

IN THE SUPREME COURT OF THE STATE OF ALASKA

Governor Dunleavy, Michael
Johnson, and Kelly Tshibaka,

Appellants,

v.

Alaska Legislative Council
and Coalition of Education
Equity,

Appellees.

Supreme Court No.: S-17666

Trial Court Case No. 1JU-19-00753 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU,
THE HONORABLE DANIEL J. SCHALLY, JUDGE

BRIEF OF APPELLEE THE ALASKA LEGISLATIVE COUNCIL

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Constitutional Provisions

Alaska Const. Art. II, sec. 15

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

Alaska Const. Art. III, sec. 16

The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.

Alaska Const. Art. VII, sec. 1

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Alaska Const. Art. IX, sec. 7

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

Alaska Const. Art. IX, sec. 12

The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments,

offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

Alaska Const. Art. IX, sec. 13

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Alaska Laws

AS 14.17.610

Sec. 14.17.610. Distribution of state aid.

(a) The department shall determine the state aid for each school district in a fiscal year on the basis of the district's student count data reported under AS 14.17.600. On or before the 15th day of each of the first nine months of each fiscal year, one-twelfth of each district's state aid shall be distributed on the basis of the data reported for the preceding fiscal year. On or before the 15th day of each of the last three months of each fiscal year, one-third of the balance of each district's state aid shall be distributed, after the balance has been recomputed on the basis of student count and other data reported for the current fiscal year.

(b) Distribution of state aid under (a) of this section shall be made as required under AS 14.17.410. If a district receives more state aid than it is entitled to receive under this chapter, the district shall immediately remit the amount of overpayment to the commissioner, to be returned to the public education fund. The department may make adjustments to a district's state aid to correct underpayments made in previous fiscal years.

(c) Upon an adequate showing of a cash flow shortfall of a district, and in the discretion of the commissioner, the department may make advance payments to a district. The total of advance payments may not exceed the amount of state aid for which the district is eligible for the fiscal year.

Ch. 6, SLA 2018

AN ACT making appropriations for public education and transportation of students; and providing for an effective date.

*** Section 1.** The following appropriation items are for operating expenditures from the general fund or other funds as set out in section 2 of this Act to the agencies named for the purposes expressed for the fiscal year beginning July 1, 2018 and ending June 30, 2019, unless otherwise indicated.

	Appropriation	General	Other
	Allocations	Funds	Funds
* * * * Department of Education and Early Development * * * *			
K-12 Aid to School Districts	26,128,400	26,128,400	
Foundation Program	26,128,400		
K-12 Support	12,111,400	12,111,400	
Boarding Home Grants	7,453,200		
Youth in Detention	1,100,000		
Special Schools	3,558,200		
Mt. Edgumbe Boarding School	12,863,300	307,400	12,555,900
Mt. Edgumbe Boarding School	11,420,600		
Mount Edgumbe Boarding School Facilities Maintenance	1,442,700		

*** Sec. 2.** The following sets out the funding by agency for the appropriations made in sec. 1 of this Act.

Funding Source	Amount
Department of Education and Early Development	
1002 Federal Receipts	250,000
1004 Unrestricted General Fund Receipts	12,111,400
1005 General Fund/Program Receipts	307,400
1007 Interagency Receipts	7,473,300
1043 Federal Impact Aid for K-12 Schools	20,791,000
1066 Public School Trust Fund	10,000,000
1108 Statutory Designated Program Receipts	170,000
*** Total Agency Funding ***	51,103,100
* * * * * Total Budget * * * * *	51,103,100

*** Sec. 3.** The following sets out the statewide funding for the appropriations made in sec. 1 of this Act.

Funding Source	Amount
Unrestricted General	
1004 Unrestricted General Fund Receipts	12,111,400
*** Total Unrestricted General ***	12,111,400
Designated General	
1005 General Fund/Program Receipts	307,400
*** Total Designated General ***	307,400
Other Non-Duplicated	
1066 Public School Trust Fund	10,000,000

1108	Statutory Designated Program Receipts	170,000
***	Total Other Non-Duplicated ***	10,170,000
Federal Receipts		
1002	Federal Receipts	250,000
1043	Federal Impact Aid for K-12 Schools	20,791,000
***	Total Federal Receipts ***	21,041,000
Other Duplicated		
1007	Interagency Receipts	7,473,300
***	Total Other Duplicated ***	7,473,300

*** Sec. 4.** DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT. The sum of \$30,000,000 is appropriated from the general fund to the Department of Education and Early Development to be distributed as grants to school districts according to the average daily membership for each district adjusted under AS 14.17.410(b)(1)(A) - (D) for the fiscal year ending June 30, 2020.

*** Sec. 5.** FUND CAPITALIZATION. (a) The amount necessary to fund the total amount for the fiscal year ending June 30, 2019, of state aid calculated under the public school funding formula under AS 14.17.410(b), estimated to be \$1,189,677,400, is appropriated from the general fund to the public education fund (AS 14.17.300).

(b) The amount necessary, estimated to be \$78,184,600, to fund transportation of students under AS 14.09.010 for the fiscal year ending June 30, 2019, is appropriated from the general fund to the public education fund (AS 14.17.300).

(c) The amount necessary to fund the total amount for the fiscal year ending June 30, 2020, of state aid calculated under the public school funding formula under AS 14.17.410(b) is appropriated from the general fund to the public education fund (AS 14.17.300).

(d) The amount necessary to fund transportation of students under AS 14.09.010 for the fiscal year ending June 30, 2020, is appropriated from the general fund to the public education fund (AS 14.17.300).

*** Sec. 6.** LAPSE. The appropriations made in sec. 5 of this Act are for the capitalization of a fund and do not lapse.

*** Sec. 7.** CONTINGENCY. The appropriations made in secs. 4 and 5(c) and (d) of this Act are contingent on passage by the Thirtieth Alaska State Legislature and enactment into law of a version of Senate Bill 26.

* **Sec. 8.** Sections 4 and 5(c) and (d) of this Act take effect July 1, 2019.

* **Sec. 9.** Except as provided in sec. 8 of this Act, this Act takes effect July 1, 2018.

ISSUES PRESENTED

Governor's obligation to execute the law. The Alaska Constitution vests in the governor the responsibility "for the faithful execution of the laws."¹ The power of the governor to abrogate a law is limited to circumstances where the law is "clearly unconstitutional under a United States Supreme Court decision dealing with a similar law."² May the governor unilaterally refuse to execute validly enacted appropriations based solely on an attorney general opinion alleging that the appropriations are unconstitutional?

Legislative power of appropriation. The legislature has the power of appropriation under art. IX, sec. 13 of the Alaska Constitution. There are no temporal limits on this power enumerated in the Alaska Constitution. Does any section of the Alaska Constitution limit the legislature's appropriation power to appropriations only for the next fiscal year, thus precluding forward-funded appropriations?

