

LAW THROWN OVERBOARD: DIRECT DEMOCRACY AND THE ALASKA OCEAN RANGERS

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ABSTRACT

Alaska is one of the premier cruise destinations in the world. The vessels' many amenities and luxuries, however, come with a price: cruise ships produce an inordinate amount of waste, most of which is dumped into the ocean. In 2006, Alaska voters passed a ballot measure establishing a program called the Ocean Rangers, which would monitor cruise ships in Alaskan waters to ensure that vessels were disposing of waste in accordance with state and federal law. In 2019, after an unsuccessful attempt in the state legislature to end the Ocean Rangers program, Alaska Governor Mike Dunleavy vetoed the entirety of the Ocean Rangers budget, effectively killing the program. This Note contends that because a ballot measure created the Ocean Rangers, Governor Dunleavy's veto likely violated the Alaska Constitution. First, this Note discusses the environmental risks of unregulated dumping and the cruise industry's historical lack of transparency in its waste management. Then, this Note distinguishes the Ocean Rangers veto from vetoes of other statutory program budgets in Alaskan case law. Next, this Note explains Alaska's constitutional protection of initiatives that were enacted directly by voters and argues why Governor Dunleavy's budget likely violated those protections. Finally, this Note postulates how potential litigants seeking to reinstate the Ocean Rangers could bring a case in state court under a citizen-taxpayer theory of standing.

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I. INTRODUCTION

Alaska is the most popular cruise destination in the United States.¹ Known for its natural splendor, the state welcomes millions of tourists every year to observe its aquatic wildlife, massive glaciers, and picturesque towns.² Of the 2.2 million tourists who visited Alaska in 2019, 1.33 million arrived by cruise, accounting for approximately sixty percent of the state's total visitation.³

Cruise ships represent some of the most luxurious sea travel that money can buy. Gone are the days of cramped quarters and seasickness; today, many large-passenger cruise ships better resemble "floating hotels," featuring a host of high-end amenities sure to fill a day at sea. In the summer of 2021, the *Carnival Freedom*, which embarked on twenty-one Alaskan cruises,⁴ featured an onboard waterpark, a tequila bar, and an exclusive Dr. Seuss character parade.⁵ Never mind that when Theodor Geisl first published *The Cat in the Hat*, Alaska was not even a state.⁶

Unlike some other tourist destinations, not all that happens on the ship stays on the ship. Cruise ships create exorbitant amounts of waste that disrupt marine ecologies. Cruises represent less than one percent of the world's merchant ship fleet, but are estimated to account for twenty-five percent of its waste.⁷ A 2010 congressional study estimated that for a single weeklong cruise, the average 3,000-person ship⁸ produces more

1. See *Cruising in Alaska*, CRUISE LINES INT'L ASSOC., <https://akcruise.org/cruising-in-alaska/overview/> (last visited Apr. 30, 2023) (stating that Alaska ports received approximately sixty-one percent of all port-of-call cruise passenger visits at U.S. ports).

2. Laura Taylor, *7 Reasons You Should Visit Alaska in 2022*, TRAVEL OFF PATH (Jan. 5, 2022), <https://www.traveloffpath.com/7-reasons-you-should-visit-alaska-in-2022/>.

3. Fed. Maritime Comm'n, Interim Report: Economic Impact of Covid-19 on the Cruise Industry in Alaska, Washington, and Oregon 5-6 (Oct. 20, 2020), https://permanent.fdlp.gov/gpo177319/20-20_AK_WA_OR_FF30_Final_Interim_Report.pdf.

4. *Carnival Increases Alaska Capacity with Freedom in 2021*, CRUISE INDUS. NEWS (Oct. 24, 2019), <https://www.cruiseindustrynews.com/cruise-news/21787-carnival-increases-alaska-capacity-with-freedom-in-2021.html>.

5. *Carnival Freedom*, CARNIVAL, <https://www.carnival.com/cruise-ships/carnival-freedom> (last visited Apr. 30, 2023).

6. Compare DR. SEUSS, *THE CAT IN THE HAT* (1957), with Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 339 (1958).

7. Anna Maria Kotrikla et al., *Waste Generation and Management Onboard a Cruise Ship: A Case Study*, 212 OCEAN & COASTAL MGMT. 1, 1 (2021).

8. In the summer of 2019, six vessels with over 3,000 passengers made a combined total of 137 voyages in Alaskan waters. See ALASKA DEP'T OF ENV'T CONSERVATION, 2019 LARGE COMMERCIAL PASSENGER VESSEL DISCHARGE STATUS AND WASTEWATER TREATMENT (2019), <https://dec.alaska.gov/media/16912/ww-tablelarge2019.pdf>. This is a small percentage of the forty vessels that made 573 voyages that summer season alone. *Id.*

than 211,000 gallons of sewage, approximately one million gallons of graywater (which is wastewater from “sinks, washing machines, bathtubs and showers”),⁹ 25,000 gallons of oily water, and eight tons of solid waste.¹⁰ The ship dumps much of this waste directly into the ocean.¹¹

Under the Submerged Lands Act of 1953, states maintain control over waters located within three nautical miles of their shoreline.¹² Federal law states that if a ship is within three nautical miles of a shoreline, the vessel ship must filter and process its wastewater before discharging it into the ocean.¹³ Ships beyond three miles from shore are permitted to directly release untreated sewage into the ocean.¹⁴

To respond to these environmental threats, Alaskan voters passed a ballot initiative in 2006 establishing the Ocean Rangers.¹⁵ The Ocean Rangers were a group of state-contracted marine engineers assigned to stay onboard cruise ships while the ships were in Alaska’s waters.¹⁶ The Ocean Rangers served as a watchdog group that “monitor[s], observe[s], and record[s] data and information related to the engineering, sanitation, and health related operations” of the cruise ship, “including but not limited to registration, reporting, record-keeping, and discharge functions required by state and federal law.”¹⁷ While the ballot initiative did not give the Ocean Rangers any intrinsic enforcement power, they were able to communicate cruise ship regulatory violations to the Coast Guard and the Alaska Department of Environmental Conservation.¹⁸

9. *Blackwater vs. Greywater*, GLOBAL WATER GRP., <https://www.globalwatergroup.com.au/our-blog/difference-between-blackwater-and-greywater> (last visited Apr. 30, 2023) [hereinafter *Blackwater vs. Greywater*].

10. Claudia Copeland, CONG. RSCH. SERV., RL32450, CRUISE SHIP POLLUTION: BACKGROUND, LAWS AND REGULATIONS, AND KEY ISSUES 1 (2010), <https://crsreports.congress.gov/product/pdf/RL/RL32450/14> [hereinafter CRUISE SHIP POLLUTION].

11. See Press Release, Oceana Works to Stop Cruise Ship Pollution (Oct. 6, 2009), <https://oceana.org/press-releases/oceana-works-stop-cruise-ship-pollution/> (stating that an average-sized cruise ships dump 30,000 gallons of sewage into the ocean on a daily basis).

12. 43 U.S.C. § 1312.

13. CRUISE SHIP POLLUTION, *supra* note 10, at 9.

14. *Id.* Sewage dumped at these distances can still negatively affect a coast’s water quality. See Laura K.S. Welles, Comment, *Due to Loopholes in the Clean Water Act, What Can a State Do to Combat Cruise Ship Discharge of Sewage and Gray Water?*, 9 OCEAN & COASTAL L.J. 99, 110 (2003) (“[Illegally dumped sewage] can affect a coastal state’s water quality because the waste can wash back to shore.”).

15. ALASKA DIV. OF ELECTIONS, PRIMARY ELECTION VOTER PAMPHLET 12 (2006), https://www.elections.alaska.gov/doc/bmp/2006/2006_bmp.pdf [hereinafter BALLOT MEASURE 2].

16. ALASKA STAT. § 46.03.476.

17. *Id.* § 46.03.476(b).

18. *Id.* § 46.03.476(c).

Those bodies have the authority to enforce punishment for the reported violations.¹⁹ This program was entirely funded via a per-head tax that tourists paid upon docking in Alaska.²⁰

While many Alaskans are fiercely supportive of the Ocean Rangers,²¹ the political waters surrounding the program are anything but calm. Governor Mike Dunleavy, a Republican elected to office in 2018,²² has expressed disapproval of the program throughout his administration.²³ Concerned that the Ocean Rangers were not providing the “bang” for their “buck”²⁴ and were disproportionately unfair to the cruise industry,²⁵ Governor Dunleavy introduced Senate Bill 70 to eliminate the Ocean Rangers and establish a new cruise ship inspection regime.²⁶ However, Senate Bill 70 died in committee and never reached legislative vote, meaning the Ocean Rangers initiative remained enacted law.²⁷

Undeterred, Governor Dunleavy pursued a new course of action to eradicate the Ocean Rangers. In 2019, the governor used the line-item

19. *Id.* § 46.03.020(6–7).

20. *Id.* § 46.03.480(d).

21. See Joe Viechnicki, *Ocean Ranger Repeal Moves Out of Senate Committee*, KTOO (Apr. 26, 2022), <https://www.ktoo.org/2022/04/26/ocean-ranger-repeal-moves-out-of-senate-committee/> (“Written public testimony has been overwhelmingly in support of keeping or even expanding independent oversight by the marine engineers.”); see also Karen Severson & Mark Severson, *Alaska Voices: Cruise Ships Need Ocean Rangers on Deck*, PENINSULA CLARION (Mar. 8, 2022, 11:38 PM), <https://www.peninsulaclarion.com/opinion/alaska-voices-cruise-ships-need-ocean-rangers-on-deck/> (voicing support for the Ocean Rangers from commercial fishermen in Alaska).

22. *Governor Mike Dunleavy*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/governor/mike-dunleavy/> (last visited Apr. 30, 2023).

23. See Jason Brune, Comm’r, Alaska Dep’t of Env’t Conservation, Comments to the Prince William Sound Regional Citizens’ Advisory Council (May 2, 2019), https://www.pwsrca.org/wp-content/uploads/filebase/newsroom/legislative_affairs/2019_regulatory_reform/Excerpted-quotes-by-ADEC-Commissioner-Jason-Brune-during-PWSRCACs-public-Board-of-Directors-meeting-in-May-2019.pdf (stating that the Ocean Rangers program does not provide “the bang” for its “buck”).

24. *Id.*

25. *Alaska’s Governor Suspends Funding for Cruise Ship Monitors*, MARITIME EXEC. (Jul. 4, 2019, 6:57 PM), <https://maritime-executive.com/article/alaska-s-governor-suspends-funding-for-cruise-ship-monitoring>.

