IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Division of Elections and Director Gail Fenumiai, Appellants, v. Recall Dunleavy, Appellee.	)	Supreme Court No. **S-17706**

Trial Court Case No. **3AN-19-10903 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC AARSETH, JUDGE

SUPPLEMENTAL BRIEF OF APPELLANTS STATE OF ALASKA, DIVISION OF ELECTIONS AND DIRECTOR GAIL FENUMIAI

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CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 7. Revenue Bills, Legislative Process, Presidential Veto

1: All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

2: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

3: Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Alaska Const. art. II, § 15. Veto

The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.

Alaska Const. art. II, § 16. Action Upon Veto

Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next

regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses. *[Amended 1976]*

ALASKA STATUTES

§ 15.45.500. Form of application

The application must include

(1) the name and office of the person to be recalled;

(2) the grounds for recall described in particular in not more than 200 words;

(3) the printed name, the signature, the address, and a numerical identifier of qualified voters equal in number to 10 percent of those who voted in the preceding general election in the state or in the senate or house district of the official sought to be recalled, 100 of whom will serve as sponsors; each signature page must include a statement that the qualified voters signed the application with the name and office of the person to be recalled and the statement of grounds for recall attached; and

(4) the designation of a recall committee consisting of three of the qualified voters who subscribed to the application and shall represent all sponsors and subscribers in matters relating to the recall; the designation must include the name, mailing address, and signature of each committee member.

SUPPLEMENTAL QUESTIONS

This Court has requested supplemental briefing on the following issues:

1. The historical basis of state constitutional provisions, and particularly the Alaska Constitution, Article II, section 15, regarding a governor's discretionary authority to veto items in appropriation bills and the related requirement that the governor provide a statement of objections to the vetoed items;

2. The constitutional limits, if any, that exist on a governor's exercise of the authority to veto items in appropriation bills; and

3. In light of the foregoing, the legal framework this court should use for determining whether the third ground for recall is "legally sufficient" as required by our case law. How should the governor's statement of his objections inform the analysis? Can the statement of objections itself demonstrate an "improper" use of the governor's veto authority sufficient to support recall? Is an "improper" use of the governor's veto authority a violation of the separation of powers doctrine? As used in the recall petition, is "separation of powers" a law — which the governor either violated or did not violate — or is it shorthand for something else? How should voters interpret the phrases "separation of powers" and "the rule of law"?

INTRODUCTION

Article II, section 15 of the Alaska Constitution grants the governor the power to strike or reduce items in appropriations bills. The governor's line item veto power covers every item in every appropriation, including those to the judicial branch. The only express limit on the governor's line item veto power is that any veto must be

accompanied by a statement of objections, which according to this Court must simply be coherent and comprehensible. The Constitution places no restriction on the reasons the governor might rely upon for an objection—there are no forbidden objections. The only express check that the Constitution places on the governor's line item veto is the power that it grants to the legislature to override a veto. But most importantly in this case, the committee's statement of grounds does not mention the governor's veto statement of objections. Therefore, as a matter of law, the Court cannot consider – just as the Division of Elections could not consider – the statement of objections when determining the legal sufficiency of the third ground.

The statement of grounds alleges in its third paragraph that "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law." But the "separation of powers" is not a law that can be violated, but rather a doctrine that partially describes the structure of American governments. When courts hold that the separation of powers has been "violated," this is shorthand for saying that one branch of government has attempted to exercise a power that belongs to another branch of government. What has been encroached in such cases are express constitutional provisions assigning powers to a particular branch of government. Separation of powers cannot be violated when one branch of government exercises a power that the Constitution expressly grants to that branch.

No encroachment on judicial power occurred because of the governor's line item veto. The act described by the statement of grounds—the use of the line item veto to reduce the court system's budget—is plainly within the governor's constitutional power

and is not an attempt to exercise judicial or legislative power. As a matter of law, therefore, the recall petition's third ground does not state a violation of separation of powers. A governor cannot violate separation of powers by using his line item veto to reduce an appropriation to the court system. A governor does not "attack the judiciary" or "attack the rule of law" —whatever those nebulous and unheard of concepts mean—by exercising his express constitutional power to reduce appropriations to the court system.

