes the appointees from office and forces the governor to begin the appointment process anew.[6] The legislature then compounded the problem by purporting to curtail the governor's recess appointment authority, prohibiting him from appointing someone to a recess vacancy if previously appointed in the regular session—even if the legislature never voted on the person's appointment. Neither constitutional text, history, public policy, nor common sense support this result.

The net effect of the legislature's actions is a gross expansion of its power at the expense of the executive that thwarts the delegates' intent to create a strong executive, fails to serve the purposes underlying the legislature's confirmation power, and undermines the separation of powers. The Court should recognize that this violates the Alaska Constitution and reverse the decision below.

STATEMENT OF THE CASE

I. The Alaska Constitution established a strong executive with broad appointment authority to ensure a functioning state government.

The Alaska Constitution establishes a strong executive to ensure that the critical functions of state government are carried out effectively and efficiently. The provisions

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[6] Alaska Statute 39.05.080(3) (providing "[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"). Under HB 309, passed last year, appointees were deemed to have been declined on December 15, 2020. HB 309, ch. 19, SLA 2020; SB 241, ch. 10, SLA 2020 (extending declaration of public health disaster to November 15, 2020).

in Article III, which sets out executive power, work in tandem, centralizing executive authority and responsibility for administering state government.[7] Reviewing this landscape of gubernatorial authority, this Court observed that "[t]here is no dispute that our constitution was designed with a strong executive in mind."[8]

An historian of Alaska's constitutional convention explained that the delegates' decision to create a strong executive was born in part from the concern that the territorial government was too weak to effectively govern, and that the territorial legislature had contributed to that weakness by diffusing executive power to a variety of boards and commissions.[9] As Delegate Rivers remarked in introducing the executive authority article, "[w]e are all strongly agreed on the principle of the strong executive."[10] Indeed, that notion is woven throughout Alaska's constitutional fabric. For example, the governor's veto power over spending items in appropriations bills reflects "a desire by

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[7] Article III, § 1 provides that "[t]he executive power of the State is vested in the governor." Article III, § 16 makes the governor responsible for carrying out and enforcing the Constitution and state laws. Article III, § 17 authorizes the governor to convene the legislature at any time he "considers it in the public interest." Article III, §§ 25, 26, and 27 authorize the governor to appoint executive branch officials. Still other provisions authorize the governor to make changes in the executive branch "which he considers necessary for efficient administration," and to supervise "each principal department head." Alaska Const. Art. III, §§ 16, 24.

[8] *Bradner*, 553 P.2d at 8 n.3.

[9] Gerald A. McBeath, *The Alaska State Constitution* 99, 113 (2011).

[10] Proceedings of Alaska Constitutional Convention (PACC) 1984 (January 13, 1956).

the delegates to create a strong executive branch with 'a strong control on the purse strings' of the state,"[11] thus the constitution's "executive check" on spending.[12]

Recognizing the weaknesses of diffuse executive power, the delegates declined to name specific departments, instead limiting the number of principal departments to twenty.[13] They rejected the approach of many states in which department heads are elected,[14] instead establishing the governor as the elected head of the executive branch with full executive power and giving the governor authority to select officials to lead those departments and to fill other executive branch positions. They vested the governor with executive power "to appoint [these] subordinate executive officers to aid him in carrying out the laws of Alaska," because, as this Court recognized, "without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated."[15] They also gave the governor authority to make recess appointments to carry out the state's work when the legislature was not in session.[16]

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11 *Thomas v. Rosen*, 569 P.2d 793, 795 (1977); *accord Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 896 (Alaska 2004) ("[T]his section was 'a provision in regard to the appropriation and spending of money which would allow somewhat more power to lie in the strong executive." (quoting PACC 1741)).

12 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 102 (Alaska 2016).

13 Alaska Const. Art. III, §§ 22, 25-27.

14 *See* PACC 1987, 2068 (January 13, 1956).

15 *Bradner*, 553 P.2d at7.

16 Alaska Const. Art. III, § 27.

Thoughtful about assuring checks and balances,[17] the delegates also gave the legislature a limited role to play in the appointment process.[18] But they did not adopt the federal process for confirmation set out in the U.S. Constitution, which provides that the president "shall nominate" a wide range of federal officials and then appoint them with the "Advice and Consent of the Senate."[19] Instead, the delegates charted Alaska's own path consistent with the need for a strong executive.[20] As Delegate Rivers explained, "we have tried to bolster the executive to where he can function efficiently and effectively as the head of the state government in these modern times," so the governor "has certain appointing powers which are later confirmed by the legislature in joint session."[21] This balance of authority is set forth in §§ 25 and 26, which limit the legislature's role to confirmation of department heads and certain board and commission appointees,

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17 *Bradner*, 553 P.2d at 7.

18 The notion of shared authority also exists in the budget context. *See Simpson v. Murkowski*, 129 P.3d 435, 446 (Alaska 2006) (explaining how the budget and veto process reflects framers' intent to create "a role for both the governor and the legislature in the appropriations process."). But unlike the scattered provisions regarding the state budget, which are set out in Articles II and IX, the appointment authority—an "executive function"—is anchored entirely in article III. Alaska Const. Art. III, §§ 1, 16, 22, 24-27.

19 U.S. Const. Art. II, § 2, cl. 2. *See, e.g.*, PACC 2179-81 (January 14, 1956).

20 *See* PACC 1984 (January 13, 1956) ("[W]e found that the older state constitutions with their many elective officials and many restrictions upon the powers of the executive could almost in their entirety be eliminated from consideration as reference matter.").

21 *Id*. at 1984-85.

instructing that these officials are "appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session."[22]

The delegates also considered what role the legislature should play in the recess appointment context. The first draft of Article III, § 27 they considered prohibited the recess appointment of an individual whose appointment had not been confirmed, *unless* the Senate had adjourned without taking action on the appointment. [Exc. 12] The recess provision was later deleted on the theory that recess appointments could be managed through legislation instead.[23] But a new recess provision was adopted after other delegates worried that without explicit recess appointment authority, the governor would be unable to fill recess vacancies.[24] After some debate, the convention settled on a version that empowers the governor to make recess appointments "in offices requiring confirmation by the legislature," while giving the legislature authority to establish the "duration of such appointments."[25]

Unlike in the federal system where officials are nominated by the president but not actually "appointed" and eligible to begin working until the Senate exercises its advice and consent power, appointees in Alaska begin carrying out the full range of critical state

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[22] Alaska Const. Art. III, §§ 25 and 26. The only other explicit authority provided the legislature is the ability to establish removal procedures for board and commission members and to establish by law the duration of recess appointments. Art. III, § 27.

[23] PACC 2265 (January 16, 1956).

[24] *Id*. at 2264, 2267-69 (Del. Buckalew: "I am a little worried about Section 18. I doubt seriously if the governor would have the authority to make a recess appointment.").

[25] *See id*. at 2285-86. The final version of the recess appointment provision was modified as a matter of style to eliminate the phrase "ad interim."

business while awaiting confirmation.[26] Appointees subject to confirmation include many full-time salaried employees, like department heads such as the Commissioner of Revenue, the Attorney General, and others; the public defender; and the commissioners of the Regulatory Commission of Alaska and the Alaska Oil and Gas Conservation Commission.[27] But more often, appointees fill critical volunteer positions that promote public health and keep Alaskans safe—serving, for example, on the State Medical Board, the Alaska Police Standards Council, the Board of Nursing, the Alaska Workers' Compensation Board, and the State Commission on Human Rights.[28] [Exc. 30, 65-66]

In 1964, the Alaska Legislature enacted HB 255 establishing "procedures" for confirmation, amending AS 39.05.080(3) to provide, among other things, that legislative inaction on an appointee is "tantamount to" a rejection vote on that appointee:[29]

> 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

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[26] *See* AS 39.05.080(4); *Cook v. Bothelo*, 921 P.2d 1126, 1130 and n.4 (Alaska 1996) ("The fact that the appointee's right to the office is contingent upon confirmation by the legislature does not change this result. Confirmation occurs after appointment."). *Contra*, U.S. Const. Art. II, § 2, cl. 2. Other words that could have denoted lesser authority granted to the governor such as "shall nominate" are not used. *See NLRB v. Noel Canning*, 573 U.S. 513, 518-519 (2014) (acknowledging that the President nominates officials but "must obtain 'the Advice and Consent of the Senate before appointing an Officer of the United States.") (citing U.S. Const. Art. II, § 2, cl. 2)).