26. Under the new regime, Governor Dunleavy proposed that state compliance staff would “still monitor cruise ships . . . with state wastewater and air quality permits and regulations” via “records reviews, inspections in port, opacity monitoring, and vessel tracking.” ALASKA S. J., 31st Leg., 1st Sess. at 0377 (Feb. 22, 2019), <https://www.akleg.gov/basis/Journal/Pages/31?Chamber=S&Page=0373&pageEnd=0388#SB70>.

27. See *id.* at 0376 (stating that the last action for S.B. 70 was a referral to the Resources Committee on February 22, 2019).

veto²⁸ to eliminate the entirety of the Ocean Rangers' operating budget for fiscal year 2020, which totaled approximately \$3.4 million.²⁹ This veto effectively killed the Ocean Rangers, even though the State of Alaska continues to collect the per-head fee paid by cruise passengers that funded the program.³⁰

Governor Dunleavy's budgetary veto of the Ocean Rangers had little immediate effect since the COVID-19 pandemic led to the cancellation of the 2020 and 2021 cruise ship seasons.³¹ However, as Alaskan cruises return to pre-pandemic numbers in 2023,³² cruise ships will face a vastly different regulatory procedure without the Ocean Rangers onboard.

This Note contends that Governor Dunleavy's budgetary veto³³ of the Ocean Rangers was an unconstitutional misuse of veto power.³⁴ While Alaska courts have previously allowed governors to eradicate statutory programs through appropriations vetoes, the Alaska Constitution prohibits vetoes of successful ballot initiatives.³⁵ Governor Dunleavy's budgetary veto served as a *de facto* veto of the entire Ocean Rangers program and was therefore unconstitutional.

Part II of this Note will provide a comprehensive framework of the purpose and enactment history of the Ocean Rangers and Governor

28. While the Supreme Court of the United States prohibited presidential use of the line-item veto in *Clinton v. City of New York*, forty-four state governors currently have some form of line-item veto power. Robert Longley, *Line-Item Veto: Why the U.S. President Does Not Have This Power*, THOUGHTCO (Sept. 2, 2022), <https://www.thoughtco.com/presidents-cannot-have-line-item-veto-3322132>. See also *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that presidential line-item veto power is unconstitutional).

29. Press Briefing, Governor Michael J. Dunleavy, State of Alaska, FY2020 Budget Vetoes: Items of Interest (June 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/Press_Items_of_Interest_High_Level_6-28-19.pdf.

30. Interview with Randy Bates, Dir. of Alaska Div. of Water (Sept. 23, 2022). Part II of this Note will explore the per-head fee in greater depth.

31. See generally DEP'T OF REVENUE, IMPACTS TO ALASKA FROM 2020/2021 CRUISE SHIP SEASON CANCELLATION (2021), <https://gov.alaska.gov/wp-content/uploads/sites/2/04082021-Cruise-Impacts-to-Alaska.pdf>.

32. See Jonson Kuhn, *Cruise Ships Projected to Be Closer to Capacity This Season*, JUNEAU EMPIRE (Jan. 12, 2023), <https://www.juneauempire.com/news/cruise-ships-projected-to-be-closer-to-capacity-this-season/> ("[I]n an earnings report for 2023, cruise lines are projecting their ships to run at 90% full in the first quarter of the year, which . . . is a good indication that the industry is getting back on track.").

33. For the purposes of this Note, "budgetary veto" and "line-item veto" will be used interchangeably.

34. Any future reference to the Governor's "unconstitutional" veto refers to this Note's central argument. No court has ruled on the constitutionality of the Governor's veto of the Ocean Rangers' budget. Therefore, readers should take note that the conclusion of unconstitutionality is the author's alone and does not reflect the views of the Alaska Law Review staff, editorial board, or faculty.

35. ALASKA CONST. art. XI, § 6.

Dunleavy's subsequent budgetary veto. Part III will use a case study of a previous budgetary veto in Alaska to explain how current legal precedent will hinder potential plaintiffs who seek reinstatement of the Ocean Rangers under theories of promissory estoppel, the Contract Clause of the United States Constitution, or separation of powers. Part IV will distinguish the Ocean Rangers from Part III's case study and explore how the Ocean Rangers' identity as a successful ballot measure affords it additional constitutional protection against vetoes. Finally, Part V will provide a cursory overview of how a potential plaintiff could assert standing to pursue this constitutional theory in an Alaska court.

II. THE BIRTH, LIFE, AND DEATH OF THE OCEAN RANGERS

The Ocean Rangers are inextricably linked to a long history of cruise ship environmental violations in Alaska. This Part will first explain the environmental, social, and political factors that contributed to the Ocean Rangers ballot initiative. Next, this Part will describe the legislative and ballot history of the Ocean Rangers initiative. Finally, this Part will survey the Dunleavy Administration's acts to abolish the Ocean Rangers, including Senate Bill 70 and the governor's 2019 budgetary veto.

A. Cruise Ship Waste

The necessity of the Ocean Rangers is best contextualized through a rigorous examination of cruise ship waste. Every day, operating cruise ships generate multiple streams, or types, of waste. This waste can be catastrophic to the surrounding environment. Nitrogen and phosphorous in poorly treated wastewater can create algae blooms that deplete the surrounding environment of oxygen and suffocate sea life.³⁶ Graywater (which is "wastewater that comes from sinks, washing machines, bathtubs and showers")³⁷ and blackwater (which is wastewater from toilet facilities that contains human waste, like fecal matter and urine)³⁸ often carry microplastics, pharmaceuticals, personal care products, and pathogens into the sea, which can then be transferred to other sea organisms.³⁹ Fecal microorganisms in wastewater can introduce antibiotic-resistant bacteria to the ocean,⁴⁰ which then pose severe health

36. Ved P. Nanda, *U.S. Perspective on the Legal Aspects of Cruises*, 66 AM. J. COMP. L. 213, 238 (2018).

37. *Blackwater vs. Greywater*, *supra* note 9.

38. *Id.*

39. Joseph Lloret et al., *Environmental and Human Health Impacts of Cruise Tourism: A Review*, 173 MARINE POLLUTION BULL. 1, 2 (2021).

40. *Id.*

risks to humans at the shore.⁴¹

While one might picture a dirty trail of waste following behind the ship, much cruise ship waste floats stealthily in the water.⁴² As a result, scientists and the cruise industry have discovered various methods and indicators to measure and analyze the various streams of waste that cruise ships leave in their wake.

One of the primary indicators of wastewater is the presence of coliform bacteria.⁴³ Coliform bacteria are “organisms that are present in the environment and in the feces of all warm-blooded animals and humans.”⁴⁴ While coliform bacteria do not cause illness in humans, these bacteria serve as an indicator that other disease-causing pathogens could be in the water.⁴⁵ Fecal coliform, a subgroup of coliform bacteria specifically found in human fecal matter, are an even more accurate indicator of water contamination.⁴⁶ The presence of fecal coliform in a water sample “often indicates recent fecal contamination, meaning that there is a greater risk that pathogens are present than if only total coliform bacteria is detected.”⁴⁷

Alaska law dictates that a large passenger commercial vehicle may not discharge more than 200 colonies⁴⁸ of fecal coliform per 100 milliliters of water,⁴⁹ a quantity ten times greater than the acceptable standard for drinking water.⁵⁰ For comparison, untreated sewage may contain up to

41. Megan May, *The Bacteria On Your Beaches: Are More Antibiotic-Resistant Bacteria Getting into the Ocean?*, OCEANUS (May 7, 2018), <https://www.whoi.edu/oceanus/feature/the-bacteria-on-your-beaches/>.

Humans may become infected with antibiotic-resistant bacteria by swimming in contaminated water, by exposing their bloodstreams to contaminated sand, or by eating contaminated seafood. *Id.* Each of the above scenarios “provide avenues for bacterial interactions and increase the risk of getting antibiotic-resistant infections.” *Id.*

42. See Leila Heiry, *An Up-Close Look at an Advanced Cruise Wastewater System*, ALASKA PUB. MEDIA (Sept. 28, 2017), <https://alaskapublic.org/2017/09/28/an-up-close-look-at-an-advanced-cruise-wastewater-system/> (stating that treated wastewater on cruise ships “is like clear water”).

43. *Coliform Bacteria in Drinking Water*, WASH. STATE DEP’T OF HEALTH, <https://doh.wa.gov/community-and-environment/drinking-water/contaminants/coliform> (last visited Apr. 30, 2023).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. A bacterial colony is “a group of bacteria derived from the same mother cell.” *What is a Bacterial Colony*, HUDSON ROBOTICS (Dec. 15, 2020), <https://bit.ly/3Yu7spJ>. “This means that a single mother cell reproduces” to create a “group of genetically identical cells,” otherwise known as a bacterial colony. *Id.*

49. ALASKA STAT. § 46.03.463(b).

50. ALASKA DEP’T OF ENV’T CONSERVATION, PATHOGENS LISTING METHODOLOGY 2 (Jan. 2021),

five million colonies per 100 milliliters of water.⁵¹ In 2019, the Alaska Department of Environmental Conservation found that nine of 256 samples of wastewater from various cruise ships in Alaska exceeded the allowable amount of fecal coliform, and three of those samples came back with more than triple the legal limit (greater than 600 colonies per 100 milliliters of water).⁵²

Sewage is not the only major form of waste produced by cruise ships. Ship engines and machinery release excess oil, which mixes with water in the lowest part of the hull of the ship, called the bilge.⁵³ This mixture, known as bilge water, contains oil, gasoline, and byproducts from the biological breakdown of petroleum and can be calamitous for ocean life.⁵⁴ If bilge water contains any more than 0.1 milligrams of surfactants (a type of molecule that lowers surface tension between two substances),⁵⁵ the seawater “will be toxic for marine life.”⁵⁶ Cruise ships are some of the highest producers of bilge water,⁵⁷ generating about eight metric tons (the weight of eight elephants)⁵⁸ of oily bilge water for each twenty-four hours of operation.⁵⁹

B. Cruise Ships’ Historic Lack of Transparency Regarding Waste Management

Most major cruise ships have vast and complex filtration and sanitation systems that treat wastewater and bilge water before

<https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=127181>.

51. *Fecal Coliform Bacteria Counts: What They Really Mean About Water Quality*, OASIS DESIGN, <https://oasisdesign.net/water/quality/coliform.htm> (last visited Apr. 30, 2023).

52. ALASKA DEP’T OF ENV’T CONSERVATION, 2019 ANNUAL COMPLIANCE REPORT: CRUISE SHIP WASTEWATER 5–6 (2019), <https://dec.alaska.gov/media/25047/2021-wastewater-compliance-report.pdf>.

