IN THE SUPREME COURT OF 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 No. S-18333** Trial Court Case No. 3AN-22-04028CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ADOLF V. ZEMAN

BRIEF OF APPELLANTS

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ALASKA CONSTITUTIONAL PROVISIONS

Article II, § 13. Form of Bills

Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

Article IX, § 13. Expenditures

No money shall be withdrawn from the treasury except in accordance with appropriations made by law.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.

Article IX, § 17. Budget Reserve Fund

(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. [Amended 1990]

ALASKA STATUTES

AS 37.14.750. Alaska higher education investment fund established.

(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.

PARTIES

Appellants Madilyn Short, Riley von Borstel, Kjrsten Schindler, and Jay-Mark Pascua (collectively the "Students") have all decided to pursue post-secondary educational opportunities in Alaska in part because of scholarship, grant, and loan monies that have been appropriated from the Alaska Higher Education Investment Fund ("HEIF"). [Exc. 2-5] Appellees Governor Michael J. Dunleavy (the "Governor"), the Office of Management and Budget within the Office of the Governor ("OMB"), and the Department of Administration (collectively the "Executive Branch") all had a role in transferring the more than $422 million from the HEIF into the Constitutional Budget Reserve ("CBR") in violation of the Alaska Constitution.

INTRODUCTION

Breaking with precedent from prior administrations, the Executive Branch reimagined an expansive definition of what funds are subject to the annual "sweep" of funds to repay the CBR in 2019. Although the legislature mustered enough votes to effectuate a "reverse sweep" and sidestep the issue that year, the legislature failed to garner sufficient votes for the current fiscal year ("FY2022"). The Executive Branch then took its expansive list of what funds and subfunds are subject to the sweep — which included more than $400 million that the legislature had appropriated to the HEIF, and more than $1 billion that the legislature had appropriated to the Power Cost Equalization ("PCE")

Endowment Fund — and moved those funds and more into the CBR where they can only be accessed by a three-quarters vote from both houses of the legislature.

This appeal squarely presents the following question for this Court: whether the monies the legislature appropriated to the HEIF are subject to the annual CBR sweep under article IX, section 17(d) of the Alaska Constitution. The superior court adopted the Executive Branch's position that this issue had already been decided in *Hickel v. Cowper*, and that no further analysis was necessary.[1] But *Hickel* did not analyze or decide this issue.

A standard constitutional analysis establishes that section 17(d) applies only to surplus, leftover, unobligated general funds remaining at the end of each succeeding fiscal year, not to funds that the legislature has already appropriated for a specific public purpose. Not only is this interpretation consistent with the plain language and purpose of section 17(d), it also respects the legislature's broad appropriation power under article II of our Constitution.

Because the superior court erred by declaring that the HEIF is subject to the annual CBR sweep, this Court should REVERSE the superior court and hold that the HEIF is not subject to the sweep contained in article IX, section 17(d) of the Alaska Constitution.

JURISDICTION

The superior court denied the Students' motion for summary judgment and granted the Executive Branch's cross-motion for summary judgment on February 17, 2022.

[1] 874 P.2d 922, 936 & n.32 (Alaska 1994) [hereinafter *Hickel*].

[Exc. 306-321] A final judgment was issued on February 22, 2022. [Exc. 322] This Court has jurisdiction to decide this appeal under AS 22.05.010.

ISSUE PRESENTED

Did the superior court err by concluding that monies the legislature appropriated to the HEIF for the public purpose of endowing student education are subject to the annual CBR sweep under article IX, section 17(d) of the Alaska Constitution?

STATEMENT OF THE CASE

I. Factual Background

A. Voters established the CBR in 1990.

The CBR was established after voters approved the amendment to the Alaska Constitution in 1990. [Exc. 17] The impetus behind the CBR was to encourage the legislature to set aside certain "windfall" profits from settlements related to resource extraction and place those profits in a reserve.[2] [Exc. 17; *see also* Exc. 58]

The CBR has four general characteristics outlined in the four subsections of article IX, section 17 of the Alaska Constitution. The CBR: (1) is capitalized through certain settlement proceeds and earnings;[3] (2) may be accessed by a simple majority of the legislature "[i]f the

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[2] *See Hickel v. Halford*, 872 P.2d 171, 178 (Alaska 1994) [hereinafter *Halford*]; *see id.* at 177 ("[T]he purpose of the amendment . . . was to remove certain unexpected income from the appropriations power of the legislature, and to save that income for future need." (footnote omitted)); *id.* at 177 n.9 ("Article IX, section 17 is a response to a perceived impending fiscal crisis resulting from a growing gap between State spending levels and general fund revenues. To combat this 'gap' and the crisis thought to accompany it, the amendment seeks to hold down current spending levels, by preventing the legislature from appropriating certain 'windfall' receipts *and* creating a savings fund to help offset future revenue declines." (emphasis in original) (citations omitted)).

[3] Alaska Const. art. IX, § 17(a).

amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year";[4] (3) may otherwise be accessed with a three-quarters vote from both houses of the legislature;[5] and (4) must be "repaid" annually if there is "money in the general fund available for appropriation at the end of each succeeding fiscal year."[6]

This Court has already addressed the first two subsections of section 17 in two prior cases.[7] This appeal concerns the final subsection relating to the annual replenishment of the CBR, accomplished by "sweeping" available money from the general fund at the end of each fiscal year.[8] Article IX, section 17(d) of the Alaska Constitution provides, in full:

> 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.[9]

This provision creates the budgetary mechanism commonly referred to as the CBR sweep, where any excess funds are "swept" back into the CBR at the end of each fiscal year with available monies.[10] Until very recently, the legislature has relied on funds from the CBR to

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4 Alaska Const. art. IX, § 17(b).

5 Alaska Const. art. IX, § 17(c).

6 Alaska Const. art. IX, § 17(d).

7 *See Hickel*, 874 P.2d at 923-35; *Halford*, 872 P.2d at 173.

8 Alaska Const. art. IX, § 17(d).

9 *Id.* (emphasis added).

10 *Id.*

balance the state's budget, and a "reverse sweep" vote to prevent excess monies from being used to repay the CBR requires a three-quarters vote in both houses of the legislature.[11]

B. The legislature established the HEIF in 2012.

The HEIF was established by the twenty-seventh legislature in 2012,[12] funded by $400 million the legislature had appropriated the year before.[13] [*See* Exc. 240-241] The HEIF's initial appropriation came from the Alaska Housing Finance Capital Corporation and was made at a time when the CBR was fully repaid. [*See* Exc. 175, 221-222, 241, 243] Enshrined in statute, the legislature intended for the HEIF to serve as a stable, long-term funding source for scholarships and grants for the Alaska Performance Scholarship ("APS") and Alaska Education Grant ("AEG") programs.[14] The legislature enacted this

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[11] *See* Alaska Const. art. IX, § 17(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.").

[12] *See* AS 37.14.750.

[13] *See also* ch. 74, § 27, FSSLA 2012 ("The [HEIF] established in AS 37.14.750 . . . is the fund identified in sec. 20(f), ch. 5, FSSLA 2011.").

