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

APPELLANTS' REPLY BRIEF

CASHION, GILMORE & LINDEMUTH
Attorneys for Appellants

Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No.1511099
CASHION GILMORE & LINDEMUTH
510 L. St., Suite 601
Anchorage, Alaska 99501
Phone: (907) 222-7932
Fax: (907) 222-7938

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

AUTHORITIES PRINCIPALLY RELIED UPON

ALASKA CONSTITUTIONAL PROVISIONS

Article IX, § 7. Dedicated Funds

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. [Amended 1976]

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.

INTRODUCTION

Throughout its brief, the Executive Branch repeatedly decries the Students and the Legislative Council for not providing this Court with a reason to treat the section 17(d) test any differently than the apples-to-apples comparison required by section 17(b), vehemently arguing that *Hickel v. Cowper* requires "available for appropriation" to mean the same thing in both sections. Finally, after thirty pages, the Executive Branch concedes that the very "adjustment" the Students have identified from the beginning actually *must* be made to the section 17(d) test to exclude current appropriations, based on section 17(d)'s unique temporal language and different underlying purpose.

The Executive Branch's "adjustment" is the exception that swallows the rule, and involves the very same constitutional analysis based on the plain language and purpose of section 17(d) that has been argued by the Students. *All* of the legislature's appropriations, including those to the HEIF, must be honored; monies identified and committed through valid legislative appropriations cannot be swept. Because there are no second-class appropriations under our Constitution, appropriations to the HEIF cannot be treated differently from any other appropriation. The superior court's decision that section 17(d) requires the HEIF's monies be swept should be reversed.

ARGUMENT

I. The Executive Branch Concedes That *Hickel*'s Section 17(b) Test Cannot Apply To Section 17(d).

The Students identified the first fatal flaw to the Executive Branch's argument in their opening brief: that its unwavering and "strict" adherence to *Hickel*'s definition of

"available for appropriation" is not actually a perfect application of that definition at all, instead requiring a selective reading of *Hickel*'s section 17(b) definition when applied to section 17(d).[1] [At. Br. 22-25] And despite repeatedly claiming that it is bound by and simply following *Hickel* in the first 30 pages of its brief, [*See* Ae. Br. 19 (claiming to apply "the same definition of 'available for appropriation' in parts (b) and (d)"); *see also* Ae. Br. 3, 18-19] the Executive Branch finally concedes in subsection I.C of its argument that it is actually asking this Court to apply only *part* of *Hickel*'s definition to section 17(d), making an "adjustment" to remove "irrelevant" portions of the definition. [Ae. Br. 34 ("The [section] 17(b) adjustment is not part of the core definition of 'available for appropriation.' "); *see* Ae. Br. 18 (claiming that following the part of *Hickel*'s holding which defines "available for appropriation" as including appropriated monies is "irrelevant")]

As much as the Executive Branch wishes to minimize its unilateral "adjustment" to *Hickel*'s section 17(b) definition of "available for appropriation" for section 17(d), the Executive Branch's modification is hardly a small change. [Ae. Br. 34] Removing all current appropriations from section 17(b)'s definition is the very thread that unravels the whole test.[2]

---

[1] *See Hickel v. Cowper*, 874 P.2d 922, 927, 935 (Alaska 1994) [hereinafter *Hickel*] (defining "amount available for appropriation").

[2] Make no mistake, although the Executive Branch focuses on trust receipts and federal funds, its suggested "adjustment" also excludes all monies needed to fund appropriations for the current fiscal year budget, consistent with Attorney General Treg Taylor's memorandum. [Ae. Br. 11, 30-34; *see also* Exc. 127-129]

The Executive Branch's justification for this "adjustment" is two-fold; one, that these appropriations are relevant only for the apples-to-apples comparison required by section 17(b) and have no relevance to section 17(d), and two, that the temporal language in section 17(d) as to when the test is to be applied excludes current appropriations:

> [S]ection [17](d), by contrast, requires no year-to-year comparison complicated by federal funding and other "trust receipts." For purposes of the sweep, the relevant question is simply, what funds remain available to the legislature at one moment in time: the end of the fiscal year.[3] [Ae. Br. 33-34]

These are the very points the Students have been making all along. [*See* At. Br. 13-15, 32; *see also* Exc. 31-32, 207-210] And the justification excluding current year appropriations from the sweep applies equally to prior existing appropriations that have not lapsed.