53. CRUISE SHIP POLLUTION, *supra* note 10, at 5.

54. *Id.*

55. Surfactants are a type of molecule that lower the surface tension between two substances, “either a gas and a liquid (e.g. water surface tension), two liquids (e.g. water and oil), or a liquid and solid (water and dirt particles).” Eisha Ahmed, “*Breaking Down*” *Surfactants: What They Are, How They Work, and Their Role in the Pandemic*, DISPERSA (Sept. 25, 2020), [https://www.dispersa.ca/blog/what-are-surfactants-and-how-do-they-work/#:~:text=Surfactants%20are%20type%20of%20molecule,\(water%20and%20dirt%20particles\)](https://www.dispersa.ca/blog/what-are-surfactants-and-how-do-they-work/#:~:text=Surfactants%20are%20type%20of%20molecule,(water%20and%20dirt%20particles)).

56. Muhammet Boran, *Pollution of Marine Environment by Ship*, 47 MARINE RSCH. J. 244, 246 (2017).

57. *Id.*

58. Brendan McGuian, *What is a Metric Ton?*, ALL THE SCI. (Oct. 6, 2022), <https://bit.ly/3NVdY3K>.

59. CRUISE SHIP POLLUTION, *supra* note 10, at 4.

discharging it into the ocean.⁶⁰ Yet, even with this advanced technology at their disposal,⁶¹ ships have employed illegal means to skirt environmental regulations. For example, in 2013, a whistleblowing engineer aboard the *Caribbean Princess*⁶² discovered a “magic pipe” and reported its presence to law enforcement.⁶³ A magic pipe “is a detachable, flexible or solid pipe which is used to throw excess oily water from the ship’s storage tanks to the sea” without undergoing any treatment whatsoever.⁶⁴ The pipe is detachable so it can be easily hidden from regulators.⁶⁵

There are many reasons a marine engineer may feel incentivized to use this piece of illegal equipment: magic pipes can artificially balance incorrect entries in an oil record book, delay reports of faulty equipment, or prevent unwanted questions about waste management from the corporate office.⁶⁶ On August 23, 2013, the *Caribbean Princess* used this magic pipe to dump 4,227 gallons of oily water off the coast of England while simultaneously running clean seawater through the ship’s overboard equipment “in order to create a false digital record for a legitimate discharge.”⁶⁷

The *Caribbean Princess*’s illegal use of a magic pipe is only a recent example of a chronic pattern of cruise lines skirting regulations.⁶⁸ A report by the U.S. Government Accountability Office in 2000 found that between

60. The technological workings of cruise ship wastewater treatment facilities are complex and outside the scope of this Note. For more information, see *Sewage Treatment Plant on Ships Explained*, MARINE INSIGHT (Mar. 29, 2019), <https://www.marineinsight.com/tech/sewage-treatment-plant>.

61. Pun intended.

62. The *Caribbean Princess* is operated by Princess Cruise Lines Ltd., a subsidiary of Carnival Cruises. Press Release, U.S. Att’y’s Off. Dist. of S.C., Company to Pay \$40 Million and Implement Remedial Measures on All Carnival Companies Visiting U.S. Ports (Dec. 1, 2016), <https://www.justice.gov/usao-sc/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution> [hereinafter DOJ Press Release].

63. Associated Press, *The \$40m ‘Magic Pipe’: Princess Cruises Given Record Fine for Dumping Oil at Sea*, GUARDIAN (Dec. 2, 2016, 12:08 AM), <https://www.theguardian.com/environment/2016/dec/02/the-40m-magic-pipe-princess-cruises-given-record-fine-for-dumping-oil-at-sea>.

64. Raunek Kantharia, *Magic Pipe: The Mystery of the Illegal Activity Still Continues on Ships*, MARINE INSIGHT (July 15, 2019), <https://www.marineinsight.com/maritime-law/magic-pipe-the-mystery-of-the-illegal-activity-still-continues-on-ships/>.

65. *Id.*

66. *Id.*

67. DOJ Press Release, *supra* note 62.

68. See 2022 *Cruise Ship Report Card*, FRIENDS OF THE EARTH (2022), https://foe.org/wp-content/uploads/2022/07/CruiseShipReportCard_2022_final-July-25.pdf (grading twelve of eighteen cruise lines an “F” for water quality compliance).

1993 and 1998, cruise ships were involved in eighty-seven confirmed illegal discharge cases in American waters.⁶⁹ In 1999, Royal Caribbean admitted to the Department of Justice that it routinely dumped waste oil within the “environmentally sensitive Inside Passage”⁷⁰ of Alaska, resulting in a then-historic fine of \$18 million.⁷¹ Combined with the substantial punitive fines, Royal Caribbean ended up paying a total of \$27 million, \$2 million more than what Exxon paid in its civil settlement with the state and federal governments after the Exxon Valdez oil spill.⁷²

Royal Caribbean’s plea agreement also encompassed four felony violations of the Oil Pollution Act of 1990 “for the deliberate and routine midnight dumping of harmful quantities of waste oil into the waters off the coast of Alaska, including the Inside Passage,” two felony counts for false statements to the Coast Guard of “materially false Oil Record Books,” and one felony violation of the Clean Water Act “for the knowing discharge of pollutants . . . including photo and dry cleaning waste into the coastal waters, including in the Port of Juneau.”⁷³ In its press release relaying the plea agreement, the Department of Justice noted that Royal Caribbean had destroyed “a secret bypass pipe used to make discharges.”⁷⁴

Royal Caribbean’s flagrant misconduct sent shockwaves throughout Alaska. The sense of betrayal was palpable: one person writing to the *Juneau Empire* said, “[a]n apology and fines don’t begin to pay for what

69. Claudia Copeland, CONG. RSCH. SERV., RL32450, *Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues* 4 (2005).

70. Alaska’s Inside Passage is a 500-mile stretch of coast along the Pacific Ocean and encompasses fjords, tidewater glaciers, and the largest intact temperate rainforest in the world. *Inside Passage*, TRAVEL ALASKA, <https://www.travelalaska.com/Destinations/Regions/Inside-Passage> (last visited Apr. 30, 2023).

71. Royal Caribbean’s crimes in Alaska accounted for \$6.5 million of the \$18 million fine – the largest apportionment of any region in the country. DOJ Press Release, *supra* note 62.

72. Chris Ryan & Michelle Bedoya, *When Self-Policing Does Not Cut It: Cruising, RCRA, and Hazardous Waste on the High Seas*, 21 BARRY L. REV. 89, 93 (2016). Exxon received a \$150 million fine for the oil spill, but the court forgave \$125 million of that fine “in recognition of Exxon’s cooperation in cleaning up the spill and paying certain private claims.” *Settlement*, EXXON VALDEZ OIL SPILL TR. COUNCIL, <https://bit.ly/3VJtGSm> (last visited Apr. 30, 2023). Therefore, Exxon paid only \$25 million of its overall settlement. *Id.* Exxon paid close to \$1 billion dollars in criminal fines and civil damages for the spill. Press Release, *Exxon to Pay Record One Billion Dollars in Criminal Fines and Civil Damages in Connection with Alaskan Oil Spill* (Mar. 13, 1991), <https://www.epa.gov/archive/epa/aboutepa/exxon-pay-record-one-billion-dollars-criminal-fines-and-civil-damages-connection-alaskan.html>.

73. DOJ Press Release, *supra* note 62.

74. *Id.*

these people have done to southeast Alaska or the hearts of its citizens.”⁷⁵ One citizen writer went so far as likening the ship’s dumping to “Saddam Hussein setting oilfields afire during the Persian Gulf war.”⁷⁶ The outrage created strong public support for a new “head tax” – a per-person tourist fee – which would allow for greater state surveillance over cruise ship conduct.⁷⁷

C. Creating the Ocean Rangers

In 2001, Alaska established the Commercial Passenger Vessel Environmental Compliance (CPEVC) Program, which “set effluent limits and sampling requirements for the discharge of blackwater and graywater from commercial passenger vessels.”⁷⁸ The CPEVC also required cruise ships to take samples of their discharges in Alaska.⁷⁹

In August 2006, Alaska citizens fortified the CPEVC Program with Ballot Measure 2, which established a new regulatory scheme where cruise ship passengers had to pay a \$4 per person per voyage head tax.⁸⁰ This tax was used to pay for “state-employed marine engineers . . . licensed by the Coast Guard . . . to observe health, safety and wastewater treatment and discharge operations.”⁸¹ These engineers would later be known as the Ocean Rangers. The \$4 head tax was collected from cruise tourists docked at an Alaska port⁸² to ensure that Alaska citizens would not have to fund the Ocean Rangers Program.⁸³ This fee, designed to generate the entirety of the Ocean Rangers’ approximately \$4.2 million annual budget,⁸⁴ is subject to legislative apportionment and cannot be

75. Edwin McDowell, *In Alaska, Cruise Line Chief Offers Apology for Dumping*, N.Y. TIMES, (Aug. 26, 1999), <https://www.nytimes.com/1999/08/26/business/in-alaska-cruise-line-chief-offers-apology-for-dumping.html>.

76. *Id.*

77. *See id.* (“[L]ingering resentment toward Royal Caribbean is likely to result in the adoption . . . of a \$5 ‘head tax’ on each passenger as cruise ships dock [in Alaska].”).

78. Alaska Dep’t of Env’t Conservation, *Ocean Ranger Guidebook 6* (2019) [hereinafter *Ocean Ranger Guidebook*].

79. *Id.*

80. BALLOT MEASURE 2, *supra* note 15, at 12–13. A head tax is a “flat or uniform tax levied equally on every taxpayer. Unlike an income tax, it is a fixed amount and not based on how much one earns, nor does it change based on any taxpayer circumstance or action.” *Head Tax*, TAX FOUND., <https://taxfoundation.org/tax-basics/head-tax/> (last visited Apr. 30, 2023).

81. BALLOT MEASURE 2, *supra* note 15, at 12.

82. ALASKA STAT. § 46.03.480.

83. *See* BALLOT MEASURE 2, *supra* note 15, at 13 (referring to the \$4 head tax as a “Ranger fee”).

