IN THE SUPREME COURT FOR THE STATE OF ALASKA

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,

Appellants,

v.

GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Appellees.

Supreme Court Case No. S-18333

Trial Court No. 3AN-22-04028 CI

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT AT ANCHORAGE, THE HONORABLE ADOLF ZEMAN PRESIDING

AMICUS BRIEF OF ALASKA LEGISLATIVE COUNCIL

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Alaska Constitution, art. IX, § 17

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

* * *

AS 37.14.750

(a) The Alaska higher education investment fund is established in the general fund for the purpose of making grants awarded under AS 14.43.400 - 14.43.420 by appropriation to the account established under AS 14.43.915(a) and of making scholarship payments to qualified postsecondary institutions for students under AS 14.43.810 - 14.43.849 by appropriation to the account established under AS 14.43.915(b). Money in the fund does not lapse. The fund consists of

(1) money appropriated to the fund;

(2) income earned on investment of fund assets;

(3) donations to the fund; and

(4) money redeposited under AS 14.43.915(c).

(b) The legislature may appropriate any amount to the fund established in (a) of this section. Nothing in this section creates a dedicated fund.

(c) As soon as is practicable after July 1 of each year, the commissioner of revenue shall determine the market value of the fund established in this section on June 30 for the immediately preceding fiscal year. The commissioner shall identify seven percent of that amount as available for appropriation as follows:

(1) one-third for the grant account established under AS 14.43.915(a), from which the Alaska Commission on Postsecondary Education may award grants; and

(2) two-thirds for the scholarship account established under AS 14.43.915(b), from which the Alaska Commission on Postsecondary Education may award scholarships.

(d) In this section, unless the context requires otherwise, "fund" means the Alaska higher education investment fund established in (a) of this section.

I. INTRODUCTION

This appeal addresses whether the Higher Education Investment Fund ("HEIF") is subject to the budgetary "sweep" provision of article IX, section 17 of the Alaska Constitution ("section 17"). The HEIF is a legislatively created endowment fund used to purchase a specifically customized investment portfolio designed to provide a return that will reliably secure funding of scholarships for Alaska's students who remain in the state for post-secondary education. Appellees assert that this longstanding state service must be dismantled because the HEIF's funds are required to be swept into the Constitutional Budget Reserve ("CBR"). The Legislative Council respectfully submits that Appellees' position misapprehends both the purpose and structure of the HEIF as well as the scope of the sweep provision under section 17(d). Properly understood, the HEIF is not subject to the sweep provision.

II. BACKGROUND[1]

The Legislature established the HEIF in 2012 to serve as a long-term endowment to support academic grants and scholarships for Alaska students.[2] The Legislature committed and appropriated $400 million (the original corpus of the HEIF) to an express purpose: the creation of an "investment fund" to be sustained by investment returns and annually yield seven percent of the endowment's value to be used "for the purpose of

[1] The parties addressed the general background in some detail in the proceedings below, and the Legislative Council expects they will do the same here. Accordingly, to avoid duplicative briefing, the Legislative Council provides background only on discrete aspects that are specific to its argument.

[2] *See* AS 37.14.750(a).

making grants . . . and scholarship payments."[3] For nearly a decade, the invested HEIF funds have sustainably provided tens of millions of dollars in grants and scholarships to deserving Alaska students while simultaneously preserving and replenishing the original corpus of the Legislature's initial investment.[4]

Unlike some other funds in the state treasury, the HEIF is not an accounting entry where cash sits until the Legislature appropriates it for expenditure by an agency. Instead, in 2012 the Legislature required that the corpus of the HEIF be expended to deliberately obtain a customized portfolio of revenue-producing assets to sustainably fund grants and scholarships, which is exactly what occurred.[5] As of December 2021, the HEIF was fully invested in a diverse range of equities, fixed income securities, real assets, and cash.[6] In so doing, the Legislature aimed to ensure that there would be a reliable, non-lapsing endowment so that Alaska's students could make plans for their educational future.[7] The creation of that endowment and the purchase of these revenue-producing assets achieved that goal.