¹ Article III, sec. 16, Constitution of the State of Alaska.

² *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003); see also *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) ("Early in this country's jurisprudence it was established that we are a government of laws, not of men, and that the task of expounding upon fundamental constitutional law and its application to disputes between various segments of government and society rests with the judicial branch of government." (citing *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803))).

Duty to provide for a system of public education. Even if there is an implicit limitation on the appropriation power, is there an exception when the forward-funded appropriations are necessary for the legislature to carry out its duty to fund public education under the public education clause?

INTRODUCTION

In 2018, to stabilize funding for public education, the Thirtieth Alaska State Legislature passed SCS HB 287(FIN) ("HB 287"), an appropriations bill that provided forward funding for public education for fiscal year 2020, a single year in advance of the upcoming fiscal year.³ [Exc. 1-6] The appropriations were not vetoed by the sitting governor and were enacted into law. [Exc. 1-6] After Governor Dunleavy took office, he introduced a proposed budget that sought to reduce and repeal the fiscal year 2020 education funding. [R. 524] The legislature rejected this proposal.⁴ Contrary to the enumerated duty under art. III, sec. 16 of the Alaska Constitution, Governor Dunleavy later refused to execute the appropriations made in HB 287 for fiscal year 2020, and the legislature filed suit.

The legislature holds the power to appropriate funds, and this power to appropriate is a core function of the legislature.⁵ The Alaska Constitution contains no temporal limits on the legislature's power of appropriation and does not prohibit the legislature from exercising its power of appropriation to forward fund public education by one fiscal year.

³ Ch. 6, SLA 2018. This brief refers to these appropriations as "forward funding" or "forward-funded appropriations."

⁴ See ch. 1, FSSSLA 2019.

⁵ Article IX, sec. 13, Constitution of the State of Alaska.

The governor's refusal to execute validly enacted appropriations, on the other hand, wholly disregards the separation of powers doctrine and the governor's explicit obligation under art. III, sec. 16 of the Alaska Constitution to faithfully execute the laws of this State. In this appeal, the governor fails to address this unprecedented refusal to execute the law, while seeking to expand the power of the executive at the expense of the legislature's power of appropriation and the judiciary's power to adjudicate the constitutionality of legislative acts.

Under the Alaska Constitution, the legislature also bears the sole responsibility and authority to "establish and maintain a system of public schools,"⁶ and in doing so, the legislature has a long history of forward funding education.⁷ [R. 505-513] Thus, the governor's refusal to execute the forward-funded appropriations "infringe[d] upon the legislature's power of appropriation and duty to fund public education under the Public Education Clause." [Exc. 189]

⁶ Article VII, sec. 1, Constitution of the State of Alaska.

⁷ See, e.g., AS 14.17.300 (establishing public education fund and allowing money appropriated to the fund to be spent "in aid of public schools and for centralized correspondence study programs . . . and for transportation of pupils"); ch. 16, sec. 28(c), SLA 2014 (maintaining balance in the public education fund sufficient to forward fund education for the next fiscal year), ch. 14, sec. 28(e), SLA 2013 (same); ch. 15, sec. 26(f), SLA 2012 (same).

The governor repeatedly claims that the legislature violated an "annual appropriation model" inferred from various provisions in the constitution. The governor fails to identify, however, how the legislature violated any of the enumerated provisions of the Alaska Constitution that purportedly make up this "annual appropriation model." Assertions that an "annual appropriation model" should prevent the legislature from forward funding education ignore the reality that all budgeting is prospective and that the legislature always retains the power to amend, repeal, or reappropriate appropriations--a power that the legislature exercises every budget cycle.

The governor's argument that it is more difficult for a new legislature to amend or repeal an appropriation previously enacted into law than to enact a new one is a fallacy. The legislature has amended or repealed other forward-funded appropriations specific to public education on multiple occasions in the past.⁸ Notably, this case arose only after the governor failed politically. After the governor was unable to persuade the legislature to reduce the fiscal year 2020 funding for public education, he unilaterally withheld the validly

⁸ See, e.g., ch. 23, sec 31, SLA 2015 (reducing the appropriations made in ch. 16, sec. 28(c), SLA 2014 from \$1,202,568,100 to \$77,008,600); ch. 38, sec. 42(b), SLA 2015 (repealing \$32,243,700 in one-time funds to be distributed to public schools in fiscal year 2016, along with \$19,904,200 to be distributed to public schools in fiscal year 2017); ch. 18, secs. 32(c)-(d), SLA 2014.

appropriated funds. [Exc. 17-18] The superior court properly held this act was a violation of the governor's duty to faithfully execute the law.⁹ [Exc. 189]

The Thirtieth Alaska State Legislature's decision to forward fund education by a single fiscal year was not a novel approach to funding public education, and a decision by this Court to affirm the legislature's action in no way will result in the opening of "Pandora's Box" as claimed by the governor. As state revenues continue to decline, the legislature will continue to thoroughly examine every corner of the state budget, including appropriations previously enacted, just as it did in this case.¹⁰

The governor repeatedly attempts to cast the issues presented in this case in a hypothetical manner, raising the specter of some dreaded slippery slope, rather than discussing the facts before this Court. This Court is not asked to opine whether all future attempts by the legislature to forward fund appropriations will pass constitutional muster. The issues here are limited to the Thirtieth Alaska State Legislature's decision

⁹ Article III, sec. 16, Constitution of the State of Alaska ("The governor shall be responsible for the faithful execution of the laws.").

¹⁰ See ch. 1, sec. 17(b), SSSLA 2019 (appropriating from the constitutional budget reserve, following receipt a three-fourths vote of the members of each house of the legislature, to fill the gap between fiscal year 2020 revenue and general fund appropriations, and explicitly including the 2018 appropriations to forward fund public education).

to forward fund education by a single fiscal year and the governor's refusal to execute those appropriations.

STATEMENT OF THE CASE

On April 18, 2018, the legislature passed HB 287, making appropriations for public education for fiscal year 2019 and forward funding public education for fiscal year 2020.¹¹ [Exc. 1-6] HB 287 was "intended to pass separately from the regular operating budget and early in the session to enable school districts to avoid mandatory teacher layoff notices."¹² [R. 442] Representative Paul Seaton, the sponsor of HB 287 further stated the following:

Even after the budget has passed the legislature, line item veto or veto reductions can be made by the Governor. In 2015, the Legislature needed to come back in special session to pass a second operating budget that included education funding. In 2016, the state operating budget was passed by the legislature on May 31. Last session, the state operating budget did not pass the Legislature until June 22 and [was] signed by the Governor on July 1. All this uncertainty for the funding amount forces school districts to draft multiple budgets. Anticipating low amounts requires districts to give termination notices (pink slips) to tenured teachers by May 15 and non-tenured teachers by the last day of school.¹³ [R. 442-43]

In addition to forward funding public education for fiscal year 2020, the legislature also appropriated \$30 million in one-time funds to public schools to be distributed as grants during

¹¹ Ch. 6, SLA 2018.