84. FED. MARITIME COMM’N, *COVID-19 IMPACT ON CRUISE INDUSTRY 9* (2020), <https://permanent.fdlp.gov/gpo177319/20->

used for other state programs.⁸⁵ The majority of this budget would go toward paying cabin fare for the Ocean Rangers to stay aboard the cruise ship, as the ships refused to provide free or discounted lodging for the engineers.⁸⁶

The ballot measure also required a \$46 per passenger per voyage excise tax⁸⁷ upon entering Alaska.⁸⁸ All passenger taxes and fees total \$50. Under Ballot Measure 2, Alaska would also collect a thirty-three percent tax on the adjusted gross income “from [the] operation of gaming or gambling activities on ships operating in Alaskan waters.”⁸⁹ Finally, the ballot measure added requirements for large passenger cruise ships to obtain a wastewater discharge permit from the Alaska Department of Environmental Conservation and meet Alaska Water Quality Standards at the point of discharge.⁹⁰

Not everyone supported this proposal. Alaskans Protecting Our Economy (APOE), a group that vehemently opposed the proposed tax, claimed that a per-head fee would disincentivize tourists from cruising in Alaska and hurt local businesses.⁹¹ APOE raised and spent \$1,357,924 to quash the Ocean Rangers initiative.⁹² Tellingly, the overwhelming majority of its funds came from a single donation: \$1,344,244 from the Northwest Cruiseship Association.⁹³ In contrast, Responsible Cruising in Alaska, a group supporting the measure, raised and spent a mere \$8,497 to ensure passage of the Ocean Rangers measure.⁹⁴ Despite the David and Goliath campaign approaches, Ballot Measure 2 passed with fifty-two percent of the vote.⁹⁵

Once established, the Ocean Rangers were tasked with monitoring

20_AK_WA_OR_FF30_Final_Interim_Report.pdf.

85. ALASKA STAT. § 46.03.480(d).

86. Interview with Randy Bates, *supra* note 30.

87. An excise tax is a tax “imposed on a specific good or activity. . . . Common examples of excise taxes include those on cigarettes, alcohol, soda, gasoline, and betting.” *The Three Basic Tax Types*, TAX FOUND., <https://taxfoundation.org/taxedu-primer-the-three-basic-tax-types/> (last visited Apr. 30, 2023).

88. BALLOT MEASURE 2, *supra* note 15, at 13. This tax would apply to all passengers of vessels that carried more than 250 people. *Id.*

89. *Id.*

90. OCEAN RANGER GUIDEBOOK, *supra* note 78, at 6.

91. Dick Kauffman, *Opponents of “Cruise Tax” Say Alaska’s Economy is Under Attack*, STORIES IN THE NEWS (July 12, 2006), http://www.sitnews.us/0706news/071206/071206_cruise_tax.html.

92. *Alaska Cruise Ship Tax Initiative, Measure 2 (August 2006)*, BALLOTPEdia, [https://ballotpedia.org/Alaska_Cruise_Ship_Tax_Initiative,_Measure_2_\(August_2006\)](https://ballotpedia.org/Alaska_Cruise_Ship_Tax_Initiative,_Measure_2_(August_2006)) (last visited Apr. 30, 2023).

93. *Id.*

94. *Id.*

95. *Id.*

and reporting on all cruises that passed through Alaska each summer season. The Ocean Rangers were more than a water-quality watchdog – the organization looked for noncompliance in a multitude of areas. The Ocean Rangers’ standards for noncompliance were based on Alaska and federal statutory requirements.⁹⁶ Upon boarding the ship, the Ocean Rangers were to 1) provide information about ship discharges; 2) take samples of graywater, blackwater, and receiving water;⁹⁷ 3) ensure that ships were offloading only the waste they had previously disclosed they would offload; 4) determine whether illnesses onboard the vessel were within the Centers for Disease Control and Prevention reportable threshold; 5) inquire about the exhaust-gas cleaning system; 6) note which types of fuel the vessel used; and 7) search for any other areas of potential noncompliance.⁹⁸ The Ocean Rangers also looked for indications that a ship was using a magic pipe.⁹⁹

D. Ocean Rangers Imperiled

While the statute requires Ocean Rangers to be present at all times on all large commercial passenger vehicles entering Alaska’s marine waters, in 2019, Ocean Rangers were aboard ships fifty-five percent of the days those ships were in Alaska’s waters.¹⁰⁰ This was primarily due to an increased number of ships and voyages.¹⁰¹ Altogether, the Ocean Rangers recorded 263 noncompliance incidents from the 1,513 “Daily Reports” completed in 2019, an increase from 189 incidents in 2018,¹⁰² and 184 incidents in 2017.¹⁰³ The 2019 summary report included forty-four incidents of oil pollution, twenty-eight incidents of wastewater noncompliance, twenty incidents of other waste noncompliance, and seventeen incidents of air pollution, resulting in a year-over-year increase in almost every category.¹⁰⁴ The rising number of reports over the years posed a quandary for state officials: was the increase in violations proof that the Ocean Rangers were failing to deter cruise ships from polluting or proof as to how necessary the Ocean Rangers were to keep cruise ships

96. BALLOT MEASURE 2, *supra* note 15, at 17.

97. Receiving water means “sampling taken near the ship in water to monitor mixing zones.” OCEAN RANGERS GUIDEBOOK, *supra* note 78, at 3.

98. *Id.*

99. *See id.* at 84 (detailing indicators of magic pipe use).

100. ALASKA DEP’T OF ENV’T CONSERVATION, 2019 OCEAN RANGER ANNUAL REPORT 4 (2019) [hereinafter OCEAN RANGERS 2019 REPORT], <https://dec.alaska.gov/media/19847/2019-ocean-ranger-annual-report.pdf>.

101. *Id.*

102. *Id.*

103. ALASKA DEP’T OF ENV’T CONSERVATION, OCEAN RANGER 2018 REPORT 3 (2018), https://dec.alaska.gov/media/13266/or_2018.pdf.

104. OCEAN RANGERS 2019 REPORT, *supra* note 100, at 9.

in line?

Alaska Governor Mike Dunleavy concluded the former. On February 22, 2019,¹⁰⁵ Dunleavy – asserting his authority to transmit a bill to the legislature¹⁰⁶ – introduced Senate Bill 70, which sought to repeal the Ocean Rangers in its entirety.¹⁰⁷ In his letter to the President of the Senate Rules Committee, Dunleavy argued that the Ocean Rangers provided only “limited benefit to residents of the state.”¹⁰⁸

Official appraisals of the Ocean Rangers are mixed in Alaska. On the one hand, Edward White, head of the Alaska Department of Environmental Conservation (DEC) cruise ship monitoring program, stated that the Ocean Rangers constituted a “critical part” of the state’s permitting process.¹⁰⁹ On the other hand, Jason Brune, the Dunleavy-appointed Commissioner of the DEC, asserted that the Ocean Rangers had a negligible effect on cruise ship pollution.

On March 13, 2019, Brune told the Alaska Senate’s Resources Committee that Ocean Rangers often identify *potential* noncompliance, which may not reflect actual noncompliance.¹¹⁰ When the DEC finds actual noncompliance, it issues a Notice of Violation (NOV), which explains the alleged area of noncompliance and offers a time window for the violating party to cure the error.¹¹¹ The Ocean Rangers lacked statutory authority to issue their own NOVs. Instead, when an Ocean Ranger reported an observed potential violation, a DEC staff member reviewed the report and investigated further, and the DEC staff member ultimately determined whether to issue an NOV.¹¹² Brune told the Senate

105. *SB 70 Actions*, ALASKA STATE LEGISLATURE, <https://www.akleg.gov/basis/Bill/Detail/31?Root=SB%2070%20Ocean%20Rangers> (last visited Apr. 30, 2023).

106. ALASKA CONST. art. III, § 18.

107. *SB 70 Actions*, ALASKA STATE LEGISLATURE, <https://www.akleg.gov/basis/Bill/Detail/31?Root=SB%2070%20Ocean%20Rangers> (last visited Apr. 30, 2023).

108. ALASKA S. J., 31st Leg., 1st Sess. at 0377 (Feb. 22, 2019), <https://www.akleg.gov/basis/Journal/Pages/31?Chamber=S&Page=0373&pageEnd=0388#SB70> (last visited Apr. 30, 2023).

109. Jacob Resneck, *DEC Staff: Ocean Rangers ‘Critical’ to Monitoring Cruise Ship Pollution*, ALASKA PUB. MEDIA (Feb. 21, 2019), <https://alaskapublic.org/2019/02/21/dec-staff-ocean-rangers-critical-to-monitoring-cruise-ship-pollution/>.

110. *Meeting of S. Res. Standing Comm.*, ALASKA S. RES. COMM. MINUTES, 24th Leg., at 4 (March 13, 2019) [hereinafter *Senate Resources Meeting*] (statement of Jason Brune, Dir. Alaska Dep’t of Environmental Conservation at 3:32:00 PM) <https://www.akleg.gov/PDF/31/M/SRES2019-03-131530.pdf> (reflecting that Brune stated that “Potential noncompliance identified by Ocean Rangers may not reflect actual compliance . . .”).

111. ALASKA STAT. § 47.32.140(a).

112. *Senate Resources Meeting*, *supra* note 110, at 12.

Resources Committee that over eleven years, the DEC issued only six NOVs attributable to an Ocean Rangers observation.¹¹³ In that same period, the DEC issued 238 NOVs attributable to “permittee self-reporting, staff inspections review, and opacity monitoring by contractors.”¹¹⁴

Brune’s campaign against the Ocean Rangers began long before Dunleavy took office. At a breakfast meeting for the Alaska Resource Development Council (RDC), a trade association “comprised of individuals and companies from Alaska’s fishing, forestry, mining, oil and gas, and tourism industries,”¹¹⁵ Brune admitted that eradicating the Ocean Rangers was “near and dear to [his] heart.”¹¹⁶ Fending off theories that the cruise industry “put him up to” his opposition, Brune stated, “No . . . this was my baby, I talked with the Governor about this one. When I was at the RDC we worked on the cruise ship initiative, I was always grumpy about the Ocean Rangers.”¹¹⁷ In fact, while Brune was an officer at the RDC, the organization co-endorsed the letter of opposition presented to voters regarding the Ocean Rangers Ballot Measure, which stated that the Ocean Rangers initiative would be “bad for Alaska.”¹¹⁸

Despite the DEC’s arguments about the ineffectiveness of the Ocean Rangers, Senate Bill 70, the governor’s bill to end the Ocean Rangers, died with little fanfare. Its last entry in the Senate Journal was a cancelled meeting for public testimony in March of 2019—less than one month after the bill’s formal introduction to the legislature.¹¹⁹

In response to the bill’s failure, Governor Dunleavy and the opponents of the Ocean Rangers changed strategy. In June of 2019, approximately three months later, Dunleavy issued a press briefing of “Items of Interest” for his fiscal year 2020 budgetary vetoes.¹²⁰ The

113. *Id.* at 4.

114. *Id.* at 7.