Twenty-two years before it established the HEIF, the Legislature proposed (and voters ratified) an amendment to the Alaska Constitution — section 17 — to address a

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[3] AS 37.14.750(a).

[4] *See* Appellants' Excerpt of Record ("Exc.") 136–37 (HEIF Investment Income Nov. 30, 2021); *see also* State of Alaska, Department of Revenue, Treasury Division, Alaska Higher Education Fund (last accessed Mar. 9, 2022), https://treasury.dor.alaska.gov/home/investments/alaska-higher-education-fund.

[5] *See supra* note 4.

[6] *See id*.

[7] *See infra* notes 39, 42, and accompanying text; *see also* AS 37.14.750(a).

forecasted "gap" between annual revenues and state spending levels.[8] Section 17 created the CBR as a savings account that could be accessed under two sets of circumstances. First, if the amount available for appropriation was less than the prior year, the Legislature could access the fund (up to a cap of the prior year's appropriation) through a simple majority vote.[9] Second, the Legislature could access the fund for any public purpose through a three-fourths affirmative vote of each house.[10] Pursuant to section 17(d), the Legislature was required to repay appropriations made from the fund. As reflected in both the legislative history and in communications to the voting public, one of the chief goals of the constitutional amendment was to "provide some stability" to the State's finances, thus "minimiz[ing] the effects of a 'boom' one year, and a 'bust' the next."[11] The CBR thus allowed the Legislature to maintain the status quo from year to year, offering a consistent level of appropriations and services to the public without abrupt shifts.

When section 17(d) was being debated in the Legislature, one of its leading proponents explained how the provision was intended to work: "And then, if money is borrowed or appropriated from the budget reserve fund in that manner, or any money taken out of it, [the money] would be repaid to the budget reserve fund *out of any general*

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[8] *See* Alaska Const. art. IX, § 17.

[9] *See Hickel v. Cowper*, 874 P.2d 922, 928–29 (Alaska 1994); *see also* Alaska Const. art. IX, § 17(b).

[10] *See Hickel*, 874 P.2d at 923 n.1; *see also* Alaska Const. art. IX, § 17(c).

[11] Exc. 58; *Hickel*, 874 P.2d at 929 ("One of the purposes of the budget reserve amendment, however, was to provide a 'stabilizing mechanism' in the budgetary process." (quoting testimony of budget officer Mary Halloran before the House Finance Committee)).

fund surpluses that remain at the end of the fiscal year."[12] This concept was reiterated in the election pamphlet distributed to the voters who ratified section 17(d). The summary provided by the Legislative Affairs Agency noted that "[m]oney that is appropriated from the reserve fund must be repaid. *Surplus general fund money* must be deposited in the reserve fund at the end of each year until the reserve fund is repaid."[13] Members of the Legislature informed voters that, "[t]he Legislature will be required to repay any money it appropriates from the Budget Reserve. *If the next year['s] revenues are insufficient [and] the Legislature cannot afford to replenish the Budget Reserve, the 'debt' will carry forward until it is repaid.*"[14] Taken together, these statements confirm that the Legislature and the voters understood that the repayment (or replenishment) of the CBR would come from annual revenues and any surplus general funds. If those revenues and surpluses were insufficient to satisfy the "debt" to the CBR in any particular year, the debt would be carried over to the next year.

In 1994, this Court decided *Hickel v. Cowper*. The primary issue addressed in *Hickel* dealt with what amounts were considered "available for appropriation" under section 17(b) — that is, the case principally concerned when the Legislature could access the CBR, rather than when or how the CBR must be repaid.[15] Because of the focus on section 17(b), the *Hickel* Court considered the intent of the framers with respect

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[12] House Floor Session on SJR 5, 16th Leg., 2d Sess., Audio 2, 1:02:50 – 1:03:08, http://www.akleg.gov/ftr/archives/1990/HFLR/l2l-HFLR-900508-2.mp3 (May 8, 1990) (emphasis added) (Statement of Representative Kay Brown).

[13] Exc. 57.

[14] Exc. 58 (emphasis added).

