IN THE SUPREME COURT OF THE STATE OF ALASKA

HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, Appellant, v. THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Appellee.	)	Supreme Court No.: S-18003
Trial Court Case No.: 1JU-20-00938 CI		

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

REPLY BRIEF OF APPELLANT GOVERNOR MICHAEL J. DUNLEAVY

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Article 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.

Article 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.

Article 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 Statutes:

…

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.

…

INTRODUCTION

The parties agree that the legislature abdicated its responsibility to vote on executive branch appointees. [Ae. Br. 31, 37] They disagree about whether the legislature can give that inaction the force of, and allow it to substitute for, a constitutionally prescribed confirmation vote and then further restrict a governor from reappointing individuals who were never even voted on.

The Council's position is that the words of the constitution and this court's precedent do not mean what they say. Instead, the legislature can reshape confirmation any way it wants, even at a cost to the separation of powers. But nowhere does the Council identify a source for its self-proclaimed authority, suggesting rather that absent an explicit constitutional *prohibition,* the legislature is free to impede the executive branch appointment process. And nowhere does the Council square its position with the role that gubernatorial appointment authority plays in Alaska's constitutional structure or address the alarming ramifications of its position. There is no textual, historical, or practical basis to support the Council's expansive interpretation of legislative power. The constitution allows appointees to serve until the legislature votes to reject them, and the governor's recess appointments of individuals who were never voted on are valid.

ARGUMENT

I. Until the legislature votes to reject appointees for confirmation, those appointees may continue serving and working on behalf of Alaskans.

Alaska's delegates provided the governor explicit appointment authority as an incident of executive power to ensure that the state would be led by a strong executive

and that the governor could meaningfully administer executive branch affairs.[1] [At. Br. 3-8, 13] Allowing appointees to be removed from office whenever the legislature does nothing thwarts those goals. The Council's position permits the legislature to kneecap an administration without the accountability of a vote, frustrating the will of the electorate by impeding a governor's ability to utilize the subordinates he or she needs to administer state affairs and oversee the delivery of essential services. And it does all of this despite having no foothold in constitutional text, without serving any real purpose, and at significant cost to Alaskans.

A. Article III does not allow the legislature to reject appointees by inaction.

The Council's defense of its scheme is rooted in an incorrect premise—namely, that Article III, §§ 25 and 26 are silent on how the legislature can exercise its confirmation power. [Ae. Br. 31] The Council maintains that the legislature has unfettered discretion to "establish procedures for exercising its power of confirmation." [Ae. Br. 11-13] But the challenged laws in this case are not mere internal legislative procedures. And while the constitution does not explicitly direct *when* the legislature must vote, it does specify *how* it can exercise its confirmation power to "check" executive appointment authority—a joint session vote.[2]

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

2 The governor is not arguing that the legislature should be compelled to vote, nor is he asking the Court to weigh in on legislative "procedures regarding voting or convening a joint session." [Ae. Br. 11, 26] He is also not claiming that the legislature's 2020 inaction "serve[s] as confirmation." [Ae. Br. 26] The governor's position is that appointees continue serving *until* the legislature votes.

The Council argues that §§ 25 and 26, which it deems a "confirmation mandate," require only that the legislature meet in joint session to vote to confirm appointees, not to reject them. [Ae. Br. 13-14, 31] In its view, it can reject appointees by doing nothing. [Ae. Br. 9, 11] But this makes no sense when one reads the provisions in their entirety and considers how they describe confirmation: appointees serve "subject to confirmation *by a majority of the members of the legislature in joint session*."[3] This language contemplates two possible outcomes from one prescribed act. The first is that thirty-one members of the legislature in joint session—"a majority"[4]—vote "yea," and an appointee is confirmed. The second is that the legislature casts *anything less* than thirty-one "yea" votes, and the appointee is rejected. If an appointee receives only thirty "yea" votes, they have not secured a majority, and are rejected for appointment.

The Council's argument that §§ 25 and 26 do not require a joint session vote to decline confirmation because these provisions do not provide that appointees are "subject to confirmation *or declination*" thus misses the mark. [Ae. Br. 11] If the language were drafted as the Council posits, an appointee receiving only thirty votes would face uncertainty. By omitting "or declination," the delegates made clear that a tie vote defeats an appointment, and only a majority vote confirms one.

