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MEMORANDUM

January 30, 2021

SUBJECT: Governor's Disaster Emergency Declaration Extensions
(Work Order No. 32-LS0356)

TO: Senator Lora Reinbold
Attn: Kelli Toth

FROM: Andrew Dunmire 
Legislative Counsel

You have asked several questions relating to the governor's disaster emergency declarations, which are addressed below.

Did the governor usurp the Legislature's authority by issuing disaster emergency declarations for COVID-19 beyond November 15, 2020?

On March 11, 2020, the governor issued a declaration of a public health disaster emergency under AS 26.23.020 in anticipation of the spread of the novel coronavirus disease (COVID-19). The legislature—through passage of ch. 10, SLA 2020—extended the governor's disaster declaration until November 15, 2020.¹ On November 6, 2020, Governor Dunleavy preemptively issued a new declaration of public health disaster emergency, effective November 16, 2020, through December 15, 2020.² On December 15, 2020, he issued a similar order, declaring a new disaster, effective from December 16, 2020, through January 15, 2021.³ And on January 14, 2021, he issued a third disaster

¹ Section 2(a), ch. 10, SLA 2020.

² Gov. Mike Dunleavy, State of Alaska Declaration of Public Health Disaster Emergency (November 6, 2020), available at <https://gov.alaska.gov/wp-content/uploads/sites/2/Disaster-Declaration-11.6.2020.pdf> (last visited Jan. 28, 2021).

³ Gov. Mike Dunleavy, State of Alaska Declaration of Public Health Disaster Emergency (December 15, 2020), available at <https://gov.alaska.gov/wp-content/uploads/sites/2/12.15.2020-COVID-Disaster-Declaration.pdf> (last visited Jan. 15, 2021).

declaration, this one effective until midnight on February 14, 2021.⁴ The governor's orders did not extend the initial disaster declaration – instead, the orders declared successive *new* disasters for the same emergency, COVID-19.⁵

AS 26.23.020(c) provides:

(c) If the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency. The disaster emergency remains in effect until the governor finds that the danger has passed or the disaster has been dealt with so that the emergency no longer exists. The governor may terminate the disaster emergency by proclamation. *A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution.* The proclamation must indicate the nature of the disaster, the area threatened or affected, and the conditions that have brought it about or that make possible the termination of the disaster emergency. A proclamation to declare a condition of disaster emergency must also state whether the governor proposes to expend state funds to respond to the disaster under (i) or (j) of this section.⁶

AS 26.23.020(c) is clear that the legislature holds the exclusive power to extend a disaster declaration beyond 30 days. Therefore, only the legislature had authority to extend the disaster emergency declaration beyond November 15, 2020, and the governor lacked statutory authority to do so.

Would a court find the governor's successive declarations to be a violation of AS 26.23.020(c)?

Yes, a court likely would find that the governor's executive orders declaring new disasters beyond November 15, 2020, violated AS 26.23.020(c). As discussed above, that statute gives the legislature, and only the legislature, authority to extend a disaster declaration.

It is difficult to predict how Alaska judges might review the governor's successive disaster declarations if challenged in court. When Wisconsin's governor issued successive

⁴ Gov. Mike Dunleavy, State of Alaska Declaration of Public Health Disaster Emergency (January 14, 2021), available at <https://covid19.alaska.gov/wp-content/uploads/2021/01/01.15.21-Disaster-Declaration.pdf> (last visited Jan. 15, 2021).

⁵ As discussed below, the governor likely violated AS 26.23.020 by declaring new public health disasters for the same emergency.

⁶ (Emphasis added).

disaster declarations related to the COVID-19 pandemic, his actions were challenged both in state court (*Lindoo v. Evers*) and directly with the Wisconsin Supreme Court (*Fabick v. Evers*).⁷ The plaintiffs in each case argued that the governor lacked the power to unilaterally extend the disaster by issuing new proclamations.⁸ In *Lindoo*, the state court declined to issue a temporary injunction which would have had the effect of terminating the governor's declarations, finding:

Nothing in [the statute allowing the governor to declare a public health emergency for up to 60 days, unless extended by the legislature] prohibits the governor from declaring successive states of emergency. Instead, the statute allows a declaration if the governor determines that a public health emergency exists. That language gives the governor broad discretion to act whenever conditions in the state constitute a public health emergency. Although the governor cannot rely on emergency powers indefinitely, he can when a public health emergency exists *and the legislature lets him do it . . .* The legislature can end the state of emergency at anytime, *but so far, it has declined to do so*. As the statewide representative body of the citizens of Wisconsin, *the legislature's inaction is relevant and it weighs against judicial intervention*, especially when the requested intervention will have statewide impact.⁹