[15] *See* 874 P.2d at 926.

to section 17(b) and the extrinsic indications of the voters' probable understanding of that provision.[16] As to section 17(d), which is at issue in the instant appeal, the *Hickel* Court concluded that it could see no reason to give its language a different meaning than it had in section 17(b).[17] But the *Hickel* Court did not address the framers' intent or the voters' probable understanding as to section 17(d).

Appellees contend that *Hickel* requires the sweep of the entire HEIF into the CBR — i.e., the liquidation of the legislatively created endowment and transfer of those funds to the CBR — effectively destroying the grant and scholarship program the endowment sustains and upending the plans and expectations of countless Alaskan students and families. Not so. The framers' intent, including the extrinsic indications of the voters' probable understanding of section 17(d), makes clear that the constitutional provision was meant to *stabilize* Alaska's budget and to avoid the elimination of existing state services. Appellees' interpretation of section 17(d) requires the opposite, and it fails for that reason alone. Appellees' interpretation also fails because the corpus of the HEIF *has been expended.* Even if *Hickel*'s test for section 17(b) is applied to the very different considerations at play in section 17(d), therefore, the corpus of the HEIF is not "available for appropriation."

III. STANDARD OF REVIEW

Questions of constitutional interpretation are legal questions, and the courts

[16] *See id.* at 927–30.
[17] *See id.* at 936 n.32.

"adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[18] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. The court should look to the plain meaning and purpose of the provision and the intent of the framers."[19] The Legislature's interpretation of constitutional terms relating to appropriations may be considered more persuasive than otherwise, although it is only one of several tools for use by the courts in interpreting the constitution.[20] Because section 17(d) was ratified by the people, courts "defer to the meaning the people themselves probably placed on the provision. Normally, such deference to the intent of the people requires adherence to the common understanding of words."[21]

IV. INTERESTS OF AMICUS

Article II, section 11 of the Alaska Constitution establishes the Legislative Council as a permanent interim committee of the Alaska Legislature. The Legislature has delegated the Council authority to "do all things necessary to carry out legislative directives and law."[22]

Article II, section 13 of the Alaska Constitution vests the power of appropriation

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[18] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (internal quotation marks omitted).

[19] *Hickel*, 874 P.2d at 926 (quoting *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

[20] *See id.* at 925 n.7.

[21] *Id.* at 926 (quoting *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991) (internal alteration and quotation marks omitted)).

[22] AS 24.20.060(4)(E).

of the State of Alaska in the Legislature.[23]

The issues raised in this appeal have a direct and immediate impact on the scope of the Legislature's appropriation power, including how that appropriation power is impacted by article IX, section 17(d) of the Alaska Constitution,[24] and thus the Legislature — appearing through its Legislative Council — has an important interest in being heard in this case. Pursuant to Appellate Rule 212(c)(9), the Alaska Legislative Council is participating as amicus curiae after obtaining written consent of all parties.[25]

V. ARGUMENT

A. The Framers and Voters Intended to Preserve the Stability of Existing State Programs Through Section 17.

The intent of the framers and the extrinsic indications of the voters' probable understanding of section 17 — and in particular section 17(d) — are clear and were not meaningfully disputed by Appellees below.[26] Both the Legislature and the voters understood that section 17 would help instill greater predictability, reliability, and stability to Alaska's budgeting process. A reduction in state revenues would allow the Legislature to access the CBR with a simple majority vote, ensuring the continuation of vital state services and preserving the status quo without the need to liquidate any state assets: "[B]oth the legislative history of section 17 and extrinsic evidence of the voter's

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[23] *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) ("[The Alaska Constitution] gives the legislature the power to legislate and appropriate." (internal citations omitted)).

[24] *See, e.g.*, Complaint ¶¶ 34–38, located at Exc. 12.

[25] *See* Consent to Filing Amicus Curiae Brief, filed contemporaneously herewith.

[26] *See generally* Exc. 153–72.

understanding of the amendment's provisions indicate that elimination of state services and/or liquidation of state assets was not considered a necessary prerequisite to simple majority access to the budget reserve."[27] This would help avoid jarring disruptions to existing state programs whenever there was a dip in revenues.