¹² HB 287 Sponsor Statement

¹³ *Id.*

fiscal year 2020 in HB 287.¹⁴ [Exc. 6] The forward-funded appropriations for fiscal year 2020 were enacted into law in 2018, with a delayed effective date of July 1, 2019, which is the beginning of fiscal year 2020.¹⁵

On May 3, 2018, Governor Bill Walker signed HB 287 into law, which consequently became ch. 6, SLA 2018. [Exc. 1-6] In November 2018, Governor Dunleavy was elected. On December 14, 2018, the newly elected governor released a proposed fiscal year 2020 budget prepared by the outgoing governor "simply to meet the statutory deadline." [Exc. 62; R. 32] That budget sought to amend the fiscal year 2020 appropriations to include the estimated amounts of the appropriations. [R. 520] This original fiscal year 2020 budget proposal also included a proposal to forward fund public education for fiscal year 2021. [R. 520]

The governor introduced an amended budget on February 21, 2019, seeking to reduce the amount of state aid to be appropriated to public schools by nearly 24 percent. [R. 524] The governor also sought to repeal the \$30 million in grants to be distributed to public schools in fiscal

¹⁴ Ch. 6, sec. 4, SLA 2018.

¹⁵ *Id.* at sec. 8.

year 2020. [R. 525] The governor's proposals were rejected by the legislature.¹⁶

On May 8, 2019, contrary to existing law and the prior attorney general's advice, Attorney General Kevin Clarkson issued an opinion concluding that the appropriations made by the legislature in HB 287 were unconstitutional.¹⁷

Without first challenging the constitutionality of the appropriations made in HB 287, the governor declined to, on or before July 15, 2019, execute or otherwise disburse one-twelfth of each school district's state aid appropriated by the legislature, as mandated under AS 14.17.610(a). Consequently, on July 16, 2019, the legislature filed a Complaint in the superior court, [Exc. 8-16] asking the court for a

[d]eclaratory judgment that Defendants . . . violated the Constitution of the State of Alaska by failing to execute the appropriation[s] made in [secs. 4, 5(c), and 5(d),] ch. 6, SLA 2018 and failing to distribute to school districts the amounts appropriated by the Legislature. [Exc. 14 - 15]

Funding to public school districts for 2019 and 2020 was subsequently disbursed pursuant to the superior court's order, dated July 16, 2019, which granted the parties' Joint Motion and Proposed Order Regarding Fiscal Year 2020 Education Funding Pending Resolution of Litigation. [Exc. 17-20] Upon the parties' filing of simultaneous motions

¹⁶ See Ch. 1, FSSLA 2019.

¹⁷ 2019 Op. Alaska Att'y Gen. (May 8).

for summary judgment, the superior court granted the legislature's request for summary judgment, holding that the governor violated art. III, sec. 16 of the Alaska Constitution in failing to disburse the forward-funded appropriations made in HB 287. [Exc. 180-89] The governor initiated this appeal.

STANDARD OF REVIEW

Questions of constitutional and statutory interpretation, including the constitutionality of a law, are questions of law to which this Court applies its independent judgment.¹⁸ When interpreting the Alaska Constitution, analysis "begins with, and remains grounded in, the words of the provision itself."¹⁹ This Court is "not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."²⁰ Instead, this Court must "look to the plain meaning and purpose of the provision and the intent of the framers."²¹ "Legislative history and the historical context,

¹⁸ *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

¹⁹ *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 926-28 (Alaska 1994)). The governor misstates the standard for interpreting the Alaska Constitution, citing *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). [Appellants' Brief at 12] This Court has much more recently stated that constitutional analysis begins with the "provision itself." *Wielechowski*, 403 P.3d at 1146.

²⁰ *Wielechowski*, 403 P.3d at 1146 (quoting *Hickel*, 874 P.2d at 927-28) (alteration in original).

²¹ *Id.* (quoting *Hickel*, 874 P.2d at 926).

including events preceding ratification, help define the constitution."²²

"A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."²³ "[A] party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation."²⁴

ARGUMENT

I. The governor violated the Alaska Constitution by refusing to execute the forward-funded appropriations.

Two key facts are undisputed in this case: (1) the appropriations made in HB 287 were enacted into law;²⁵ [Exc. 1-6] and (2) the governor refused to execute those appropriations. [R. 173] Under art. III, sec. 16 of the Alaska Constitution "[t]he governor shall be responsible for the faithful execution of the laws." The governor disputes the constitutionality of the appropriations made in HB 287 as a *defense* for his refusal to execute the appropriations. Because the governor ignored previous decisions by this Court that expressly limit the

²² *Id.* at 1147 (citing *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016)); see also *State v. Alex*, 646 P.2d 203, 208 (Alaska 1982); *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 800, 804 (Alaska 1975).

²³ *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (quoting *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001)).

²⁴ *Id.*

²⁵ Ch. 6, SLA 2018.

governor's power to abrogate a legislative act,²⁶ and refused to execute the appropriations without first bringing a constitutional challenge, the complaint in this matter centers solely on the governor's duty under art. III, sec. 16 of the Alaska Constitution to faithfully execute the law. The governor's refusal to either execute the appropriations or seek a judicial decision as to their constitutionality cannot shift the burden of demonstrating the constitutionality of the appropriations made in HB 287 to the legislature.

In fact, this Court does not need to decide whether the appropriations made in HB 287 were constitutional. Rather, this Court should affirm the superior court decision on grounds that the governor violated art. III, sec. 16 of the Alaska Constitution when refusing to execute the appropriations made in HB 287.

A. The governor has a constitutional obligation to execute all laws, unless the law is "clearly unconstitutional."

Rather than properly challenging the constitutionality of the forward-funded appropriations in HB 287, the governor chose to ignore the appropriations, forcing the legislature to initiate this suit.²⁷ When the legislature raised this issue in

²⁶ See *Kodiak Island Borough*, 71 P.3d at 900 (limiting governor's power to abrogate statutes that are clearly unconstitutional).