The *Hickel* Court held that "monies which already have been validly committed by the legislature to some purpose should not be counted as available,"[4] because "any given sum of money can only be appropriated once during a given time period."[5] Attorney General Treg Taylor relied on this language to honor all existing FY2022 appropriations.

---

[3] Earlier in its brief, the Executive Branch chides the Students and the Legislative Council for "flip[ping] the constitutional language from the forward-looking question section 17 poses—is the money *available* to the legislature for appropriation?—to a backward looking one . . .—has the money ever been appropriated before?" [Ae. Br. 22-23 (emphasis in original)] But the Executive Branch *itself* excludes "amounts actually appropriated" in its "adjustment." [*See* Ae. Br. 30-34]

[4] *Hickel*, 874 P.2d at 930-31.

[5] *Id.* at 931 n.20; *see also id.* at 930 ("Although all funds might be available by some means, counting funds already validly appropriated to a specific purpose as still 'available' would disrupt existing state programs and would constitute an inflexible constitutional intrusion on the legislature's authority to evaluate the wisdom of particular appropriations. Although such a constitutional intrusion is conceivable, we are unwilling to read it into a provision with quite a different purpose.").

[Exc. 127-129] The parties agree that the unique temporal language in section 17(d) *must* give "available for appropriation" a different meaning from section 17(b). [At. Br. 13-15; Ae. Br. 30-34] Taken to its logical conclusion, the "adjustment" based on this different language means that *all* valid and ongoing appropriations are exempt from the CBR sweep,[6] which by definition includes the HEIF appropriations.

The Students fully recognize that all current and active appropriations — including those non-lapsing appropriations to the HEIF — fall under *Hickel*'s section 17(b) analysis, and therefore should absolutely be included in the apples-to-apples comparison which determines whether a simple majority of the legislature can appropriate from the CBR in any given year.[7] [*See* Ae. Br. 21] The HEIF is no different than any other appropriation in this respect. A strict application of the section 17(b) test to section 17(d) at the end of the fiscal year would lead to the absurd result of defunding the entire budget, causing the entirety of state government to grind to a halt, absent an annual three-fourths vote of both houses.[8] The Executive Branch concedes that this result should not happen; [Ae. Br. 31 (characterizing it as "obviously wrong")] hence, its "adjustment." [Ae. Br. 30-34] This

---

6 *See id.* at 927, 935 (defining "amount available for appropriation" as including all existing appropriations in a given year). The Executive Branch also underplays other multi-year appropriations, like those to the capital budget for multi-year projects, failing to recognize that appropriated monies may sit in state accounts for years before expenditure. [Ae. Br. 26] It is simply false that "[f]unds [authorized to be] paid to contractors for such projects do not sit, available to be withdrawn and spent on an alternative purpose[.]" [Ae. Br. 26]

7 *See* Alaska Const. art. IX, § 17(b).

8 *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.").

Court has rejected definitions which demand similarly absurd outcomes, and should do the same here.[9]

Ultimately, with its "adjustment," the Executive Branch has concocted a definition of "available for appropriation" to target appropriations to special funds (like the HEIF), while excluding other current year appropriations. [*See* Ae. Br. 30-34] This results-oriented definition just so happens to align with the Governor's desire to eliminate the HEIF, [*See* Exc. 87-100] the PCE Endowment Fund, [*See* Exc. 80-84; *see also* At. Br. 9-10] and other special funds, [*See* Exc. 83-84] and is consistent with his goal of having a greater and outsized role (through exercising his veto power) in the annual appropriation process. [*See* Exc. 47-48, 234; *see also* At. Br. 30-31] But as discussed below, there is no principled