In contrast, the Supreme Court of Michigan ruled that Michigan's governor exceeded her authority when she extended her COVID-19 disaster declaration.¹⁰ In that state, the relevant statute instructs that, 28 days after declaring a state of disaster or emergency, the governor shall issue an order declaring the disaster terminated unless the legislature approves an extension.¹⁰ Unlike in Alaska, Michigan's legislature did not extend that state's disaster declaration, and it ended by statute on April 30, 2020. The governor

⁷ See Compl., *Derek Lindoo vs. Tony Evers*, No. 20-CV-219 (Wis. Cir. Ct., Polk Co., Aug. 25, 2020); Pls.' Notice of Mot. and Mot. for a Temporary Inj., *Derek Lindoo vs. Tony Evers*, No. 20-CV-219 (Wis. Cir. Ct., Polk Co., Sept. 28, 2020); *Jeré Fabick v. Tony Evers*, No. 2020AP1718-OA (Wis. S. Ct. Oct. 15, 2020) (petition for original action granted on October 28, 2020).

⁸ *Id.*

⁹ Decision and Order, *Derek Lindoo vs. Tony Evers*, No. 20-CV-219 (Wis. Cir. Ct., Polk Co., Oct. 12, 2020) (emphasis added) (citations omitted) (internal quotation marks omitted). The *Lindoo* plaintiffs appealed the decision to the Wisconsin Supreme Court, which stayed the appeal pending its decision in *Fabick*. The Wisconsin Supreme Court held oral arguments in *Fabick* on November 16, 2020. It has not issued a decision as of January 28, 2021.

¹⁰ *In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at *6 (Mich. Oct. 2, 2020).

followed the provision of the statute requiring her to terminate the declaration of disaster, but she "acted immediately thereafter to issue another executive order, again declaring a . . . 'state of disaster' under the [statute] for the identical reasons as the declarations that had just been terminated—the public-health crisis created by COVID-19."¹¹ The state supreme court took issue:

Given that [the relevant statute] required the Governor to terminate a declaration of a state of emergency or state of disaster after 28 days in the absence of a legislatively authorized extension, we do not believe that the Legislature intended to allow the Governor to redeclare under the [statute] the identical state of emergency and state of disaster under these circumstances. To allow such a redeclaration would effectively render the 28-day limitation a nullity.¹²

Consequently, the court ruled that the governor lacked authority to renew her declaration of a state of disaster based on the COVID-19 pandemic beyond April 30, 2020.¹³

Returning to Alaska, it is difficult to predict how a court would rule. Generally speaking, courts try to stay out of disputes between elected officials, and it is possible that an Alaska judge might take a similar approach to the Wisconsin judge by ruling that if the legislature takes issue with the governor re-declaring disasters for the same reason, then it should pass a bill ending the disaster declaration. Conversely, an Alaska judge might find the reasoning from the Michigan case persuasive and rule that the governor had no authority to extend the COVID-19 disaster declaration. It is also possible that a judge might determine that the legislature has suffered no injury by the governor's successive declarations, and therefore decline to take any action. As this is an issue of first impression in Alaska, and as the COVID-19 pandemic is unprecedented in modern times, it is impossible to predict with any certainty how a court would rule.

"How can the governor legally, unilaterally extend the declaration of a public health disaster emergency for the same condition (COVID-19 virus)?"

No statutory provision authorizes the governor to issue a second declaration for the same emergency. A "disaster emergency" is defined as "*the condition* declared by proclamation of the Governor."¹⁴ This definition limits the disaster to the condition (singular) declared in the governor's proclamation. In this case, the condition is described as "an outbreak of

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *8.

¹⁴ AS 26.23.900(3) (emphasis added).

COVID-19."¹⁵ Unless the governor wishes to address a different emergency, the governor likely cannot issue a second proclamation to address the same disaster or condition because the power to extend a disaster emergency rests solely with the legislature. While nothing in the Alaska Disaster Act explicitly prohibits the governor from declaring successive states of emergency, if the governor were able to simply issue another disaster proclamation for the same disaster or condition, it would subvert the intent of AS 26.23.020(c) and infringe on the legislature's exclusive power to extend a disaster emergency.¹⁶

However, this would be an issue of first impression before Alaska courts, and it is possible that a court would find that the governor has the power to issue a second disaster proclamation based on the COVID-19 outbreak. In light of the unprecedented nature of this pandemic and the fact that President Trump "declared that a major disaster exists in the State of Alaska,"¹⁷ a court might not fault the governor for declaring successive declarations for the same emergency. Additionally, the current health orders declare that "in January 2021, a new strain of the SARS-CoV-2 [virus] was identified as being more contagious than the original strain, and is spreading in the United States."¹⁸ The governor might argue that the emergence of this new virus strain constitutes a different emergency.

Are the governor's eight health orders "illegal and therefore null and void?"