Likewise, the Legislature and the voters recognized that fulfilling section 17(d)'s repayment obligation could take some time to accomplish, depending on annual revenues and the size of any general fund surpluses that existed at the end of any given fiscal year.[28] If those amounts available in the first repayment year were not sufficient to cover the outstanding debt to the CBR, the debt would roll over to succeeding years until it was fully repaid. Consistent with the framers' and voters' recognition that section 17 would help stabilize Alaska's budget and avoid the elimination of existing state services (or liquidation of state assets), there is no indication whatsoever that either the framers or voters believed that section 17(d)'s repayment must be done hurriedly, potentially eliminating existing state services.

Sections 17(b) and 17(d) should be interpreted consistently so as to create a harmonious whole, with neither provision interpreted to require the elimination of pre-existing state services.[29] Appellee's contrary interpretation would create the anomalous circumstance where the CBR could be accessed by a simple majority vote under section 17(b) to help fund and preserve existing state programs, but then the funds for

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[27] *Hickel*, 874 P.2d at 929.

[28] *See supra* page 4.

[29] *See Forrer v. State*, 471 P.3d 569, 585 & n.164 (Alaska 2020) (noting that constitutional provisions should be read in harmony with one another).

those programs could immediately be swept under section 17(d) terminating the programs.

Neither the framers nor the voters intended that existing state programs like the HEIF would be liquidated or de-funded to expedite repayment of the CBR. This Court should interpret section 17(d) as intended by the framers and the voters.[30]

B. *Hickel* Supports the Legislature's Reading of Section 17(d).

When defining the scope of section 17(b),[31] the *Hickel* Court laid out several core principles that help guide the Legislature, the Executive Branch, and the courts when assessing which funds are "available." *Hickel* did not classify the HEIF (which postdated *Hickel*) or many other funds as either "available" or "unavailable" under section 17, leaving that to be sorted out in the first instance by executive and legislative branch officials more familiar with the funds.[32] The principles laid out in *Hickel* confirm that the HEIF is not sweepable.

The *Hickel* Court held that "monies which already have been validly committed by the legislature to some purpose should not be counted as available."[33] Further, monies are not deemed available if they have been "converted from cash to some other

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[30] *See Hickel*, 874 P.2d at 927 ("We are unwilling . . . to interpret existing constitutional language more broadly than intended by the framers or the voters."); *see also Sherman v. Holiday Const. Co.*, 435 P.2d 16, 19 (Alaska 1967) (noting the judicial function to interpret statutes in such a way as to avoid absurd results).

[31] *See Hickel*, 874 P.2d at 926 ("The *primary* issue in this case is the meaning of the term 'amount available for appropriation' as used in article IX, *section 17(b)* of the Alaska Constitution." (emphases added)).

[32] *See id.* at 934 n.27. Prior to the current administration, these officials determined that the HEIF was not sweepable. *See* Exc. 60.

[33] *Hickel*, 874 P.2d at 930–31.

type of asset."[34] This is because "any given sum of money can only be appropriated once during a given time period."[35] Here, the Legislature appropriated and committed the HEIF funds to be expended for an express purpose: the establishment of an "investment fund" (i.e., an endowment) composed of revenue-producing assets that would provide income to replenish and preserve the fund, with seven percent of the endowment fund annually available to be used "for the purpose of making grants . . . and scholarship payments."[36] Consistent with the Legislature's purpose in creating the HEIF, the appropriated monies have been invested in a customized well-diversified portfolio including equities and real assets, further confirming that the funds are not "available."[37] The HEIF plainly is not a "general fund surplus." Instead, the HEIF is the result of a deliberate commitment of monies to a specific purpose, holding revenue-producing assets purchased by those monies to help fund scholarships and grants.

Appellees claimed below that the only questions for the Court are (1) whether the HEIF is in the general fund, and (2) whether the Legislature must make an additional appropriation before the agency can expend those funds.[38] Because additional appropriations are made before scholarship dollars are received by students, Appellees

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[34] *Id.* at 931 n.20. Even Governor Cowper limited his overbroad argument to cash funds, which the *Hickel* Court found to be "a reasonable limitation." *Id.* at 928 n.14.