Article IV of the Alaska of the Constitution establishes a judiciary. This provision implicitly requires that the Judiciary be funded sufficiently to enable it to perform its basic constitutional functions. A constitutional violation would occur if the state had adequate resources to fund basic government but the legislature limited its appropriation to the Judiciary, or the governor struck or reduced such an appropriation, to such a degree that the courts could not perform their basic functions. In such extreme situations—and only in such extreme situations—other state supreme courts have relied upon the "inherent power" doctrine to enable themselves to mandate a minimum necessary level of funding for court operations. If the inherent power doctrine enables the Judiciary to require minimum necessary funding, then a low or reduced appropriation from the legislative or executive branches can never encroach upon the judiciary's exercise of its constitutional powers.

The committee's third ground does not satisfy any of the three pertinent statutory standards for recall—neglect of duty, lack of fitness or incompetence. Defining the three grounds is a question of law for the Court. The governor's exercise of his line item veto power to reduce the court system's total appropriations by less than one percent, even

coupled with an objection aimed at criticism of an Alaska Supreme Court decision, is neither an unconstitutional violation of separation of powers nor "improper," whatever that later term might mean. And, as a matter of law, the governor's constitutional exercise of his line item veto power does not constitute neglect of duty, lack of fitness or incompetence and, therefore, cannot serve as a valid ground for recall.

ARGUMENT

The Court's order on supplemental briefing invites the parties to discuss the significance of the governor's explanation of his partial veto of court system funding—his "statement of objections"—which the committee has argued underlies the allegations of the third paragraph of its statement of grounds. But the committee's statement of grounds makes no reference to the governor's objections; indeed, it does not even identify which veto is at issue. Therefore, if the Court is to consider the substance of the governor's objections, it must first abandon all existing precedent addressing the law of recall in Alaska and ignore the clear intent of the recall statutes that limit the committee to 200 words to make its case.

This Court is reviewing the certification decision of the Director of the Division of Elections. Relying on statute—and all Alaska recall cases—the Director based her decision on the 200 words of the statement. This Court must do the same. The committee alleged that the governor has attacked the rule of law, but if the rule of law means anything, it means that the people can trust the courts to impartially apply the law in all cases, including cases that affect the courts. And here, the law requires that the Court

consider only the words of the statement of grounds, which say nothing about the governor's objections.

I. The history of the line-item veto.

Article II, section 15 of the Alaska Constitution declares: "The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriations bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin." Every appropriation to every state government branch, department, program and subdivision, including those to the Judiciary, are subject to the governor's line item veto.

The line-item veto emerged in the nineteenth century as a popular tool for controlling state spending and balancing state budgets.[1] Additionally, it was intended to "prevent legislators from log-rolling" in appropriations bills "and to give governors some ability to limit state expenditures."[2] It was adopted by Alaska in 1912,[3] and incorporated into the new State constitution, with the expressed intent to give the executive branch "a strong control on the purse strings."[4]

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1 Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171, 1179 (1993).

2 *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 373 (Alaska 2001); *see also, Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993) ("Historically, the line item veto was put in state constitutions to counteract legislative "pork-barreling," the practice of adding extra items to an appropriation bill which the governor could not veto without vetoing the entire appropriation bill.").

3 Nicholas Passarello, *The Item Veto and the Threat of Appropriations Bundling in Alaska*, 30 Alaska L. Rev. 125, 150 (2013).

4 3 Proceedings of the Alaska Constitutional Convention (PACC) 1740 (January 11, 1956).

The requirement that the governor provide "a statement of his objections" derives from a similar veto requirement in the federal constitution[5] and is a standard formulation in state constitutions.[6] As this Court explained in *Alaska Legislative Council v. Knowles*, the requirement that the governor explain the reasons for a veto serves at least two principal functions. It allows the legislature to determine what it must do to avoid incurring another veto, and it forces the governor to reveal his reasoning "'so that both the Legislature and the people might know whether or not he was motivated by conscientious convictions in recording his disapproval.'"[7]

In making this assessment, the Court relied on a Kentucky case, *Arnett v. Meredith*, in which the Kentucky Court of Appeals held that the public and the Legislature "have the right to know the reason or reasons why a particular act was disapproved by the Governor so that they may exercise their rights and powers as voters and lawmakers to overcome such objections in the future, if the act is a meritorious one and approved by them."[8] Thus, the objections serve as the governor's contribution to the

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5 U.S. Constitution, art. I, § 7 ("If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it").

6 *See e.g.*, Colo. Const. art. 4, § 11 ("Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill..."); Mo. Const. art. 3, § 31; Tenn. Const. art. 3, § 18.

7 21 P.3d 367, 76 (Alaska 2001) (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 40 (Ky. 1938)).