"Confirmation" itself is an act that is necessarily only effectuated by a vote—whatever the result of the vote might be—and the process by which an appointee is

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[3] Alaska Const. Art. III, §§ 25-26 (emphasis added).

[4] *See* Alaska Const. Art. II, § 1 (establishing a senate of twenty members and a house of representatives of forty members).

confirmed (or not) is baked into the constitutional text. Confirmation and declination are simply two sides of the same coin. The Council is therefore wrong to claim the governor's interpretation would add a "missing term" to § 25 and § 26. [Ae. Br. 11] On the contrary, only the governor's position gives meaning to every word in the text while preserving its purpose of checking—not neutralizing—executive appointment authority.[5]

The Council observes that the statutory definition of "subject to" reflects that appointments are "under the contingency of," "dependent on," and "affected by" procedures the legislature establishes for confirmation. [Ae. Br. 14] This is only partly true: an appointee's continued service is certainly dependent on, and "affected by" confirmation. But it is not dependent on whatever legislative procedures the legislature might adopt, however constitutionally infirm.[6] As discussed, appointments can only be affected by the legislature coming together as a unicameral entity and voting—not by mere inertia. Absent a vote, no contingency is triggered to alter the appointees' status, and their public service is unaffected. And nothing in the constitutional text suggests that some different or lesser act (or inaction) carries the force of a joint session vote.

Permitting the legislature to reject appointees by inaction is also inconsistent with the constitutional history. Indeed, the Council concedes that the delegates *never* discussed rejection of appointees by anything other than a vote. [Ae. Br. 20] And as the governor's opening brief explained, what discussion the delegates did have reveals that they wanted

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5 *ACLU v. State*, 122 P.3d 781, 786 (Alaska 2005) ("We must give effect to every word, phrase, and clause of the Alaska Constitution.").

6 If that were true, the legislature could, for example, pass a law that a majority of each house could independently vote to confirm—or reject—an appointee.

to ensure that the legislature would act on appointees in a unicameral setting, where each legislator could serve as one vote of a single body. [*See* At. Br. 14-15] Nowhere does this history reflect that they imagined the legislature would fail to vote—let alone that if it did, that inaction would constitute rejection. And the 1955 territorial act the Council points to in support of its position said nothing at all about legislative inaction, though it clearly instructed that a vote must occur. [Ae. Br. 16-17; Exc. 1-4]

The Council defaults to invoking AS 39.05.080 and HB 309, claiming that they "establish procedures for exercising its power of confirmation." [Ae. Br. 12] But these laws are precisely the problem, and they do far more than articulate internal procedures or legislative policy choices. [Ae. Br. 30-33] They modify the act of confirmation in a way that deviates from constitutional text and, as discussed below, gives the legislature a greater role in the appointment process than Article III and *Bradner v. Hammond* allow.[7]

B. Allowing the legislature to reject appointees by inaction expands legislative power.

The governor and the legislature agree the confirmation power is one component of Alaska's constitutional framework, and a part of Alaska's system of checks and balances. [Ae. Br. 32-33] Where they disagree is about how profoundly the legislature's scheme alters that framework. Far from being a matter of legislative "judgment" [Ae. Br. 33], the legislature's purported "process" fundamentally upsets the balance of executive-legislative power. It requires the governor to repeatedly exercise appointment authority (selecting from an arbitrarily reduced pool of candidates)—*not* because the legislature

[7] 553 P.2d 1, 7 (1976).

exercised its confirmation power as the delegates contemplated, but because it did nothing at all. With no sense of irony, the Council claims the legislature can shirk its constitutional power and duty to investigate appointees,[8] decline to vote, *and* that its implied authority allows it to give this lassitude the force of action. [Ae. Br. 13-25] But this Court's precedent and the separation of powers prevent the legislature from dictating executive branch actions anytime the constitution does not explicitly prohibit it.