[14] *See* AS 37.14.750(a) ("The [HEIF] is established . . . for the purpose of making grants awarded under [the AEG program] by appropriation to the account established under AS 14.43.915(a) and of making scholarship payments to qualified postsecondary institutions for students under [the APS program] by appropriation to the account established under AS 14.43.915(b)."). As was previously highlighted by the Alaska Legislative Council, [*See* Exc. 253-254] it was explained to the legislature that the HEIF "could be set up as an endowment so you pay out X percent per year from the fund." *See* Hearing on CSHB 104(RLS) Before the S. Fin. Comm., 27th Leg., 2d Sess., Audio, 09:51:11-09:51:18, http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202012-01-18%2009:00:00 (Jan. 18, 2012) (testimony of Jerry Burnett, Director, Administrative Services Division, Department of Revenue).

law to ensure that the fund existed into perpetuity, and explicitly provided that money the legislature appropriates to the fund "*does not lapse*."[15]

The legislature indicated its intent to preserve the corpus of the fund by directing the commissioner of revenue to annually identify 7% of the HEIF's value as being available annually for further appropriation to the APS and AEG programs, which also confirms that the HEIF was intended to act as an endowment for those programs.[16] Of those annually identified funds, two thirds are earmarked for the APS program,[17] along with one third for the AEG program.[18] The legislature can always appropriate more or less than 7% from the HEIF, including for other purposes, if the current legislature so desires.[19]

The APS program provides annual merit scholarships to Alaskans who attend qualified postsecondary educational institutions.[20] [Exc. 65; *see also* Exc. 21] Each APS recipient receives either $4,755, $3,566, or $2,378 annually based on that student's GPA and college entrance exam scores,[21] and nearly 3,000 students receive scholarships from the APS program each year. [Exc. 65; *see also* Exc. 21] The AEG program provides annual needs-based grants to Alaskans who attend qualified postsecondary educational

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15 AS 37.14.750(a) (emphasis added); *see also* AS 37.14.750(a)(1)-(4).

16 AS 37.14.750(c).

17 AS 14.13.915(b); *see also* AS 37.14.750(c)(2).

18 AS 14.13.915(a); *see also* AS 37.14.750(c)(1).

19 *See Wielechowski v. State*, 403 P.3d 1141, 1147 (Alaska 2017) (discussing the Alaska Constitution's anti-dedication clause).

20 *See* AS 14.43.810-.849.

21 *See* AS 14.43.825(a).

institutions.[22] [Exc. 72; *see also* Exc. 21-22] Each AEG recipient receives up to $4,000 annually from the program,[23] and nearly 3,000 students receive grants from the AEG program each year. [Exc. 72; *see also* Exc. 21-22]

Although the HEIF was originally established to provide funding only to the APS and AEG programs,[24] the legislature has more recently appropriated money from the HEIF to also support the Washington-Wyoming-Alaska-Montana-Idaho medical school ("WWAMI") program, including in FY2022.[25] [Exc. 77] The WWAMI program provides loans to Alaskans going to the four-year medical school at the University of Washington, through the Alaska Commission on Postsecondary Education ("ACPE"), to help cover the difference between in-state and out-of-state tuition. [*See* Exc. 22-23] These WWAMI program loans are forgiven for those who return to Alaska to work as doctors and residents after completing their medical training;[26] those who do not return must repay half of their

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22 *See* AS 14.43.400-.420. Students qualify for the AEG program primarily based on financial need. *See* AS 14.43.415(a)(3); *see also* 20 AAC 16.015(a); 20 AAC 16.037.

23 *See* AS 14.43.420(a).

24 *See* AS 37.14.750(a).

25 For example, in FY2022, the legislature also appropriated funding ($138,200) from the HEIF to the Live Homework Help program — run through the Division of Alaska State Libraries, Archives and Museums — which provides free live online tutoring to thousands of students throughout Alaska and is utilized by K-12 and introductory-level college students each year. [*See* Exc. 77]

26 *See* AS 14.43.510. One third of the loan is forgiven for each year a doctor works in rural Alaska, and one fifth of the loan is forgiven for each year a doctor works elsewhere in Alaska. AS 14.43.510(b).

loans to the ACPE, and those repayments have been appropriated back into the HEIF, including in FY2022.[27] [Exc. 79]

C. The Executive Branch identified the HEIF as being subject to the CBR sweep in 2019.

After the legislature failed to vote for the reverse sweep by the required three-fourths majority in both houses for the FY2020 operating budget in July 2019, then-OMB Director Donna Arduin sent a letter outlining which funds would be subject to the CBR sweep pursuant to article IX, section 17(d) of the Alaska Constitution. [Exc. 80-82] Director Arduin's letter was also accompanied by a specific list of funds and accounts OMB asserted were subject to the CBR sweep, which included the HEIF in its entirety.[28] [Exc. 83-84]

Director Arduin's designations were contrary to the positions of multiple prior administrations, and meant that 54 funds or "subfunds" were now subject to the sweep, in comparison to 32 "subfunds" which were previously so designated. [Exc. 59-60, 83-84] This broad determination of what funds or "subfunds" were subject to the sweep was also arbitrary, as 9 of the "subfunds" previously identified were no longer designated as being subject to the sweep. [*See* Exc. 59-60, 83-84] The HEIF's designation as a fund subject to the sweep was also consistent with the Governor's expressed desire to eliminate the HEIF; he introduced legislation earlier in 2019 that would have repealed the HEIF statutes, which did not pass. [*See* Exc. 87-100]

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[27] *See* AS 14.43.510(a).

[28] The HEIF was the second-largest fund deemed subject to the CBR sweep by OMB. [Exc. 59-60, 83-86, 239]

After the Executive Branch released Director Arduin's list, the legislature came up with enough votes to effectuate the reverse sweep at the end of July 2019.[29]

D. The Executive Branch maintained its position that the HEIF is subject to the CBR sweep for FY2022.

The legislature passed an operating budget for FY2022 in June 2021, and the Governor exercised his vetoes over the FY2022 budget on June 30, 2021.[30] The FY2022 operating budget included over $21 million in appropriations from the HEIF. [Exc. 78] The Governor did not exercise his line-item veto authority over any of these appropriations.

However, the legislature failed to achieve the three-quarters vote necessary in both houses to effectuate the reverse sweep.[31] And immediately after the budget was passed, the Executive Branch confirmed that it intended to sweep the funds identified by OMB in 2019 into the CBR, and that such monies would therefore not be available for the FY2022 appropriations. [Exc. 101-104] Relevant here, the Executive Branch indicated that all monies existing in the HEIF would be swept into the CBR, and that the FY2022 appropriations from the HEIF to support the APS, AEG, and WWAMI programs could not be honored. [*See* Exc. 101]

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29 *See* 2019 Senate Journal 1422; 2019 House Journal 1340.

30 *See generally* ch. 1, SSLA 2021.

31 *See* 2021 Senate Journal 1290-1291; 2021 House Journal 1318-1319.

E. The Governor later partially reversed his position and directed OMB to honor FY2022 appropriations from the HEIF, but maintained that the remainder of the HEIF's monies must be swept.