[27] *See* AS 42.04.020(f) (RCA); AS 31.05.015 (AOGCC).

[28] *See* AS 8.64.010, AS 08.64.107 (State Medical Board); AS 18.65.150 (Police Standards Council); AS 08.06.010, AS 08.06.100 (Board of Nursing); AS 23.30.005 (Alaska Workers' Compensation Board); AS 18.80.020, AS 18.80.060 (Alaska State Commission on Human Rights).

[29] Ch. 1, SLA 1964; *Cook*, 921 P.2d 1126 (explaining statute "sets out the procedural steps to be followed during the legislative function of confirmation; it does not establish the substantive elements of the executive act of appointment.").

> 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.

The provision mirrored a 1955 territorial statute, with a notable exception: the territorial version did not include the language deeming inaction "tantamount to declination."[30]

The Department of Law has long identified legal infirmities in this language, but the infrequency of legislative inaction—coupled with the realities of political negotiation and comity—avoided direct confrontation over the statute's constitutionality until now.[31] Although the statute has been on the books since 1964, the legislature has never before tried to wield it against the executive branch in the extraordinary manner it did in 2020.[32]

II. The legislature failed to act on appointments in 2020, igniting a long-simmering dispute over its limited role in the appointment process.

In the winter of 2020, Governor Dunleavy presented to the legislature over ninety executive branch appointments, including members of more than forty state boards and commissions and the Commissioner of Revenue.[33] [Exc. 64] The legislature was

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30 [Exc. 2 (Sec. 4, ch. 64, SLA 1964)].

31 *See* 1983 WL 42546 (Alaska A.G. June 3, 1983) (stating the Department of Law had "serious questions" concerning the validity of any provision of AS 39.05.080 permitting blanket rejection of gubernatorial appointments if the legislature fails to act).

32 *See* discussion at p. 22, *infra*.

33 1528-1537 House Journal (Feb. 5, 2020).

statutorily obligated to vote on those appointments in joint session.[34] But the statute quoted above—AS 39.05.080(3)—provides that "failure" to do so is "tantamount to a declination of confirmation" when the regular session adjourns.

As the governor's 2020 appointees began carrying out critical work for the state while awaiting confirmation, the COVID-19 pandemic spread across the globe, causing an unprecedented public health crisis, extraordinary loss of life, and devastating economic harm. Nonetheless, the Alaska Legislature continued to hold hearings, and ultimately passed over thirty bills on various subjects[35] until it left Juneau after sixty-eight days.[36] It never met in joint session to consider the governor's appointments.

Instead, the legislature sought to extend the time period to do so by passing ch. 9, SLA 2020 ("HB 309"). Like existing law,[37] section 1(a)(1) of the bill required that the legislature vote on the appointments, providing "the legislature *shall*, in joint session, act on the appointments at any time by confirming or declining the appointments by a majority vote of all of the members" (emphasis added). But section 1(b) again included a contradictory provision in which the legislature gave itself authority to act through

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34 "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." AS 39.05.080(2)(b) (emphasis added).

35 http://www.akleg.gov/basis/Bill/Passed/31?sel=14

36 Anchorage Daily News, "Alaska Legislature Approves $4.5 billion budget plus $1,000 permanent fund dividend, then departs Juneau," March 29, 2020, *available at*: https://www.adn.com/politics/alaska-legislature/2020/03/29/alaska-legislature-approves-45-billion-budget-plus-1000-permanent-fund-dividend-then-departs-juneau/.

37 AS 39.05.080(2)(b).

inaction, stating that "failure of the legislature to act to confirm or decline to confirm an appointment during the Second Regular Session of the Thirty-First Alaska State Legislature" would be tantamount to "a declination of confirmation on the earlier of" (1) January 18, 2021; or (2) 30 days after the March 11, 2020 emergency declaration expired or the governor issued a proclamation that the disaster no longer exists.[38]

The Thirty-First Legislature failed to meet its extended deadline. In November 2020, the public health emergency proclamation identified in HB 309 expired. Thirty days later, on December 16, 2020, Governor Dunleavy notified the legislative leadership of his position that those appointees who were not voted on continued to serve under valid appointments and that he was also exercising his constitutional authority "under the Alaska Constitution, Article III, Section 27 to continue their appointments." [Exc. 13-14]

III. The Legislative Council sued the governor, claiming broad authority to reject his appointees and prohibit their reappointment without ever voting on them.

On December 23, 2020, the Alaska Legislative Council, on behalf of the Alaska Legislature, sued Governor Dunleavy. [Exc. 15-21] It requested a declaratory judgment that 94 of his appointees were rejected for confirmation because the legislature failed to act on them, and an injunction prohibiting the governor from continuing their appointments or using his recess appointment power to reappoint them.

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[38] In the spring of 2020, the Department of Law again advised that HB 309's permitting categorical default rejection of executive branch appointees threatened executive authority. http://law.alaska.gov/pdf/bill-review/2020/006_2020200305.pdf

Governor Dunleavy filed an answer and counterclaim asserting that by not voting on the appointees, the legislature violated Article III, §§ 25 and 26, AS 39.05.080(2) and § 1(a), chapter 9, SLA 2020; and he requested a declaratory judgment that AS 39.05.080(3) and § 1(b), chapter 9, SLA 2020 are unconstitutional. [Exc. 22-27]

Seven weeks later, after preliminary injunction motion practice, summary judgment briefing, and oral argument, the trial court granted the Council's motion for summary judgment. [Exc. 31-63, 67] The governor has appealed.

There are now roughly 181 executive branch officials serving the people of Alaska subject to confirmation.[39] The legislature is roughly two-thirds of the way through its statutory ninety-day session and is scheduled to adjourn April 18, 2021.[40] If the Council's view prevails, the legislature may—simply by *failing* to fulfill its explicit duty to act—disqualify all of these appointees from office and require the governor to start over.

STANDARD OF REVIEW

The Court applies its independent judgment to constitutional questions.[41] "The "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself"; the Court is "not vested with the authority to add missing terms or

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39 Since January 19, 2021 the Governor has presented to the legislature for confirmation virtually all of the 94 appointees who were denied a confirmation vote last year along with new appointees. [Exc. 65]

40 AS 24.05.090.

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

hypothesize differently worded provisions ... to reach a particular result."[42] Nor does the presumption that statutes are constitutional[43] change what the constitution means.[44] Instead, the Court "look[s] to the intent of the framers"[45] and "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[46]

ARGUMENT

I. Statutory provisions allowing the legislature to reject appointees without voting in joint session violate the Alaska Constitution.

Reflecting Alaska's constitutional design that the state be led by a strong executive, the governor is given robust appointment authority, an incident of executive power of which the legislature shares one small component—confirmation.[47] This design recognizes the governor's need to select officials to carry out policy and efficiently operate state government, while allowing the legislature a check on who is selected.[48] But the legislature's attempt to exercise its check through *inaction*—rather than a vote in joint session—thwarts this design, stymying the executive branch's ability to effectively run state government without advancing the public policies served by confirmation.

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42 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

43 *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 192 (Alaska 2007).

44 *See Hickel*, 874 P.2d at 925 ("This court retains the same power to interpret constitutional terms regardless of the subject matter of the term.").

45 *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (citing *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975)).

46 *Kritz*, 170 P.3d at 192.

47 *Bradner*, 553 P.2d at 6-8.

48 *Id*. at 6-7.

A. Under the plain language of Article III, §§ 25-26 an appointee continues to serve until the legislature votes not to confirm.

The Court's analysis of a constitutional provision "begins with, and remains grounded in, the words of the provision itself."[49] Here, the text is clear: officials are "appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session . . . ." In other words, they are "appointed" by the governor, but their appointments are "subject to" a confirmation vote by "the legislature in joint session," which may reject them. The delegates' inclusion of the phrase "the legislature in joint session" was deliberate[50]—they intended that confirmation would turn on a joint session majority vote, an affirmative act that is a far cry from complete inaction.