The answer to this question is the same as above: it is very difficult to predict how a court would rule. The governor issued his health orders under the authority prescribed to him by AS 26.23.020. If a court rules that he permissibly issued new emergency disaster declarations, then it would likely also rule that he had authority to issue emergency health orders. If instead a court determines that the governor lacked authority to issue new emergency disaster declaration based on COVID-19, then the court may also decide that

¹⁵ Gov. Mike Dunleavy, State of Alaska Declaration of Public Health Disaster Emergency (March 11, 2020), available at <https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf> (last visited Jan. 15, 2021).

¹⁶ Also relevant is the Michigan case discussed above, in which the Supreme Court of Michigan made this exact finding after that state's governor issued a new disaster declaration for COVID-19 when the 28-day statutory deadline lapsed.

¹⁷ *President Donald J. Trump Approves Alaska Disaster Declaration*, White House Statements and Releases (Apr. 9, 2020), available at <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-approves-alaska-disaster-declaration-5/> (last visited Jan. 25, 2021).

¹⁸ *See, e.g.*, Gov. Mike Dunleavy, COVID-19 OUTBREAK HEALTH ORDER No. 1 (January 14, 2021), available at <https://covid19.alaska.gov/wp-content/uploads/2021/01/01.15.21-Outbreak-Health-Order-No-1-Suspension-of-Laws-DD4.pdf> (last visited January 18, 2021).

the health orders were issued unlawfully. For example, after the Supreme Court of Michigan issued its decision in the case discussed above, it issued another order declaring that – because the governor had exceeded her power by issuing COVID-19 emergency orders – those orders were "of no continuing legal effect."¹⁹

Is Health Order No. 7 legal?

Through your email request and my phone conversation with Kelli Toth on January 15, 2021, you have asked specifically whether Governor Dunleavy has authority to issue Health Order No. 7. The purpose of that order "is to permit online ticket sales for raffles, lotteries, and other contests so that proceeds from these contests may benefit charities in Alaska."²⁰

Health Order No. 7 declares that, "[n]otwithstanding AS 05.15.640, permittees, operators, or multiple-beneficiary permittees may sell tickets online for a raffle or lottery, dog mushers' contest, derby, or type of classic defined in AS 05.15.690 to in-state purchasers of legal purchasing age only." The order specifically declares that it was issued "pursuant to the authority vested in [the governor] under AS 26.23.020," but it does not cite to a specific subsection within that statute.

AS 26.23.020(g)(1) – (11) enumerate the governor's powers during an emergency disaster declaration, but it is not obvious that any part of subsection (g) grants the governor authority to issue Health Order No. 7. Subsection (g)(1) is perhaps most closely related; it gives the governor authority to suspend "any regulatory statute prescribing procedures for the conduct of state business . . . if compliance with the provisions of the statute . . . would prevent, or substantially impede or delay, action necessary to cope with the disaster emergency."

A plaintiff challenging Health Order No. 7 in court could argue that "regulatory statute" and "state business" refer to statutes that govern state agencies. That argument seems to be supported by the plain text of the statute, but I cannot find a definition for "regulatory statute" in the Alaska Statutes, case law, or legal dictionaries. Further confounding the issue, AS 26.23.020 has never been analyzed in a published court opinion—it has only been cited in two cases, both times in a passing manner without any substantive discussion.²¹

¹⁹ *House of Representatives v. Governor*, 949 N.W.2d 276 (Mich. 2020).

²⁰ Gov. Mike Dunleavy, COVID-19 OUTBREAK HEALTH ORDER No. 7 (January 14, 2021), available at <https://covid19.alaska.gov/wp-content/uploads/2021/01/01.15.21-Outbreak-Health-Order-No-7-Online-Ticket-Sales-DD4.pdf> (last visited January 25, 2021).

²¹ See *Hickel v. Cowper*, 874 P.2d 922, 933 (Alaska 1994); *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 275 (1st Cir. 2003).

The governor may argue that "state business" is a broad enough term that it covers state regulation of charitable gaming rules. The governor would have to convince a judge that Health Order No. 7 is a necessary component of Alaska's COVID-19 response plan. The governor could argue that in-person ticket sales pose an unnecessary risk of viral transmission and that permitting online sales eliminates that risk while allowing charities to continue receiving gaming revenue. Yet it is difficult to see how not being able to sell gaming tickets online "would prevent, or substantially impede or delay, action necessary to cope with" the COVID-19 pandemic.

If challenged in court, the governor may need to establish facts to support Health Order No. 7. For example, he might present evidence that charities that rely upon gaming revenue are a crucial part of Alaska's pandemic response plan, and that a loss of gaming revenue would impede their ability to continue aiding the state's response. But without knowing why the governor issued this order—or what underlying facts might justify it—it is difficult to predict how a court would rule if confronted with these questions. You might consider eliciting testimony from a member of Governor Dunleavy's administration to lay a factual foundation explaining why he issued Health Order No. 7.

Were secs. 1 – 4, 6 – 20, 22, 23, 30, and 32 of SB 241 repealed on November 15, 2020?