---

[9] *See Heller v. Dep't of Revenue*, 314 P.3d 69, 81 n.59 (Alaska 2013) ("We recognize that although '[t]here is a presumption that the same words used twice in the same act have the same meaning,' 'it is possible to interpret an imprecise term differently in two separate sections of the statute which have different purposes.' " (alteration in original) (citation omitted) (first quoting *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995); then quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 64:6 (7th ed. 2008))); *id.* (concluding "it is consistent with statutory principles of construction to assign different meanings to the [same] term" in part because the "different meanings are compelled by the convincing evidence of legislative intent"); *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 347-48 (Alaska 2011) (concluding that the same word used multiple times in a statute should not be given the same meaning because "the legislature appears not to have distinguished" between the two different uses of the same word, and using the same definition would render one of the provisions "meaningless"); *see also FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344, 351 (Alaska 2001) ("[E]ven when a statute's language meaning seems plain on its face, ambiguity may arise if applying that meaning would yield anomalous consequences."); *id.* ("[B]ecause 'plain meaning' cannot exist in a vacuum, ambiguity is necessarily a creature of context.").

reason to distinguish between the legislature's non-lapsing appropriations to the HEIF and its other appropriations.

The Executive Branch's recognition that an unmodified application of *Hickel*'s section 17(b) definition should not apply to section 17(d) is a death knell for its entire argument. [Ae. Br. 18-19, 30-34] To use its own analogy, the Executive Branch asks this Court to blindly follow *Hickel*'s "carrot cake recipe" to define the scope of section 17(d) — a "recipe" that was written for section 17(b) — while excluding carrots. [Ae. Br. 34 (suggesting that carrots are "an extra ingredient necessary in light of the text and specific purpose of [section 17](b)")] But one cannot bake a carrot cake without any carrots. As conceded by the Executive Branch, the temporal language in section 17(d) requires a different test from section 17(b), such that validly-appropriated monies are not subject to the CBR sweep. [Ae. Br. 30-34] And because the HEIF's monies were appropriated just like any other appropriation, this Court should conclude it meets this requirement and is not subject to the sweep.

II. The Executive Branch Doubles Down On Its Baseless Concept Of Second-Class Appropriations.

Because the Executive Branch concedes monies subject to current year appropriations should not be included in "money in the general fund available for appropriation at the end of [the] . . . fiscal year,"[10] the Executive Branch attempts to distinguish between those appropriations and the legislature's valid, non-lapsing appropriations to the HEIF. [Ae. Br. 30-34] The Executive Branch argues that the HEIF

[10] Alaska Const. art. IX, § 17(d).

appropriations are "not true" or "valid" "spending" appropriations, [Exc. 166-167; Ae. Br. 23] relegating them to second-class status that has no basis in the Alaska Constitution or this Court's case law.[11] This is the second fatal flaw of the Executive Branch's argument.

The Executive Branch does not directly address the logical inconsistency raised by the Students, but claims — without *any* support — that the framers and voters somehow (secretly) chose to place major restrictions on existing legislative appropriations so that special funds (like the HEIF) would be "swept" out of existence. [Ae. Br. 34-41]. For precedent, it relies solely on *Hickel*'s interpretation of section 17(b)'s apples-to-apples comparison to the distinguish between "true" spending appropriations and appropriations which are merely "accounting designations." [Exc. 166; *see* Ae. Br. 34-41] But *Hickel* did not alter or change this Court's expansive definition of appropriations in earlier or subsequent case law, and *Hickel* did not create two classes of appropriations where one is swept and one is not. There simply are no second-class appropriations under the Alaska Constitution or *Hickel*.

The legislature does not just have a "preference" that the $400+ million stay in the HEIF; [Ae. Br. 38] it is the law.[12] [*See* Exc. 241] The Executive Branch ignores this Court's long line of appropriation cases recognizing the legislature's exclusive power and authority

---

[11] Although the Executive Branch attempts to soften the arguments it made before the superior court, that the appropriations to the HEIF are "soft" or "not true appropriations," [Exc. 166] the outcome is the same. The Executive Branch argues the HEIF appropriations are subject to the sweep, but other current year appropriations are not.