115. *About Us*, RES. DEV. COUNCIL, <https://www.akrdc.org/about-rdc> (last visited Apr. 30, 2023).

116. Dermot Cole, *Ocean Rangers Fall Victim to One-Man Government-By-Veto Rule*, REPORTING FROM ALASKA (Jul. 24, 2019), <https://www.dermotcole.com/reportingfromalaska/2019/7/24/dunleavy-refuses-to-follow-law-on-cruise-ship-monitoring>.

117. *Id.*

118. BALLOT MEASURE 2, *supra* note 15, at 20. Brune was formerly Executive Director of the RDC. *Know Your Trustees*, ALASKA PERMANENT FUND CORP., <https://apfc.org/know-your-trustees/> (last visited Apr. 30, 2023).

119. *Bill History/Action for Legislature: SB 70*, ALASKA STATE LEGISLATURE, https://www.akleg.gov/basis/Bill/Detail/31?Root=SB70#tab6_4 (last visited Apr. 30, 2023).

120. Press Release, Governor of Alaska, FY2020 Budget Vetoes: Items of Interest (Jun. 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/Press_Items_of_Interest_High_Level_6-28-19.pdf. Governor Dunleavy is no stranger to line-item vetoes of

Governor stated he would veto the allocation of \$3,409,100 for the Ocean Rangers, citing unfairness among industries because “cruise ships are the only permittees to have around-the-clock observation for compliance.”¹²¹ While the Dunleavy Administration repeatedly labeled it unfair that there were no “mining rangers” or “timber rangers,” neither official appeared to contemplate that mines and timber mills, unlike cruise ships, are not portable by design.¹²² This portability makes it significantly easier for cruise ships to evade state and federal regulations. These evasions, like those of Royal Caribbean in the late 1990s, have created devastating consequences for Alaska in the past.¹²³

This budgetary veto neither reduced Alaska citizens’ taxes, nor did it redirect funds to other public programs.¹²⁴ The repeal left some popular cruise destinations to fend for themselves. Glacier Bay National Park and Preserve, which in 2022 received visits from 508,912 cruise ship passengers,¹²⁵ started its own cruise ship monitoring program to fill the void the Ocean Rangers left behind.¹²⁶

Because the Ocean Rangers statute subjected its funding to legislative apportionment, funds cannot be redirected to another state

the budget. In June of 2019, the same month Dunleavy vetoed the Ocean Rangers budget, Dunleavy issued more than 180 line-item budgetary vetoes, resulting in cuts of approximately \$44 million in funding. Dan Kaufman, *Why Alaskans Are Trying to Recall Their Governor*, NEW YORKER (Mar. 5, 2020), <https://www.newyorker.com/news/dispatch/why-alaskans-are-trying-to-recall-their-governor>. In response to Dunleavy’s budget vetoes, a coalition of Alaskans began a formal recall effort seeking his removal as governor. *Id.* This effort lasted approximately two years but ended in August of 2021 when the coalition could not gather enough signatures. Becky Bohrer, *Effort to Recall Alaska Governor Dropped After 2-Year Push*, ASSOCIATED PRESS (Aug. 25, 2021), <https://apnews.com/article/business-alaska-d60018aa574e2be0048fd5f00eaa238c>.

121. Press Release, Governor of Alaska, FY2020 Budget Vetoes: Items of Interest (Jun. 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/Press_Items_of_Interest_High_Level_6-28-19.pdf.

122. *Senate Resources Meeting*, *supra* note 110, at 4 (statement of Jason Brune, Commissioner Alaska Department of Environmental Conservation at 3:32:00 PM).

123. *See supra* Part II.B.

124. Jacob Resneck, *Governor Vetoes Funding for Ocean Rangers Cruise Ship Inspectors*, ALASKA PUB. MEDIA (July 1, 2019), <https://alaskapublic.org/2019/07/01/governor-vetoes-funding-for-ocean-rangers-cruise-ship-inspectors/>.

125. *Glacier Bay 2023 Fact Sheet*, NAT’L PARK SERV. (Mar. 28, 2023), <https://www.nps.gov/glba/learn/management/upload/2023-GLBA-Fact-Sheet-508-for-WEB.pdf>.

126. Claire Stremple, *Without Ocean Rangers, Glacier Bay is Monitoring Cruise Ships on its Own*, KTOO (July 29, 2022), <https://www.ktoo.org/2022/07/29/glacier-bay-cruise-ship-monitoring-program/>.

program or initiative without an act by the legislature.¹²⁷ This means that the more than \$3.4 million that sustained the Ocean Rangers is simply sitting in the state budget with nowhere else to go.¹²⁸ Most significantly, the Ocean Rangers, as created by ballot measure, remains valid, enacted law.

III. SIMPSON V. MURKOWSKI AND BUDGETARY VETOES

Governor Dunleavy's budgetary veto of the Ocean Rangers caused much outrage in Alaska, with many expressing worries about cruise ship waste going unmonitored.¹²⁹ Some may wonder what recourse, if any, is available to them to restore monitoring and accountability for cruise ships. While no lawsuit challenging Governor Dunleavy's budgetary veto has been filed at the time of this Note, litigation remains an option to Alaskans.

Concerned individuals who wish to go to the courts with hopes of restoring the Ocean Rangers may face an uphill battle under some of the most obvious legal theories. This Part explains why Alaska precedent virtually guarantees that the state supreme court will not reinstate the Ocean Rangers' budget under traditional routes of promissory estoppel,¹³⁰ the Contract Clause of the United States Constitution,¹³¹ or the theory of separation of powers.¹³²

A. Simpson v. Murkowski: A Case Study of Budgetary Veto

The Ocean Rangers program is not the first to experience death by budgetary veto in Alaska. In 2006, the state supreme court heard a similar

127. Jacob Resneck, *DEC Staff: Ocean Rangers 'Critical' to Monitoring Cruise Ship Pollution*, ALASKA PUB. MEDIA (Feb. 21, 2019), <https://alaskapublic.org/2019/02/21/dec-staff-ocean-rangers-critical-to-monitoring-cruise-ship-pollution/>.

128. Resneck, *supra* note 124.

129. *See, e.g.*, Gershon Cohen, *Letter: Ocean Rangers Veto Confounds*, ANCHORAGE DAILY NEWS (Apr. 26, 2020), <https://www.adn.com/opinions/letters/2020/04/26/letter-ocean-rangers-veto-confounds/> (expressing disapproval of the Governor's veto).

130. Promissory estoppel is a legal principle in which a promise made without consideration may still be enforceable to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. *Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

131. The Contract Clause prohibits states from passing a "law impairing the obligation of contracts." U.S. CONST. art. I, § 10, cl. 1.

132. *See generally* 1 Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 3.2 (7th ed. 2021).

story in *Simpson v. Murkowski*.¹³³ There, elderly Alaskans challenged the governor's decision to eliminate the budget for Alaska's Longevity Bonus Program (LBP).¹³⁴ The LBP, enacted in 1972, provided Alaskans over the age of sixty-five "incentive to continue to live in Alaska" by issuing monthly payments to qualifying residents.¹³⁵

In 1993, Alaska Governor Walter "Wally" Hickel published a letter proposing a phase-out of the LBP ("phase-out plan").¹³⁶ The phase-out plan allowed older seniors who organized their retirement around their expectation of continued receipt of Longevity Bonus payments to still collect, but decreased eligibility for younger seniors and Alaskans who had not yet reached old age.¹³⁷ Under Hickel's plan, the LBP would continue to provide funds for living eligible residents, but would eliminate new eligibility starting in 1997.¹³⁸ The Alaska State Legislature then codified the phase-out plan as a statute ("phase-out statute") later that year.¹³⁹

In 2003, ten years after the introduction of the phase-out plan, Governor Frank Murkowski issued his proposed operating budget to the legislature for fiscal year 2004, failing to provide any appropriations for the LBP.¹⁴⁰ Upon receipt, the state legislature amended the proposed budget to include funding for what remained of the LBP.¹⁴¹ Murkowski then issued a line-item veto of the appropriation, eliminating the program entirely despite the fact that the phase-out statute remained valid and enacted.¹⁴²

Alaska seniors eligible under the phase-out plan sued Governor Murkowski, demanding LBP's reinstatement.¹⁴³ The plaintiffs' central claims were the following: (1) the phase-out statute created a "legal entitlement" to the LBP interrupted by the governor's line-item veto;¹⁴⁴ (2) those eligible were entitled to receive LBP payments under promissory estoppel because "they relied to their legal detriment upon express and implied promises that the bonuses would continue for the duration of their lives;" (3) the LBP established a contractual relationship between the

133. 129 P.3d 435 (Alaska 2006).

134. *Id.* at 437.

135. *Id.* at 437-38.

136. *Id.*

137. *See id.* (describing the features of Governor Hickel's phase-out program).

138. *Id.*

139. *Id.* at 439.

140. *Id.*

141. *Id.* at 446.

142. *Id.* at 446-47.

143. *Id.* at 437.

144. Point 1 serves as a foundation upon which plaintiffs' promissory estoppel and Contract Clause arguments rest. Therefore, while Plaintiffs make four central claims, the court responds using only three doctrinal approaches. *Id.* at 437-38.

eligible citizens and the state government, and the line-item veto violated the Contract Clause of the United States Constitution;¹⁴⁵ and (4) the language in the phase-out statute constituted “a continuing appropriation for state constitutional purposes.”¹⁴⁶ The court rejected each of these arguments, ultimately holding that the governor’s line-item veto stood.¹⁴⁷ Each of these arguments illustrates a potential pitfall for litigants seeking to reinstate the Ocean Rangers.

B. Promissory Estoppel

The court began by reiterating that to find a legal entitlement under the theory of promissory estoppel, there must be a “very clear” illustration of an actual promise.¹⁴⁸ The opinion presented two reasons why there was no actual promise to Alaska seniors to maintain the LBP. First, former Governor Hickel lacked the authority as governor to determine what happened to the LBP in perpetuity. Second, the former governor’s letter detailing the phase-out, which the plaintiffs cited as the source of their legal entitlement, explicitly acknowledged that the phase-out scheme was subject to the approval of the state legislature, therefore acknowledging a condition of its implementation.¹⁴⁹ Because the court failed to find an actual promise, they did not investigate the record for any additional elements of promissory estoppel.¹⁵⁰

Here, in the case of the Ocean Rangers, potential litigants may find a promissory estoppel argument even less viable than the plaintiffs in *Simpson* for two reasons. First, *Simpson* failed to find an actual promise by the former governor creating a legal entitlement to the continuation of the LBP.¹⁵¹ Second, even if *Simpson* did find an actual promise, there is no evidence that Governor Dunleavy, any governor before him, or the Alaska State Legislature promised to maintain the Ocean Rangers. In fact,

145. “The Contract Clause provides that no state may pass a ‘Law impairing the Obligation of Contracts,’ and a ‘law’ in this context may be a statute, constitutional provision, municipal ordinance, or administrative regulation having the force and operation of a statute.” *Contract Clause*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-10/clause-1/contract-clause> (last visited Apr. 30, 2023).