The Alaska Federation of Natives ("AFN") and nineteen other plaintiffs sued the Executive Branch over its decision to designate the PCE Endowment Fund as being subject to the sweep in July 2021. [Exc. 26-27] In August, the superior court in *AFN v. Dunleavy* agreed with those plaintiffs, concluding that the Executive Branch's interpretation of article IX, section 17(d) of the Alaska Constitution as including the PCE Endowment Fund was unconstitutional. [Exc. 105-126] The Executive Branch did not appeal that decision.

Later that month, Attorney General Treg Taylor authored a memorandum concerning all of the FY2022 appropriations that OMB had previously determined could not be honored because those appropriations were from funds swept into the CBR. [Exc. 127-129] And because Attorney General Taylor recognized that "monies which already have been validly committed by the legislature to some purpose should not be counted as available," [Exc. 128 (emphasis omitted) (quoting *Hickel*, 874 P.2d at 930-31)] he concluded that "it is legally defensible to release the funds and pay out the validly enacted appropriations for" FY2022. [Exc. 129]

Based on this new analysis, the Governor directed OMB to "immediately" honor the FY2022 appropriations from the HEIF and other funds and subfunds designated to be swept. [Exc. 130] But in spite of Attorney General Taylor's August memorandum — which correctly recognized that *all* existing appropriations "validly committed by the legislature to some purpose" are not sweepable [Exc. 128 (quoting *Hickel*, 874 P.2d at

930)] — the Executive Branch continued to assert that all remaining HEIF monies would nevertheless be subject to the annual CBR sweep. [Exc. 131-135]

II. Procedural History

The Students filed a complaint and motion for summary judgment on January 4, 2022, challenging the Executive Branch's sweep of the HEIF. [Exc. 1-50; *see also* Exc. 51-149] The parties jointly moved for expedited consideration, which was promptly granted. [Exc. 150-152] The Executive Branch filed a cross-motion for summary judgment, [Exc. 153-172; *see also* Exc. 173-200] and the Alaska Legislative Council filed an Amicus Brief in support of the Students' position. [Exc. 247-267; *see also* Exc. 268-274]

After full briefing and oral argument, [*See* Exc. 203-235, 275-296, 313; *see also* Exc. 236-246, 297-305] the superior court denied the Students' motion for summary judgment and granted the Executive Branch's cross-motion for summary judgment on February 17, 2022. [Exc. 306-321] The impact of the court's order is that more than $422 million that used to exist within the HEIF is now in the CBR, which means that money is no longer used as an endowment for education and can only be accessed by a three-fourths majority vote of both houses of the legislature instead of a simple majority vote as was intended for the HEIF monies.

The Students appeal.

STANDARD OF REVIEW

This Court "review[s] summary judgment rulings de novo,"[32] and applies its "independent judgment" to interpret "constitutional and statutory" provisions.[33] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[34] This Court "look[s] to the plain meaning and purpose of the provision and the intent of the framers"[35] when interpreting the Constitution, recognizing that "[l]egislative history and the historical context . . . help define the constitution."[36] This Court has also explained that "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [Courts] are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[37]

ARGUMENT

This Court has never had the opportunity to directly consider the plain language, legislative history, and purpose of article IX, section 17(d) of the Alaska Constitution until now. And after a clear-eyed and faithful analysis of section 17(d), this Court should agree

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32 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Seybert v. Alsworth*, 367 P.3d 32, 36 (Alaska 2016)).

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

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

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

36 *Id.* at 1147 (quoting *Ketchikan Gateway Borough*, 366 P.3d at 90).

37 *Id.* at 1146 (second alteration in original) (quoting *Hickel*, 874 P.2d at 927-28).

with the Students that the constitutional requirement to annually repay the CBR only applies to unappropriated, unobligated, surplus general fund monies.

In contrast, the Executive Branch's argument is based on a misreading of *Hickel v. Cowper* that undermines the legislature's appropriation power. Constitutionally-valid, non-lapsing appropriations — like the legislature's $400 million appropriation which capitalized the HEIF — cannot be undone by the section 17(d) sweep. Recognizing the tension with the legislature's article II appropriation power, the Executive Branch argues that the legislature's appropriations to the HEIF are somehow "not true" "spending" appropriations, and are therefore not protected from the section 17(d) sweep. But there are no "second-class" appropriations under the Alaska Constitution, and this Court should not depart from precedent and dilute the legislature's appropriation power by concluding otherwise.

Because the Students' interpretation of section 17(d) is consistent with that provision's plain language and purpose, and does not infringe on the legislature's article II appropriation power, this Court should adopt the Students' interpretation and hold that the HEIF is not subject to the annual CBR sweep.

I. Article IX, Section 17(d) Does Not Subject Appropriated Monies To The Annual CBR Sweep.

A. The plain language of section 17(d) confirms appropriated monies are excluded from the annual CBR sweep.

Article IX, section 17(d) of the Alaska Constitution provides:

> 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.[38]

The temporal phrase "at the end of each succeeding fiscal year" in section 17(d) is critical to understanding which specific monies are "available for appropriation" and therefore must be swept back into the CBR. This language necessarily exempts existing appropriations for a fiscal year from the sweep, and subjects only leftover, lapsed, or additional monies not subject to an existing appropriation to the sweep. Otherwise, the legislature would be unable to pass an effective budget to fund state government absent a three-fourths vote in both houses so long as any outstanding amounts must still be "repaid" to the CBR.[39] The temporal phrase in section 17(d) recognizes that one can only determine what monies are subject to the annual sweep after the legislature's annual budgeting process.

Under a commonsense interpretation of section 17(d), monies which have already been appropriated — like the previously-appropriated monies to the HEIF — are not "available for appropriation at the end of [the] succeeding fiscal year" *unless* the appropriation has lapsed *and* the funds are no longer obligated.[40] After all, section 17(d) must be read consistently with both article II and article IX, section 13 of the Alaska Constitution, which provides: "No money shall be withdrawn from the treasury except in accordance with

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38 Alaska Const. art. IX, § 17(d) (emphasis added).

39 *See* Alaska Const. art. IX, § 17(c).

40 The Executive Branch concedes that the appropriations to the HEIF had not lapsed at the time of the sweep. [*See* Exc. 127-129]

appropriations made by law. . . . Unobligated appropriations outstanding at the end of the period of time specified by law shall be void."[41]

This plain language reading is also consistent with the understanding of "general fund" at the time section 17 was added to the Constitution, a term that is not defined by either the Alaska Constitution or in statute.[42] The sweep applies only to monies in the general fund, and the phrase "the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year" is best understood to apply to monies "not designated for any specific purpose."[43]

To respect all provisions of the Alaska Constitution, only surplus funds — i.e., *unobligated* monies that are not subject to an existing legislative appropriation — should be subject to the annual CBR sweep.

B. The purpose of section 17(d) was to repay the CBR with any remaining surplus monies.

In addition to the plain language of section 17(d), this Court considers the "purpose of the provision and the intent of the framers" when interpreting the meaning of the Alaska

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41 Alaska Const. art. IX, § 13.

42 *See General fund*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("The primary operating fund of a governmental unit *not designated for any specific purpose*." (emphasis added)); *see also Hickel*, 874 P.2d at 928 ("The dictionary definitions of the controlling words . . . provide a helpful starting point.").