In *Bradner v. Hammond*, the court recognized that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."[9] It thus declined to infer that the legislature had implied authority to confirm officials other than those identified in §§ 25-26. *Bradner* recognizes that constitutional text and purpose, viewed against Alaska's constitutional framework, are dispositive in considering the scope of confirmation authority.[10]

The Council now asks this Court to flip *Bradner* on its head and infer broad implied legislative authority *absent* any express grant. [Ae. Br. 30-34] It tries to distinguish *Bradner*'s central limiting principle by arguing that in that case, "express language" in §§25 and 26 limited which officials could be subject to confirmation, while claiming those same provisions are silent on the manner in which the legislature can

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8 *See Cook v. Bothelo*, 921 P.2d 1126, 1131 (Alaska 1996) (describing confirmation as a constitutionally delegated part of the appointment power to the legislature that implies "both a power, and a duty, to investigate the status of appointed officers.").

9 553 P.2d at 7.

10 *Id*. at 7-8.

reject appointees. [Ae. Br. 31] Neither proposition is true. Sections 25 and 26 do not *expressly* prohibit the legislature from subjecting other subordinate officials to confirmation. But *Bradner* nevertheless properly understood that the constitutional text identifying certain positions as subject to confirmation marked the "outer reach" of the legislature's authority[11]—the text implicitly foreclosed the legislature from trying to confirm *other* appointees. The same reasoning applies here. By providing that officials serve subject to a vote, §§ 25 and 26 grant the legislature one and only one tool to check executive appointment power—a joint session vote. [Ae. Br. 31] That language prevents the legislature from rejecting appointees by other, unwritten means.[12]

This makes sense when one considers Alaska's system of checks and balances. The nature of appointment power is an executive function, rooted entirely in Article III, and the delegates gave the governor—not the legislature—authority to appoint officials to assist him or her in efficiently carrying out state business.[13] They also crafted a constitutional check to preclude the exercise of arbitrary power and maintain the separation of powers,[14] a thread woven throughout the constitution. For example, when the legislature fails to pass laws Alaskans believe are needed, the delegates assured the

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11 553 P.2d at 7.

12 *See AKPIRG v. State*, 167 P.3d 27, 33 (Alaska 2007) (addressing separation of powers dispute by looking to nature of the power that the legislature granted, the branch of government assigned that power in the constitution, whether the constitution suggests that the power is to be shared by two branches, and "whether the limits of any express grant have been exceeded or present an encroachment on another branch.").

13 Alaska Const. Art. III, §§1, 24-26.

14 *See AKPIRG*, 167 P.3d at 34.

people would have the power of initiative to "check" against legislative inaction.[15] When the governor is concerned with out of control spending, he or she may strike or reduce items in appropriations bills to "check" inflated expenditures.[16] And when the legislature disagrees with the selection of an appointee, it can "check" the governor's authority by voting to reject the appointee.[17] In each case, the exercise of one entity's constitutionally conferred authority balances that of another. For purposes of confirmation, the "check" is reflected in the legislature's thirty "nay" votes on an appointee.

This vote is the check—a transparent and affirmative act in which one co-equal branch of government exercises its authority against another's. But legislative inaction is not an exercise of legislative authority at all. It tells a governor nothing about the legislature's view of the appointment. It needlessly robs Alaskans of the public servant's services. And it requires the governor to begin the appointment process anew, encouraging use of §27 recess appointment authority. Allowing legislative inaction to substitute for a vote does not check the arbitrary abuse of power—it *is* one.

The legislature's rejection-by-inaction scheme promotes none of the purposes the system of checks and balances built into §§ 25-26 provide, while pointlessly expanding legislative power at the expense of constitutionally conferred gubernatorial authority. To the extent this scheme reflects legislative "policy choices," [Ae. Br. 33-35] it reflects only the legislature's interest in assuming for itself a greater share of executive power than the

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15 *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 493-94 (Alaska 2020).
16 Art. II, § 15.
17 Art. III, § 26.

constitution and *Bradner* allow. The legislature may abdicate its confirmation power, but it may not wield its inaction to encroach on and thwart gubernatorial authority.[18]