²⁷ The governor could have sued the commissioner responsible for enforcing the law, as was done in *State ex rel Hammond v. Allen*, or sought declaratory relief. See *State ex rel Hammond v.*

the superior court, the governor merely responded that "[t]he governor is bound to comply with the Alaska Constitution which takes precedence over any particular bill passed by the legislature."²⁸ [Exc. 133] But the governor does not identify a constitutional provision directing him to ignore the art. III, sec. 16, duty to faithfully execute the laws. Even if the governor questions the constitutionality of a law passed by the legislature, the governor cannot simply ignore the law. This Court has instead limited the governor's power to abrogate a law passed by the legislature to situations where the law is "clearly unconstitutional."²⁹

In *Kodiak Island Borough v. Mahoney*, a case examining whether a municipal clerk could refuse to certify a proposed initiative on constitutional grounds, this Court held that

[w]e read the clerk's power to declare an initiative proposal unconstitutional as being somewhat analogous to the power of a state executive agency to declare a state statute unconstitutional. In both cases it is the courts, not the clerk or the executive, that are

Allen, 625 P.2d 844 (Alaska 1981) (Governor sued the Commissioner of Administration to determine effect of repeal by referendum on statutory retirement system for legislators); see also *Legislative Council v. Knowles*, 988 P.2d 604, 609 n.22 (Alaska 1999).

²⁸ The governor argued that the appropriations made in HB 287 were "essentially indistinguishable from the future revenue appropriations deemed unconstitutional by the superior court in 1985" and that the governor was excused from executing the appropriations because "the attorney general informed the governor in a formal opinion that the appropriation was unlawful." [Exc. 133]

²⁹ *Kodiak Island Borough*, 71 P.3d 896 at 900.

primarily responsible for constitutional adjudication. Yet in order to avoid a waste of resources and needless litigation it is right that the latter should have the power to refuse to give life to proposals or laws that are clearly unconstitutional. In the case of executive agencies we have held that they have authority to "abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional."³⁰

Thus, in this case, it would have been permissible for the governor to withhold spending and refuse to execute the appropriations made in HB 287 only if the United States Supreme Court had previously found such appropriations unconstitutional. The United States Supreme Court has never issued such a ruling, nor has the governor alleged that any other court has rendered a ruling on the issues presented in this case.³¹

³⁰ *Id.* at 900 (quoting *O'Callaghan v. State, Director of Elections*, 6 P.3d 728, 730 (Alaska 2000)).

³¹ In the superior court, the governor argued that the decision in *Trustees for Alaska v. State*, 3-AN-84-12053 Civ. (Aug. 30, 1985), provided grounds for refusing to execute the appropriations at issue. [Exc. 30-31; R. 27-28] This argument is frivolous. Not only does the *Trustees for Alaska* decision carry no precedential value, it is easily distinguishable from this case. The appropriations at issue in *Trustees for Alaska* were continuing appropriations enacted in codified law that would have extended into the unforeseeable future. The appropriations in this case were not continuing and were not codified; they were appropriations for one fiscal year in advance. See ch. 6, SLA 2018. [Exc. 1-6]

B. The appropriations at issue were not "clearly unconstitutional."

It is also undisputed that whether the legislature may forward fund education by one fiscal year is a matter of first impression. Because no other court has issued an opinion on this issue, there was no basis for the governor to withhold disbursement of the funds on grounds that the appropriations were "clearly unconstitutional." Further, the governor has not asserted that the appropriations made in HB 287 were "clearly unconstitutional" in this appeal.

Explicit disagreement between the past two attorney generals about the constitutionality of these forward-funded appropriations only highlights that the appropriations were far from clearly unconstitutional.

In 2018, then Attorney General Jahna Lindemuth, in analyzing the forward-funded appropriations at issue in this case, stated,

[s]ections 4, 5(c), and 5(d) include education related appropriations for the fiscal year 2020 from the general fund. Pursuant to sec. 8, these appropriations do not take effect until July 1, 2019. *Although not common, it is permissible for the legislature to include in a budget bill appropriations for future fiscal years.* These appropriations do not bind a future legislature because a future legislature can always amend, reappropriate, or repeal the future appropriations.³² [R. 514-516]

³² 2018 Op. Alaska Att'y Gen. (May 1) (emphasis added). That opinion was authored by the same Assistant Attorney General who was counsel of record for Governor Dunleavy in this case in the superior court. [R. 528-529]

A year later, Attorney General Kevin Clarkson issued an opinion concluding that the appropriations made by the legislature in HB 287 were unconstitutional.³³ Without any change in law explaining the abrupt shift in opinions as to the constitutionality of the appropriations made in HB 287, the governor can hardly make a showing that the appropriations were "clearly unconstitutional," to excuse the refusal to execute the appropriations and disburse the funds as appropriated.

C. The attorney general cannot declare a law unconstitutional.

In the superior court, the governor alleged that he should be excused from executing the appropriations at issue because "the attorney general informed the governor in a formal opinion that the appropriation was unlawful."³⁴ [Exc. 133] But this Court has previously held that the attorney general has no power to declare a law unconstitutional.

³³ 2019 Op. Alaska Att'y Gen. (May 8) (opining that "[a]bsent an appropriation for FY20 K-12 education in the budget bills passed this legislative session, the only appropriation for education will be one that is unconstitutional in the view of the Department of Law."). It is the judicial branch, however, not the Department of Law that determines the constitutionality of laws passed by the legislature.

³⁴ The governor also suggested that to execute the appropriations would have somehow violated the constitution. [Exc. 133] The Alaska Constitution, however, does not provide an exception to the governor's duty to faithfully execute the laws of this State under art. III, sec. 16. In Appellants' Brief, the governor provides no legal justification excusing the refusal to execute the appropriations at issue prior to the filing of this lawsuit and the stipulation to disburse funds. [Exc. 17-20]

In *O'Callaghan v. Coghill*, this Court stated,

[f]or an attorney general to stipulate that an act of the legislature is unconstitutional is a clear confusion of the three branches of government; it is the judicial branch, not the executive, that may reject legislation. . . . *An attorney general can have no authority to be the binding determiner that legislation is unconstitutional.*³⁵

In reaching this conclusion, this Court cited an opinion of the Pennsylvania Supreme Court on this issue, which explained,

[i]f the Attorney General in his opinion believes that a statute is unconstitutional, he has the right and indeed the duty to either cause to be initiated an action in the courts of this Commonwealth and thus obtain judicial determination of the issue or he may prepare, for submission to the General Assembly, such revision of the statute as he may deem advisable. . . . There may exist an exception in those instances wherein the Supreme Court of the United States has declared unconstitutional a statute of another jurisdiction, which statute is the same as or similar to the Pennsylvania statute in all important aspects. In such instances, the Attorney General being of the opinion that a United States Supreme Court decision is controlling as to a Pennsylvania statute, he may implement that judicial decision. We do not mean to suggest that in all cases the Attorney General should enjoy this latitude, only in those cases when the applicability of the U.S. Supreme Court decision to a Pennsylvania statute is clear and unequivocal. We conclude, therefore, that *the Attorney General is without power or authority, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute which is*

³⁵ 888 P.2d 1302, 1303 (Alaska 1995) (emphasis added) (quoting *National Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986)).