43 *See* Alaska Const. art. IX, § 17(d); *General fund*, BLACK'S LAW DICTIONARY (6th ed. 1990). Although the legislature by statute later created the HEIF as a subfund within the general fund, it is unlikely they were using the term "general fund" in the same way as it was used in section 17(d). *See* AS 37.14.750(a) ("The [HEIF] is established in the general fund . . . ."). There is no evidence that the legislature intended for the HEIF to be subject to the section 17(d) sweep. [*See* Exc. 253-254]

Constitution.[44] And because section 17(d) was adopted by a majority vote of the people after a resolution of the legislature passed by a two-thirds vote of each house,[45] determining the purpose of section 17(d) includes an examination of both the intent of the legislature that drafted the amendment, as well as consideration of how the voters may have understood the language when they adopted it.[46]

Here, both the framers' intent and voters' understanding of section 17(d) align with its plain language. The purpose of section 17(d) was to repay the CBR with any leftover, *surplus* general fund monies that remain "at the end of each succeeding fiscal year."[47] And there is no evidence that either the framers or the voters intended section 17(d) to dramatically reshape or limit the legislature's power to make valid, non-lapsing appropriations.

1. Framers' intent

At the outset, it is worth noting that there is little legislative history about section 17(d), because its language was added on the House floor at the tail end of the 1990 legislative session. [*See* Exc. 33-36] But the history that does exist confirms that the 1990

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44 *Wielechowski*, 403 P.3d at 1146 (quoting *Hickel*, 874 P.2d at 926); *see* Alaska Const. art. IX, § 17(d). The Students refer to the drafters of the constitutional amendment that created the CBR as its "framers" or "1990 framers," even though they were part of the 1990 legislature, to be consistent with this Court's precedent for analyzing amendments to the Alaska Constitution. *See Wielechowski*, 403 P.3d at 1144, 1146, 1148-50; *see also Hickel*, 874 P.2d at 928 (noting that it considered "the intent of the framers" when defining "amount available for appropriation" for purposes of section 17(b)).

45 *See* Alaska Const. art. XIII, § 1.

46 *See Wielechowski*, 403 P.3d at 1146-51.

47 Alaska Const. art. IX, § 17(d).

framers intended only for monies to repay the CBR if they were unreserved, surplus monies that had not already been appropriated.

Senate Joint Resolution 5 ("SJR 5"), the vehicle which allowed for the creation of the CBR, was completely rewritten through an amendment on the floor of the House on May 8, 1990.[48] Although only one short statement explained what would later become section 17(d), that statement was made by Representative Kay Brown, who would later author the sponsor statement in favor of creating the CBR.[49] [Exc. 57-58] And Representative Brown explained on the House floor that any money appropriated from the CBR "would be repaid . . . out of any general fund *surpluses* that *remain* at the end of a fiscal year."[50]

Relatedly, in an earlier Senate Finance Committee hearing considering a prior version of SJR 5, Senator Jan Faiks — another future author of the sponsor statement supporting creation of the CBR [*See* Exc. 58] — confirmed that section 17 targeted "*unrestricted* general funds":

> The new CS refers to "appropriations from the general fund," as opposed to the CS from yesterday that used the term "from the treasury." This makes it more consistent with public perception and alleviates a communications gap with what the

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48 1990 House Journal 4241-4243 (adopting the current version of article IX, section 17 of the Alaska Constitution by adopting Amendment No. 10 to SJR 5).

49 Representative Brown also happens to be one of the two representatives the *Hickel* Court relied on when interpreting the meaning of section 17(b). *See Hickel*, 874 P.2d at 929 & n.18 (relying on a statement of Representative Kay Brown).

50 *See* 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/121-HFLR-900508-2.mp3 (May 8, 1990) (emphasis added) (statement of Representative Kay Brown) [hereinafter Statement of Representative Kay Brown] ("If money is borrowed, or appropriated from the budget reserve fund in that manner, or any money taken out of it, [it] would be repaid to the budget reserve fund out of any general fund surpluses that remain at the end of a fiscal year.").

> Legislature appropriates, *which is unrestricted general funds*[.]"[51]

Taken together, these statements show that the 1990 framers believed that only *remaining unrestricted surpluses* in the general fund at the end of each fiscal year would be subject to the CBR sweep. Such "remain[ing]" "surpluses" would necessarily *not* include appropriations for the upcoming fiscal year; nor would it include monies that had previously been appropriated and remained obligated for a specific public purpose. It is also entirely consistent with the overall purpose of the CBR, which set aside certain windfall profits so that they could be used by a simple majority of the legislature in leaner times to help stabilize funding for the operation of state government.[52]

Critically, there is no indication whatsoever that the legislature somehow intended to either restrict its own appropriation power or undo prior appropriations that had not lapsed through section 17(d). There is also no legislative history showing that the 1990 framers intended to limit the legislature's ability to appropriate money to invest and save in such special funds or subfunds that happen to technically exist within the general fund, while still allowing the legislature to create special funds that are not subject to the CBR

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[51] *See* Hearing on SJR 5 Before the S. Fin. Comm., 16th Leg., 2d Sess. (Feb. 2, 1990) (statement of Senator Jan Faiks) [hereinafter Statement of Senator Jan Faiks] (emphasis added).

[52] *See Halford*, 872 P.2d 171, 177-78 & n.9 (Alaska 1994); *see also Hickel*, 874 P.2d at 929 ("One of the purposes of the [CBR] amendment . . . was to provide a 'stabilizing mechanism' in the budgetary process." (citation omitted)).

sweep outside the general fund, like the PCE Endowment Fund or the Earnings Reserve Account.[53] [*See* Exc. 121-125]

This Court has explained that a "robust discussion . . . would be expected" if the legislature had intended "a sweeping constitutional change and a consequent sweeping change to the state's budgetary framework."[54] The parties agree that the legislature has the power to set up and appropriate monies to special endowment funds like the HEIF.[55] And so it speaks volumes that the Executive Branch has not pointed to *any* legislative history supporting an interpretation of section 17(d) that somehow authorizes the sweep of monies that the legislature has already appropriated to a specific public purpose. [*See* Exc. 153-172, 275-296] That is because no such legislative history exists. The 1990 framers simply intended to repay the CBR with whatever "surplus[]" monies in the general fund may "remain" after all other legislative appropriations,[56] i.e., "unrestricted general funds."[57] After all, it would be *inconsistent* with the 1990 framers' overarching purpose of stabilizing state finances if the CBR's repayment provision were so powerful and draconian that it

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53 *See Wielechowski*, 403 P.3d at 1146-52.

54 *Id.* at 1150.

55 The parties agree that the HEIF is not a dedicated fund. [Exc. 22, 31, 160] Just as it is clear that the legislature can, and has, appropriated money from the HEIF for any public purpose (irrespective of the purposes listed in AS 37.14.750), it is just as clear that nothing in the Alaska Constitution prohibits the legislature from appropriating money to "set[] up" a "special fund[]" like the HEIF, including one with an appropriation that "does not lapse." *See State v. Alex*, 646 P.2d 203, 208-10 (Alaska 1982) (citing 4 Proceedings of the Alaska Constitutional Convention (PACC) at 2363 (Jan. 17, 1956)); AS 37.14.750(a).

56 *See* Statement of Representative Kay Brown.