[35] *Id.* at 931 n.20.

[36] AS 37.14.750(a).

[37] *See* Exc. 136–37 (HEIF Investment Income Nov. 30, 2021); *see also* State of Alaska, Department of Revenue, Treasury Division, Alaska Higher Education Fund (last accessed Mar. 9, 2022), https://treasury.dor.alaska.gov/home/investments/alaska-higher-education-fund.

[38] *See* Exc. 162–63.

argue, the HEIF is necessarily sweepable. Appellees' arguments ignore the HEIF's legislative history, misapprehend the essential nature of the HEIF's endowment structure, and misstate the *Hickel* test.

During testimony on the bill that created the HEIF, the Executive Director of the Postsecondary Education Commission testified as to the importance of a consistent funding source for the HEIF. Under an earlier scholarship program, many eligible students were not taking advantage of the program because, as confirmed through surveys, these students were wary about the program "given the tentative nature of the funding status."[39] In other words, a scholarship program that depended on annual funding by the Legislature and the Governor was ineffective at attracting students to make a multiple-year commitment in reliance on the program's continued availability because students lacked confidence that the funds would still be there during later years of these students' educational careers. Predictably, many of these students left Alaska and pursued educational opportunities in the Lower 48. Thus, to accomplish its *specifically intended purpose*, the HEIF had to have reliable funding.

The Legislature responded to this concern in two ways. First, the Legislature added language to the statute confirming that "[m]oney in the fund does not lapse"[40] and remains available to fund future scholarship and grant applicants. Second, the Legislature structured the HEIF as an endowment whereby the corpus of the fund was

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[39] http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202012-01-18%2009:00:00 (testimony of Diane Barrans before the Senate Finance Committee on Jan.18, 2012 at 9:16:58 – 9:17:45).

[40] AS 37.14.750(a).

initially appropriated for expenditure to purchase a customized investment portfolio and then seven percent of the fund's assets were to be liquidated annually — and made available for appropriation — to fund scholarships and grants.[41] This endowment structure ensured that students could plan on a stable, non-lapsing funding source, knowing that it would remain consistent in the future, rather than fretting about the vicissitudes of annual budgetary decisions. When Senator Donny Olson worried aloud that future students may be "left in the lurch" if HEIF's funds were insufficient, the Department of Revenue explained that the funds' stability could be protected by setting up a customized asset allocation in an investment portfolio to achieve future expected payments, noting:

> this could be set up as an endowment so you pay out X percent per year from the [HEIF] to the other [scholarship or grant] fund. And then you could, you know, in a down year — depending on how it's invested — you could have that kind of a mechanism so students wouldn't ever [be left in the lurch]. You'd build up larger fund balances in good years, and feed off the corp . . . utilize some of the corpus in a bad year, as an endowment model is set up.[42]

The Legislature adopted this endowment approach.

As an endowment, there was and is no need for further appropriation to complete the expenditure that the Legislature intended when it funded the HEIF. The Legislature created the HEIF as a stable, non-lapsing funding source to reassure students that if they worked hard and performed well, funding would be available for scholarships and grants

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[41] *See id.*

[42] http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202012-01-18%2009:00:00 (9:50:13 – 9:51:42) (testimony of Jerry Burnett, Director, Administrative Services Division, Department of Revenue).

when the time came for them to pursue higher education opportunities in Alaska. That purpose was accomplished with the creation of the HEIF. Given that money from the HEIF was intended to produce an annual income stream for scholarships and grants, the money in the HEIF needed to be invested in revenue-producing assets to effectuate the Legislature's goal (i.e., so that a percentage of the whole can be drawn while maintaining the body of the corpus). This is not merely an "accounting designation" or a "savings account" — it was the Legislature's purposeful investment in a funding mechanism to provide a reliable source of funding for current and future scholarships and grants for Alaska's students. And the appropriation in fact has been expended in establishing the investment fund and purchasing the assets that comprise it.[43] Appellees thus may not sweep the HEIF under the test articulated by the *Hickel* Court.