In initially presenting the executive article, Delegate Rivers explained that appointive power for heads of departments had been vested in the governor "subject to confirmation by the houses of the legislature meeting in joint session" adding that "approval of appointments has been done in Alaska in that manner for many years *by a*

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49 *Wielechowski*, 403 P.3d at 1146.

50 *See, e.g.*, PACC 2186 (January 14, 1956) (Del. Rivers: "He may appoint under this clause without calling the legislature and they will fill it until the legislature meets, and then the policy would be to confirm them in joint session of both houses. Is that clear? . . . We are referring to recess or interim appointments. He may appoint under this clause without calling the legislature and they will fill it until the legislature meets, and then the policy would be to confirm them in joint session of both house."). *Compare Abood v. Gorsuch*, 703 P.2d 1158, 1161, 1163 and n. 4 (Alaska 1985) ("The unicameral nature of the Legislature when sitting in joint session is underscored by language in the 1976 amendment to article II, section 16 . . . .") with Alaska Const. Art. II, § 14 ("No bill may become law without an affirmative vote of a majority of the membership of each house.").

joint session of both houses."[51] The delegates later discussed the manner by which appointees would be considered, with some delegates favoring the draft language requiring "advice and consent of the Senate" in recognition of the bicameral nature of the constitutional design.[52] But ultimately they agreed to Delegate Hellenthal's amendment that where confirmation was required, "it shall be the policy of this body that such confirmation be made by both houses of the legislature jointly assembled."[53] Delegate Nordale similarly recognized that confirmation would be taken up in joint session when discussing recess appointment authority: "We are setting up a strong executive and we are requiring that most appointments be confirmed in some manner or other. In the constitution it is by joint session."[54] The delegates thus understood that the power of confirmation was something that could only be exercised in joint session, by voting. The plain language of §§ 25 and 26 reflects that understanding.

The legislature cannot redefine this constitutional language by statute, deeming its complete inaction the equivalent of a joint session vote. As the Court recognized in *Hickel v. Cowper*, the legislature's role in a constitutional process does not "alter or increase its authority to define constitutional terms."[55] In *Hickel*, the Court invalidated

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51 PACC 1988 (January 13, 1956) (emphasis added).

52 3 PACC 2170-72 (January 14, 1956) (discussing Delegate Rivers's amendment to change language requiring confirmation of "Senate" to "legislature in joint session"). As Del. Johnson argued in opposing that motion, "I believe we have adopted a bicameral legislature and we ought to operate as one." *See also id*. at 2177-81.

53 *Id*. at 2185-86.

54 PACC 2264 (January 16, 1956).

55 874 P.2d at 925.

two statutes governing appropriations—even though appropriations are a legislative prerogative—because the legislature's definitions of constitutional terms and other limits on appropriations did not accord with the constitutional text and structure. The Court explained that while the legislature has authority to determine the manner by which amounts available for appropriation are repaid to the general reserve fund, it impermissibly narrowed the status and definition of what amounts were constitutionally available.[56]

Just as the legislature in *Hickel* unlawfully attempted to redefine the appropriations process by statute, here it has unlawfully attempted to redefine the confirmation power by statute. But like appropriation, "confirmation" is not a subject left to the legislature to define—it is a constitutional principle that shapes the balance of power. And the fact that the legislature has been delegated "confirmation" authority, and may decide what internal procedures it uses in the confirmation process, does not give it the right to transform the act of confirmation into an entirely different creature, nor does it insulate statutory definitions of the act from constitutional scrutiny.

To the contrary, the Court has acknowledged that even matters ostensibly committed to the legislature require judicial review to assure the legislature is complying with the constitution. For example, in *Abood v. Gorsuch*,[57] the Court considered whether

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[56] *Id*. at 936 (explaining that while legislature has authority to determine manner by which amounts available for appropriation are repaid to general reserve fund, it impermissibly narrowed status and definition of what amounts were constitutionally available).

[57] 703 P.2d 1158 (Alaska 1985).

certain officials were improperly confirmed for lack of a quorum in the joint session vote. The Court held that "what quorum is necessary for confirmation votes is a question of Alaska constitutional law," and concluded that the quorum requirement of Article II, § 12 applied "only to the business of each house, not to the business of the Legislature in joint session."[58] Likewise, the manner by which the legislature can confirm or reject an appointee is a question of constitutional law, and one that is easily decided by reference to the constitutional text. And had the delegates intended to allow the legislature to reject appointees by simply doing nothing, they could have said so.[59]

Allowing appointees to serve pending an actual vote not only effectuates the phrase "legislature in joint session," but it also comports with the meaning of "subject to."[60] Webster's Dictionary defines "subject to" as "[b]eing under the contingency of; dependent upon or exposed to (some contingent action)," while the Black's Law Dictionary defines it as "[l]iable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for." These definitions reinforce the text and a common-sense reading of §§ 25 and 26: once appointed, officials' continued

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58 *Id*. at 1161-62. Under Article II, § 12, "[a] majority of the membership of each house constitutes a quorum to do business . . . ."

59 *See e.g.*, TX CONST. Art. IV, § 12(e) ("If the Senate, at a regular session, does not take final action to confirm or reject a previously unconfirmed recess appointee . . . [the appointee] is considered to be rejected by the Senate when the Senate session ends."). The superior court acknowledged the constitution does not explicitly allow for tacit confirmation, but then incorrectly read it to allow for tacit *rejection*. [*See* Exc. 41]

60 The meaning of "subject to" was considered by the Court in *Hendricks-Pearce v. State, Dept. of Corrections* 323 P.3d 30 (Alaska 2014). There, the dissenting justices cited dictionary definitions of the phrase. *Id.* at n. 10 (citing Webster's New International Dictionary 2509 (2d ed.1959) and Black's Law Dictionary 1425 (6th ed.1990)).

service is "exposed to," "governed or affected by" "some contingent action"—the legislature later acting by a majority vote in joint session.

The Council posits that "subject to" gives the legislature unstated authority to establish a durational time limit for legislative action on a regular session appointment, which—if not taken—results in the appointment being rejected without a vote. But §§ 25 and 26 include no such language. And where the framers wanted to authorize the legislature to establish a durational time period, they did so—specifically § 27's recess appointment provision.[61] The reasonable and practical interpretation of §§ 25 and 26 is that the delegates gave the legislature authority to act on appointments by taking a vote in a joint session—not to give it a "pocket veto" over appointments.

B. The legislature cannot, by statute, exceed the limits on its confirmation authority that this Court recognized in *Bradner v. Hammond*.

This Court's precedent also establishes that the legislature's rejection-by-inaction scheme is unconstitutional. In *Bradner v. Hammond*,[62] the Court made clear that the legislature cannot, by statute, expand its confirmation power. *Bradner* addressed a statute subjecting officials not identified in Article III, §§ 25 and 26 to confirmation. The governor challenged the statute, arguing that the legislature's role in confirming appointees was a limited, delegated authority that "must be strictly construed."[63] The Court agreed, concluding "the appointment of executive officers is an executive function"

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61 *See* discussion at pp. 32-40, *infra*.

62 553 P.2d 1.

63 *Id*. at 4.

and that "confirmation is not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government."[64] Without this executive power, the Court recognized, "the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated."[65] The Court concluded that §§ 25 and 26 "delineate *the full extent* of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate officers."[66]

Bradner draws a clear line, which the trial court failed to heed: the legislature cannot claim for itself a stronger confirmation power than what it is expressly granted in §§ 25 and 26. The trial court reasoned that because the statute here does not subject more officials to confirmation like the statute in *Bradner* did, it does not unlawfully expand legislative power. [Exc. 49-51] But the fact that this case is not *identical* to *Bradner* does not make the legislature's scheme here any less an intrusion on executive authority. Just as in *Bradner* the legislature gave itself authority to reject extra appointees not identified in §§ 25 and 26, here the legislature has given itself extra ways to reject appointees not identified in §§ 25 and 26. Both maneuvers expand legislative power over appointments to assume a greater say in which officials may ultimately serve Alaska.

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64 *Id*. at 6-7.

65 *Id*. at 7.

66 *Id*.

This Court has repeatedly emphasized the importance of constitutional limits on conferred authority in maintaining the separation of powers. For example, it limited the governor's veto power to avoid "do[ing] violence to the checks and balances mechanism built into our constitutional form of state government."[67] And in *Bradner*, it limited legislative confirmation authority so as not to "emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch."[68] The Court should continue to maintain the balance of power between the executive and legislative branches here.