146. *Id.* at 439. The author altered the order of the list of the plaintiff’s claims in order to match the order of the court’s reasoning.

147. *Id.* at 449.

148. *Id.* at 443.

149. *Id.* at 443–44.

150. *See id.* at 444 (“Because we affirm the superior court’s decision that *Simpson* failed to establish that a promise was made, we need not reach the question whether enforcement of the purported promise would be necessary in the interest of justice.”).

151. *Id.*

Dunleavy's actions as governor are virtually opposite from former Governor Hickel's phase-out plan. By appointing Randy Brune, who had publicly stated an enduring desire to quash the Ocean Rangers, as head commissioner of Alaska's Department of Environmental Conservation, Dunleavy signaled that his administration was hostile to the Ocean Rangers program from the start. Therefore, this Note posits that a promissory estoppel argument for reinstating the Ocean Rangers would be destined to fail.

C. The Contract Clause

Next, the court in *Simpson* rejected the plaintiffs' arguments that (1) the LBP established a contractual relationship between the eligible citizens and the state government, and (2) the governor's line-item veto ended that relationship in violation of the Contract Clause of the United States Constitution.¹⁵² The court found it would "do violence to traditional contract theory" and the operation of government itself "to hold that any statute requiring some action by a citizen to obtain a benefit or protect a right constituted an open offer to contract."¹⁵³ The court applied a presumption that unless explicitly stated in the language of the statute, there is no legislative intent for any law to create a private contractual right for citizens.¹⁵⁴

Here, any contract clause argument in support of reinstatement of the Ocean Rangers appears foreclosed from the start. Solid precedent, both at the state level in *Simpson* and United States Supreme Court level in *Dodge v. Board of Education of City of Chicago*,¹⁵⁵ severely limits a court's ability to find that a statute impliedly creates a contract right for private citizens. Success under contract clause theory becomes even less likely when considering that the Ocean Rangers are a program benefitting the public at large, and the statute creates no individual entitlement to the services the Ocean Rangers provide. For this reason, pursuing a claim under the Contract Clause of the United States Constitution in any potential litigation against Governor Dunleavy's budgetary veto of the Ocean Rangers would likely be fruitless.

152. *Id.*

153. *Id.* (quoting *Clawson v. United States*, 24 Cl. Ct. 366, 370 (1991)).

154. *Id.* (quoting *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (internal citations omitted)).

155. 302 U.S. 74 (1937). There, the Court stated that it presumed that a statute "is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise." *Id.* at 79.

D. The Alaska State Constitution and Separation of Powers

Finally, the *Simpson* court held that the state constitution permitted Governor Murkowski's line-item veto. The plaintiffs argued that "although the legislature could eliminate or reduce" the LBP, so long as the statute enacting the LBP remained law, "the governor is not empowered to use his veto power with respect to appropriations to fund the program."¹⁵⁶ The court concluded that the veto was legitimate despite the LBP statute's status for two reasons: first, the legislature had an opportunity to override the governor's veto, yet chose not to; and second, the framers of the state constitution "indicate[d] a desire . . . to create a strong executive branch with a 'strong control on the purse strings' [sic] of the state."¹⁵⁷ Therefore, the state constitution did not mandate that the governor allow for continual appropriation for the LBP.

The *Simpson* court reasoned that it would only mandate appropriations when the lack of funding amounted to a revocation of a fundamental right.¹⁵⁸ The majority acknowledged that in *Department of Health & Social Services v. Planned Parenthood of Alaska*,¹⁵⁹ the Supreme Court of Alaska had previously found a constitutional violation when the state legislature failed to apportion Medicaid funds toward medically necessary abortions.¹⁶⁰ In *Planned Parenthood*, the court held that legislative exercise of the purse power "has not in the past, and may not now, bar courts from upholding citizens' constitutional rights."¹⁶¹ The Alaska Supreme Court had previously held reproductive rights, including the right to an abortion, were fundamental.¹⁶² Therefore, the legislature had no authority to use its power of the purse to deprive its citizens of abortions.¹⁶³ Quoting the California Supreme Court, the *Planned Parenthood* court held the following: "If the government can use [the power of the purse] to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper."¹⁶⁴ The *Simpson* court distinguished the LBP funding from the abortion funding in *Planned*

156. *Simpson*, 129 P.3d at 446 (Alaska 2006).

157. *Id.* (quoting *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977)).

158. *Id.* at 447.

159. 28 P.3d 904 (Alaska 2001).

160. *Simpson*, 129 P.3d at 447.

161. *Id.* at 914.

162. *See* *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (holding that reproductive rights, including the right to an abortion, are fundamental rights).

163. *Planned Parenthood*, 28 P.3d at 905.

164. *Id.* at 914 (quoting *Comm. to Def. Reprod. Rts. v. Myers*, 624 P.2d 779, 798 (Cal. 1981)).

Parenthood by stating that because the LBP is a statutory entitlement program and does not invoke a constitutional right, the court is under no obligation to reinstate the LBP's budget.

Here, potential plaintiffs hoping to reinstate the Ocean Rangers program through the court will likely run into a similar obstacle as those who hoped to reinstate the LBP: there is no fundamental right in Alaska to enjoy the benefits of the Ocean Ranger program. By restricting the remedy available in *Planned Parenthood* solely to infringements of fundamental rights, the court implicitly endorsed executive use of the line-item veto to contradict legislative will. *Simpson* concluded that because a legislature could, in theory, override a governor's line-item veto with a two-thirds vote,¹⁶⁵ there is no violation of separation of powers.¹⁶⁶

This line-item veto power has the potential to override the democratic process. After Governor Murkowski proposed eradication of the phase-out plan, the Alaska state legislature amended the governor's proposed budget to reestablish LBP funding.¹⁶⁷ When Governor Dunleavy introduced the bill eradicating the Ocean Rangers, the legislature expressed its will by failing to move the bill forward.¹⁶⁸ These legislative reactions demonstrate unease and overall disagreement with the governor's proposed policies. Yet both Governors Murkowski and Dunleavy summarily disregarded that unease through unitary executive action. If abused, the line-item veto power may result in the governor refashioning the government into exactly what he or she desires, with little say from Alaska voters or their legislative representatives.

IV. THE OCEAN RANGERS AND DIRECT DEMOCRACY

At first glance, state supreme court precedent in *Simpson* and *Planned Parenthood* seem to foreclose any chance of judicial relief from Governor Dunleavy's decision to eliminate the Ocean Rangers program. Yet the Ocean Rangers had an advantage the LBP did not: the Ocean Rangers were a product of direct democracy, created under a ballot initiative in 2006.¹⁶⁹ This distinction presents a yet-unexplored avenue to perhaps compel a court to reinstate the Ocean Rangers' budget. The Alaska State Constitution forbids veto of a ballot measure that wins a majority of the votes.¹⁷⁰ This Note argues that through his use of the line-item budgetary

165. ALASKA CONST. art. II, § 16.

166. *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006).

167. *Id.* at 46-47.

168. See discussion *supra* Part II.

169. See discussion *supra* Part II (detailing the history of the Ocean Rangers' enactment).

170. See ALASKA CONST. art. XI, § 6 (stating that ballot initiatives "are not subject

veto, Governor Dunleavy *de facto* vetoed¹⁷¹ the entire program, and, in doing so, violated the Alaska Constitution. This Part details the history and purpose of direct democracy in the United States, the Alaska Constitution's explicit protections of direct democracy action, and the resulting protections surrounding the Ocean Rangers program. This Part also suggests measures the governor could proactively take to cure his budgetary veto and amend the Ocean Rangers program through the legislature so that the program better resembles his policy goals.

A. Defining Direct Democracy

Direct democracy is a form of governance in which citizens vote on proposed legislation, constitutional amendments, treaties, or policy decisions, thereby circumventing the lawmaking powers of elected representatives.¹⁷² There are three main contemporary tools of direct democracy in the United States: ballot initiatives, referenda, and recall elections.¹⁷³ Today, three states utilize the ballot initiative alone, three states utilize the voter referendum alone, and twenty-one states utilize both the ballot initiative and the referendum.¹⁷⁴ Additionally, nineteen states plus the District of Columbia allow for recalls.¹⁷⁵

These tools allow voters to maximize their influence over the workings of state government. The ballot initiative permits voters to enact laws in state or local government without requiring action by their elected

to veto").

171. See *De Facto*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "de facto" as "having effect even though not formally or legally recognized . . ."). Governor Dunleavy's budgetary veto had the effect of preventing the Ocean Rangers from acting, just as a traditional veto prevents a statute from being enacted into law.

172. ELLIOT BULMER, DIRECT DEMOCRACY 3 (2014). Direct democracy has a rich history in American governance. In the seventeenth century, English colonists gathered in town hall meetings to propose new laws and veto statutes passed by their elected representatives. Henry Noyes, *Direct Democracy as a Legislative Act*, 19 CHAPMAN L. REV. 199, 200 (2016). Three of the earliest state constitutions—those in Pennsylvania, Massachusetts, and New Hampshire—implemented direct democracy tools. *Id.* In 1898, South Dakota became the first state to adopt initiative and referendum procedures. John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSPS. 185, 186 (2005). As the populism movement grew throughout the nineteenth and twentieth centuries, more states sought to put the powers of government back into the hands of their people and implemented direct democracy measures. Noyes, *supra* note 172, at 200. From 1898 to 1918, twenty-four states adopted the initiative, referendum, or both. *Id.* at 200–01.

173. BULMER, *supra* note 172.

174. Noyes, *supra* note 172, at 201.

175. *Recall of State Officials*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 15, 2021), <https://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx>.

representatives.¹⁷⁶ The referendum, on the other hand, allows for those same voters to have laws which were enacted by their elected representatives submitted to voters for their approval.¹⁷⁷ As legal scholar Lewis Jerome Johnson wrote, the initiative “corrects sins of omission,” while the referendum “corrects sins of commission.”¹⁷⁸ Finally, the recall allows voters to remove and replace a public official before the traditional end of that official’s term of office.¹⁷⁹

A common misconception is that direct democracy is a delegation of power from the legislature to the people.¹⁸⁰ This idea fundamentally misunderstands a core principle of American democracy: all power is inherent to the people.¹⁸¹ The Supreme Court of the United States has held that “the animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government.”¹⁸² No power can be delegated to its original source. Therefore, citizens participating in direct democracy are acting out of their own formidable democratic power.