This endowment structure, adopted to implement the Legislature's purpose, demonstrates how the HEIF is different. Certain other funds have been deemed to be "available for appropriation" because initial appropriations were provided to those funds, and the appropriations then remained in the sub-fund until appropriated again for an ultimate expenditure.[44] Analogizing to these funds, Appellees have argued that "'appropriations' to the HEIF are not true appropriations [because] [t]hey do not

[43] In addition to giving students comfort that the funds would be available for future grants and scholarships, the distribution of the scholarships and grants themselves are, of course, an important consideration for these students. That distribution is discussed *infra* at Section V.C.

[44] *See Hickel*, 874 P.2d at 933 (citing the Railbelt energy fund, the Alaska marine highway system vessel replacement fund, and the educational facilities maintenance and construction fund).

authorize any expenditure of funds out of the state treasury."[45] Appellees are mistaken. There is no requirement that any appropriation authorize an expenditure of funds *out of the state treasury* to be a "true" appropriation. An appropriation is an appropriation; there are no second-class appropriations. Wherever the funds reside, the test is whether they "already have been validly committed by the legislature to some purpose."[46] The funds the Legislature appropriated to create the HEIF endowment meet that test.[47]

As described by the *Hickel* Court, "[a]n appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[48] The appropriation to the HEIF was the setting aside from the public revenue of a certain sum of money ($400 million) for a specified object

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[45] Exc. 166.

[46] *Hickel*, 874 P.2d at 930–31.

[47] To provide an example of a fund that was available for "expenditure without further legislative action" and thus "no longer available for appropriation," the *Hickel* Court pointed to the oil and hazardous substance release response fund ("OHSRRF") which is a restricted fund within the general fund. *Hickel*, 874 P.2d at 933. The *Hickel* Court noted that the OHSRRF was not sweepable because the commissioner of environmental conservation was authorized to use the money in the fund *without further authorization* from the Legislature. *See id.* ("Because the legislature has made the entire balance of this fund available for expenditure, the amounts deposited into the fund are validly appropriated and therefore no longer available for appropriation."). The initial appropriation of the HEIF corpus — requiring the Department of Revenue to set up an investment fund — similarly made the fund "available for expenditure" by the Department to purchase the customized asset portfolio that today comprises the HEIF, and the Department actually expended the HEIF monies by purchasing those assets. By actually having been expended by the Department, the HEIF corpus has been taken even a step further than the OHSRRF corpus, which is merely available to be expended at the commissioner's discretion.

[48] *Hickel*, 874 P.2d at 932–33 (quoting *Thomas v. Rosen*, 549 P.2d 793, 796 (Alaska 1977) and *State ex rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936)).

(setting up an investment fund for long-term funding of scholarships), in such manner that the Department of Revenue was authorized to use that money, and no more, for the object of setting up an investment fund through purchasing the appropriate investment portfolio (i.e., expending the money), and no other. The HEIF is not simply the shifting of cash from one part of the treasury to another. Through the HEIF, the Legislature directed the Department of Revenue to create an endowment fund and purchase revenue-producing assets. The corpus of the HEIF, when invested in a diversified portfolio, is the manifestation of that appropriation.

This is true irrespective of the nature of the assets owned by the HEIF. Their relative liquidity is irrelevant. A portfolio containing a mixture of investment assets, with the income from that investment portfolio being used to fund scholarships and grants, is just as "unavailable" as would be a portfolio of real estate rental properties with the income from these rental properties being used to fund scholarships and grants. The *Hickel* Court asked whether funds "have been validly committed by the legislature to some purpose." Here the Legislature committed funds to creating an endowment fund to provide a dependable future income stream for Alaskan students. Investing the funds in intangible assets — which potentially can be liquidated more easily than real property — does not negate the validity of the appropriation or make the funds "available." Appropriating funds for the purpose of creating an educational endowment fund is as final an expenditure by the Legislature as is building a road or expanding a port.

C. The Possibility of Subsequent Appropriations from a Portion of the HEIF Does Not Change the Outcome.

Appellees contend that the HEIF as a whole may be swept because some funds in the HEIF are expended (for example, as scholarships and grants to Alaskan students) through a further appropriation by the Legislature.[49] This argument misses the mark for two reasons.