*presumptively constitutional until declared otherwise by the Judiciary.*³⁶

Not only was it impermissible to rely on the opinion of the attorney general when refusing to execute the appropriations made in HB 287, the timing of that opinion is also important. It was only after the legislature rejected the governor's proposal to reduce the amount of state aid appropriated to public schools by nearly 24 percent and to eliminate the \$30 million in grants appropriated to public schools that Attorney General Clarkson issued the opinion that the appropriations were invalid.³⁷ Thus, it was not until the governor failed to persuade the legislature to adopt the governor's proposed budget reductions that the attorney general opined that the appropriations were unconstitutional.

In sum, the governor's unilateral action in refusing to execute the appropriations made in HB 287 was a clear violation

³⁶ *Hetherington v. McHale*, 311 A.2d 162, 167-68 (Pa. Commw. Ct. 1973), *rev'd on other grounds*, 329 A.2d 250 (Pa. 1974) (emphasis added).

³⁷ See CSSSHB 39(FIN) am(brf sup maj fld) (House did not include repeal of forward funding in the version it passed on April 11, 2019; SCS CSSSHB 39(FIN) am S (Senate did not include repeal of forward funding in the version it passed on May 1, 2019); 2019 Op. Alaska Att'y Gen. (May 8). In addition, as stated above, nothing in the legal landscape changed in the year between the opinion rendered by Attorney General Lindemuth, approving the forward-funded appropriations, and the opinion later issued by Attorney General Clarkson, claiming that the appropriations were unconstitutional.

of the governor's duty under art. III, sec. 16 to faithfully execute the laws.³⁸ The superior court agreed, holding,

[a]rt. III, § 16 of the Alaska Constitution vests the governor with the responsibility "for the faithful execution of the laws." The Defendants thus have a constitutional obligation to execute the appropriations in SLA 2018, Ch. 6, § 4, § 5(c), and § 5(d), and therefore must execute them accordingly. To do otherwise infringes upon the legislature's power of appropriation and duty to fund public education under the Public Education Clause. (footnote omitted) [Exc. 188-189]

To empower the governor to unilaterally declare laws passed by the legislature invalid or unconstitutional would undermine the most basic principles of the separation of powers doctrine. This Court should affirm the decision of the superior court on the grounds that the governor had a constitutional obligation to disburse the appropriations as passed by the legislature in the absence of any showing that the appropriations were "clearly unconstitutional."

II. The legislature properly exercised its appropriation power to forward fund public education under the public education clause of the Alaska Constitution.

Article VII, sec. 1 of the Alaska Constitution requires the legislature to "establish and maintain a system of public

³⁸ The governor's refusal to execute the appropriations also resulted in a violation of AS 14.17.410 and AS 14.17.610(a), which require the state to disburse one-twelfth of each school district's state aid from the funds for public school districts appropriated by the legislature on or before July 15, 2019. The superior court agreed, noting that "[t]he Defendants also have a statutory obligation to execute the appropriations pursuant to AS 14.17.610 and AS 14.17.410." [Exc. 189]

schools." Therefore, the purpose of the appropriations at issue is paramount in evaluating the constitutional interests at stake in this case.

Most recently, in analyzing public education funding, this Court explained that,

[i]n allocating power and responsibility under the Alaska Constitution, the delegates sought to provide the State with room to grow and to adapt. They designed the constitution to be flexible so that the legislature could fill in the exact details later. Though the delegates sought to limit certain powers and to avoid certain pitfalls, they did not intend to compel the State to unravel existing programs nor did they intend to prevent the State from experimenting and adapting to changing circumstances.³⁹

The need for flexibility in providing public education has been recognized by both the Alaska Supreme Court and the United States Supreme Court, each holding that given the "complexity of the problems of financing and managing a statewide public school system . . . within the limits of rationality, the legislature's efforts to tackle the problems should be *entitled* to respect."⁴⁰

The legislature--and the legislature alone--is responsible for funding public education and preserving the ability to adapt to a mounting problem relative to budgeting for public education

³⁹ *Ketchikan Gateway Borough*, 366 P.3d at 94-95 (internal quotations omitted).

⁴⁰ *Hootch*, 536 P.2d at 803-04 (emphasis added) (internal quotations omitted) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

in this state is paramount. As the superior court properly held,

[s]imply put, forward-funding appropriations here do not constrict the legislature's power over free disposition of state funds to such a degree that they exceed the legislature's freedom to experiment and adapt to the changing circumstances and hurdles of the day, *particularly in the field of public education.* (emphasis added) [Exc. 187-188]

III. The Alaska Constitution does not mandate an "annual appropriation model."

The Alaska Constitution imposes no temporal limits on the legislature's power of appropriation. The governor, through constant repetition of the phrase "annual appropriations model," implores this Court to improperly add missing terms or hypothesize differently worded provisions to create a temporal limit that does not otherwise exist.⁴¹ In order to achieve the result the governor seeks, this Court must re-write art. IX of the Alaska Constitution. The governor has failed to allege a violation of an enumerated clause of the Alaska Constitution. Instead, the governor asks this Court to infer a new constitutional restriction on the legislature's power of appropriation; a request that should unquestionably be rejected.

The superior court correctly held that none of the finance clauses in art. IX of the Alaska Constitution--either alone or in conjunction with each other--explicitly mandate a so-called

⁴¹ See *Wielechowski*, 403 P.3d at 1146.

"annual appropriation model."⁴² [Exc. 185-186] Because there are no temporal limits on the power of appropriation and there is no "annual appropriation" clause in the Alaska Constitution, the real question in this case is whether the appropriations at issue violated "the dedicated funds clause, the appropriations clause, the budget clause, [or] the veto clause." [Appellants' Brief at 14]

The governor cites a few lines of dicta from previous decisions by this Court in an attempt to create a new "annual appropriation" restriction on the legislature's power of appropriation. [Appellants' Brief at 13] This Court has previously stated,

[s]ection 7 of article IX provides in relevant part that "[t]he proceeds of any state tax or license shall not be dedicated to any special purpose." The drafters

⁴² See art. IX, sec. 7, Constitution of the State of Alaska ("The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska."); art. IX, sec. 12 ("The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State."); art. IX, sec. 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void."); art. II, sec. 15 ("The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills.").

of the anti-dedication clause adopted it to preserve control of and responsibility for state spending in the legislature and the governor." [T]he more special funds [that] are set up the more difficult it becomes to deny other requests until the point is reached where neither the governor nor the legislature has any real control over the finances of the state." The anti-dedication clause helps preserve the state's annual appropriation model and ensures that governmental departments will not be restricted in requesting funds from all sources.⁴³

The governor repeatedly attempts to use a short phrase from the above quote as evidence of an "annual appropriation model" mandated by the Alaska Constitution. However, the historical explanation quoted above on the issue of *dedicated funds* does not limit the legislature's appropriation power. Instead, as correctly held by the superior court,