Last year, in response to the COVID-19 pandemic, the legislature passed SB 241. The governor signed the bill into law, and it was enacted as ch. 10, SLA 2020. As Ms. Toth noted in her email dated December 30, 2020, sec. 34 of that bill repeals secs. 1 – 4, 6 – 20, 22, 23, 30, and 32 "on the earlier of (1) November 15, 2020; or (2) the date the governor determines . . . that the public health disaster emergency declared by the governor under AS 26.23.020 on March 11, 2020, . . . no longer exists." As the governor has not determined that the public health disaster emergency no longer exists, the sections referenced above were repealed on November 15, 2020, by operation of sec. 34.

If you have any questions, or if I may be of further assistance, please call.

ASD:mjt
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MEMORANDUM

June 4, 2020

SUBJECT: Constitution and emergency powers
(Work Order Nos. 31-LS1803 and 1805)

TO: Senator Lora Reinbold

FROM: Noah Klein 
Legislative Counsel

You requested an evaluation of Governor Dunleavy's and Anchorage Mayor Berkowitz's COVID-19 public health mandates and orders.¹ You asked four specific questions.

(1) Under what authority have the mandates been issued?

The governor's mandates have been issued pursuant to a delegation of power in AS 26.23, the Alaska Disaster Act. Mayor Berkowitz's mandates have been issued pursuant to Anchorage's home rule powers and AS 26.23.

(2) Are the governor's mandates executive orders?

No, the mandates were issued pursuant to the governor's emergency powers under AS 26.23.

(3) Do the mandates violate the United States Constitution, the Alaska Constitution, or other law?

Nothing in the mandates is clearly unconstitutional or unlawful. Because similar mandates have been challenged in other jurisdictions with modest success, it is difficult to definitively conclude that every mandate would survive constitutional or other legal challenge.

(4) How can the legislature check the governor's power?

¹ Your request notes constituent concern about the governor's and mayor's mandates. Please note that I am providing this opinion as general legal advice to a legislator. This advice should not be relied upon by a constituent or a community. Further, AS 24.60.030(a)(2) of the Legislative Ethics Act prohibits use of legislative resources for the private benefit of a person. Providing legal advice to a constituent may violate that prohibition.

The legislature may refuse to extend a disaster declaration, legislate to end a disaster declaration, or legislate to limit the governor's disaster powers.

These issues are addressed in more detail below.

I. The Mandates

On March 11, 2020, the governor declared a public health disaster emergency. The legislature extended the disaster emergency and the governor's disaster powers until November 15, 2020. During the current disaster emergency the governor has issued 18 health mandates and the Mayor has issued ten emergency orders.²

II. Authority to Issue Public Health Mandates

A. Governor's Authority to Issue Public Health Mandates Related to COVID-19

The Alaska Disaster Act³ grants the governor broad emergency powers, and the Department of Health and Social Services has public health authority and powers under AS 18.15.350 - 18.15.395. The Disaster Act empowers the governor to "declare a condition of disaster emergency"⁴ and "issue orders, proclamations, and regulations" that "have the force of law" when "necessary to carry out the purposes of [AS 26.23]." Additionally, AS 26.23.020(g) enumerates specific powers the governor may exercise during a disaster. These powers notably include the power to "control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises in it" as well as the power to "direct and compel the relocation of all or part of the population from any stricken or threatened area in the state if the governor considers relocation necessary for the preservation of life or for other disaster mitigation purpose."⁵ The specific disaster emergency addressed will determine the extent of the governor's emergency powers.⁶ During a public health disaster emergency due to a disease outbreak the Department of Health and Social Services may also exercise specific disaster powers.⁷

² The governor's health mandates are available at <https://covid19.alaska.gov/health-mandates/> (last visited May 29, 2020) and the mayor's orders are available at <https://covid-response-moa-muniorg.hub.arcgis.com/pages/emergency-orders> (last visited June 1, 2020).

³ AS 26.23.010 - 26.23.240 and AS 26.23.900.

⁴ AS 26.23.020(c).

⁵ AS 26.23.020(g).

⁶ *See id.* (describing the governor's powers in relation to "the disaster emergency").

⁷ AS 18.15.390.

You asked whether the governor's mandates are executive orders. The mandates are not "executive orders" described in art. III, sec. 23 of the Alaska Constitution. That section authorizes the governor to reorganize the executive branch using executive orders subject to legislative disapproval within 60 days. The current mandates were issued pursuant to the emergency powers that the legislature delegated to the Governor in AS 26.23.