8 *Arnett*, 121 S.W.2d at 40.

legislative debate over the political wisdom of the vetoed bill or item of appropriations.

II. The constitutional limits on the governor's line-item veto authority.

The only check that the Constitution places on the governor's line item veto power is the power that it grants to the legislature to override a veto.[9] The only constitutional limit on the governor's exercise of the line item veto is that any veto must be accompanied by a statement of objections.[10] The Constitution places no restriction on the reasons the governor might rely upon for an objection, nor does the Constitution identify forbidden objections.[11] This Court's few cases invalidating line-item vetoes have relied on a determination that the veto did not apply to an "item" as meant by the constitution,[12] or that it did not veto an "appropriation."[13] Although this Court has invalidated attempted line-item vetoes, it has never done so based on the content of an objection—or even the lack of an objection.

Instead, this Court has adopted "the 'minimum of coherence' standard when reviewing gubernatorial objections."[14] Under that test, courts simply "look to see whether the objection makes comprehensible reference to the provision being vetoed, and do not

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9 Alaska Const. art. II, § 16.

10 Alaska Const. art. II, § 15 ("He shall return any vetoed bill, with a statement of his objections, to the house of origin").

11 *See id.*

12 *Knowles*, 21 P.3d 367 (contingency language in appropriation bill is not an "item" that can be vetoed).

13 *Thomas v. Rosen*, 569 P.2d 793 (Alaska 1977) (bill authorizing general obligation bond not an appropriation bill).

14 *Knowles*, 21 P.3d at 376.

attempt to evaluate the reasoning underlying the objection."[15] In *Knowles*, this Court relied on *Romer v. Colorado General Assembly*, in which the Colorado Supreme Court declined to question "the sufficiency, rationality, or validity" of the governor's objections, calling substantive review of statements of objections "a mistake": "We prefer the approach of the framers of the United States Constitution who rejected judicial participation in the veto of bills, and who were acutely aware of the separation of powers issues raised by vetoes."[16] Thus, this Court has expressly directed that the courts should not judge the appropriateness of the governor's reasons so long as they are comprehensible.[17] By evaluating the governor's reasons for a line item veto, the courts would stray into political questions they have no special competence to settle and are required to eschew.[18]

Other courts have adopted a similar approach. In *Cascade Telephone Company v. Tax Commission of Washington*,[19] for example, the Washington Supreme Court held that it saw "nothing in the wording of our constitutional provision which places any duty upon the Governor to logically demonstrate his position or which makes the veto good or bad

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15 *Id.*

16 *Romer v. Colorado General Assembly*, 840 P.2d 1081, 1084 and n.6 (Colo. 1992).

17 *Knowles*, 21 P.3d at 376.

18 *Id.* ("ultimately such disputes are inherently political because they implicate the appropriations and budgetary powers of the legislature and the executive, and the political relationship between those branches of government. The judiciary has no special competence to settle these types of inherently political disputes").

19 30 P.2d 976 (Wash. 1934).

as the Governor's reasons may be sound or otherwise. The giving of a reason by the Governor is for the information of the Legislature."[20]

Provided that basic constitutional mandates are funded, the Constitution places no quantifiable monetary limitations on either the legislature's appropriation power or the governor's line item veto power.[21] A constitutional violation would occur if the legislature or the governor were to underfund the courts to such a degree that they could not perform their basic functions. In such extreme situations—and only in such extreme situations—other state supreme courts have relied upon the "inherent power" doctrine to enable themselves to mandate a minimum necessary level of funding for court operations.[22] As the Alabama Supreme Court held in *Folsom*, the judicial branch "has the inherent power to assure itself sufficient funding to perform its duties."[23] However, the Court's that have embraced the "inherent power" doctrine have cautioned that courts "should exercise that power sparingly, such as in circumstances in which it appears that the ability of the judicial branch to perform its core functions is at stake."[24]

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20 *Id.* at 978.

21 *Knowles*, 21 P.3d at 378.

22 *Folsom v. Wynn*, 631 So.2d 890, 899 (Ala. 1993); *see also, County of Barnstable v. Commonwealth*, 572 N.E.2d 548 (Mass 1991) ("When the funds provided for the judicial branch are not enough to maintain a minimally adequate court system, the judiciary has the power to order the provision of such funds, with or without legislative appropriation."); *Grimsley v. Twiggs County*, 292 S.E.2d 675 (Ga. 1982) (trial court had inherent power to order payment of necessary personnel); *State ex. rel. Metropolitan Public Defenders Servs. Inc. v. Courtney*, 64 P.3d 1138, 1139 n.1 (Or. 2003) (citing cases).