C. Reason and policy reinforce the conclusion that an appointee continues to serve until the legislature votes not to confirm.

Alaska's framers were concerned about concentrating too much power in one branch, so they gave one piece—and only one piece—of the executive power of appointment to the legislature as a check on gubernatorial appointments.[69] But rejection by inaction tips the balance of appointment authority too far to the legislature's side. It means that legislators need never meet in joint session to consider appointments. Instead, they can do nothing, knowing the result will be a swath of vacancies in critical leadership positions. This shifts to the governor—for no reason—the burden of needlessly repeating the appointment exercise, forcing the governor to work more simply because the legislature would like to work less.

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67 *Thomas*, 569 P.2d at 796-97.

68 *Bradner*, 553 P.2d at 8.

69 *Id*. at 1.

In contrast, allowing public servants to continue working for Alaskans until actually voted on in joint session does not undermine legislative authority—it preserves that authority, while also keeping government functioning and responsive to the people. The legislature can, at any time, "investigate the status of appointed office as well as the qualifications of the individuals appointed to those offices."[70] If an appointee is unfit for office, a majority of the legislature in joint session can vote to reject that individual. The legislature thus retains its limited role in the selection of executive branch officials, preserving the balance of powers that Article III contemplates.[71] The same cannot be said for the reverse scenario, which lets the legislature shirk its constitutional responsibility.

Letting the legislature do what it seeks to do here—that is, remove an entire slate of appointees from office without acting—is deeply disruptive to the efficient administration of government and undermines the will of voters. And there is no reason to believe this "only" occurred as a result of the pandemic. On the contrary, as the legislature becomes more polarized and the organization of the house or senate more delayed each year, legislative inaction, exhaustion, or paralysis may become the norm.

That the governor may call a special session provides no real remedy because even if the governor calls the legislature into a special session, he cannot compel the

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70 *Cook v. Bothelo*, 921 P.2d 1126, 1132 (Alaska 1996).

71 *Bradner*, 553 P.2d at 6 (recognizing "the underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers").

legislature to vote.[72] This occurred when former Governor Tony Knowles, a Democratic governor, called a special session of a Republican-controlled legislature in 2002 to consider four groups of appointments, and the legislature adjourned within minutes without voting on the appointees. [R. 372-76] In response, Governor Knowles opted to make thirteen new interim appointments, so the constitutional infirmity in the legislature's scheme continued lying dormant. [*Id*.] But the fact that Governor Knowles chose comity over legal confrontation does not mean that the challenged laws are constitutional. Context is critical: Governor Knowles was in the last year of his administration and faced with filling only thirteen boards and commissions positions—not 94 or possibly 181 across a spectrum of critical state agencies. [R. 372-76] Given that there are a host of factors that might lead an administration to avoid litigation where possible, as well as the inherent political calculus governors must make in governing, it is not surprising that this Court has not yet had occasion to consider this issue. Even so, an administration's acquiescence to an unconstitutional statutory scheme does not make the statutory scheme constitutional.

If the Court affirms the superior court's decision, then it is all the more likely that future fractured legislatures will adjourn without taking action on appointees. The consequences following that inaction will be deeply felt. When Alaskans elect a governor, their vote reflects broad public support for that individual's platform. A

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[72] *See* Alaska Const. Art. II, §9, Art. III, §17. Moreover, by its terms, AS 39.05.080(3) applies only to "regular session."

governor, particularly a newly elected one, must be free to exercise her judgment and appoint the deputies and officials who will assist her in supervising the executive branch and administering governmental affairs.[73] The more difficult it becomes for a governor to fill leadership positions in her cabinet and on over 130 important boards and commissions, the more difficult it becomes for a governor to govern. This would present a particularly serious problem in Alaska, where unlike other states there are no county governments and few municipal governments in place to provide public services, leaving state government as the primary service provider for Alaskans.

By removing a slate of executive branch officials, the legislature would neuter the governor's ability to implement the policies he was elected to implement, something the delegates clearly did not want or envision.[74] Consider if the same event occurs this year, and the legislature insists on now removing 181 appointees the day it adjourns. [*See* Exc. 65-66] The ensuing vacancies would thwart any real policy implementation and force the governor to engage in a potentially endless cycle of selecting new officials, undermining the efficient administration of government. Such a maneuver would be particularly

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[73] *See Myers v. United States*, 272 U.S. 52, 117 (1926). ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").

[74] *See* PACC 2068 (January 13, 1956) (Del. Rivers: "[W]e are trying to arrive at a situation where we get both a fair amount of democracy and a fair amount of efficiency."); *Id*. at 2070 ("I think that if we permit the governor to hire his assistants that we will secure efficiency; we will eliminate a tendency towards a rather undesirable political scheming process, and I think that we will bring about much better government.").

challenging for a new administration, which must fill a massive number of positions across Alaska's 130 boards and commissions upon taking office. [*See* Exc. 63-64]

Whatever the reason—a pandemic, political polarization, or obstructionism—the fallout would profoundly interfere with state government. During a fiscal crisis, it would hamstring a governor's ability to implement fiscal policy by forcing turnover in critical positions like the Commissioner of Revenue. During a pandemic, it would threaten the delivery of critical services, removing, for example, multiple members of the State Medical Board, the Board of Nursing, the Board of Pharmacy, and other important entities. It would leave critical boards and commissions short staffed and others potentially unable to act.[75] [Exc. 65-66] And the gaps legislative inaction creates cannot be easily filled given the realities of Alaska's small population and the difficulty of recruiting qualified Alaskans to serve. [Exc. 29, 63-64] Indeed, it is impossible to expect a governor to recruit and evaluate nearly two hundred potential officials—much less to get them up to speed to carry out meaningful work—in a swift manner. [76]

Tacit rejection of appointees through inaction also deprives the public of important information and input, permitting legislators to undermine government functioning with little or no accountability. No single legislator needs to go on record with a vote, he or she can instead sit back and let an administration get decapitated by default, leaving

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[75] *See e.g.*, AS 08.65.090 (requiring five Medical Board members for quorum).

[76] Recognizing the legislature's role and constitutional obligation to vote in joint session and the text of §§ 25 and 26, the governor has not argued that legislative inaction tacitly *confirms* executive branch officials. But tacit confirmation would be the better approach from a policy standpoint, as it avoids the problems identified above.

Alaskans uncertain what role their elected officials played in the result. And by depriving legislators of the opportunity to vote on appointees in joint session, tacit rejection deprives individual legislators, the public, the governor, and legislators' constituents of valuable information about legislators' views on who should run government.[77] Thus, reason and policy—in addition to the constitutional text and precedent—support the governor's position.

D. *Munson v. Territory of Alaska* does not show that Alaska's delegates intended to allow the legislature to reject appointees by inaction.

The superior court relied on *Munson v. Territory of Alaska*—a territorial decision interpreting a 1955 territorial law—to infer that Alaska's delegates intended to allow legislative inaction to substitute for a majority vote in joint session to reject an appointee.[78] [Exc. 41-42, 45] But *Munson* was decided nearly a year *after* the delegates met to debate Alaska's constitutional framework, so it could not have been in the minds of the delegates, nor could its allowance for tacit rejection have informed their understanding. And *Munson* did not consider the governor's position here given the facts of the case, nor did it consider legislative inaction in the context of constitutional executive authority because it was decided pre-statehood.

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[77] And if, as the legislature argues, a governor cannot reappoint those individuals to office under his recess authority, the governor has no way to plan for his administration. Without knowing how legislators voted, a governor does not know whether the merit, qualifications, or policy goals of an appointee were problematic or what (other) appointee might garner sufficient support, further compounding the burden on a sitting governor.

[78] 16 Alaska 580 (December 28, 1956).

Munson involved a statute providing that when appointments were presented "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 majority vote of all of the members thereof the appointments so made and presented."[79] After the territorial legislature adjourned without voting on a fisheries board appointee, the territorial governor appointed Munson. When the board refused to recognize Munson in favor of the initial appointee, Munson sued, and the original board member defended the case by arguing that the legislature's failure to vote on him should be treated as "tacit confirmation." The court disagreed, concluding the legislature's failure to vote was "in effect, rejection."[80]

Thus, the court in *Munson* was not confronted with—and did not rule on—the governor's position here, which is *not* that appointees are *tacitly confirmed* when the legislature does not act, but rather that they continue serving subject to a later vote. In *Munson*, because two people appointed at different times claimed the seat, the court had only two choices: endorsing tacit confirmation or tacit rejection of the first appointee.