B. Anchorage Mayor's Authority to Issue Public Health Mandates to Respond to COVID-19

A municipal mayor's power to issue mandates in response to a disaster emergency cannot exceed the municipality's powers and the mayor's authority to exercise those powers. The Municipality of Anchorage is a unified municipality.⁸ A unified municipality is a home rule municipality.⁹ Article X, sec. 11 of the Alaska Constitution provides: "A home rule borough or city may exercise all legislative powers not prohibited by law or charter." AS 29.10.200 lists specific limitations on home rule powers. Nothing in this list limits a home rule municipality's authority to respond to a public health disaster emergency. Additionally, AS 26.23.140 expressly provides that the principal executive officer of a municipality may declare a disaster, and the municipality's governing board may extend the disaster declaration. Mayor Berkowitz's orders do not violate home rule municipal power.¹⁰

III. Nondelegation and Compliance with the Alaska Disaster Act

You expressed concern that the governor, rather than the legislature, has issued COVID-19 public health mandates. Litigants in other jurisdictions have, with varying degrees of success, challenged executive authority to issue COVID-19 health mandates as unlawful delegations of legislative power.¹¹ Because the Alaska Supreme Court has not evaluated

⁸ See Anchorage Municipal Charter, art. XVII, sec. 17.13(g).

⁹ AS 29.04.010.

¹⁰ This memo analyzes the mayor's power under state law, it does not analyze whether the specific mandates comply with Anchorage's charter or code.

¹¹ See, e.g., *Hartman v. Acton*, 2020 WL 1932896, at *3 (S.D. Ohio Apr. 21, 2020) (refusing to address a delegation challenge on the merits because it raised issues of state law and noting delegation relating to health may be constitutional without restrictions on the executive exercise of legislative power (quoting *State v. Schreckengost*, 282 N.E.2d 50 (1972))) but see *Wisconsin Legislature v. Palm*, 2020 WL 2465677 at *8 (Wisc. May 13, 2020) (noting that Department of Public Health Secretary, an executive branch appointee issuing Wisconsin's COVID-19 health mandates, "cannot point to any procedural safeguards on the power she claims" and concluding that the health mandates cannot be adopted without formal rulemaking in part because such power would implicate nondelegation concerns).

the Alaska Disaster Act's broad delegation of legislative power to the governor, I cannot definitively conclude whether the delegation is constitutional.¹²

The Alaska Supreme Court has applied a sliding scale approach to evaluate a delegation of legislative power to the executive branch: "[T]he constitutionality of a delegation is determined on the basis of the scope of the power delegated and the specificity of the standards to govern its exercise. 'When the scope increases to immense proportions . . . the standards must be correspondingly more precise.'"¹³ Discussing a delegation of the police power to the executive branch, the Alaska Supreme Court has also explained that "because of this close relation to public welfare . . . fewer specific standards or criteria for the guidance of administrative officials are required."¹⁴

A court evaluating the legislative power delegated to the governor to respond to a public health disaster would begin by evaluating the scope of the delegation and the standards

¹² "The Alaska Constitution vests legislative power in the legislature; executive power in the governor; and judicial power in the supreme court, the superior court, and additional courts established by the legislature." *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007) (citing *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976)). The legislature may delegate some of its legislative power to the executive branch. See *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960) ("The real question, then, is not whether there may be a delegation. Rather it is how far the legislature may go in delegating power to an agency . . ."). The *Boehl* opinion further explained that "[t]he United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Id.* (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1939)). If the legislature's delegation to the executive branch fails to provide sufficient standards to govern the delegation, a court may, nonetheless, conclude that the delegation is unconstitutional. *Usibelli Coal Mine, Inc. v. State*, 921 P.2d 1134, 1144 (Alaska 1996).

¹³ *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1143 (Alaska 1987) (second alteration in original) (quoting *Synar v. U.S.*, 626 F. Supp. 1374, 1386 (D.D.C. 1986)).

¹⁴ *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 590 (Alaska 1960). That opinion similarly stated:

In a field so closely related to the welfare of the public, the members of the legislature could not be expected to foresee and make provision in advance for all the varying conditions that might arise from time to time The grant of general rule-making power was necessary in order that the legislative objective would not be frustrated.

imposed on the power. The court may find that the Disaster Act's enumerated purposes,¹⁵ the 30-day limit on disaster declarations without a concurrent resolution by the legislature,¹⁶ and the specific list of the governor's emergency powers in AS 26.23.020(g) are sufficient standards to guide the exercise of the governor's emergency powers.¹⁷ Additionally, the court could focus on the nature of the delegation, rather than the standards, and recognizing that the governor's disaster powers are related to the public welfare, may hold that the delegation is constitutional.¹⁸

You also asked whether the mandates violate the governor's delegated authority. In addition to the powers delegated under AS 26.23, the legislature extended the disaster declaration by passing SB 241 (ch. 10, SLA 2020) on March 28, 2020. The governor had already issued 12 public health mandates and the legislature did not override any of those mandates. Nonetheless, because the Alaska Supreme Court has never evaluated or determined the specific extent of the emergency powers delegated to the governor, it is difficult to predict whether the mandates will survive a challenge alleging the governor exceeded his statutory authority.