B. Direct Democracy in Alaska

The Alaska Constitution, like many other state constitutions,¹⁸³ explicitly recognizes the inherent power of its people. Article I, § 2 states, “[a]ll political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.”¹⁸⁴

176. *Id.*

177. *Id.*

178. Lewis Jerome Johnson, *Direct Legislation as an Ally of Representative Government*, in *THE INITIATIVE REFERENDUM AND RECALL* 139, 142 (William B. Munro ed., 1912).

179. *Recall of State Officials*, *supra* note 175. In 2019, some voters began a two-year effort to recall Governor Dunleavy over a series of vetoes and budget cuts. Bohrer, *supra* note 120.

180. *See* Noyes, *supra* note 172, at 201.

181. *Id.*

182. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 813 (2015).

183. *See, e.g.*, CONN. CONST. art. I, § 2 (“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient.”); ME. CONST. art. I, § 2 (“All power is inherent in the people all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.”); MICH. CONST. art. I, § 1 (“All political power is inherent in the people.”); NEV. CONST. art. I, § 2 (“All political power is inherent in the people.”).

184. ALASKA CONST. art. I, § 2.

In recognition of this inherent power, the state constitution plainly and explicitly provides the three major tools of direct democracy—ballot initiative, referendum, and recall—to its citizens. Article XI lays out the procedures for initiatives, referenda, and recalls in the state.

First, § 1 recognizes that the people of Alaska “may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.”¹⁸⁵ Consistent with the recognition of the people’s power in Article I, no language in Article XI suggests that this power is delegated to the people by the executive or legislature.

Second, § 6 provides multiple safeguards to protect the power, authority, and longevity of a successful ballot initiative or referendum. Once a proposition acquires the majority of votes cast, the measure is enacted and becomes effective ninety days after the lieutenant governor certifies the election results.¹⁸⁶ Once the law goes into effect, it is “not subject to veto.”¹⁸⁷ The provision also states that the legislature may not repeal the provision “within two years of its effective date.”¹⁸⁸ The initiative “may be amended at any time.”¹⁸⁹

This language suggests that Alaska’s constitutional framers recognized there were some constitutionally legitimate means by which public officials could remove a ballot initiative. The Alaska Constitution allows initiatives to be repealed, but only after two years have elapsed after enactment. This demonstrates a strong desire by the constitutional framers to keep initiatives intact and in accordance with the people’s majority will. Unlike the repeal provision, the constitutional language provides no time window for a veto.¹⁹⁰ This necessarily implies that a veto will never be an appropriate action against a successful ballot initiative.

C. Constitutional Protection of the Ocean Rangers

The plain language of Article XI of the Alaska Constitution prohibits line-item budgetary vetoes of measures enacted via direct democracy. Plain language is a vital tool of constitutional construction: as articulated in *Hickel v. Cowper*,¹⁹¹ the state supreme court’s “analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself.”¹⁹² For this reason, this Part will focus on the plain

185. *Id.* art. XI, § 1.

186. *Id.* art. XI, § 6.

187. *Id.*

188. *Id.*

189. *Id.*

190. Governor Dunleavy issued the budgetary veto thirteen years after the Ocean Rangers initiative passed. *See supra* Part III.

191. 874 P.2d 922 (Alaska 1994).

192. *Id.* at 927.

language of the Alaska Constitution to ground the Note's legal analysis in a context relevant and useful to Alaskan jurisprudence.

Under plain language analysis, "words are to be given their natural, obvious and ordinary meaning" unless context suggests otherwise.¹⁹³ In *Forrer v. State*,¹⁹⁴ the Alaska Supreme Court articulated a series of rules governing the court's interpretation of the plain language in the Alaska Constitution. The court interprets all "[t]erms and phrases" in the state constitution according to "their ordinary meaning as they were understood at the time."¹⁹⁵ Any repeated use of those terms or phrases is presumed to have consistent meaning throughout the document.¹⁹⁶ Additionally, Alaska courts "do not interpret constitutional provisions in a vacuum."¹⁹⁷ Instead, the state constitution "is meant to be read as a whole with each section in harmony with the others."¹⁹⁸ Finally, in *Hickel v. Cowper*, the court stated that it was not "vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach a particular result."¹⁹⁹ The court must only work with the terms and phrases present in the document.

Article XI, § 6 states, "[a]n initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date."²⁰⁰ In the case of the Ocean Rangers, the operative term is "veto," and the question is whether the language of this provision allows a governor to line-item veto the entire budget of a program enacted via ballot measure.

The constitution's plain language reveals that the Ocean Rangers program is not subject to a veto of any kind, at any time – including a line-item veto of a ballot appropriations bill – for three reasons. First, the state constitution's plain definition of "veto" includes line-item vetoes and vetoes of appropriations bills. Second, the language in article XI, § 6, when read in harmony with Article II, § 15, restricts the governor to only vetoing bills passed by the legislature.

First, the Alaska Constitution does not substantively differentiate

193. *Dunleavy v. Alaska Leg. Council*, 498 P.3d 608, 613 (Alaska 2021) (citing *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056 n.7 (Alaska 1981)). The Alaska Supreme Court defers to the plain meaning "absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction." *Citizens Coal. for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991).

194. 471 P.3d 569 (Alaska 2020).

195. *Id.* at 585.

196. *Id.*

197. *Id.*

198. *Id.*

199. 874 P.2d 922, 927–28 (Alaska 1994).

200. ALASKA CONST. art. XI, § 6.

between vetoes of bills and vetoes of appropriations. In article II, § 15, the constitution states the following: “The governor may veto bills passed by the legislature. He may, *by veto*, strike or reduce items in appropriation bills.”²⁰¹ The veto is a tool the governor may wield to either cancel a bill passed by the legislature or cancel a planned appropriation in the state budget. This section does not create a new or secondary type of veto, but instead merely provides clarification of what the general veto power includes.

Similarly, the Alaska Supreme Court has failed to recognize any substantive difference between the governor’s veto of a legislative bill and an appropriations bill. In *Simpson v. Murkowski*, the Alaska Supreme Court did not treat Governor Murkowski’s veto of the LBP’s budget as a distinct type of veto. Instead, the court stated that the Alaska Constitution “establishes the power of the governor to exercise a line-item veto with respect to appropriation bills.”²⁰² There, the court recognized the appropriation veto as an application of the general veto power, not as a separate legal mechanism.

Further, by the language of Article II, § 15, the framers established the boundaries of the governor’s veto power. In relevant part, the constitution states, “[t]he governor may veto bills passed by the legislature.”²⁰³ The language “bills passed by the legislature” does not reach bills enacted via direct democracy. A ballot initiative is not passed by the legislature; it is passed by voters and then certified by the lieutenant governor.²⁰⁴

Thus, the framers twice reiterated the limitation against budgetary line-item vetoes of programs passed pursuant to ballot initiatives: first, by specifying that the governor could veto “bills passed by the legislature”²⁰⁵ without also including a reference to any other type of enacted law; and second, by stating outright that ballot initiatives were “not subject to veto.”²⁰⁶ When read together, as is custom in plain language analysis,²⁰⁷ these two provisions create double insulation against the governor’s attempts at a budgetary veto of a popularly-passed program.

201. *Id.* art. II, § 15 (emphasis added).

202. 129 P.3d 435, 446 (Alaska 2006).

203. ALASKA CONST. art. II, § 15.

204. *Id.* art. XI, § 6.

205. *Id.* art. II, § 15.

206. *Id.* art. XI, § 6.

207. *See* Forrer v. State, 471 P.3d 569, 585 (Alaska 2020) (stating that a court must read provisions of the Alaska Constitution in harmony with one another).

D. Curing the Unconstitutionality of the Ocean Rangers Veto

The Ocean Rangers statute is a direct reflection of the voters' will. Should Governor Dunleavy still wish to end the Ocean Rangers program, he could cure the likely unconstitutionality of his budgetary veto before litigation occurs. The Alaska Constitution allows the legislature to repeal a ballot initiative after two years. Because the Ocean Rangers initiative passed more than two years ago, the legislature has constitutional authority to repeal the underlying law. Legislative repeal would formally end the Ocean Ranger program, thereby converting the Ocean Rangers' lack of budget from an aberration to an inevitability.

In 2019, the legislature expressed unwillingness to repeal the Ocean Rangers when the state senate allowed the governor's bill to die in committee.²⁰⁸ Should Governor Dunleavy face similar legislative resistance to getting rid of the program entirely, the governor could suggest that the legislature amend the Ocean Rangers law to better meet his administration's policy goals.²⁰⁹ This might be a beneficial option to both the governor and the legislature. First, the governor would be using a constitutional means to change a law that frustrates his policy goals. Second, the legislature, under Article XI, § 6, has the authority to reshape the Ocean Rangers statute because ballot initiatives may be amended at any time after enactment.²¹⁰ This way, the legislature would be able to alter the Ocean Rangers program without eradicating it entirely, which may still satisfy voters who desire robust regulation of cruise ship waste. As it stands, however, the governor's line-item veto remains unconstitutional.

V. UNDERSTANDING STANDING

Should the governor fail to cure his budgetary veto through legislative repeal or amendment, Alaskans may wish to file a lawsuit and challenge the governor's budgetary veto. The rare factual circumstances of the Ocean Rangers' creation and demise leave much uncertain in terms of court precedent. As suggested in Part III of this Note, potential plaintiffs hoping to reinstate the Ocean Rangers under theories of promissory estoppel, the Contract Clause of the United States Constitution, or separation of powers will face a steep uphill battle.²¹¹ However, the state constitution's language protecting successful ballot

208. See discussion *supra* Part II (describing the legislative history of S.B. 70).

209. ALASKA CONST. art. III, § 18 (authorizing the governor to "recommend the measures he considers necessary").

210. *Id.* art XI, § 6.

211. See discussion *supra* Part III.

initiatives from vetoes strongly suggests that the Alaska Supreme Court will find the governor's action an unconstitutional use of executive power.

While standing is a complex legal issue and is mostly outside the scope of this Note, this Part will provide a cursory look at how a plaintiff could potentially challenge the governor's budgetary veto of a ballot measure. Potential plaintiffs supporting the Ocean Rangers are most likely to reach the court by suing under Alaska's citizen-taxpayer theory of standing. First, this Part will detail the theory and case law of citizen-taxpayer standing in Alaska. Next, this Part will analyze how citizen-taxpayer standing might apply to potential plaintiffs who desire to litigate against the governor's budgetary veto.