23 *Folsom*, 631 So.2d at 899.

24 *Metropolitan Public Defenders Servs. Inc.*, 64 P.3d at 1139.

III. Legal framework for determining whether the third ground for recall is "legally sufficient".

The legal framework for determining whether the third paragraph of the statement of grounds is legally sufficient is whether it alleges facts that, if true, make a *prima facie* showing of one or more of the statutory grounds for recall.[25] The Court evaluates the committee's legal conclusions to ensure they are legally correct[26]—whether the third ground articulates a valid basis for recall is a question of law for the court.[27] This means the Court may not simply accept the committee's legally incorrect assertion that the governor violated the separation of powers by using his line-item veto. Rather it must look at the facts alleged—and only those facts alleged in the statement of grounds—to determine first if they constitute a violation of the law, and second if that violation of the law constitutes one or more of the statutory grounds for recall.[28] Neither is true in this case.

IV. The governor's statement of objections cannot inform the Court's analysis because the statement of grounds makes no reference to the governor's objections.

The Court has asked "how the governor's statement of his objections" should

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25 *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1059-60 (Alaska 1995).

26 *Citizens for Ethical Government v. State*, 3AN-05-12133CI at 78-79 (Alaska Super. Jan. 4, 2006) (Stowers, J.) ("[I]n a petition if there's a statement in the form of X is illegal where the constitution or some state law prohibits y, those are statements of law, and that's appropriate for the court, and indeed it's my duty, to evaluate those and to determine whether or not those are true and accurate statements of law.").

27 *Id.*

28 *von Stauffenberg*, 903 P.2d at 1059-60.

"inform the analysis." But the governor's statement of objections cannot be considered because it is not part of the recall committee's statement of grounds. That statement alleges only that "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law." [Exc. 1] As the Division has repeatedly noted, the only *fact* alleged here is that the governor used his line-item veto. The claims that he "violated separation-of-powers," that the veto was "improper[]," and that it constituted an "attack [on] the judiciary and the rule of law" are, in the former case a legal conclusion, and in the latter case mere rhetoric. In both cases the claims are devoid of specific factual substance.

The committee urges the Court to consider the contents of the budget documents cited in the last paragraph of the statement of grounds. [At. Br. 42-43] But those documents do not communicate to the reader that the allegation is about the nature of the governor's objection related to state-funded abortions. [R. 91] In addition, considering their content would be flatly inconsistent with the plain language of the statutes and all existing Alaska precedent interpreting the state's recall laws, which limit a statement of grounds to 200 words. Even if the Court interprets AS 15.45.500(2)'s 200-word limit to be easily circumvented by simply incorporating information by reference (in this case, budget documents), the third paragraph would still lack sufficient factual particularity to make the governor's statement of objections relevant to this Court's analysis. Considering both paragraph three and the budget documents, the reader would most likely conclude that the committee was alleging that the offensive act was the Governor's

veto of a court system appropriation, not that the offensive act was his *reason* for the veto.

This is demonstrated by the initial version of the third paragraph, before the superior court invalidated subsection (b):

> Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities. [Exc. 1]

In addition, the statement of grounds' last paragraph cited "OMB Change Record Detail (Appellate Courts, University, AHFC, Medicaid Services)," the documents that identify the governor's vetoes and objections. Even assuming—contrary to all legal authority—that the Division and the voters are expected to consult the referenced documents to understand the gravamen of the committee's allegations, they could not reasonably be expected to infer that the committee was objecting to the Governor's reason for vetoing part of the court's funding. When these budget documents are considered as support for both parts of paragraph three, nothing particularly directs attention to the governor's objection in support of the veto of $334,700 from the appellate court budget. To the contrary, the change record details for all the other vetoes—of the COLA salary increase for judicial employees, and funding for AHFC, Medicaid, and the University—contain the same language explaining the veto: "The State's fiscal reality dictates a reduction in

expenditures across all agencies." [*See* R. 91, 831, 833-34][29]

Given that subsection (b) seems to allege that the governor violated the separation of powers vis-à-vis the legislature simply by cutting funding, the most natural reading of subsection (a) is that the funding cuts themselves constitute the alleged "attack on the judiciary and the rule of law." Certainly, nothing in the statement of grounds or the Change Record communicates to the reader that it is the substance of the governor's objection to the second vetoed item that allegedly warrants his recall.