Multiple other states, including Kansas,¹⁹ Pennsylvania,²⁰ Nebraska,²¹ Rhode Island,²² Texas,²³ Indiana,²⁴ Montana,²⁵ Colorado,²⁶ and Illinois²⁷ have disaster statutes delegating

¹⁵ AS 26.23.010.

¹⁶ AS 26.23.020(c).

¹⁷ See, e.g., *Dearmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 723 (Alaska 1962) (holding that statement of purpose and general limitations are adequate standards on delegation), *Walker v. Alaska State Mortgage Ass'n*, 416 P.2d 245, 254 (Alaska 1966) (noting that delegation included limit on power and that the complexity of the subject precludes a more detailed delegation).

¹⁸ *Boehl*, 329 P.2d at 590.

¹⁹ K.S.A. 48-925.

²⁰ 37 Pa.C.S. § 7301.

²¹ Neb. Rev. Stat. § 81-829.40.

²² R.I. St 30-15-9.

²³ Tex. Gov't Code Ann. §§ 418.011 - 418.026.

²⁴ I.C. 10-14-3-12.

²⁵ MCA 10-3-104.

similar emergency powers to their governors. The majority of challenges in other jurisdictions alleging that COVID-19 responses exceeded statutory authority have been unsuccessful.²⁸ Additionally, because all of Alaska is a disaster area under AS 26.23.020(g)(7), the governor may "control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises in" the entire state.

You specifically questioned whether the governor's quarantine orders comply with his statutory authority and AS 18.15.385.²⁹ Relying on the power to "control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises in it"³⁰ the Governor's tenth mandate provides: "All people arriving in Alaska, whether resident, worker, or visitor, are required to self-quarantine for 14 days and monitor for illness."³¹ The mandate includes the threat of criminal punishment of up to

²⁶ C.R.S. § 24-33.5-704.

²⁷ 20 Ill. Comp. Stat. 3305/7.

²⁸ See, e.g., *Free Minnesota Small Business Coalition v. Walz*, 2020 WL 2745414 at *1 (Minn. App. May 26, 2020) (holding that governor had authority to issue COVID-19 mandates without formal rulemaking), *McGhee v. City of Flagstaff*, 2020 WL 2308479 at *3 (D. Az. May 8, 2020) (concluding that disaster declaration responding to COVID-19 was properly based on governor finding emergency existed), *Cassell v. Snyders*, 2020 WL 2112374 at *13 -14 (N.D. Ill. May 3, 2020) (holding that governor can declare successive 30-day disaster emergencies to respond to COVID-19), *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 at *13 (Pa. Apr. 20, 2020) (concluding that governor's order requiring businesses to close was a valid exercise of statutory emergency powers); see also *In re Abbott*, 2020 WL 1943226 at *2 -8 (Tex. Apr. 23, 2020) (concluding that parties lacked standing and refusing to address argument that governor exceeded his emergency powers); but see *Wisconsin Legislature v. Palm*, 2020 WL 2465677 at *5 - 9 (Wis. May 13, 2020) (invalidating state COVID-19 mandates after concluding that under Wisconsin statutes the mandates could not be issued unless first complying with rulemaking process).

²⁹ AS 18.15.385 authorizes the Department of Health and Social Services to quarantine individuals to avoid spread of contagious disease.

³⁰ AS 26.23.020(g)(7).

³¹ State of Alaska COVID-19 (Coronavirus) Information, COVID-19 Health Mandates Issued By: Governor Mike Dunleavy, Updated Health Mandate 010: International and Interstate Travel - Order for Self-Quarantine available at <https://covid19.alaska.gov/health-mandates> (last visited May 29, 2020) (emphasis in

one year incarceration, a \$25,000 fine, or both. A court will probably evaluate the governor's authority to control the movement of people and occupancy of premises under the governor's emergency powers in AS 26.23 rather than AS 18.15.385. The broad purposes of the Disaster Act and the governor's power to control the movement of people provide support for the governor's mandates. Additionally, a court could distinguish the two laws by noting that AS 18.15.385 addresses only the department's authority to quarantine and recognizing that the governor has issued the health mandate for self quarantine and testing under the Disaster Act.

IV. Other Constitutional Questions

You also asked whether the governor's mandates are unconstitutional and requested analysis about "the constitutionality or lack thereof" of the mandates. When reviewing the governor's mandates I did not identify any restriction or prohibition that is clearly unconstitutional. There is, however, the potential for constitutional challenges. Litigation in other jurisdictions has included claims of (1) takings without just compensation,³² (2) prohibiting free exercise of religion,³³ (3) restricting free speech, association, and assembly,³⁴ (4) infringement of fundamental rights,³⁵ (5) equal protection violations,³⁶

original). That mandate was revised on June 3, 2020, to replace the 14 day self quarantine requirement with testing for most travelers to the state.

³² See *Tobacco & Wine, Inc. v. County of Dallas*, 2020 WL 1952814 at *1 (N.D. Tex. Apr. 23, 2020) (asserting that COVID-19 order requiring closure of plaintiff's business was a regulatory taking), *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 at *15 (Pa. Apr. 13, 2020) (asserting that COVID-19 order was a taking because it prohibited the use of petitioners property).