57 *See* Statement of Senator Jan Faiks.

could undo valid appropriations,[58] including special funds contemplated by the delegates at the constitutional convention.[59]

2. Voters' understanding

In addition to the 1990 framers' intent behind section 17(d), what the voters reasonably understood Ballot Measure 1 to mean (the ballot initiative that created the CBR) comports with the framers' view: only leftover surplus general fund money would be used to repay the CBR.

In the voting booth, voters would have seen an explanation that money withdrawn from the CBR "would have to be paid back from money *left* in the treasury's general fund." [Exc. 57 (emphasis added)] Additionally, the nonpartisan legislative affairs agency explained in the 1990 general election voter pamphlet that, although "[m]oney . . . appropriated from the [CBR] must be repaid," that repayment would occur *only* with "*[s]urplus* general fund money." [Exc. 57 (emphasis added)] Furthermore, the statement in support of the measure clearly contemplated that only surplus funds would be used to repay the CBR; otherwise, its supporters would not have explained that "[i]f the next year['s] revenues are insufficient [and] the Legislature cannot afford to replenish the [CBR], the 'debt' will carry forward until it is repaid." [Exc. 58]

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58 *See Hickel*, 874 P.2d at 929; *Halford*, 872 P.2d at 177 n.9.

59 *See Alex*, 646 P.2d at 210 (noting that the purpose behind article IX, section 7 of the Alaska Constitution "was to allow for the setting up of certain special funds, such as sinking funds for the repayment of bonds, but to prohibit the earmarking of any special tax to that sinking fund" (citing 4 PACC at 2363)).

Again, the Executive Branch has not pointed to a single piece of contrary evidence on what voters would have understood section 17(d) to mean. [*See* Exc. 153-172, 275-296] And again, that is because no such evidence exists. If anything, opinion pieces published in the Anchorage Daily News about the CBR prior to the 1990 election confirm that voters — both for and against the creation of the CBR — understood that section 17(d) would only require repayment with "surplus" "leftover" monies.[60]

As this Court has explained when addressing arguments similar those propounded by the Executive Branch here, it would be "a far leap to conclude voters understood and intended . . . to [change] the legislature['s] broad [appropriation] power . . . . Surely there would have been some public discourse about a . . . sweeping [change in] legislative authority; its absence, like the absence of discussion in the . . . legislature, is telling."[61] Voters reasonably understood that the CBR would impose limitations on when the legislature could spend certain windfall profits;[62] voters would *not* have understood that the CBR would impose "sweeping" changes to the legislature's regular budgetary process with the power to undue valid appropriations.[63] All of the evidence surrounding the 1990

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60 *See* Staff, Opinion, "Bank it", ANCHORAGE DAILY NEWS, 1990 WLNR 4063810 (Aug. 31, 1990) ("If it passes, lawmakers can stash any *leftover* money [in the CBR]." (emphasis added)); Roger Cremo, Opinion, ANCHORAGE DAILY NEWS, 1990 WLNR 4069423 (Oct. 30, 1990) ("There is provision for restoration of money taken from [the CBR]. . . . [A]ll that's required is that the legislature put back into the fund any *surplus* left in the General Fund at the end of each year, until restoration is complete." (emphasis added)).

61 *Wielechowski*, 403 P.3d at 1151.

62 *See Hickel*, 874 P.2d at 929; *Halford*, 872 P.2d at 177 n.9.

63 *See Wielechowski*, 403 P.3d at 1151.

election shows that voters would have understood section 17(d) to apply only to leftover or surplus general funds remaining at the end of the fiscal year, consistent with its overall budgetary stabilization principle.[64]

This alignment between the 1990 framers' intent, voters' understanding, and the plain language of section 17(d), shows that the Students' interpretation is constitutionally sound and should be adopted by this Court.

II. The Executive Branch's Interpretation Of Section 17(d) Is Flawed.

A. The Executive Branch's first flaw is using only part of *Hickel*'s section 17(b) test to define the section 17(d) sweep.

Adopting the Executive Branch's argument, the superior court summarily determined that *Hickel* is controlling and requires that the HEIF be swept into the CBR. [*See* Exc. 316-317] But *Hickel* is distinguishable, and the Executive Branch has improperly relied on dicta in that decision to twist the words of a single footnote into subjecting the HEIF to the annual CBR sweep.

The Executive Branch will ask this Court to blindly follow and apply *Hickel*'s section 17(b) definition of "available for appropriation" for section 17(d). [*See* Exc. 162-163] But critically, the Executive Branch has purposefully misread the *Hickel* test for section 17(b) in arguing that the "same" test should apply to section 17(d). In its opening brief to the superior court, the Executive Branch argued that *Hickel* defined "available for

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[64] The Students note that their interpretation of section 17(d) would continue to serve as a powerful repayment provision; the legislature's failure to obtain enough votes for a reverse sweep for FY2022 would likely still cause hundreds of millions of unappropriated dollars to flow back into the CBR. [*See* Exc. 59, 239]

appropriation" as only including "all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure." [Exc. 163 (emphasis omitted) (citing *Hickel*, 874 P.2d at 935)] In its reply, the Executive Branch had to concede that this sentence actually states only *part* of the test for what funds the *Hickel* Court deemed to be "available for appropriation" with respect to section 17(b). [*See* Exc. 286]

When considering what funds are "available for appropriation" to determine whether section 17(b)'s stabilization mechanism permits the legislature to access the CBR's monies through a simple majority vote,[65] the *Hickel* Court held that:

> "amount available for appropriation" must include all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation. ***It must also include all amounts which the legislature actually appropriates for the fiscal year***, whether or not they could have been considered available prior to the appropriation."[66]

The *Hickel* Court repeated its definitional holding later in its opinion: "In addition, ***all amounts actually appropriated***, whether or not they would have been considered available prior to appropriation, ***are available within the meaning of section 17***."[67]

The Executive Branch has tried to sidestep the unambiguous full definition of "available for appropriation" from *Hickel*'s section 17(b) definition because it is unworkable as applied to section 17(d). [*See* Exc. 286-290] After all, were this Court to

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65 *See Hickel*, 874 P.2d at 926-36.

66 *Id.* at 927 (emphasis added).

67 *Id.* at 935 (emphasis added).

adopt and apply *Hickel*'s section 17(b) definition of "available for appropriation" to section 17(d), *all* appropriations — *including those for the current fiscal year* — would be swept. With the CBR's current amount outstanding totaling approximately $10 billion, that would mean the legislature would not be able to pass a budget to fund state government — absent supermajorities in both legislative bodies — for the next two fiscal years. Similarly, appropriated funding for five-year capital budget projects, such as to construct a new building or an overpass, could be swept away into the CBR mid-construction. A strict application of section 17(b)'s test to section 17(d) would leave the budget unfunded and dozens of large-scale projects and programs "mothballed" or abandoned throughout Alaska. Such an application of the *Hickel* test for section 17(b) cannot reasonably be applied to section 17(d).