A statement of grounds is not a puzzle that must be solved by the Division and the voters to deduce what the sponsors are alleging an official has done and why it matters. On the contrary, it must state "the grounds for recall described in particular."[30] And because paragraph three says nothing about the governor's objections supporting his veto, that statement of objections cannot inform this Court's analysis of the sufficiency of the allegations of paragraph three.

V. This Court's precedent precludes relying on the reasons for a veto as a basis for recall even if the committee had actually pointed to the governor's objections in its statement of grounds, which it did not.

The Court wonders whether an "improper" use of a governor's veto authority could be sufficient to support a recall attempt. The answer is "no," because no standard exists for determining that a veto is "improper." "Improper" is not a legal or

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29 The governor's vetoes of AHFC funding are explained here: https://omb.alaska.gov/ombfiles/20_budget/PDFs/MH_Capital_Veto_Summary_6-28-19.pdf.

30 AS 15.45.500(2).

constitutional term; there is no constitutional text or test for deciding whether or not a veto is "proper." Although a veto may be *invalid* or *void* if it is not accompanied by a minimally coherent objection, or if does not strike or reduce the amount of an appropriation, the claim that a veto is "improper" is simply a political judgment, and this Court has clearly held that Alaska law does not allow voters to remove an elected official from office based on policy disagreements.[31] Subjecting a governor to recall because of the reasons given for exercising his veto power constitutes political recall, which is not permitted under Alaska law. Again, veto disputes "are inherently political because they implicate the appropriations and budgetary powers of the legislature and the executive, and the political relationship between those branches of government."[32] The fact that court system funding has been vetoed does not make a governor's use of his veto power any less proper or political.

Although courts have noted that the purpose of the statement of objections is to inform the legislature *and* the voters, that does not establish that such a statement can constitute a ground for recall.[33] The voters get to weigh in on policy matters at regularly scheduled elections. If Alaska is to maintain a for-cause recall, then the so-called appropriateness of a governor's statement of objections cannot be left to voters in a recall campaign. *Knowles* established that Alaska courts do not "attempt to evaluate the

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31 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294 (Alaska 1984).

32 *Knowles*, 21 P.3d at 377.

33 *See e.g.*, *Knowles*, 21 P.3d at 376.

reasoning underlying the [governor's] objection."[34] And without a standard to determine the legal sufficiency of a recall committee's complaint about a veto objection, simply allowing the voters to decide in a recall election whether the objection is "proper" will impermissibly allow political recall based merely on "disagreement with [the governor's] position on questions of policy."[35]

VI. The governor's exercise of a power that the Constitution expressly gives him cannot violate the "separation of powers."

Although some state constitutions have provisions establishing the separation of powers,[36] this Court has recognized that "the doctrine of separation of powers…is implicit in Alaska's constitution."[37] Thus, it is not a "law" so much as a partial description of the structure of Alaska's government. This Court has further recognized that "[a] problem inherent in applying the doctrine of 'separation of powers' stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers."[38]

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34 *Id.*

35 *Meiners*, 687 P.2d at 294.

36 *See e.g.*, W. Va. Const. art. 5, § 1 Division of powers ("The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature."); Ill. Const. art. 2, § 1 Separation of Powers ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

37 *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

38 *Id.*

The Court's four-factor test for evaluating a separation-of-powers claim demonstrates that the real question is whether one branch of government has exceeded the scope of its constitutional authority by attempting to exercise a power that the constitution has delegated to another branch. The Court considers (1) the nature of the power at issue; (2) which branch of government is assigned this power in the constitution; (3) whether the constitution suggests that the power is to be shared by two branches; and (4) whether the limits of any express grant have been exceeded or present an encroachment on another branch.[39] Applying this test, it is clear that a governor's line-item veto cannot violate the separation of powers.

First, the line-item veto power is budgetary in nature. Its constitutional purpose is "to create a strong executive branch with 'a strong control on the purse strings' of the state."[40] Second, although appropriations lie at the core of the legislature's power,[41] the constitution clearly establishes that budgeting is a power shared by the legislative and

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39 *Alaska Pub. Interest Research Gp. v. State*, 167 P.3d 27, 35 (Alaska 2007).

40 *Thomas v. Rosen*, 569 P.2d at 795.