³³ See *Cross Culture Christian Ctr. v. Newsom*, 2020 WL 212111 at *1 (E.D. Ca. May 5, 2020) (church alleging that "stay-at-home orders infringe upon their constitutional and statutory rights to . . . practice religion as they choose"), *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 at *10 (D. N.M. Apr. 17, 2020) (church alleging that prohibition of mass gatherings violates free exercise clause), *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020) (church asserting that mayor's prohibition of drive through church services violated the free exercise clause), *Cassell v. Snyders*, 2020 WL 2112374 at *3 (N.D. Ill. May 3, 2020) (church asserting that prohibition on religious gatherings of more than 10 people violated the free exercise clause), *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 at *5 (D. Me. May 9, 2020) (same).

³⁴ See *Benner v. Wolf*, 2020 WL 2564920 at *7 (M.D. Pa. May 21, 2020) (asserting that prohibition on gatherings infringe on freedoms of speech and assembly), *Friends of Danny DeVito*, 2020 WL 1847100 at *23 (campaign committee arguing that governor's COVID-19 order "interferes with the right to peacefully assemble, as it closes a 'place of physical operations' they wish to use to 'hold meetings and to engage in speech and advocacy'"), *Esshaki v. Whitmer*, 2020 WL 1910154 at *2 (E.D. Mich. Apr. 20, 2020)

(6) and failure to provide procedural due process.³⁷ Some of these constitutional challenges have alleged violations of both the United States Constitution and state constitutions.³⁸ Other courts, including the United States Supreme Court,³⁹ have generally

(candidate seeking to appear on primary ballot asserting that "the State's strict enforcement of statutory signature gathering requirements with the Governor's Stay-at-Home Order has placed a severe burden on his ability to run for elected office — in violation of the freedom of speech[] [and] freedom of association . . . guaranteed to him by the First and Fourteenth Amendments"), *Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496 at *10 (D. Md. May 20, 2020) (businesses arguing that prohibition on gatherings and requirement to wear face coverings restrict freedom of speech and assembly).

³⁵ See *In re Abbott*, 954 F.3d 772, 780 (5th Cir. 2020) (providers alleging that governor's mandate prohibits abortion and violates their substantive due process rights), *Best Supplemental Guide, LLC v. Newsom*, 2020 WL 2615022 at *5 - 6 (E.D. Ca. May 22, 2020) (company that owns gyms arguing that mandated closures violate the right to travel and fundamental liberty interests), *Amato v. Elicker*, 2020 WL 2542788 at *5 (D. Conn. May 19, 2020) (restaurant owners arguing that mandate places a "substantial and under burden on the Plaintiff's liberty and right to pursue an honest living").

³⁶ *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 at *5 (D. Me. May 9, 2020) (church asserting mandate violates the equal protection clause), *Hartman v. Acton*, 2020 WL 1932896 at *10 (S.D. Ohio Apr. 21, 2020) (bridal shop owner alleging governor's order providing "a limited redress mechanism" for some entities to challenge designation as non-essential violates equal protection), *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 at *5 (Pa. Apr. 13, 2020) (candidate arguing that mandate's prohibition on access to campaign office while incumbent not similarly restricted violates equal protection).

³⁷ *Best Supplemental Guide, LLC v. Newsom*, 2020 WL 2615022 at *5 (E.D. Ca. May 22, 2020) ("Plaintiffs seem to argue that State and County officials should have afforded them some sort of legal process prior to enacting and threatening to enforce their stay at home orders). *Friends of Danny DeVito v. Wolf*, 2020 WL 1847100 at *14 (Pa. Apr. 13, 2020) (business owners asserting that they did not receive procedural due process when mandate classified businesses as essential or non-essential).

³⁸ See, e.g., *Friends of Danny DeVito*, 2020 WL 1847100 at *15 (business owners asserting taking in violation of Pennsylvania and United States Constitutions).

³⁹ *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2813056 at *1 (May 29, 2020).

found the challenged mandates constitutional.⁴⁰ But some courts have issued temporary restraining orders enjoining enforcement of mandates due to constitutional concerns as applied in certain circumstances.⁴¹

The United States Supreme Court recently addressed a free exercise challenge and refused to grant a church an injunction to prohibit enforcement of a mandate because under the challenged mandate "[s]imilar or more severe restrictions apply to comparable secular gatherings . . . where large groups of people gather in close proximity for extended periods of time."⁴² Notably, the Court, and most courts in other jurisdictions