The Council incorrectly claims that its provisions are part of a "well-established balance of power" that has been "in existence since before statehood," implying that rejection-by-inaction provision is constitutional because of its perceived longevity. [Ae. Br. 4, 14, 33] But as explained in the opening brief, not until eight years *after* Alaska's constitution was ratified did the legislature confer upon itself the purported ability to reject appointees without voting by adding the challenged tacit declination provision to AS 39.05.080(3), and the territorial statute the Council repeatedly points to did not even have a tacit declination provision. [Exc. 1-4; At. Br. 8-9, 25-27] Moreover, the Department of Law has long identified legal problems in that provision, reflecting the executive branch's public concern with the law's infirmity.[19] The fact that a direct challenge did not arise until now is also not surprising given the legislature's past practice was largely to adhere to AS 39.05.080(2)(B) and vote on appointees. And not until 2020 did the legislature fail to vote on an *entire slate* of nearly 100 executive branch appointees. Far from being "settled," the legislature and the governor have historically understood that appointees serve until the legislature votes to reject them, and not until now did legislative inaction prompt the need for judicial resolution.

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[18] Ultimately is the legislature's own inaction, not the governor's actions, that dilute the legislature's role and voice in the confirmation process.

[19] *See* 1983 WL 42546 (Alaska A.G. June 3, 1983).

The Council nevertheless wrongly suggests that the scheme's longevity has somehow rendered it constitutional. [Ae. Br. 3, 44] But it cites no evidence or history in support of that proposition. In its briefing to the superior court, the Council pointed to only two occasions on which the legislature failed to vote on appointees, and neither suggests the challenged scheme is lawful. [R. 359-60] The first example occurred in 2002 when the legislature voted to adjourn after Governor Knowles called a joint session to vote on various appointees. [R. 359-60] But as discussed in the governor's opening brief, Governor Knowles' decision to acquiesce and appoint new people to those few vacancies rather than exercise his recess appointment authority to reappoint the original appointees says more about the political landscape of the time and one governor's deliberative calculations than it does about the statute's constitutionality. [At. Br. 22]

The second example reflects that occasional acts of comity, compromise, and cooperation can negate the need for litigation. Thus, in 2019 the legislature tabled the confirmation of one appointee to the Board of Veterinary Examiners. [R. 330-21] But there, the legislature informed the governor that the appointee's confirmation had been tabled and was not taken up before adjournment, and the legislature never sent a letter notifying the governor the appointment was declined under AS 39.5.080(3). The appointee continued serving throughout 2019 until his name was presented again in 2020—without legislative objection. [*See* R. 330, 347] The fact that the legislature historically votes on appointees and that the challenged provisions have almost never been enforced rob the purported "long history" of these laws of any significance.

C. Given Alaska's unique constitutional balance of executive appointment power, neither out-of-state caselaw nor federal law is dispositive.

The governor's opening brief discussed the variability of other constitutional and statutory structures and how they choose to balance power between the executive and legislative branches. [At. Br. 27-30] It also explained why allowing appointees to continue serving until the legislature votes to reject appointees adheres most closely to the text and spirit of *Alaska's* Constitution. [*Id*.] Doing so respects the legislature's ability to vote and ultimately "check" gubernatorial appointments, while allowing the governor and Alaskans to benefit from the continued work of these public servants.

The Council largely sidesteps these arguments. Nowhere does it engage with the governor's discussion about how this dispute can only be resolved by looking to Alaska's constitutional framework. [*See* At. Br. 27-31] Instead, it observes that "declination through legislative inaction" is not "novel," citing the same two cases it identified below—*McCarthy v. Watson*,[20] and *State, ex rel. Oberly v. Troise*.[21] [Ae. Br. 26-28] But as already explained, neither of those cases grew from a similar context. [At. Br. 29-30] *McCarthy* arose in a state lacking specific constitutional provisions on appointments. [At. Br. 29] *Troise* held that inaction did not constitute consent—*not* that inaction amounted to rejection.[22] Neither case is thus helpful in evaluating Alaska's constitutional design.