Understanding this logical inconsistency, the Executive Branch had to concede in briefing below that the temporal aspect of determining what is available for appropriation at the end of a fiscal year — i.e., after the budget has been enacted — must be given meaning. [*See* Exc. 289] Furthermore, Attorney General Taylor interpreted *Hickel* to determine that FY2022's appropriations should still be honored because under *Hickel* "**monies which already have been validly committed by the legislature to some purpose should not be counted as available**." [Exc. 128 (emphasis in original) (quoting *Hickel*, 874 P.2d at 930-31)] There is no reason why that same logic and "validly committed" definition should not apply to *all* valid, obligated, prior appropriations, such as the one that initially capitalized the HEIF, which is why the Executive Branch attacks

the validity of the original HEIF appropriation. [Exc. 166 ("Simply put, 'appropriations' to the HEIF are not true appropriations.")]

Ultimately, the Executive Branch's adherence to the *Hickel* section 17(b) test is its fatal flaw. On one hand, the Executive Branch says that *Hickel*'s definition of "available for appropriation" for section 17(b) must be blindly followed and applied to section 17(d), and that no independent constitutional analysis or deviation from its "holding" is required. [*See* Exc. 162-163] On the other hand, the Executive Branch states that only *part* of *Hickel*'s section 17(b) definition is applicable, summarily ignoring that *Hickel* repeatedly defined "available for appropriation" as including "all amounts actually appropriated."[68] [*See* Exc. 286-290]

The Executive Branch cannot have it both ways. If *Hickel* defined "available for appropriation" to have the exact same definition for both sections 17(b) and 17(d) — which it did not — then *Hickel*'s section 17(b) definition cannot be selectively followed without further constitutional analysis. And once this Court undertakes a proper constitutional analysis of section 17(d), it becomes evident that the Students' interpretation based on the plain language and purpose behind section 17(d) should be adopted.

B. The Executive Branch's second flaw is interpreting section 17(d) to diminish the legislature's appropriation power in violation of article II.

The Executive Branch's interpretation of section 17(d) would require the executive to move monies out of the HEIF against the will of the legislature, effectively voiding prior, non-lapsing appropriations that comprise the HEIF by "sweeping" them into the CBR. But

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68 *Id.*; *see also id.* at 927.

this would be a radical, new, and unconstitutional infringement on the legislature's appropriation power.

In order to avoid an article II violation, the Executive Branch has characterized the legislature's prior appropriations to the HEIF as second-class "soft" or "not true appropriations." [Exc. 166] The Executive Branch later tried to backtrack from this characterization by claiming there is a difference between "spending" and "non-spending" appropriations. [*See* Exc. 281-286] But however formulated, this Court should reject the Executive Branch's invitation to create second-class appropriations not found in the Alaska Constitution.

There should be no dispute that the appropriation which originally capitalized the HEIF was, in fact, a true and valid appropriation,[69] [*See* Exc. 241] and that the legislature continued to make additional appropriations that "do[] not lapse" to the HEIF,[70] including for FY2022. [Exc. 79] After all, the HEIF monies did not sit around in a passive checking account of state government waiting to be spent; the appropriations were invested with the specific purpose of generating money to fund scholarships and grants for Alaskan students pursuing postsecondary education in Alaska,[71] and those investments have generated hundreds of millions of dollars that would not have existed otherwise.[72] That is exactly

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69 *See also* ch. 74, § 27, FSSLA 2012 ("The [HEIF] established in AS 37.14.750 . . . is the fund identified in sec. 20(f), ch. 5, FSSLA 2011.").

70 AS 37.14.750(a).

71 *See* AS 37.14.750.

72 In fact, the HEIF accrued nearly $75 million with over a 27% rate of return in FY2021 alone. [*See* Exc. 38] And thanks to the legislature's appropriations directing the executive to invest its monies, the HEIF gained approximately $12.3 million in December

what "the executive officers of the government [were] authorized to use that money" for, and nothing else, fulfilling the legislature's intent for those appropriations.[73]

The Executive Branch nevertheless attempts to redefine what an appropriation is under the Alaska Constitution, arguing that the "soft" appropriations to the HEIF are merely "accounting designations" and are not constitutionally valid. [Exc. 166] In support of this new conception of an appropriation, the Executive Branch originally cited article IX, section 13 of the Alaska Constitution, claiming that under this constitutional provision the legislature's 2011 appropriation into the HEIF subfund was not a real appropriation because the funds did not leave the state treasury.[74] [Exc. 166 ("Simply put, 'appropriations' to the HEIF are not true appropriations.")] When the Students pointed out that the legislature's appropriation power is found in article II — not article IX, section 13[75]

2021 alone, equivalent to an annualized rate of return of over 40%. [Exc. 222; *see also* Exc. 244-246]

[73] *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) [hereinafter *Knowles II*] (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)). If the legislature had provided funding to construct a new laboratory at UAA, renovate an engineering building at UAF, or purchase a new research vessel for UAS, there would be no question that those appropriations are still valid and must be honored.

[74] *See* Alaska Const. art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law.").

[75] *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) [hereinafter *Knowles I*] (explaining that the Alaska Constitution "gives the legislature the power to legislate and appropriate" (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13)). After all, article IX, section 13 — entitled "Expenditures" — does not limit or define the *legislature's* appropriation power; instead, this constitutional provision ensures that the *executive* cannot expend or obligate state money without the authority of the legislature. *See* Alaska Const. art. IX, § 13. In fact, section 13 itself confirms this limitation on the executive branch. *See id.* ("No obligation

— the Executive Branch then relied on *Hickel* to try and make a distinction between "spending" appropriations and appropriations that require another appropriation to expend money. [*See* Exc. 281-286] But the effect of this new argument is still the same; the Executive Branch would have this Court believe that second-class appropriations exist, and that those appropriations must obtain a three-quarters vote threshold in both houses of the legislature every year to remain valid pursuant to section 17(d). In essence, the Executive Branch wants to transform the HEIF into a non-existent and annually-disappearing "special" fund.[76]

There is simply no basis for the Executive Branch's position. The Alaska Constitution "gives the legislature the power to legislate and appropriate."[77] And "the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[78]

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for the payment of money shall be incurred *except as authorized by law*." (emphasis added)).

[76] This is effectively a back-door veto of the entirety of the HEIF. After the Governor's legislation to eliminate the HEIF failed, [*See* Exc. 87-100] the HEIF was added to the list of funds subject to the sweep. [*See* Exc. 80-84]

[77] *Knowles I*, 21 P.3d at 371 (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13).

[78] *Knowles II*, 86 P.3d at 895 (emphasis added)) (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)); *see State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987) (recognizing that the appropriation power resides in the legislature and cannot be delegated to the executive); *see also Mallott v. Stand for Salmon*, 431 P.3d 159, 165 (Alaska 2018) (noting that the restriction on the people's power to appropriate "was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets" (emphasis omitted) (quoting *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996)).