41 Alaska Const. art. II §§ 1, 13; art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law."); art. XI § 7 (prohibiting the use of an initiative to make or repeal an appropriation); *see also, University of Alaska Classified Employees Ass'n v. Univ. of Alaska*, 988 P.2d 105, 107 (Alaska 1999) ("The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs"); *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988); *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991) ("The purpose of the prohibition on repeal of appropriations by initiative is to ensure that the legislative body remains in control of and responsible for the budget.")

executive branches.[42] Third, the line item veto power is expressly assigned to the governor by the constitution.[43] And finally, the governor's veto does not exceed the limits of Article II, section 15 nor does it encroach on the powers of another branch. Unlike some other state constitutions, the Alaska Constitution does not exempt appropriations to the judicial or legislative branches' from the governor's line item veto power.[44] Indeed, the Chief Justice has acknowledged that the governor may veto lines of the court system

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42 *Thomas*, 569 P.2d at 795 ("the item veto power of the governor checks legislative appropriations"); *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006) ("As the superior court concluded, under the Alaska Constitution 'it is the joint responsibility of the governor and the legislature to determine the State's spending priorities on an annual basis.'"); *see also, Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895 (Alaska 2004) ("[A]rticle II, sections 15 and 16 of the Alaska Constitution govern the balance of power between the legislative and executive branches of Alaska's government.").

43 Alaska Const. art. II, §15.

44 Alaska Const. art. II, § 15. *Compare* Haw. Const. art. 3, § 16 ("Every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses and shall thereupon be presented to the governor. If the governor approves it, the governor shall sign it and it shall become law. If the governor does not approve such bill, the governor may return it, with the governor's objections to the legislature. Except for items appropriated to be expended by the judicial and legislative branches, the governor may veto any specific item or items in any bill which appropriates money for specific purposes by striking out or reducing the same; but the governor shall veto other bills, if at all, only as a whole.") (Emphasis added). *See also, State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 421 (W. Va. 1973) (interpreting article 6, § 51 of West Virginia Constitution, containing specific and distinct provisions regarding the judiciary's budgetary process, as insulating judiciary's budget from governor's line item veto authority).

budget.[45] The governor's veto was an exercise of a discretionary *executive* power, not a judicial or legislative power, and thus cannot constitute a violation of the separation of powers. And the constitutional check on the governor's veto power is the legislature's power to override any veto that it considers inappropriate.[46]

Lastly, the Court's question about how voters should "interpret the phrases 'separation of powers' and 'the rule of law'" only serves to emphasize the lack of factual and legal particularity in the statement of grounds. If the language of the statement does not have a clear meaning such that even this Court is uncertain how to understand its terms, it has surely failed to meet the statutory requirement of stating "the grounds for recall with particularity."[47]

CONCLUSION

This case is not about the Court's view of the governor's reasons for vetoing court system funding. This case is not about what the governor did; it is only about what the

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45 Letter from Chief Justice Bolger to Governor Dunleavy, dated December 13, 2019 (available online at http://www.akleg.gov/basis/get_documents.asp?session=31&docid=58504) ("The Governor does have explicit authority to veto all or portions of the general appropriation bill enacted by the legislature. This is the one area in which the constitution by explicit language permits the executive branch to exercise fiscal control over the other two branches of government. Though an expressed exception to pure separation of powers, even this authority must be exercised within the limitations of that doctrine and cannot be exercised in a way that will impair the constitutional functioning of the legislature or the judiciary.").

46 Alaska Const. Art. II, § 16. It is noteworthy that the legislature did not override the governor's court system veto, a fact of which this Court may take judicial notice. *See Varilek v. City of Houston*, 104 P.3d 849, 852 (Alaska 2004).

47 AS 15.45.500(2).

statement of grounds says he did and whether as a matter of law the stated grounds articulate a legal basis for recall. The closeness of these two issues is ample reason for this Court to adhere carefully to the rules laid out in statute and precedent. Those rules dictate that the Court limit its analysis to the 200 words of the statement of grounds, which makes no reference to the governor's objections. Even if this Court ignores controlling law and reviews the governor's veto statement, as a matter of law the governor did not violate separation of powers by exercising his constitutionally express line-item veto power. The third paragraph of the committee's statement of grounds—like the other three paragraphs—does not state a valid ground for recall. It lacks both sufficient factual particularity to explain to voters—and the Division—why the governor allegedly should be recalled, and, ignoring that problem, it is also legally insufficient because (1) the governor has not violated any constitutional or statutory limit on his veto power, and (2) the governor's exercise of his line item veto power is not a neglect of duty, lack of fitness or a demonstration of incompetence.