Moreover, *Munson* had nothing to do with the balance of legislative and gubernatorial power under Article III. Because it was decided before the adoption of the

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79 *Id.* at 584-85.

80 *Id*. at 588. The court relied on *Munson*'s reference to *Marbury v. Madison*, 5 U.S. 137 (1803), reasoning that under the U.S. Constitution "there is no appointment until the Senate affirmatively grants its consent." [Exc. 43] But unlike the federal three-part system, in which an official does not start until the Senate confirms and the president commissions the officer, Alaska appointees begin work immediately. *See infra* at pp. 46-49.

Alaska Constitution, the court had no constitutional context to consider. In contrast, AS 39.05.080(3) must be evaluated in light of Article III's constitutional text, the framers' goal of a "strong executive," and the limits on legislative authority in *Bradner*.

The fact that the legislature "codified" *Munson* in 1964 by enacting tacit rejection language in the last sentence of AS 39.05.080(3) is also irrelevant. That simply indicates that the legislature wanted to claim more ways of rejecting appointees than the constitution provides—the statute says nothing about its own constitutionality.[81]

E. Case law from other states does not support the Council's position.

Alaska's constitution, including its strong executive, reflects a balance between legislative and executive authority that is unique to Alaska. Other states have adopted very different approaches reflecting different balances. Contrary to the superior court's conclusion, there is no universally shared view of how appointments and confirmation work, nor any "unanimous rule" about the effect of legislative inaction. [Exc. 44, 46]

Most state constitutions contain provisions indicating that some gubernatorial appointments must be confirmed by at least one house of the legislature.[82] But some

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[81] The fact that Governor Dunleavy signed HB 309, which contains analogous language, also does not make it lawful. Signing a bill may reflect the realities of political negotiation, compromise, and comity inherent in government. An act of political acquiescence by a governor in a pandemic is not the "'constitutional interpretation by a coordinate branch of government' but rather a product of realistic ordering of executive goals at the time." *See Bradner*, 553 P.2d n. 5.

[82] *But see Tucker v. State*, 35 N.E.2d 270, 291 (Ind. 1941) ("On the contrary, an intention to enlarge the power as it had previously existed, and as it existed in the President, is manifest in the omission to require the confirmation of appointments by the Senate, which was included in the Federal Constitution and in the Constitution of the State of Indiana which was superseded.").

constitutions do not address appointment power at all, leaving the matter to statute.[83] A handful explicitly prescribe the effect of legislative failure to act on a nomination or appointment, with some directing that failure results in tacit confirmation.[84] A smaller number provide that inaction results in tacit rejection.[85] And some constitutions contain a

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[83] *See e.g.*, ALA. CONST. (Art. V, § 136 provides that governor may appoint to fill vacancy in other elected statewide offices, but no other appointment power provided); CT CONST. (Art. IV, no appointment power); *see also*, KAN. CONST. Art. 2, § 18, (expressly delegating power to provide for appointments to legislature: "The legislature may provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution.").

[84] For example, the Illinois constitution provides that the governor shall appoint officers, "by and with the advice and consent of the Senate," but that "[a]ny nomination not acted upon by the Senate within 60 session days after the receipt thereof *shall be deemed to have received the advice and consent of the Senate*." ILL. CONST. Art. 5, § 9 (emphasis added). Similarly, the Michigan constitution provides "Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. *Any appointment not disapproved within such period shall stand confirmed*." MICH. CONST. Art. 5, § 6 (emphasis added). *See also*, OHIO CONST. Art. III, § 21 ("…Failure of the Senate to act by a roll call vote on an appointment by the governor within the time provided for herein shall constitute consent to such appointment."); PA. CONST. Art. 4, § 8 ("…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.").

[85] *See*, *e.g.*, TEX. CONST. Art. 4, § 12(e) ("If the Senate, at a regular session, does not take final action to confirm or reject a previously unconfirmed recess appointee or another person nominated to fill the vacancy for which the appointment was made, the appointee or other person, as appropriate, is considered to be rejected by the Senate when the Senate session ends."); *See also* MO. CONST. Art. IV, § 51 (providing that appointees may not take office before "receiving the advice and consent of the senate," except for recess appointments whose "authority to act shall commence immediately upon appointment by the governor but shall terminate if the advice and consent of the senate is not given within thirty days after the senate has convened in regular or special session.").

"holdover" clause, providing that officers continue serving until their successors are "duly qualified,"[86] thus mitigating the adverse impacts of legislative inaction.

Yet there are few cases addressing what happens when the legislature fails to act on its confirmation power and the state constitution is silent. The Council and the superior court rely on only three: *State ex rel. McCarthy v. Watson*,[87] *Bell v. Sampson*,[88] and *State ex rel. Oberly v. Troise*.[89] But contrary to the superior court's conclusion, those cases do not reflect some broadly recognized rule that absent express language providing otherwise, legislative inaction is the equivalent of rejection. [Exc. 44, 52]

These cases are also fundamentally different from this one. *McCarthy* and *Bell* arose in states lacking specific constitutional provisions governing appointments.[90] So like *Munson*, they are simply statutory interpretation cases, where tacit rejection does not detract from gubernatorial authority.[91] The superior court did not cite a single case in

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86 *See e.g.*, DEL. CONST. Art. XV, § 5.

87 45 A.2d 716, 717 (Conn. 1946).

88 23 S.W.2d 575, 578 (Ky. App. 1930).

89 526 A.2d 898 (Del. 1987).

90 *Bell*, 23 S.W.2d at 578 (noting that Kentucky has "no general constitutional provision providing for confirmation by the Senate of executive appointments."); *see also* CT. CONST.

91 The superior court cited other statutory interpretation cases like *Dunn v. Alabama State University Board of Trustees*. 628 So.2d 519 (Ala 1993). But Alabama, like Connecticut and Kentucky, does not have a constitutional appointments provision. As a result, *Dunn* was decided under the statutes creating Alabama State University, which required that trustees be appointed with the advice and consent of the senate and stated that "all appointments shall be effective until adversely acted upon by the Senate." The appointments in *Dunn* were disapproved by the Senate Committee on Confirmations and not forwarded for a vote, which the Court held was an adverse action sufficient to end the appointments. *Id*. at 521. However, four years later, the Court held that adjournment by

which a court held that legislative inaction in the wake of a governor's exercise of his or her *constitutional* appointment power constituted rejection. In *Troise*, the Court did not hold that inaction constituted rejection, but rather that it did not constitute *consent* to an appointment.[92] The governor had grown impatient with the senate's failure to act and issued full-term commissions to his appointees as if they had been confirmed.[93] The Court held only that the full-term commissions were invalid, nothing more. The superior court also cited *Lungren v. Deukmejian*,[94] but that case did not even involve legislative inaction. The appointee there received a vote in both houses, but one had voted to confirm and the other to deny confirmation, so the sole issue was whether California's constitutional language required both houses to reject and defeat an appointment.[95]

Thus other states do not follow any general model. Given the variability of appointment schemes across the country and the fact-specific nature of appointments

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itself, without an adverse committee report, did not end an appointment: "We cannot logically hold that inaction on the Legislature's part can 'kill' or 'undo' something that the Governor has done pursuant to statutory authority." *Watkins v. Board of Trustees of Alabama State University*, 703 So.2d 335, 341 (Ala. 1997).

92 *Troise*, 526 A.2d at 903-04 ("[T]here is no evidence to indicate that the delegates intended that the judiciary would have the power to force the Senate to act by declaring inaction to be the equivalent of consent.").

93 *Id*. at 899.

94 755 P.2d 299 (Cal. 1988).