The Council concedes that there is no broadly recognized rule on legislative inaction in the face of constitutional silence. [Ae. Br. 26, 29] And critically, nowhere

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20 45 A.2d 716, 717 (Conn. 1946).
21 526 A.2d 898 (Del. 1987).
22 *Id*. at 903-04.

does it cite a case where the constitution conferred appointment power on a governor but was silent on legislative inaction and a court held that appointees were tacitly rejected. Nevertheless, it suggests the governor's position is somehow out of step with a non-existent uniform rule. [*See* Ae. Br. 26, 29] But given the variability of appointment provisions, the inherently fact specific nature of cases interpreting them, and the blueprint of Article III read in light of *Bradner*, it is the Council's position that lacks firm footing.

The Council contends that its position must be correct because under federal law, federal nominations to the U.S. Senate who are neither confirmed nor rejected during the session are returned by the Secretary to the President. [At. Br. 29-30] But this argument ignores the significant distinctions between the federal and state appointment models and fails to acknowledge that unlike in Alaska, regular federal appointees cannot serve until *after* securing Senate consent. [At. Br. 6-8, 46-48] The federal model is thus of little utility in deciding whether legislative inaction constitutes rejection of state officials.

The Court need look no further than Alaska law to resolve this dispute. And it is telling that the legislature's original understanding of its confirmation power comports with the governor's position. AS 39.05.080(2) *requires* the legislature to act on appointees by a majority vote, and the Council frankly acknowledges that by not voting in 2020, it violated that provision. [Ae. Br. 37] And AS 39.05.070 provides that the policy goals underlying the legislature's statutory confirmation scheme seek to eliminate gubernatorial recess appointments except in rare circumstances and promote in-session

appointments. Nowhere does the Council deny that those policy goals simply cannot be achieved, and in fact are undermined, unless the legislature actually votes.[23]

The council claims that these provisions are "not an issue on appeal" and were not raised below. [Ae. Br. 26-27] But the governor is not asking this Court to rule that the legislature violated its own statute (a point already conceded). And because the Council claims that the laws at the center of this case are an exercise of its policy-making authority, there is no reason that this Court should ignore the very policy those laws were intended to promote.[24] The provisions themselves merely help inform an issue already briefed—whether tacit declination and the statutory restrictions on recess reappointments of individuals who were never voted on run afoul of Article III.

The Court's review of these statutes is not dependent on any new facts, and the substance of the statutes themselves are closely tied to the issues at the heart of this appeal.[25] The Council has claimed that it has broad leeway to enact "procedural" laws about confirmation—of which AS 39.05.070 and AS 39.05.080 are two—and that it can both reject appointees by inaction and substantively restrict recess appointments. In assessing those arguments and resolving the constitutional question presented, it is

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[23] On the contrary, providing for automatic rejection of appointees on the last day of session by legislative inaction forces the governor to make recess appointments. [At. Br. 31-32]

[24] *See* AS 39.05.070; *Cook v. Bothelo*, 921 P.2d 1126, 1131 (Alaska 1996) (characterizing AS 39.06.080 as not defining the substantive elements of executive appointments "but rather establishes the procedures by which appointees are confirmed").

[25] The Court may consider arguments not raised below if the issues (1) do not depend upon new facts, (2) are closely related to trial arguments, and (3) could have been gleaned from the pleadings. *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985).

appropriate for the Court to consider whether the Council's position can be reconciled with its own statutes. The governor's discussion of these laws could also have been gleaned from the theories argued below—indeed, a different subsection of AS 39.05.080 is the crux of this appeal, and *Munson v. Territory of Alaska*, on which the Council relies, discussed the precursor to AS 39.05.070 at length.[26] Finally, the Council is not unaware of nor prejudiced by the governor's discussion of the legislature's own statutes. There is no reason for this Court to ignore the legislature's statutory scheme when resolving the merits of this appeal.

II. The legislature is not authorized to restrict who a governor may appoint under Article III, § 27 recess appointment authority.

Article III, § 27 authorizes imposition of durational limits on recess appointments, but it does not allow the legislature to substantively limit who the governor can appoint. This is particularly true when the legislature never voted to reject the recess appointee.