An appropriation bill, like the ones which initially capitalized the HEIF and appropriated more money to the HEIF in FY2022, is a special kind of legislation. This Court has held that an appropriation "set[s] aside from the public revenue . . . 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."[79] To make an appropriation the legislature need only sufficiently describe a monetary asset transfer "to allow identification of the monies involved."[80] And with the goal of "safeguard[ing] the independence of each branch," and "protect[ing each] from domination and interference" from the other branches, this Court has made it clear that separation of powers means one branch of government cannot interfere with how another branch exercises its core powers.[81]

The Executive Branch may not like that the legislature retains the broad and sole power to appropriate, but all of this Court's prior appropriation cases — cases cited by the Executive Branch below as supposedly *limiting* the legislature's appropriation power to expenditures where funds leave the state treasury — only confirm the legislature's broad power to control and designate the use of *all* state assets, even those that remain within the state treasury. [*See* Exc. 282-284] For example, in *Thomas v. Bailey*, this Court concluded

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79 *Knowles II*, 86 P.3d at 898) (quoting *Thomas*, 569 P.2d at 796). This Court has also defined an appropriation as "a sum of money dedicated to a particular purpose." *Id.* (quoting *Knowles I*, 21 P.3d at 373).

80 *Id.* at 898 n.39.

81 *Bradner v. Hammond*, 553 P.2d 1, 6 n.11 (Alaska 1976) (quotation omitted); *see also State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021).

that the legislature's appropriation power included the ability to control *any* state asset, including non-monetary assets like state lands.[82] This Court later reaffirmed the legislature's sole authority to manage state lands in *McAlpine v. University of Alaska*, critically holding that "designating the use" of state assets — even a transfer of assets within various state accounts or entities — is an appropriation power reserved to the legislature.[83] And the case the Executive Branch relies on the most, *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles* (*Knowles II*), is not a case that limited *the legislature's* appropriation power at all.[84] [*See* Exc. 284] Rather, the *Knowles II* Court simply held that *a governor's* line-item veto power could only be exercised over monetary appropriations.[85]

Section 17(d) must be read in harmony with article II and article IX, section 13 of the Alaska Constitution, which prohibits the Executive Branch from expending or obligating funds without the authority of the legislature.[86] Because the Executive Branch's opportunity to weigh in on legislative appropriations is constitutionally limited to the

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82 595 P.2d 1, 7 (Alaska 1979) (concerning ownership of 30 million acres of state land).

83 *See* 762 P.2d at 87-89; *see also id.* at 88 ("Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose.").

84 *See* 86 P.3d at 895.

85 *Id.* ("We now . . . hold that the governor's appropriations veto applies only to monetary appropriations.").

86 *See* Alaska Const. art. IX, § 13; *see also* Alaska Const. art. II, § 13.

governor's veto pen,[87] any attempt by the executive to get a second bite at the apple through a tardy back-door veto cannot be constitutional.

The HEIF is a valid, constitutionally sound appropriation. The legislature has "designated the use" of more than $400 million, [Exc. 241] by establishing the HEIF through a statute,[88] to fulfill its intended purpose of providing continued support to Alaskans pursuing postsecondary educational opportunities in Alaska.[89] This Court should avoid interpreting section 17(d) in a manner that creates a new limitation on the legislature's power to appropriate not found in the Constitution.

III. *Hickel v. Cowper* Does Not Require A Different Interpretation Of Section 17(d).

A. *Hickel* is consistent with the Students' interpretation of section 17(d).

Contrary to the Executive Branch's suggestion, this Court does not need to overlook or overrule *Hickel* to adopt the Student's interpretation of section 17(d). As Attorney General Taylor recognized when he determined that FY2022 appropriations should be honored from what would otherwise be "swept" funds under the section 17(b) test, [Exc. 127-129] *Hickel* confirmed that "monies which already have been validly committed by the legislature to some purpose should not be counted as available,"[90] because "any

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87 *See* Alaska Const. art. II, § 15; *see also* Alaska Const. art. II, § 17 (giving the governor a limited amount of time to veto bills).

88 AS 37.14.750; *see also* ch. 74, § 27, FSSLA 2012.

89 AS 37.14.750.

90 *Hickel*, 874 P.2d at 930-31.

given sum of money can only be appropriated once during a given time period."[91] This Court would rule consistently with *Hickel* by excluding monies that have already been appropriated, like the monies appropriated to the HEIF, from the CBR sweep.

If anything, the Students' interpretation of section 17(d) is more consistent with *Hickel* than the Executive Branch's position. After all, *Hickel* does not stand for (or even mention) the idea that some otherwise valid appropriations are actually second-class appropriations that must be liquidated pursuant to section 17(d), as the Executive Branch suggests. And there is no practical or logical difference between FY2022 appropriations — which include appropriations *into* the HEIF, [*See* Exc. 79] along with appropriations *out* of the HEIF [*See* Exc. 77-78] — and appropriations made by the legislature a decade earlier to establish the HEIF. [Exc. 241] OMB's position that the entire HEIF was swept into the CBR on June 30 at 11:59pm, and yet money remained to fund FY2022 appropriations from the HEIF on July 1, does not make sense, and cannot be supported by any reading of *Hickel*. [*See* Exc. 129; *see also* Exc. 320] Instead, because money has been appropriated to the HEIF, it should not be considered "available" for purposes of the sweep, because "[t]o do otherwise would be to continue to count sums of money as 'available for appropriation' after they have been appropriated[.]"[92]

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91 *Id.* at 931 n.20.

92 *Id.*

B. *Hickel* concerned section 17(b), and did not engage in a full analysis to interpret section 17(d).

The Students believe that their interpretation of section 17(d) is not only correct because of its plain language and purpose, but is also consistent with *Hickel*'s section 17(d) holding. However, if this Court has any concerns about *Hickel*'s definition of "available for appropriation" for section 17(b), and whether that definition could be applied to the CBR sweep under section 17(d), that language is dicta.

"Dicta is defined as '[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in [the] court's opinion which go beyond the facts before [the] court . . . are individual views of [the] author of [the] opinion and not binding in subsequent cases as legal precedent.' "[93]

Former Governor Steve Cowper filed suit in *Hickel* to determine when a simple majority vote could be used to access the CBR's monies.[94] There was no sweep at issue in *Hickel*. Nor did the *Hickel* Court undertake a constitutional analysis of section 17(d). *Hickel* did not account for the temporal differences between sections 17(b) and 17(d) because it did not need to, let alone consider the purposes behind both of those separate provisions.[95]

In *Hickel*, this Court only considered — on an expedited basis — which funds must be counted for purposes of calculating when the legislature could make appropriations from

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93 *Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595, 601 (Alaska 2021) (alterations in original) (quoting *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 922 (Alaska 1999)).

94 *See Hickel*, 874 P.2d at 923-25.

95 *Id.* at 936.

the CBR with a simple majority under article IX, section 17(b) of the Alaska Constitution.[96] In that context, the *Hickel* Court defined what "available for appropriation" means.[97] And under those circumstances, it made sense for this Court to require an apples-to-apples comparison — a comparison which includes subfunds and savings accounts the legislature created for specific purposes — to determine what is in the general fund each year so that the legislature will know when a super-majority vote is needed to access the CBR under sections 17(b) and 17(c).[98] *Hickel*'s definition of section 17(b) also included "all amounts actually appropriated"; otherwise, a proper apples-to-apples comparison between fiscal years would not be possible as the legislature develops an annual budget.[99]

But because a CBR sweep was not at issue, the *Hickel* Court did *not* consider what monies are "available for appropriation *at the end of each succeeding fiscal year*"[100] — which is the relevant language unique to section 17(d) — performed at a different time for a different reason that does not require *Hickel*'s expansive definition of "available for appropriation" for section 17(b).[101] The *Hickel* Court was asked to consider section 17*(b)*'s

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96 *See id.* at 926-935.