A. Citizen-Taxpayer Standing in Alaska

Historically, the Alaska Supreme Court has applied a liberal judicial interpretation of standing in favor of increased accessibility to the courts.²¹² There are two major forms of standing in Alaska: interest-injury standing and citizen-taxpayer standing.²¹³ Interest-injury standing is the more common, straightforward theory of standing in which a plaintiff has an interest adversely affected by the allegedly illegal conduct.²¹⁴ Citizen-taxpayer standing allows a citizen, acting under her identity as a taxpayer, to litigate issues of public significance even in the absence of direct injury.²¹⁵

Citizen-taxpayer standing is a "sufficient basis on which to challenge allegedly illegal government conduct on matters of significant public concern."²¹⁶ In *State v. Lewis*,²¹⁷ the court refrained from creating a broad right for citizens to bring suit to "vindicate the public interest."²¹⁸ Instead, it held that courts must review the circumstances to determine if the litigant and issue meet the requisite criteria in light of the court's "strong policy favoring review of alleged specific constitutional violations by state officials."²¹⁹

The first requirement of citizen-taxpayer standing is that the case in

212. *State v. Lewis*, 559 P.2d 630, 634 (Alaska 1977).

213. *L. Project for Psychiatric Rts., Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010).

214. *Trs. for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987).

215. *Id.*

216. *Id.* at 329.

217. *Lewis*, 559 P.2d at 634.

218. *Id.* at 634–35; see also *Trs. for Alaska*, 736 P.2d at 329 (holding that "taxpayer-citizen standing cannot be claimed in all cases as a matter of right").

219. *Lewis*, 559 P.2d at 636.

question must be of public significance.²²⁰ The court has recognized on two occasions that a government action potentially limited by the state constitution is of public significance. In *Lewis*, the Alaska Supreme Court recognized that a group of Alaska Natives from the Cook Inlet Region had standing to challenge a land transaction between the State of Alaska, the federal government, and Cook Inlet Region, Inc.²²¹ The court justified the plaintiffs' standing for two main reasons: first, the disputed land transfer allegedly violated two specific constitutional limitations; and second, the plaintiffs claimed that participation in the land transfer would result in losses to the state treasury and cost the taxpayers "vast sums of money."²²² Further, the court found that the plaintiffs' interest in protecting mineral resources in the land also supported the existence of a nontraditional, but still valid, injury under state law.²²³

Alaska courts generally do not require that a plaintiff with citizen-taxpayer standing be directly harmed by the alleged constitutional violation. In *Carpenter v. Hammond*,²²⁴ the plaintiff, an Anchorage resident, alleged that the state's redistricting of District 2—a state electoral district that did not include Anchorage—violated article VI, § 6 of the state constitution.²²⁵ There, the Alaska Supreme Court determined that the plaintiff had standing despite the fact that she did not reside in or near the challenged district.²²⁶ The court partly based its decision on the fact that the plaintiff alleged that the redistricting violated a "specific constitutional limitation," and that the drawing of election district lines "arguably will have a significant impact on the state."²²⁷ Therefore, the redistricting was of significant public concern.

The second requirement of citizen-taxpayer standing is that the plaintiff must be an "appropriate" party to bring the case.²²⁸ A court may refuse standing under the citizen-taxpayer theory if there is a plaintiff more directly affected by the challenged action who already has or is likely to initiate a lawsuit.²²⁹ Courts may deem a plaintiff inappropriate if there is "no true adversity of interest," like a "sham plaintiff" who intends to purposefully lose the case to create judicial precedent upholding the

220. *Trs. for Alaska*, 736 P.2d at 329.

221. *Lewis*, 559 P.2d at 634–35. The Cook Inlet Region, Inc. is a "regional corporation of Alaska Natives organized under the Alaska Native Claims Settlement Act of 1971." *Id.* at 633.

222. *Lewis*, 559 P.2d at 635.

223. *Id.*

224. 667 P.2d 1204 (Alaska 1983).

225. *Id.* at 1208.

226. *Id.* at 1210.

227. *Id.*

228. *Trs. for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987).

229. *Id.*

challenged action.²³⁰ Additionally, a court may deny standing if the citizen-taxpayer plaintiff appears to be incapable of completely advocating their position for reasons economic or otherwise.²³¹

Under the theory of citizen-taxpayer standing, the court does not leave it to public officials to self-report potential constitutional violations. In *Lewis*, the court recognized that while the governor and attorney general are “generally charged with protecting the public interest,” their position in a controversy may at times be “clearly adverse” to the plaintiff who wishes to bring the suit under citizen-taxpayer standing.²³² Therefore, Alaska citizens are empowered under the citizen-taxpayer theory of standing to litigate those officials’ alleged unconstitutional acts. This significantly mitigates the risk of a conflict of interest.

B. Citizen-Taxpayer Standing in the Ocean Rangers Controversy

Here, a potential plaintiff would likely have standing to bring suit against the governor’s Ocean Rangers veto under the citizen-taxpayer theory of standing so long as the potential plaintiff was an “appropriate” litigant.

First, the elimination of the Ocean Rangers is likely an issue of public significance. One of the key factors supporting public significance designation is that the plaintiffs would be able to bring forward a clear legal theory that the governor violated Article XI, § 6 of the Alaska Constitution.²³³ The court has repeatedly found that a constitutional violation is an issue of public significance.²³⁴ The possibility of a potential constitutional violation by the executive would likely be an issue of great import to the courts.²³⁵

Additionally, potential plaintiffs seeking to restore the Ocean Rangers would be advocating for two interests centrally important to Alaska: the conservation and preservation of the ocean and Alaska’s waters, and the integrity of direct democracy in the state. In *Lewis*, the court recognized the plaintiffs’ interest in protecting mineral resources as a factor supporting standing.²³⁶ Here, the additional, complementary democracy interest would all but guarantee that an Alaska court would

230. *Id.*

231. *Id.* at 329–30. In a footnote, the court explained that the appropriateness requirement is designed to ensure that the issues “are well presented.” *Id.* at 330 n.9.

232. *State v. Lewis*, 559 P.2d 630, 635–36 (Alaska 1977).

233. *See supra* Part III.

234. *See supra* Part III.

235. *See Lewis*, 559 P.2d at 636 (stating there is a “strong policy favoring review of alleged specific constitutional violations by state officials”).

236. *Id.* at 635.

deem the Ocean Rangers program an issue of public significance.

Further, a potential plaintiff will be more likely to establish herself as appropriate if she takes two steps. First, she should ensure she has the resources to see litigation through to its natural conclusion. Second, she should present a zealous case. Given that Governor Dunleavy is solely responsible for the line-item veto in question, the court would be unlikely to assert that the governor or state's attorney would be the best parties to advocate for the public interest for the state. Otherwise, the court would be inviting a serious conflict of interest, positioning the governor as both plaintiff and defendant.

One example of a potential plaintiff in this scenario would be an Alaska fisherman who fears that fishing waters have become dangerously polluted due to cruise ship discharges without Ocean Ranger supervision and monitoring. There are many others who could potentially bring claims, though the relative strength of their individual appropriateness is beyond the scope of this Note.

In conclusion, a potential plaintiff—assuming she meets all other relevant criteria—would likely have citizen-taxpayer standing to bring a case challenging the Ocean Rangers veto. Alaska courts have articulated a “strong” public policy “favoring review of alleged specific constitutional violations by state officials.”²³⁷ The Ocean Rangers controversy involves a direct constitutional violation. This controversy also invokes Alaska's interest both in its natural resources and its practice of direct democracy. Finally, a member of the executive branch would not be the best party to bring this case because of Governor Dunleavy's own involvement in the budgetary veto, leaving room for another appropriate litigant to file a complaint.

VI. CONCLUSION

Direct democracy, as the barest expression of democratic will, is as much a resource to the people and state of Alaska as the state's shimmering waters. In his budgetary veto, Governor Dunleavy put both of these vital resources at stake. Even if the Ocean Rangers was an imperfect program, the governor must honor the Alaska Constitution's prohibition of ballot initiative vetoes.

This Note contends that Governor Dunleavy violated the Alaska Constitution when he vetoed the entirety of the Ocean Rangers' budget in 2019. While Alaska courts would normally allow such a veto for legislative acts, the Ocean Rangers' identity as a product of direct democracy may be its life preserver. The governor's constitutional

237. *Id.* at 636.

violation, alongside the Ocean Rangers' purpose, virtually guarantee that the state court will recognize a potential Alaska plaintiff's citizen-taxpayer standing to pursue judicial reinstatement of the program.

The Ocean Rangers controversy extends beyond the issue of cruise ship waste. Indeed, this situation speaks to the democratic necessity that an executive restrain his or her actions to what the state constitution will allow and not abandon constitutional limitations in the event of disagreement with preexisting policy. Previously, Alaska has passed ballot initiatives covering a series of vitally important state issues.²³⁸ For example, successful ballot initiatives in Alaska have increased the state's minimum wage,²³⁹ protected wild salmon and Bristol Bay waters,²⁴⁰ and dictated the state's official policy on nuclear weapons.²⁴¹ The Governor's unconstitutional veto of the Ocean Rangers program, if left unchecked, puts the legitimacy and longevity of these and every ballot measure at mortal risk.²⁴² Thus, the protection of the Ocean Rangers' budget is a protection of direct democracy.

238. See generally STATE OF ALASKA, DIVISION OF ELECTIONS, INITIATIVE HISTORY (2021), <https://www.elections.alaska.gov/doc/forms/H26.pdf>.

239. *Id.* at 1.

240. *Id.*

241. *Id.* at 3; see also *Alaska Nuclear Weapons Freeze Initiative, Measure 1 (1986)*, BALLOTPEDIA, [https://ballotpedia.org/Alaska_Nuclear_Weapons_Freeze_Initiative_Measure_1_\(1986\)](https://ballotpedia.org/Alaska_Nuclear_Weapons_Freeze_Initiative_Measure_1_(1986)) (last visited Apr. 30, 2023) ("The initiative would promote mutual and verifiable nuclear weapons freeze, to be followed by nuclear weapons reduction.").

242. Every year, the Alaska Legislature and the Governor reauthorize the budget of every government program, thereby exposing the budgets of all ballot measures to the risk of death by budgetary veto. See *Layman's Guide to the Budget Process*, ALASKA STATE LEGISLATURE, at 3, <https://akleg.gov/docs/pdf/budgproc.pdf> (last visited Apr. 30, 2023).