95 *Id.* at 301. California's Constitution states that if "neither confirmed nor refused confirmation by both the Senate and the Assembly within 90 days of the submission of the nomination, the nominee shall take office as if he or she had been confirmed by a majority of the Senate and Assembly." CAL. CONST. Art. V, § 5(b).

cases that turn on different constitutional and statutory provisions, out-of-state cases offer little assistance here and do not support the Council's position.[96]

F. Rejecting appointees by inaction is inconsistent with other statutory provisions governing appointments.

The unlawfulness of the legislature's scheme is all the more evident when considering two ways it conflicts with, and even undermines, other provisions of Alaska's statutory framework on confirmation.

First, AS 39.05.080(2) requires the legislature to act in the manner it now seeks to avoid, by instructing—consistent with the constitution—that it "*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." (Emphasis added). But this command cannot be reconciled with AS 39.05.080(3)'s provision that a failure to carry out that constitutionally mandated act is somehow "tantamount to a declination of confirmation on the day the regular session adjourns." A failure to vote in joint session is plainly not the equivalent of thirty-one legislators meeting in joint session and voting as a unicameral body to confirm or reject an appointee. And there is no reason to enforce the legislature's

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[96] *See Moon v. Masters*, 247 P.2d 158, 159 (Idaho 1952) ("[T]he decisions in [] other states are based upon the peculiar language of their respective constitutional and statutory enactments. An examination of such discloses that there is wide variation in the different states concerning both their constitutional and statutory enactments with reference to the time for holding an election to fill vacancies in public offices . . . . Such decisions are neither helpful nor controlling here; the solution must be found in a rational interpretation of the appropriate constitutional and statutory provisions of our own state.").

favored statute while ignoring another statute requiring that it vote in joint session. Given the irreconcilability of these statutory provisions, the constitution must control.[97]

Second, legislative inaction undermines AS 39.05.070, which seeks to minimize the need for gubernatorial recess appointments, stating:

> 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.

Providing that tacit rejection of all appointees automatically occurs on the last day of the regular session is inconsistent with the purpose of avoiding recess appointments, particularly where an entire slate of appointees is concerned. The legislature's view leaves the governor no choice but to exercise his § 27 recess authority to keep government functioning, providing less of an opportunity for legislative input and compelling—not eliminating—the need for recess appointments.

II. Because Article III, § 27 prohibits the legislature from restricting who the governor may appoint, AS 39.05.080(3)'s appointment restriction is unlawful.

Even if the Court concludes that the legislature's tacit rejection scheme is lawful, the governor should still prevail because he may lawfully reappoint the tacitly rejected individuals under Article III, § 27. The text of § 27 is straightforward: "[t]he governor may make appointments to fill vacancies occurring during a recess of the legislature, in

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[97] If anything, "[w]hen reconciliation of conflicting provisions cannot reasonably be achieved, the proper resolution is to apply the unintelligibility canon (§16) and to deny effect to both provisions." Antonin Scalia & Bryan Garner, "Reading Law: The Interpretation of Legal Texts," 189 (2012) (irreconcilability canon).

offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law." The provision authorizes the legislature to set only durational limits on recess appointments—not limits on *whom* a governor may appoint.

Despite the clarity of § 27's text, the trial court ruled that the governor's recess appointments are invalid because a statute says they are. [*See* Exc. 49] That statute, AS 39.05.080(3) provides "[w]hen the legislature declines to confirm an appointment"—even by inaction—"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."[98] But the legislature cannot grant itself additional statutory control over recess appointments that the constitution withholds.

A. Article III, § 27 vests the governor with broad recess appointment power, allowing the legislature to impose only durational—not substantive—limits on recess appointments.

This Court's analysis of a constitutional provision "begins with, and remains grounded in, the words of the provision itself,"[99] and the starting point for a constitutional question not directly controlled by precedent is the plain text of the provision, as clarified by its drafting history.[100] Here, constitutional text, precedent, and constitutional history all confirm the validity of the governor's recess appointments.

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98 HB 309 § 1(d) echoes this prohibition.

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

100 *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020).

The plain language of Article III, § 27 allows the governor to appoint executive branch officials of his or her choosing, and withholds from the legislature the ability to broadly circumscribe the governor's selection of those officials. The first sentence authorizes the governor to make recess appointments in offices requiring confirmation. The second sentence identifies one narrow way in which the legislature may limit those appointments—by setting durational limits. Nothing in § 27 authorizes the legislature to restrict whom the governor can appoint. The legislature's attempt to do so by statute thus exceeds "the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers," by giving the legislature a greater role in the selection of executive leaders than the framers intended.[101]

Even if § 27 was unclear, *Bradner v. Hammond* is not. *Bradner* recognized that confirmation is an "*express* grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers," and that the constitutional text sets the "maximum parameters" of that delegated authority.[102] The legislature's ability to "check" the governor's recess appointment power is thus limited to its confirmation authority over select appointees and its ability to set the duration of those appointments.[103]

The superior court failed to address *Bradner* in its § 27 analysis. [Exc. 54-60] Despite recognizing that the plain language of the constitution does not authorize the

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101 *Bradner*, 553 P.2d at 7-8 and n. 17 ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.").

102 *Id*. at 8 (emphasis added).

103 *Id*. at 7-8.

legislature to enact substantive restrictions on recess appointments, the court proceeded to consider whether the legislature had "implied" power to do so. [Exc. 56] This inquiry was a needless one: under *Bradner*, there can be no such "implied" authority because the constitution's explicit provisions mark the "full reach" of legislative authority over executive appointments. Just as the legislature lacks "implied" authority to require confirmation for positions not identified in §§ 25 and 26, so too does it lack implied authority to limit recess appointments in ways not identified in § 27.

The superior court's ruling was backward—the *Bradner* court did not, as the superior court did here, attempt to root out a source of "implied" legislative authority over appointments to salvage a challenged statute. On the contrary, the Court acknowledged the legislature's argument that its claimed authority to confirm subcabinet officials was "within the ambit of the constitution's general grant of legislative power to the legislative branch,"[104] as well as its contention that "the delegates 'clearly understood that the legislature would have authority to enact statutory confirmation requirements.'"[105] But the Court nevertheless rejected those arguments. This makes sense, both because the text of §§ 25 and 26—like that of § 27—is explicit, and because despite the court's duty to reconcile challenged legislation with the constitution, "the extent to which the express language of [a] provision can be altered and departed from

104 *Id.* at 4.

105 *Id.*

and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers . . . ."[106]

The separation of powers is particularly critical here given the executive nature of the legislature's limited appointment power.[107] The superior court was concerned that the separation of powers would be disrupted if a legislature rejected an appointee in regular session and a governor simply waited to appoint that individual under § 27. [Exc. 58-59] If the legislature followed past practice, it would not consider the appointment until the last day of its regular session, allowing the governor to reappoint the individual the next day and frustrate legislative confirmation power. But these circumvention concerns are not even present where the legislature does not vote on an appointee at all.[108] Instead, it is the governor whose authority has been circumvented by being forced to begin the appointment process all over again, only now with a reduced pool of candidates.

The constitutional history does not indicate that the delegates believed the legislature should be able to block appointments it never voted to reject in joint session. The superior court relied on a colloquy about the potential limits of gubernatorial recess appointment authority, and the existence of the 1955 territorial statute, which provided that a "person whose name has been refused or rejected for appointment by the

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106 *Id.* at 8 n.22.

107 *Id*. at 7.

108 Even so, the legislature has other remedies at its disposal. The timing of a confirmation vote during regular session is firmly within legislative control, so the legislature can vote to reject an appointment when session begins. Moreover, it has an alternative remedy in § 27—the ability to set durational limits on recess appointees.

Legislature" could not be reappointed during the interim between sessions. [Exc. 56-58] But closer analysis reveals that the delegates' focus in crafting § 27 was on assuring a constitutional foothold for recess appointment authority and providing for legislative confirmation of such appointments—not on restricting gubernatorial authority.

The constitutional minutes reflect that the delegates had little interest in allowing the legislature to substantively curtail recess appointments.[109] Proposal 10/a—the precursor to article III—authorized the governor to fill recess vacancies, and included only two limits on that power.[110] Specifically, section 18 contained a durational limit stating that a recess appointment "shall expire at the end of the next regular session of the Legislature, unless a successor shall be sooner appointed and qualified," *and* a substantive limit, stating that "[n]o 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." [Exc. 12] Delegate Rivers explained this latter prohibition assured a 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

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109 Delegate Rivers told the convention that reflecting the executive committee's "strong" agreement on "the principle of the strong executive," their proposal made the governor the head of the executive department with "certain appointing powers" and gave the "power of approval of the governor's appointments to a joint session of the legislature." PACC 1984-85, 1988 (January 13, 1956). *See Cook v. Botelho*, 921 P.3d 1126, 1133 n.8 (Alaska 1996) (citing 6 PACC App. V at 121 (December 15, 1955)) ("The first draft of the recess appointment provision clearly prevented the legislature from confirming an interim appointee to a full term.").