First, an appropriation from an otherwise excluded fund does not transform that fund into a sweepable fund. As the *Hickel* Court explained, "if an appropriation lapses or if the legislature does in fact reappropriate money from an excluded fund to another purpose, it is no longer necessary to exclude *that money* from the 'amount available for appropriation' in order to protect the legislature's authority to make such decisions."[50] Insofar as this holding from *Hickel* as to section 17(b) can be appropriately applied to section 17(d), it would mean that at most the money actually appropriated from the HEIF, the annual seven percent, could be considered "available for appropriation" (and thus potentially sweepable) because it was appropriated from the excluded HEIF to another purpose. The rest of the HEIF (i.e., the corpus) would be unaffected. The corpus of the HEIF already has been appropriated for a specific purpose that it currently is serving — the establishment of an endowment fund. The HEIF's monies also have already been deliberately converted into non-cash assets, including real assets, which further places them outside the category of "available funds."

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[49] *See* Exc. 163, 166–68.

[50] *Hickel*, 874 P.2d at 931 n.20 (emphasis added).

Second, as defined in the HEIF statute, only a portion of the fund is regularly made available for appropriation: the seven percent that the Commissioner of Revenue annually identifies as being available for grants and scholarships.[51] By the statutory terms, the rest of the HEIF is not available for grants and scholarships. The HEIF "corpus" (as opposed to the later appropriations from the HEIF) remains "set[ ] aside from the public revenue . . . for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[52] Importantly, however, appropriations for grants and scholarships from the seven percent of the HEIF annually set aside for that purpose are not made on or before June 30 of any given fiscal year — the date of the sweep.[53] Instead, by operation of law, the Commissioner of Revenue determines the market value of the HEIF "[a]s soon as is practicable *after July 1* of each year."[54] In other words, when the sweep occurs at 11:59 p.m. on June 30 of any given year, it is undisputed that the seven percent of the HEIF (which would eventually fund grants and scholarships) for that year has not

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[51] AS 37.14.750(c) ("The commissioner shall identify seven percent of [the HEIF's June 30 market value] as available for appropriation [for grants and scholarships.]").

[52] *Hickel*, 874 P.2d at 932–33 (quoting *Thomas*, 549 P.2d at 796 and *Dammann*, 264 N.W. at 624). Appellees note that the Legislature has the ability to spend the HEIF for other public purposes, and it has done so. *See* Exc. 160. As explained above, any appropriation from the excluded HEIF to another purpose could render the appropriated funds vulnerable to being swept, but it would not impact the status of the remainder of the HEIF. Appropriations of a portion of the HEIF do not alter the fact that funds were appropriated and committed to HEIF for a particular purpose — establishing a funding source for grants and scholarships — which is continuing to be served to this day.

[53] *See* AS 37.14.750(c).

[54] *Id.* (emphasis added); *see also* Exc. 272 (reflecting a July 7, 2021 determination by the Commissioner of Revenue).

been made available for appropriation yet. That occurs after July 1. Because the segregated portion of the HEIF available for appropriation in a particular fiscal year has not been made available for appropriation as of June 30, it also is not sweepable.[55] After the Commissioner of Revenue identifies the seven percent portion of the HEIF for grants and scholarships in early July, however, those funds arguably become vulnerable to being swept if they have not been expended by the following June 30. But the corpus itself has already been appropriated and converted into non-cash assets and is not available for appropriation, and thus may not be swept under section 17(d).

D. The Reasonable and Practical Interpretation of Section 17(d) Excludes the HEIF from the "Sweep."

The framers' expressed intent (and the voters' probable understanding) is consistent with the reasonable, practical, and common sense understanding of section 17(d). At its core, section 17 was designed to provide greater stability to state government and year-to-year budgeting.[56] It specifically sought to avoid "boom" and "bust" cycles whereby state assets would be liquidated and existing state services would be dismantled when there was a dip in the State's finances. The *Hickel* Court went on to explain why such drastic steps were inconsistent with a reasonable common sense understanding of section 17:

> [T]he purpose and common understanding of the language in 17(b) allows the budget reserve to be used by a simple majority as necessary *to maintain state appropriations at a constant level*. Although all funds might be available by some means, counting funds already validly

[55] Unless, of course, the Legislature failed — between July 1 and the following June 30 — to actually appropriate that seven percent for grants or scholarships.