The Council acknowledges that the constitution does not explicitly grant the legislature authority to substantively restrict appointments. [*See* Ae. Br. 39-41] And it concedes that the delegates never discussed "tacit rejection" or its consequences, let alone

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[26] 16 Alaska 580, 587-88 (1956). The Council contends that because *Munson* interpreted the 1955 territorial act to allow for rejection by inaction—even though a different provision mandated that the legislature act on appointments—this Court should follow suit. [Ae. Br. 38] But it provides no real reason why. But because *Munson* was decided after the delegates met, it is of little use in considering the constitutional question at issue here. In any event, the *Munson* court was wrong: The act's mandate that the legislature vote, coupled with its stated intention of minimizing recess appointments, can only be reconciled if the legislature *is* required to vote. Otherwise, tacit declination, particularly on the last day of session, leaves the governor no option but to make a recess appointment, less critical positions remain vacant for most of the year.

that the delegates considered the possibility of legislative inaction. [Ae. Br. 20] Yet undeterred by the absence of any textual foothold in the constitution, the lack of any historical precedent in support of its position, and the adverse policy implications of its position, the council argues that the legislature can prohibit the governor from reappointing individuals who never received a confirmation vote. [Ae. Br. 39]

The Council's position rests on its faulty assertion that the delegates intended that the legislature would have expansive authority to "set the rules for interim appointments by law, *including* rules restricting the governor from reappointing a person whose appointment was rejected by the legislature." [Ae. Br. 41 (emphasis added)] But although the delegates may have understood the legislature would have some authority to regulate the confirmation process, they did not believe it should have free-ranging implied authority to enact substantive limitations on appointments. [*See* At. Br. 36-41] And had the delegates intended to allow the legislature to restrict who the governor could appoint they could have—and would have—provided for it.

As discussed in the opening brief, the only time the delegates appear to have contemplated substantive restrictions on recess appointments arose in the first version of what was then section 18. [At. Br. 37-28; Exc. 12] Delegate Rivers explained the proposal would assure the governor did not make a recess appointment of someone the legislature had "refused to approve and did not confirm" and "bypass" legislative confirmation. [At. Br. 37-38] But that version of section 18 was deleted entirely, and the

substantive restriction on the appointment of certain individuals it contained was dropped from the final version of what became §27.[27]

The Council wrongly suggests that the delegates' decision to eliminate such explicit legislative authority was meaningless, claiming the delegates understood that the legislature could already impose such a limit "by law." [Ae. Br. 41] But history shows that this is not true. On the contrary, when the delegates believed the legislature needed specific authority to restrict recess appointments to protect its confirmation power, they provided for it—by *explicitly* giving the legislature authority to establish durational limits on those appointments.[28] Had the delegates believed this could be done "by law" under some implied authority, there would be no reason for them to graft it onto §27.[29] Given the explicit delegation of authority to the legislature to impose durational limits on recess appointments, the omission of any similar delegation to impose substantive restrictions on those appointments supports the governor's position.

Bradner v. Hammond reinforces this conclusion,[30] though nowhere does the Council discuss *Bradner* in relation to §27. There, the court recognized that the power of confirmation is an "*express* grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers," and that constitutional text set the

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27 *See* PACC at 2265 (January 16, 1956).

28 Alaska Const. Art. III, § 27.

29 Nor does the territorial act support the Council's § 27 position. Because the act did not include the "tantamount to declination" language found in AS 39.05.080(3), there would be no reason for the delegates to assume the legislature had broad authority to restrict appointments of tacitly declined appointees. [Exc. 1-4]

30 553 P.2d 1 (Alaska 1976).

"*maximum* parameters" of delegated authority.[31] Thus, the legislature can act within the defined scope of this delegated authority by voting to reject appointees and setting durational limits on a recess appointee's term, but it cannot reach further into the sphere of executive power to *also* prohibit the appointment of specific individuals. If it could, the legislature's implied authority would overtake its expressly delegated authority.[32] There would be no meaningful limiting principle on how far the legislature could go in restricting appointments, and *Bradner*'s holding would be eviscerated.

"Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense," and be interpreted according to "the meaning the people themselves probably placed on the provision."[33] Reading §27 to allow the legislature to preclude recess appointments of individuals it never voted to reject is neither reasonable nor practical. Given §27's plain language, and the fact that the delegates did not discuss legislative inaction or contemplate that the legislature might fail to do its job, it is unreasonable to infer that they believed that the legislature should be permitted to block the governor from reappointing individuals who the legislature did not even vote on. The enshrinement of gubernatorial recess appointment authority in the

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31 *Id*. at 7-8.

32 *Id*. at 8 (declining to infer blending of governmental powers where "[t]o hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch, because there would be no logical termination point to the legislature's confirmation of executive appointments.").

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

constitution and the abandonment of the original section 18—the only version that provided any authority to that effect—only reinforces that conclusion. [At. Br. 37-41]

Allowing the legislature to eclipse gubernatorial appointment authority in this manner, particularly where the legislature has abdicated its responsibility to vote in the first instance, is deeply harmful to Alaska's government. [At. Br. 20-25, 46-48] It cripples Alaska's "strong executive," allows the legislature to kneecap an incoming administration and thwart the will of the electorate without the accountability of a recorded vote, and leaves the governor weaker appointment authority than the president has under the federal appointment model. [*See* At. Br. 20-25, 46-48] The Council ignores these issues. Nowhere, despite claiming its position is in accord with federal law generally, does it address—let alone square its position in this case with—the Supreme Court's recess appointment decision *NLRB v. Canning*.[34] The Council's unwillingness to engage on these points is a telling indicator of the weakness of its position.

The Council speculates that a governor could "gut" the power of confirmation by circumventing it. [Ae. Br. 42] It posits a hypothetical in which the legislature "votes to reject" an appointee, the governor reappoints that individual after regular session, the appointee temporarily serves until the legislature returns to session and (again) votes to reject the appointee, the governor later reappoints them, and this cycle "continue[s] endlessly." [Ae. Br. 42] But any concerns underlying this scenario are not present where the legislature does not vote on appointees at all. [Ae. Br. 42] Having declined to even

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[34] 517 U.S. 513 (2014).

exercise its own confirmation power, it is hard to see how anything the governor did "gutted" it. The legislature abdicated confirmation altogether, so the governor's 2020 recess appointments did not challenge legislative power in any real way. [At. Br. 44]

Moreover, the legislature has other tools at its disposal. It has historically deferred voting on appointees until the end of session. [R. 286] But if it were concerned about next-day recess appointments of rejected appointees, it could move its confirmation vote to earlier in the session, thus prompting the governor to fill essential positions sooner under §25 and § 26, rather than §27. Alternatively, because § 27 allows the legislature to set durational limits on recess appointments, the legislature could, for example, pass a law providing that recess appointments expire on the tenth day of session.[35] Both options would curb the potential abuse of recess appointments and—unlike the current scheme—are consistent with the legislature's authority.[36]

Finally, the practical consequences of this hypothetical make it unlikely to play out. Recruiting and filling one, let alone hundreds, of executive branch appointments is a sensitive, laborious, and resource-draining process. [Exc. 30, 63-64] Given that, and a governor's need to have cabinet members and senior officials available to help run government, there is little reason to believe a governor would assume the disruption, inconvenience, and political difficulties of repeatedly reappointing the same individuals to office while navigating cyclical vacancies. Many of these positions carry significant responsibilities, and the duties these public servants perform can have serious

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35 *See* Alaska Const. Art. III, § 27.

36 *See id*; Alaska Const. Art. II, § 12.

consequence for the state and Alaskans. Even brief recurring vacancies would be deeply disruptive to the governor and state government, leaving boards without quorums needed to act, requiring agencies to postpone major decisions or initiatives, and leaving the governor and agency personnel without the benefit of critical leadership. [Exc. 65-66; R. 17-19, 198] Neither a governor, the legislature, or Alaskans are served by this result. Nor would most Alaskans be willing to assume a position, begin working, face the rigors of public confirmation, be summarily removed from office for some period of time, only to then do it all over again—with no assurance of a different outcome.

CONCLUSION

For these reasons, the Court should reverse the superior court and remand with instructions to grant the governor summary judgment.