[w]hile Alaska's constitutional framers sought to protect state control over state revenue and to ensure legislative flexibility over the disposition of revenue sources, and to limit certain power and to avoid certain pitfalls, it is also apparent that the framers did not intend to prevent the state from experimenting and adapting to changing circumstances. Simply put, the forward-funding appropriations here do not constrict the legislature's power over free disposition of state funds to such a degree that they exceed the legislature's freedom to experiment and adapt to the changing circumstances and hurdles of the day, particularly in the field of public education. [Exc. 187-188]

Despite the governor's assertions in this appeal, the forward-funded appropriations at issue (1) were general fund appropriations that did not dedicate a particular tax or

⁴³ *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386, 389 (Alaska 2003).

license, (2) were still included in the next year's proposed gubernatorial budgets, (3) were expressly included by the legislature in the next year's operating budget, where the appropriations competed alongside all other general fund appropriations as the legislature balanced expenditures with anticipated revenue for that fiscal year, and (4) were subject to the sitting governor's line item veto at the time of enactment. Thus, the appropriations did not flout the intent of the framers or otherwise evade the *enumerated* constitutional checks on state spending.

A. The appropriations did not violate the dedicated funds prohibition.

This Court has never held that a legislative *appropriation* can violate the dedicated funds prohibition. When considering the dedicated funds prohibition in a number of other cases,⁴⁴ this Court has not considered whether an appropriation to forward fund public education through use of a delayed effective date violates the dedicated funds clause.

1. The forward-funded appropriations did not dedicate a particular state tax or license.

⁴⁴ See *Wielechowski*, 403 P.3d 1141; *Ketchikan Gateway Borough*, 366 P.3d 86; *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (Alaska 2009); *Myers*, 68 P.3d 386; *Sonneman v. Hickel*, 836 P.2d 936 (Alaska 1992); *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153 (Alaska 1991); *Alex*, 646 P.2d 203.

The governor relies on *Sonneman v. Hickel*,⁴⁵ arguing that the forward-funded appropriations violate the so called "annual appropriations model," but never argues that the forward-funded appropriations are dedicated funds. [Appellants' Brief at 29] The discussion by this Court in *Sonneman*, however, emphasizes that the framers of the Alaska Constitution sought to restrict the dedication of a particular "state tax or license" to a particular purpose, not to restrict the legislative power of *appropriation*.

This case is not centered on a *dedication of a particular tax to a particular purpose*; this case centers on *general fund appropriations*. [Exc. 6] The prohibition in art. IX, sec. 7 does not restrict the legislature's power of appropriation, and it is unmistakable from the constitutional convention proceedings that art. IX, sec. 7 was not intended to restrict the legislature from making the type of appropriation it did in this case. As Delegate White stated, "[t]he Committee intends that this apply to the allocation of *particular taxes to a particular purpose and no more than that*."⁴⁶

Here, the legislature forward funded appropriations "from the general fund"; it did not dedicate any particular revenue stream. [Exc. 6] This distinguishes the appropriations from

⁴⁵ 836 P.2d 936.

⁴⁶ 4 PACC 2405 (Jan. 17, 1956) (emphasis added).

other cases where this Court has found an improper dedication.⁴⁷ Even the executive branch has previously recognized that the dedicated funds clause addresses the dedication of revenue from a specific source to a specific purpose, once arguing to this Court, "[t]his is not a dedicated funds problem because money is not pre-pledged from a particular source of revenue to a particular purpose."⁴⁸

Because the legislature did not dedicate a particular state tax, license, or revenue stream to fund the state's portion of public education funding, the legislature's response to the education funding crisis was not only permissible but constituted a rational policy approach to maintaining a system of public education. The superior court agreed, holding,

[t]he Dedicated Funds Clause seeks to preserve an annual appropriation model which presumes that not only will the legislature remain free to appropriate all funds for any purpose on an annual basis, but that government departments will not be restricted in requesting funds from all sources. . . . *[T]he appropriations at issue do not directly violate the prohibition on the dedication or earmarking of a particular revenue source, which is the particular fiscal evil for which the clause was adopted.* (emphasis added) [Exc. 186]

2. The forward-funded appropriations competed alongside all other general fund appropriations.

⁴⁷ See *Sonneman*, 836 P.2d at 939-40; *Alex*, 646 P.2d at 209. See also *Ketchikan Gateway Borough*, 366 P.3d at 98 (explaining how prior dedicated funds decisions had not considered the dedicated funds clause in light of state-local cooperative programs).

⁴⁸ Brief of Appellants/Cross Appellees State of Alaska, *State of Alaska v. Ketchikan Gateway Borough*, 2015 WL 4498941 at 36.

The governor further cites *Sonneman* to argue that forward-funded appropriations impede the legislature's ability to "decide funding priorities annually on the merits of the various proposals presented." [Appellants' Brief at 16] However, this argument depends on the misconception that once approved by the legislature, forward-funded appropriations cannot be considered again by the legislature. The facts of this case demonstrate otherwise and the legislature has a long history of approving and then amending or repealing forward-funded education appropriations.⁴⁹

In this case, the forward-funded appropriations were made from the general fund, but had a delayed effective date and did not take effect until the next fiscal year.⁵⁰ [Exc. 6]

⁴⁹ Amendments, repeals, and reappropriations are a regular part of the legislature's annual budget process, and appropriations for public education have never been "off limits" to the legislature for political or other reasons. In 2015, in sec. 31, ch. 23, SLA 2015, the legislature reduced the appropriation made in sec. 28(c), ch. 16, SLA 2014, from \$1,202,568,100 to \$77,008,600, which had the effect of eliminating the forward funding for the next fiscal year. That same year, the legislature also repealed one-time funding that was to be distributed to public schools in fiscal years 2016 and 2017. Sec. 42(b), ch. 38, SLA 2015 (repealing secs. 32(c) and (d), ch. 18, SLA 2014). [R. 399-402] Most recently, in 2018, the legislature repealed \$19,500,000 in public education funding that was appropriated to the curriculum improvement and best practices fund. Sec. 39, ch. 1, FSSLA 2019 (repealing sec. 27(c), ch. 19, SLA 2018). [R. 272]

⁵⁰ Because the appropriations were made from the general fund, they did not dedicate or earmark revenue from any particular tax or license.