[56] *See supra* page 3–4.

> appropriated to a specific purpose as still "available" *would disrupt existing state programs and would constitute an inflexible constitutional intrusion on the legislature's authority to evaluate the wisdom of particular appropriations*. Although such a constitutional intrusion is conceivable, we are unwilling to read it into a provision with quite a different purpose.[57]

Disrupting existing state programs — like the HEIF — is inconsistent with the purpose and common sense understanding of section 17.

The HEIF has been in place for a decade, providing a steady and predictable stream of scholarship and grant funds to Alaskan students so that they can plan for higher education opportunities in their home state. These funds have been maintained at a largely constant level, which is a testament to the good stewardship of the customized investment portfolio that was envisioned by the Legislature — i.e., the Legislature's intent to create a long-lasting endowment has so far worked.[58] The drastic action of a "sweep" would disrupt — and, indeed, destroy — this existing state program. It would also constitute an inflexible constitutional intrusion into the Legislature's authority to evaluate the wisdom of the HEIF program.

It is undisputed that section 17(b) allows for the "borrowing" of funds from the CBR in one year so that no existing state services would be eliminated. In light of that purpose, section 17(d) should be interpreted consistently to avoid requiring the elimination of those same services under section 17(d) at the end of the fiscal year simply to expedite repayment to the CBR. Appellees argue that section 17(d) establishes

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[57] *Hickel*, 874 P.2d at 930 (emphases added).

[58] *See supra* note 4.

the repayment of the CBR as the "top constitutional priority," requiring the emptying of the HEIF in service of expedited repayment.[59] Anything less, Appellees claim, would require the deletion of section 17(d). Section 17(d) does not, however, create any such accelerated repayment obligation at the expense of existing state services. To the contrary, section 17(d) is intended to ensure that repayments will be made steadily to the CBR until the debt is fully repaid, using surplus general funds (not de-funding programs or liquidating assets). But if revenues from any given year were not sufficient to repay that debt, the framers and the public understood that the debt would be rolled over to the following year.[60] There was simply never any mention of eliminating state services or programs to repay the CBR debt as quickly as possible, because such an extreme result was never contemplated. Section 17(d) continues to serve an important role in ensuring that CBR debts get paid, but neither the text nor the purpose suggests that this repayment was meant to trump basic government obligations. The Appellees' "radically different approach to government financing"[61] would eliminate the stability that section 17 was specifically designed to protect.

Hickel is especially instructive here. In that case, former-Governor Cowper interpreted section 17(b)'s majority access formula to include all net state assets as part of the "amount available for appropriation" that must be expended before a simple majority could reach the CBR. Noting that this would "require a complete restructuring

[59] Exc. 291–92.
[60] *See supra* note 14 and accompanying text.
[61] *Hickel*, 874 P.2d at 928.

of the established financial system of the state government,"[62] this Court rejected his reading as inconsistent with the purpose of section 17, the framers' intent, and the voters' probable understanding of section 17's terms. The *Hickel* Court explained that, even if it only considered net assets that existed in a cash form (e.g., balances in a revolving loan fund), all "existing state programs dependent on those funds would have to be curtailed if these funds were expended on another purpose."[63] In other words, these existing programs would suddenly be scaled back — or dismantled altogether — if section 17 was interpreted broadly to encompass all net state assets. These proposed "reductions in the level of government service" were inconsistent with section 17's clear stabilizing purpose, and that interpretation was therefore rejected.[64] Appellees' insistence that section 17(d) be interpreted and applied to curtail, reduce, and effectively destroy the HEIF is likewise at odds with section 17's purpose.

VI. CONCLUSION

For the foregoing reasons, the Court should reject the Appellees' arguments, reverse the decision from the court below, and find that the HEIF is not sweepable under section 17(d).

[62] *Id.* at 927.
[63] *Id.* at 929.
[64] *Id.*