110 PACC 1989 (January 13, 1956).

confirm,"[111] plainly suggesting the delegates intended that the legislature would, in fact, vote in joint session on appointees.[112] But notably, that substantive restriction was omitted from later drafts.

The discussion that followed instead focused on ensuring that the governor would be able to fill, and the legislature would eventually be able to confirm, recess appointments. After concern arose about whether a governor could fill a vacancy when the legislature was not in session, Delegate Rivers explained "He may appoint under this clause without calling the legislature and they will fill it until the legislature meets, and then the policy would be to confirm them in joint session of both houses. Is that clear?"[113] Two days later, Delegate Herman introduced an amendment that passed unanimously, giving the legislature power to confirm recess appointments.[114]

At that point the subject of potential legislative restrictions briefly crystalized. Herman's amendment prompted questions about the differences between providing for

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111 *Id*. (emphasis added).

112 This is reflected in Delegate Nordale's clarifying question about why the proposal as drafted provided for appointees to be submitted "to the Senate," in which she indicated they understood the intent to be that "[i]f the nomination *shall have failed* of confirmation *by the senate or by the legislature meeting in joint session*," prompting Delegate Rivers to add "w*e mean by joint houses and by confirmation of the legislature in joint session*." PACC 1989, 1991 (January 13, 1956).

113 PACC 2186 (January 14, 1956). Delegate Rivers reiterated that his proposed amendments were "trying to provide for the governor to fill vacancies." PACC 2261 (January 16, 1956).

114 PACC 2260 (January 16, 1956) ("Mr. President, the purpose of the amendment is to make it possible for the legislature to confirm the person who has been given an interim appointment. As it stands, they would not have that opportunity.").

confirmation by the senate, the house, or the legislature in joint session,[115] leading the delegates to strike section 18 altogether. Delegate Fischer pointed out that there was "presently a law to this effect on our statute books"—a reference to the 1955 territorial act providing for recess appointment authority and legislative confirmation.[116] But Delegate Rivers responded that the governor's recess authority was "one of the essential powers of the executive," warning "while an act could be passed it might be changed and altered materially through the years"; he thus favored constitutionalizing gubernatorial recess appointment power.[117] He added that the delegates could also ensure 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."[118] This latter statement—an apparent reference to Delegate Herman's successful amendment requiring confirmation—reflects only that Rivers was concerned that a governor might make a recess appointment and then circumvent confirmation completely by "jumping" regular session and then making another recess appointment of the same person. But nothing in this discussion suggests that the delegates contemplated that the legislature could broadly limit recess appointments.

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115 PACC 2261-64.

116 PACC 2264-65 (January 16, 1956) (Del. Fischer: "I think the discussion here has shown the difficulties and problems that may arise out of bringing in his kind of detailed procedure. I think that the subject can be very adequately covered by legislation.").

117 *Id*. at 2265.

118 *Id*. (emphasis added)

On the contrary, the discussion that followed shows that the delegates understood that any territorial, statutory authority the legislature may have had to do so might not carry over into statehood. When Delegate Buckalew questioned whether by striking section 18, a governor might lack authority to make recess appointments, President Egan responded "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?" Buckalew answered "suppose we don't carry over that particular statute?"[119] Recognizing that a territorial act might not confer authority on officials post-statehood, Delegate Sundborg proposed a new section reading: "The Governor may fill any vacancy occurring in any office during a recess of the Legislature, as may be prescribed by law."[120]

Faced with this new proposal giving the legislature broad control over recess appointments, Delegate Rivers raised a "Joe Doaks" hypothetical:

> 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. By our [original] 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."[121]

Sundborg responded that his amendment would both give a governor the right to make an interim appointment *and* allow the legislature to establish rules on recess

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119 PACC 2267.

120 *Id*. at 2268.

121 *Id*. at 2268.

appointments.[122] But his amendment never became law. Later the same day, Sundborg substituted it with the precursor of § 27, explaining that his prior amendment had not accomplished what he had intended in that it "left the possibility" that a legislature could prohibit the governor from even making a recess appointment, while his new proposal allowed the governor to make appointments and the legislature to set the duration.[123]

Looking at this history, the superior court narrowly focused on Delegate Rivers's comment about "implied" legislative power and the 1955 territorial law, inferring that the delegates believed a future legislature could prohibit select recess appointments. [Dec 25, 27, 29] But the 1955 act was not crafted within Alaska's broader constitutional context—in which the delegates intended a strong executive—nor did it have the "tantamount to declination" language later added to AS 39.05.080(3).[124] And as discussed below, the convention minutes do not show that any delegates intended that the legislature could bar recess appointments of appointees never voted on, let alone that this understanding was shared by all fifty-five delegates. Delegate Buckalew explicitly recognized that territorial statutes might not carry over into statehood. And even if some statutes did carry over, the

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122 *Id*. at 2269.

123 *Id*. at 2284-86 ("The Governor may make ad interim appointments to fill vacancies occurring during a recess of the legislature in offices requiring confirmation of either or both houses of the legislature. The duration of such appointments shall be prescribed by law.").

124 To the extent the 1955 act authorized any restrictions on recess appointments, it envisioned that the legislature would vote in joint session within three days of presentment, thus giving the "appointing authority" an opportunity to submit a new name during regular session. [Exc. 2] In contrast, AS 39.08.030(3) creates a vacancy by default after legislative failure to act on the last day of session—foreclosing any opportunity for a governor to submit a new name in regular session.

delegates understood that gubernatorial recess appointment authority was sufficiently critical to require a constitutional foothold, but they made no similar provision for legislative authority to substantively restrict recess appointments.

B. The legislature cannot prohibit the appointment of an official the legislature never voted to reject in joint session.

Even if the legislature has "implied" power to limit recess appointments, constitutional text, history, and policy show that AS 39.05.080(3) goes too far by prohibiting recess appointments of people the legislature failed to vote on in joint session.

This Court has explained that "[c]onstitutional provisions should be given a reasonable and practical interpretation in accordance with common sense,"[125] and should be interpreted according "to the meaning the people themselves probably placed on the provision."[126] Nothing in the constitutional history indicates that the delegates intended to allow the legislature to both fail to vote in joint session on an appointee *and* prohibit the governor from choosing that never-voted-on person in a later recess appointment. In concluding otherwise, the superior court relied on the "Joe Doaks" hypothetical. [Exc. 58-59] But the facts of the hypothetical differ in a critical way from what occurred in 2020—namely, that the legislature actually voted to reject Joe Doaks.

This distinction is evident when considering the sequence of events Delegate Rivers posited: "the legislature does not confirm [Doaks], the governor submits no new

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125 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1994)).

126 *Id.* at 1147.

name; the legislature goes out of session; the governor then turns around and reappoints 'Joe Doaks.'"[127] In this hypothetical, the appointee was *rejected*, which is apparent because the only way a governor could "submit[] no new name" during the remainder of the session and wait for the recess to reappoint Doaks would be if he knew during the regular session that Doaks had been rejected: i.e. the legislature must have voted in joint session—the territorial statute lacked the "tantamount to declination" language, and the delegates did not discuss any means of mid-session tacit rejection.

The policy concerns in the Doaks hypothetical are also not present here. The act of confirmation "implies a coincident power and duty to investigate the status of appointed officers as well as the qualifications of the individuals appointed to those offices."[128] When the legislature voted to reject Doaks, it deliberately exercised its judgment. It may have done so after no investigation or a robust one, or for a good reason or a poor one.[129] But it has taken a transparent step that communicates support, of lack thereof, for that appointee or the appointee's (or the governor's) agenda. The legislature has used the one tool it has—a joint session vote—to "check" the governor's appointment authority. The rejection of Joe Doaks in a majority vote signals an assessment of his unfitness for office, so a decision to reappoint him arguably challenges legislative confirmation authority.