⁴⁰ See, e.g., *Open Our Oregon v. Brown*, 2020 WL 2542861 at *2 (D. Or. May 19, 2020) (refusing to enjoin mandates because plaintiff's unlikely to succeed on federal constitutional claims), *McGhee v. City of Flagstaff*, 2020 WL 2308479 at *4 - 5 (D. Az. May 8, 2020) (refusing to enjoin mandates as applied to restaurant employee because employee unlikely succeed on establishing alleged due process violations), *Antietam Battlefield KOA v. Hogan*, 2020 WL 2256496 at *7 - 13 (refusing to enjoin mandates because plaintiff's unlikely to succeed on first amendment claims), *Best Supplemental Guide, LLC*, 2020 WL 2615022 at *4 - 8 (refusing to enjoin governor's mandates because, reviewing the the mandates as applied to case, plaintiff unlikely to succeed on first amendment, right to travel, due process, equal protection or fundamental rights claims), *Friends of Danny DeVito*, 2020 WL 1847100 at *15 - 25 (holding that governor's mandates did not cause an unconstitutional takings, or violate rights to equal protection, freedom of speech and assembly, substantive due process, or procedural due process).

⁴¹ See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 -27 (6th Cir. 2020) (affirming trial court grant of injunction to abortion providers because mandate invaded abortion right, and distinguishing the specific mandate from mandate found constitutional in another jurisdiction) *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1179 - 83 (11th Cir. 2020) (affirming trial court's grant of preliminary injunction to abortion providers based on conclusion mandate was an invasion of abortion right that had no real or substantial relation to state goals), *Esshaki v. Whitmer*, 2020 WL 1910154 at *2 (E.D. Mich. Apr. 20, 2020) (holding that Governor's order in conjunction with unmodified signature requirement for prospective candidates to appear on the ballot placed significant burdens candidate's first amendment, due process, and equal protection rights and granting a preliminary injunction), *First Baptist Church v. Kelly*, 2020 WL 1910021 at *5 - 8 (D. Kan. Apr. 18, 2020) (granting church's request for a temporary restraining order after finding that mandate restricting religious gatherings was not facially neutral and not narrowly tailored to further a compelling state interest), *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249 at *6 - 8 (W.D. Ky. Apr. 11, 2020) (granting church's request for a temporary restraining order because Mayor's order was overbroad and under inclusive, likely infringing on church members' rights to freely exercise their religion).

⁴² *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2813056 at *1 (May 29, 2020).

addressing alleged violations of the United States Constitution have relied on the analysis in *Jacobson v. Commonwealth of Massachusetts*.⁴³ The *Jacobson* court, evaluating a constitutional challenge to mandatory smallpox vaccination, established a deferential standard for reviewing alleged infringement of constitutional rights during emergencies.⁴⁴

It is difficult to predict whether any of Governor Dunleavy's or Mayor Berkowitz's mandates are constitutionally infirm because courts addressing constitutional challenges in other jurisdictions, which have both enjoined and refused to enjoin different mandates, are not legal precedent in this state and because the decisions in other jurisdictions have generally turned on the mandates as applied to specific facts.⁴⁵ Furthermore, the Alaska Supreme Court often uses its own tests to evaluate alleged violations of the Alaska Constitution.⁴⁶

V. Checks on the Governor's Authority

You inquired about the legislature's and citizens' options to challenge or "reel in" the governor's mandates. Because the governor's specific emergency powers are derived from AS 26.23, the legislature could adopt new legislation limiting the governor's powers. Additionally, the legislature must, and in this instance did, pass legislation to extend the governor's emergency powers beyond 30 days. Citizens concerned about the governor's emergency powers could similarly legislate, through an initiative, to limit the governor's powers.

⁴³ 197 U.S. 11 (1905). *See Id.* at *1. (explaining that public health and welfare is "principally" the role of "politically accountable officials"), *Open Our Oregon*, 2020 WL 2542861 at *2 (listing 11 prior cases applying *Jacobson* to constitutional challenges raised against COVID-19 mandates) *but see S. Bay United Pentecostal Church*, 2020 WL 2813056 at *2 - 3 (May 29, 2020) (Kavanaugh J. dissenting) (applying the general framework for reviewing free exercise challenges without citing *Jacobson*), *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2687079 at *3 - 4 (9th Cir. May 22, 2020) (Collins J. dissenting) (asserting that the *Jacobson* framework should not apply to alleged violations of constitutional rights expressly included in the constitution, including the free exercise clause, and that courts should apply the regular test for evaluating free exercise claims).

⁴⁴ *Jacobson*, 197 U.S. at 31.

⁴⁵ *See infra* n. 39 - 41.

⁴⁶ *See, e.g., In re Naomi B.*, 435 P.3d 918, 931 (Alaska 2019) (declaring "'Alaska's constitutional guarantee of individual liberty to be more protective' than its federal counterpart" (quoting *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 245 (Alaska 2006))), *Luper v. City of Wasilla*, 215 P.3d 342, 348 n. 32 (Alaska 2009) (explaining that Alaska's standard for reviewing alleged property rights infringement "is more protective than the federal standard").

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Please call with any questions or concerns.

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