Consequently, when the forward-funded appropriations took effect, the Thirty-First Alaska State Legislature had to ensure that there was sufficient revenue to cover all general fund appropriations, including those forward-funded appropriations. In order to balance anticipated revenue and general fund appropriations, the Thirty-First Alaska State Legislature voted to fund fiscal year 2020 general fund appropriation shortfalls, explicitly including the general fund appropriations made in HB 287, from savings in the constitutional budget reserve fund under art. IX, sec. 17(c) of the Alaska Constitution.⁵¹ This deficit-filling appropriation stated the following:

(b) If the unrestricted state revenue available for appropriation in fiscal year 2020 is insufficient to cover the general fund appropriations that take effect in fiscal year 2020 that are made in this Act . . . and the general fund appropriations made in ch. 6, SLA 2018, as passed by the Thirtieth Alaska State Legislature in the Second Regular Session and enacted into law, that take effect in fiscal year 2020, the amount necessary to balance revenue and general fund appropriations that take effect in fiscal year 2020 that are made in this Act . . . and the general fund appropriations made in ch. 6, SLA 2018, as passed by the Thirtieth Alaska State Legislature in the Second Regular Session and enacted into law, that take effect in fiscal year 2020 is appropriated to the general fund from the budget reserve fund (art. IX, sec. 17, Constitution of the State of Alaska).⁵²

⁵¹ Section 17(b), ch. 1, SSSLA 2019. Passage of this deficit-filling appropriation from the constitutional budget reserve fund requires a three-fourths vote of the members of each house of the Legislature. Alaska Const. art. IX, § 17(c).

⁵² Section 17(b), ch. 1, SSSLA 2019 (emphasis added).

Therefore, despite being enacted during the Thirtieth Alaska State Legislature, the forward-funded education appropriations still competed alongside all other general fund appropriations when the Thirty-First Alaska State Legislature balanced the fiscal year 2020 budget.

In balancing the budget, the legislature could have amended or repealed the forward-funded appropriations. [Exc. 187] Despite the governor's repeated attempts to persuade the legislature to do so, the legislature made the deliberate decision to allow the forward-funded appropriations to stand.⁵³ The facts of this case simply do not support a conclusion that forward funding education does violence to Alaska's constitutional design.

3. Forward-funded appropriations are not more difficult to amend or repeal.

The governor also incorrectly continues to argue that, with respect to appropriations, "it is much easier to block a proposal in the first place than to repeal or change it once it has been enacted." [Appellants' Brief at 27] From a legal perspective, it takes the same number of votes to amend or

⁵³ In fact, the Thirty-First Alaska State Legislature also passed appropriations to forward fund education for fiscal year 2021. However, those appropriations were vetoed *twice* by the governor. See secs. 33(i) and (j), ch. 1, FSSLA 2019; secs. 11(b) and (c), ch. 2, SSLA 2019. The legislature did not override the vetoes.

repeal an appropriation as it does to pass a new one.⁵⁴ The governor's argument also fails to appreciate the legislative procedure used to adopt appropriations in this state. This case involves appropriations for education, which are operating expenses contained in the state's operating budget. The operating budget is almost always approved after going to a conference committee in the legislature.⁵⁵ While the governor contends that "only a majority in one house of the legislature" can block an appropriation [Appellants' Brief at 27], if one house fails to approve an appropriation adopted by the other house, that appropriation is negotiated by a conference committee made up of three members of each house.⁵⁶ Appropriations not initially approved by one house regularly become part of the state's operating budget through the conference committee negotiation process.⁵⁷ Similarly, if one

⁵⁴ The Alaska Constitution does not differentiate between new laws passed and laws amending existing ones. See art. II, sec. 14, Constitution of the State of Alaska.

⁵⁵ Rule 42, Uniform Rules of Legislative Procedure. While an operating budget is not required to go to conference committee before enactment, counsel for the Alaska Legislative Council is not aware of a state operating budget that did not first go to conference committee.

⁵⁶ *Id.*

⁵⁷ For example, in 2020, the Alaska House of Representatives did not appropriate a permanent fund dividend, but the conference committee ultimately approved an appropriation in the amount of \$680,000,000. See sec. 23(d), ch. 8, SLA 2020 and CSHB 205(FIN) (Corrected) am(brf sup maj fld), Thirty-First Alaska State Legislature. Conference committee reports are not subject to amendment and both houses must adopt identical conference

house were to approve an amendment or repeal of a prior appropriation, if the other house did not approve that amendment or repeal, the proposal would go to conference committee for negotiation and would not be automatically "blocked." In that case, even if the amendment or repeal of the prior appropriation were not ultimately approved, that decision would be the will of the sitting legislature.⁵⁸

For all the above reasons, the superior court held that the model's spirit is outweighed by the legislature's power of appropriation and its specific prerogative and responsibility to maintain the Alaska public education system under the Public Education Clause. This is consistent with [this Court's] reasoning and conclusion in *Myers* where it had to weigh multiple competing values in assessing whether an appropriation indirectly contravened the Dedicated Funds Clause. The *Myers* court ultimately determined that the prohibition on dedicated funds had to yield to the

committee reports for a measure to pass. Rule 42, Uniform Rules of Legislative Procedure.

⁵⁸ A dedication by statute, however, would likely be more difficult to repeal than a prior appropriation. This is because of the constitutional "single subject" restriction. Art. II, sec. 13, Constitution of the State of Alaska. For a substantive dedication to be repealed, a standalone bill would need to be passed and approved, or be included in a bill on a similar subject (if one were by chance already before the legislature). The legislature, on the other hand, has a constitutional obligation to approve an operating budget -- so every regular session there will be an appropriations measure that an amendment or repeal of an enacted education appropriation could be included in -- the single subject requirement does not apply to appropriations. *Id.* Once approved by just a single house, the amendment or repeal would then be eligible for negotiation during the conference committee process described above.

legislature's power to manage and appropriate the state's assets.⁵⁹ [Exc. 187]

B. Forward-funded appropriations do not subvert the governor's veto power.

The governor argues that the forward-funded appropriations subvert the veto power under art. II, sec. 15 of the Alaska Constitution. The superior court, however, correctly determined that since the appropriations were subject to the governor's veto in 2018, the appropriations did not violate art. II, sec.

15. Specifically, the superior court held the following:

The parties do not dispute that the Thirtieth Legislature in 2018 passed the appropriations in HB 287 pursuant to its power of appropriation and that the governor in 2018 had the opportunity to veto the appropriations but chose not to. Accordingly, the appropriations do not violate either the legislature's power of appropriation or the governor's veto power. [Exc. 188]

The veto power is not personal to the governor in office on the *effective date* of legislation; it resides with the governor in office at the time the legislation is passed. The lack of veto authority by Governor Dunleavy in this case does not present a new or unique challenge; other incoming governors have faced similar circumstances. Indeed, governors are regularly required to enforce and execute laws they did not sign into law. If anything, Governor Dunleavy's refusal to execute the

⁵⁹ See *Myers*, 68 P.3d at 394 (Alaska 2003) (noting that "the anti-dedication clause clashes with the legislature's appropriation power").

appropriations enacted into law in HB 287 is a form of reach-behind veto that is not permitted under the Alaska Constitution.⁶⁰

C. The forward-funded appropriations do not run afoul of the appropriation clause or the budget clause.

Just as the appropriations made in HB 287 did not violate the dedicated funds prohibition or the veto clause, the appropriations did not violate the appropriations or budget clauses.