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127 PACC 2268-69 (January 16, 1956).

128 *Cook v. Bothelo*, 921 P.2d 1126, 1132 (Alaska 1996).

129 *Abood v. Gorsuch*, 703 P.2d 1158, 1163 (Alaska 1985). ("[E]ach house of the legislature may conduct such inquiry as it thinks desirable into the suitability of appointees whose confirmation is required.").

In contrast, where an appointee is never voted on, the bicameral legislature the framers envisioned has taken no action, and its inaction means nothing. Legislative inaction shares none of the hallmarks of a majority vote to reject an appointee.[130] If the governor appoints Jane Doaks, and the legislature simply adjourns without voting in joint session on her appointment, the governor's decision to reappoint Ms. Doaks under § 27 does not challenge confirmation authority at all, because the legislature never exercised it. Prohibiting a recess appointment of Ms. Doaks simply impedes a governor's ability to select subordinates, while saying nothing about the legislature's view of Ms. Doaks.

This is particularly true where—as here—an entire slate of appointees is categorically rejected by default. Perhaps the legislature's inaction was due to a global pandemic, perhaps it was fatigued, or perhaps its members were in an election year, prompting a return home to campaign. Whatever the reason, when the legislature simply does not do its job, its inaction fails to "check" the governor at all.

The scant historical record reflects that the delegates believed a governor should be able to use his recess appointment authority if faced with legislative inertia. The original draft of section 18 provided that "[a]fter the end of the session no ad interim appointment to the same office shall be made *unless* the Governor shall have submitted to

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130 *See Kopp v. Schrader*, 459 Md. 494, 503, 505 (Md. Ct.App. 2018) (affirming Maryland governor's appointment of individuals he had previously appointed under his recess authority, withdrawn, and then reappointed under his recess authority a second time concluding "the Senate had a fair and reasonable opportunity to reject [the nominations], and it failed to do so. Absent such a rejection, the Governor was fully empowered to reappoint them once the session ended.").

the Senate a nomination to the office during the session and the Senate shall have adjourned *without confirming or rejecting it*." [Exc. 12 (emphasis added)] If anything, this qualified draft restriction on recess appointment power shows that the delegates believed that if no vote occurred, a governor should be able to reappoint.

The superior court wrongfully perceived this draft as authorizing the legislature to broadly restrict recess appointments, speculating that the delegates deleted it because they thought the legislature already had this implied power under the 1955 act. [Exc. 59] But it is not clear that the delegates shared any such understanding of the 1955 act, let alone that they intended it to carry over. At the time they met, the language of the 1955 act prohibited only recess appointments of people who had been "refused or rejected for appointment by the Legislature"—not those who were never voted on.[131]

The governor's view accords with the plain language of AS 39.05.080(3), which only prohibits him from appointing someone "whose name is *refused* for appointment by the legislature." (Emphasis added) A "refusal" is generally defined as "[t]he denial or rejection of something offered or demanded,"[132] and is different in form than passively failing to do the thing offered or demanded—*i.e.*, to vote in joint session.[133] While the

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131 *Munson v. Territory of Alaska*, 16 Alaska 580 (December 28, 1956).

132 Black's Law Dictionary (9th ed. 2009).

133 *Alaskans for Efficient Gov't v. Knowles*, 91 P.3d 273, 276 n. 4 (Alaska 2004) (citing Norman J. Singer, Sutherland Statutory Construction § 47.28 (6th ed.2000)) (explaining the court construes words according to their common—or, when applicable, technical—meanings). This accords with Delegate Rivers's explanation of the original draft restriction on recess appointments: "We felt it was necessary there to have that restriction in order that the governor might not bypass the approving power of the

legislature tries to bridge this distinction by deeming inaction "*tantamount* to declination," that means only that the legislature would like to view inaction as having the same result—not that it has performed the requisite act in the first instance.[134]

III. Combining a failure to vote on appointees with a prohibition on recess appointments of those people particularly upsets the balance of power.

The constitutional problem becomes all the more apparent when tacit rejection and restricting recess appointments are considered together. The net effect is a sweeping expansion of legislative power that serves no purpose and is inconsistent with the delegates' desire to have a strong executive efficiently administer government.

A comparison with the federal constitutional model reveals the imbalance in the legislature's scheme. The superior court discussed the federal model to support its conclusion that "failure of a legislative body to act on confirmation is "the equivalent of rejection." [Dec. at 16] But when recess appointments are added to the equation, the federal scheme actually supports the governor's position.

Federal executive branch appointments are provided for in Article II, section 2 of the U.S. Constitution, which says the president shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by

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legislature and make an ad interim appointment of somebody the legislature had *refused* to approve and did not confirm." PACC 1989 (January 13, 1956) (emphasis added).

[134] Webster's New International Dictionary (2d ed. 1959) (Defining "tantamount" as "equivalent in value, significance, or effect.").

Law . . . "[135] This means the president nominates a person for a position, and then later completes the appointment "by and with the advice and consent of the Senate."[136] Until appointees are confirmed, they do not take office. Senate rules provide that if the Senate adjourns or goes into recess for more than thirty days, any nomination it has not acted upon is "returned to by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."[137] This approach gives the U.S. Senate significant power to block appointments, because—unlike in Alaska—a nominee cannot take office until the Senate has voted to confirm.

But it would be a mistake to think that the federal model categorically prioritizes legislative power, particularly in the context of recess appointment authority. The founding fathers recognized that the Senate could not be continuously in session to consider appointees, and so gave the President the power to make recess appointments. Article II, section 2, clause 3 provides that: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[138] But although the superior court pointed to the federal confirmation process to support its decision, [Exc. 45] the federal

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135 U.S. Const. Art. II, § 2, cl. 2.

136 *See* Congressional Research Service, H. Hogue, M. Carey, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, p. 2 (June 22, 2015), *available at* https://fas.org/sgp/crs/misc/R44083.pdf.

137 Standing Rules of the Senate, Rule XXXI.6, reprinted in S. Doc. No. 113-18, at 44 (2013), http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf

138 U.S. Const. Art. II, § 2, cl. 3. The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345 *et seq.* gives the President authority to temporarily fill select vacancies with acting officers without Senate consent.

system maintains a balance between the executive and legislative branches in a way the court's ruling does not because the federal model does not treat inaction on a nominee as foreclosing reappointment of that individual.

On the contrary, the president may make recess appointments of officials who were nominated but not confirmed. For example, in 2010, President Obama nominated Craig Becker for a seat on the National Labor Relations Board, but his nomination was filibustered and no formal confirmation vote was taken.[139] The President then exercised his recess appointment power to appoint Becker to the Board on March 27, 2010.[140] After the Supreme Court held that a congressional recess of sufficient length authorizes the use of recess appointment power in *N.L.R.B. v. Canning*,[141] Becker's appointment was found to be valid.[142] Yet the Senate's procedural vote not to advance Becker's nomination to a final vote was closer to an actual rejection of the nomination than the 31st Alaska Legislature's failure to act on the 2020 appointees. Despite this, no question was raised about Becker's eligibility for a recess appointment.

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139 *See* Meredith Shiner, *Senate blocks Labor Board nominee*, Politico, Feb. 9, 2010, *available at* https://www.politico.com/story/2010/02/senate-blocks-labor-board-nominee-032758.

140 *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 213 (3rd Cir. 2013) (*reh'g granted* 870 F.3d 113, 126 (3rd Cir. 2017)).

141 573 U.S. 513, 520 (2014).

142 *New Vista Nursing*, 870 F.3d at 126; *accord Mathew Enter., Inc. v. NLRB*, 771 F.3d 812, 814 (D.C. Cir. 2014) (holding Becker's appointment "constitutionally valid"); *Gestamp S.C., L.L.C. v. NLRB*, 769 F.3d 254, 257-58 (4th Cir. 2014) (same); *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014) (same).

The superior court's decision allowing the legislature to foreclose recess appointments of appointees that it never actually voted on thus gives Alaska's supposedly "strong executive" weaker appointment authority than the president has under the federal model. This is inconsistent with Alaska's constitutional framework and wrongfully undermines gubernatorial authority.

CONCLUSION

For these reasons, the Governor asks that this Court vacate the judgment of the superior court and remand for entry of judgment in the Governor's favor.