97 *See id.* In doing so, *Hickel* held that AS 37.10.420 was unconstitutional. *See id.* at 936. Importantly, the term "amount available for appropriation" as used in that statute concerned only the section 17(b) calculation of what funds could be accessed by a simple majority vote. *See* AS 37.10.420(a)(1).

98 *Hickel*, 874 P.2d at 935 ("The State correctly argues that this symmetry is necessary in order to insure [sic] that the comparison required by section 17(b) fairly measures the need for access to the [CBR].").

99 *Id.*; *see also id.* at 927.

100 Alaska Const. art. IX, § 17(d) (emphasis added).

101 Just as this Court may not add terms to a constitutional provision, this Court similarly may not delete terms — like the phrase "at the end of each succeeding fiscal year"

language to determine when a simple majority vote could *access* the CBR, an analysis that must occur before appropriations are made for the next fiscal year. That is necessarily distinguished from section 17*(d)*'s language on when "surplus" money is available to *repay* prior appropriations from the CBR after the legislature's spending priorities have been set.

Hickel also did not analyze the framers' intent and voters' understanding, as detailed in this brief, to determine the purpose of section 17(d). Had *Hickel* done so, its analysis would have resembled the Students' consideration of section 17(d)'s plain language and purpose.[102] The absence of such analysis with respect to section 17(d) — especially in contrast to *Hickel*'s lengthy analysis on section 17(b)[103] — is telling.[104] The Court's statement that "[w]e see no reason to give 'available for appropriation' a different meaning in subsection [17](d) as we did in subsection [17](b)" is equivocal at best, and a far cry

— when interpreting section 17(d). *See Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) ("We are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result." (alteration in original) (quoting *Hickel*, 874 P.2d at 927-28)).

102 *See supra* pages 13-22 and accompanying text.

103 *See Hickel*, 874 P.2d at 926-36.

104 This Court recently acknowledged that it explained some budgetary mechanisms incorrectly in *Hickel*, in part because its holding on section 17(b) was decided on an expedited basis. *See Wielechowski*, 403 P.3d at 1151 n.66 ("In *Hickel* we considered, on an expedited basis, what funds were 'available for appropriation' within the meaning of article IX, section 17(b) of the Alaska Constitution . . . . [W]e were not asked to decide whether the [dividend] transfer was a constitutionally permissible dedication of Permanent Fund income, and our previous characterization of the action as 'automatic[]' does not control here." (fourth alteration in original) (citing *Hickel*, 874 P.2d at 925-26)).

from establishing binding precent after a robust constitutional analysis, and should not be treated as such.[105]

C. Alternatively, this Court should overturn *Hickel* and interpret section 17(d) consistently with its plain language and intended purpose.

The Students firmly believe that the *Hickel* Court did not establish binding precedent that subjects the HEIF to the annual CBR sweep according to section 17(d). But if this Court disagrees with the Students' assessment, this Court should reconsider its decision and adopt the Students' interpretation of section 17(d).

"[S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt those norms to society's changing demands."[106] This Court "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions and that more good than harm would result from a departure from precedent."[107] And when considering whether to overturn precedent, this Court "must balance the benefits of adopting a new rule against the benefits of stare decisis."[108]

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105 *Hickel*, 874 P.2d at 936 n.32.

106 *Meyer v. Alaskans for Better Elections, Inc.*, 465 P.3d 477, 495 (Alaska 2020) (alteration in original) (quoting *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1175 (Alaska 1993)).

107 *Id.* (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004)).

108 *Buntin*, 487 P.3d at 605 (quoting *State v. Carlin*, 249 P.3d 752, 761-62 (Alaska 2011)).

The Students meet the two-part analysis to overturn any precedent set by *Hickel* with respect to section 17(d). For the first part of this Court's analysis, this Court has held "that a decision is 'originally erroneous' if (1) it 'proves to be unworkable in practice' or (2) [this Court] failed to address relevant points and the party can show that it 'would clearly have prevailed if the points had been fully considered.' "[109]

Here, it is clear that — to the extent *Hickel* addressed section 17(d) at all — this Court "failed to address relevant points and the [Students] can show that [they] 'would clearly have prevailed if the points had been fully considered' " for at least four reasons.[110] First, the sweep of funds back into the CBR was not before the *Hickel* Court at all; rather, *Hickel* addressed the apples-to-apples comparison of funds for purposes of accessing the monies contained in the CBR with a simple majority vote pursuant to section 17(b).[111] Second, the *Hickel* Court did not fully evaluate what funds or subfunds should be subject to the CBR sweep, and it certainly did not consider whether the HEIF would be subject to the sweep.[112] Third, the *Hickel* Court did not meaningfully analyze the plain language of section 17(d), in particular the critical temporal differences between sections 17(d) and 17(b).[113] Finally, the *Hickel* Court did not consider the purpose behind section 17(d) — in stark contrast to its consideration of the purpose behind section 17(b) — and did not

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109 *Khan v. State*, 278 P.3d 893, 901 (Alaska 2012) (emphasis omitted) (quoting *Thomas*, 102 P.3d at 943).

110 *Id.* (emphasis omitted) (quoting *Thomas*, 102 P.3d at 943).

111 *See Hickel*, 874 P.2d at 926-36.

112 *See id.* at 936 & n.32.

113 *See id.* at 926-36.

consider either the framers' intent or the voters' understanding of that provision.[114] Taken together, this Court should conclude that its decision in *Hickel* regarding section 17(d) was originally erroneous if it considers *Hickel* binding precedent.[115]

The second part of a stare decisis analysis is whether "more good than harm would result from a departure from precedent."[116] The Students' position would do "more good than harm" for at least three reasons. First, the Students' interpretation of section 17(d) more faithfully implements the underlying purpose of that section from both the 1990 framers' and voters' perspective,[117] [*See* Exc. 57-58] and this Court should not "construe abstrusely any constitutional term" beyond the "plain ordinary meaning" "as the people ratified it."[118] Second, the Students' interpretation harmonizes the legislature's appropriation power and maintains the separation of powers enshrined in our Constitution.[119] There are no second-class appropriations, and adopting the Students' interpretation would faithfully honor the legislature's sole ability to appropriate state assets for any public purpose. Finally, doing so would fulfill the HEIF's express purpose of

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114 *See id.* at 929-36.

115 *Meyer*, 465 P.3d at 495 (quoting *Thomas*, 102 P.3d at 943).

116 *Id.* (quoting *Thomas*, 102 P.3d at 943).

117 *See supra* pages 15-22 and accompanying text.

118 *Wielechowski*, 403 P.3d at 1146 (quoting *Hickel*, 874 P.2d at 926).

119 *See supra* pages 25-31 and accompanying text; *see also State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021) (explaining the separation of powers doctrine).

providing long-term financial certainty for students who rely on scholarships and grants to pursue post-secondary educations in Alaska.[120]

CONCLUSION

Because the superior court erred, this Court should REVERSE and hold that the monies the legislature appropriated to the HEIF to endow student education are not subject to the annual CBR sweep contained in article IX, section 17(d) of the Alaska Constitution.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 14th day of March, 2022.

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120 *See* AS 37.14.750.