The only temporal restriction in the Alaska Constitution on appropriations requires that *the governor* submit a budget for the next fiscal year "at a time fixed by law."⁶¹ No such constitutional time constraint limits *the legislature's* power of appropriation. To even assert that the governor's budget obligations impose any kind of limit on the legislature's power of appropriation is a total fiction.

The governor's budgetary mandate under art. IX, sec. 12 of the Alaska Constitution provides the following:

Section 12. Budget. The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all

⁶⁰ If this Court were to restrict the legislature's right to pass legislation with delayed effective dates, it would be an enormous impingement of the legislature's law-making powers.

⁶¹ AS 37.07.020(a) requires the budget to become public information on December 15 and the appropriation bills, identical in content, to be delivered to the legislature before the fourth legislative day of the next regular session.

departments, offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

The governor's duty to submit a budget for the next fiscal year in no way binds the legislature or requires the legislature to enact appropriations consistent with the governor's request. It is unclear how a constitutional provision requiring the *governor* to submit to the legislature a proposed budget for the next fiscal year could serve as grounds for placing such a severe limit on legislative power.

Moreover, the concept of forward funding does not run afoul of art. IX, sec. 12 of the Alaska Constitution. Nothing prevents a governor from requesting that the legislature amend or repeal an appropriation as part of the governor's budget proposal for the next fiscal year. Not only is this a regular occurrence in the State's budgeting process,⁶² it is exactly what happened in this case. Both Governor Walker and Governor Dunleavy sought to amend the forward-funded appropriations as

⁶² See, e.g., ch. 17, sec. 22(a), SLA 2018; ch. 1, secs. 12, 16(c), 18(a)-(b), 20, 46, SSSLA 2017; ch.3, secs. 12(e), 36, 4SSLA 2016; ch. 1, secs. 15-16, SSSLA 2015; ch. 38, sec. 30, SLA 2015; ch. 18, sec. 30 SLA 2014.

part of their fiscal year 2020 budget requests to the legislature.⁶³

The legislature's policy decision to forward fund public education by one fiscal year did not impair the governor's power or duty to submit a budget proposal for fiscal year 2020 to the legislature. While the governor may have preferred that the legislature adopt the substantial reductions to public education funding for fiscal year 2020 that he proposed, the legislature chose not to do so after consideration and debate.⁶⁴

⁶³ The governor admitted to the superior court that "[b]oth the outgoing Governor Walker's proposed budget and the two budget submissions made by the Dunleavy administration included a proposed appropriation for FY20 education spending. However, neither house of the legislature included these appropriations in the version of the operating budget that each passed." (footnote omitted) [Exc. 34] As part of his budget for the "next fiscal year," Governor Walker also proposed that the legislature forward fund education appropriations for fiscal year 2021. [Exc. 150] Governor Walker did not propose forward funding any other state program.

⁶⁴ See ch. 1, FSSSLA 2019. This Court should take judicial notice of the fact that public education funding was a widely discussed issue during the fiscal year 2020 budget process. Indeed, amendments were offered to repeal the forward funding appropriated in HB 287. See, e.g., 2019 Senate Journal 983-84; 2019 House Finance Amendment LS #13 (available at http://www.akleg.gov/basis/get_documents.asp?session=31&docid=24363); see also Debate on CSSSHB 39(FIN) (April 11, 2019) (noting that fiscal year 2020 public education is fully funded through the appropriations made in HB 287, along with \$30 million in grants to be distributed to school districts in fiscal year 2020) (available at <https://www.360north.org/gavel/video/?clientID=2147483647&eventID=2019041134>); Nat Hertz, *Dunleavy says money set aside for Alaska schools is subject to veto. Lawmakers disagree*, KTOO Alaska's Energy Desk (April 11, 2019) (available at <https://www.ktoo.org/2019/04/11/dunleavy-says-money-set-aside->

Just as the legislature's decision to forward fund education did not have any impact on the governor's constitutional budgeting obligation, the appropriations did not otherwise violate the appropriations clause. In fact, the governor does not actually allege that the forward-funded appropriations violated the enumerated appropriations clause. Instead, the governor argues that the forward-funded appropriations violate the spirit of the appropriations clause as part of an "annual appropriations model." The governor's arguments fail to appreciate, however, that funding education continues to be part of the legislature's regular budget process every session. The Thirtieth Alaska State Legislature funded public education for fiscal year 2019, and forward funded public education for the next fiscal year (fiscal year 2020) through use of a delayed effective date.⁶⁵ [Exc. 1-6] Because public education for fiscal year 2020 was already funded, the next legislature (the Thirty-First Alaska State Legislature) sought to forward fund public education for the next fiscal year (fiscal year 2021).⁶⁶ [R. 518-520] Thus, despite the assertion that forward funding is contrary to an "annual appropriation model," even after passage of HB 287, public education funding

for-alaska-schools-is-subject-to-veto-lawmakers-disagree/).
[Exc. 147]

⁶⁵ Ch.6, SLA 2018.

⁶⁶ The fiscal year 2021 appropriations were vetoed by Governor Dunleavy.

continued to be considered a part of the legislature's normal budget process.

While the governor is attempting to miscast the issue in this case as one reaching beyond the education appropriations made in HB 287,⁶⁷ the facts before this Court do not support a conclusion that the appropriations were incompatible or inconsistent with Alaska's constitutional design. This Court should affirm the superior court's holding that "[t]he presumption of constitutionality that attaches to the appropriations at issue has not been rebutted." [Exc. 188]

CONCLUSION

This case began with the governor's unprecedented refusal to execute the law as required by the Alaska Constitution, yet the governor is asking this Court to significantly restrict the legislature's power of appropriation. Although the legislature initiated this case in the superior court, the legislature is in the unusual position of not bearing the burden of proving that the forward-funded appropriations were a valid exercise of the legislature's appropriation powers in fulfilling a constitutional duty to provide for a system of public education. The appropriations are presumed constitutional. The governor's

⁶⁷ This Court should not render an "opinion advising what the law would be upon a hypothetical state of facts." *Alaska Judicial Council v. Kruse*, 331 P.3d 375, 379 (Alaska 2014).

role in the appropriation process does not include the authority to unilaterally declare validly enacted appropriations unconstitutional as was done in this case. The governor's arguments that the forward-funded appropriations violated an "annual appropriation model" not found in the text of our constitution are simply not enough to overcome the presumption of constitutionality that attaches to these appropriations.

For these reasons, this Court should affirm the decision of the superior court in favor of the Alaska Legislative Council.