[12] AS 37.14.750.

to appropriate,[13] which includes the ability to transfer monies or properties between different state accounts.[14] The legislature's appropriation power unquestionably includes appropriations that "designate the use" of assets within the state; as this Court held in *McAlpine v. University of Alaska*, even a transfer of assets within various state accounts or entities is an appropriation power reserved to the legislature, and cannot be treated differently than any other appropriation.[15] The Executive Branch agrees the HEIF's appropriations have not lapsed,[16] were intended to endow student education in perpetuity, and remain valid. [Ae. Br. 25 ("The HEIF was indeed designed to operate as an endowment to produce income to support scholarships."), 25 n.90 ("The legislature intended to create an endowment that would last into perpetuity."), 40 ("The appropriation into the HEIF is not 'void[.]' "); *see* Ae. Br. 13] The Executive Branch cannot undo or invalidate valid, non-

---

13 *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)); *see Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895 (Alaska 2004) [hereinafter *Knowles II*] ("[T]he legislature, and only the legislature, retains control over the allocation of state assets among competing needs." (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988))); *see also Mallott v. Stand for Salmon*, 431 P.3d 159, 165 (Alaska 2018); *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987); *Thomas v. Bailey*, 595 P.2d 1, 7 (Alaska 1979).

14 *See McAlpine*, 762 P.2d at 87-89; *Thomas*, 595 P.2d at 7.

15 762 P.2d at 87-89.

16 *See* AS 37.14.750(a) ("Money in the fund does not lapse.").

lapsing appropriations to the HEIF by sweeping those monies into the CBR without impinging on the legislature's article II appropriation power.[17]

The Executive Branch has noted that some of article IX's provisions limit the legislature's otherwise broad article II appropriation power.[18] [Ae. Br. 4-6] But article IX, section 13, the provision relied on by the Executive Branch here, [Ae. Br. 5] places a limitation on the *executive* branch, not the legislature, by confirming that the executive cannot expend or obligate monies without authority from the legislature.[19] [At. Br. 27-31]

Although the CBR impacts the legislature's appropriation power, identifying and defining the limited scope of those impacts is critical, such as the need for determining when a super-majority vote is needed to access the CBR to fund budgets that are greater than the prior year.[20] To maintain separation of powers, the legislature's appropriation power must be broadly construed, and any limitation narrowly construed.[21]

---

[17] *See Knowles II*, 86 P.3d at 895 ("[T]he legislature, and only the legislature, retains control over the allocation of state assets among competing needs." (quoting *McAlpine*, 762 P.2d at 88)).

[18] The Students agree that the anti-dedication clause, permanent fund, and spending cap — all contained within article IX — place particularized and narrow restrictions on the legislature's appropriation power. *See* Alaska Const. art. IX, § 7 (anti-dedication clause); Alaska Const. art. IX, § 15 (permanent fund); Alaska Const. art. IX, § 16 (spending cap). None are relevant to this case.

[19] Alaska Const. art. IX, § 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.").

[20] *See Hickel*, 874 P.2d at 926-36; *see also* Alaska Const. art. IX, § 17(b).

[21] *Knowles I*, 21 P.3d at 371 ("The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature."); *see State v. Recall Dunleavy*, 491 P.3d 343,

With that framework in mind, section 17(d) cannot be read to have silently demoted some existing valid appropriations into a second-class status so that the CBR could be repaid.[22] All the CBR does is prevent a simple majority of the legislature from immediately spending certain windfall profits, if it would exceed the prior year's budget, to help stabilize state spending.[23] Section 17(d) also provides that the CBR must, eventually, be repaid.[24] But nothing in the plain language or purpose of section 17(d) even comes close to suggesting that section 17(d) requires nullifying validly-enacted prior appropriations to repay the CBR.

The Executive Branch's interpretation of section 17(d) requires the annual elimination of valid appropriations. [Ae. Br. 30-41] Other than citing *Hickel*, the Executive Branch points to no support for its position in either section 17(d)'s text or purpose. [Ae. Br. 19-41] No other authority exists suggesting that appropriations can be undone outside of the framework of a governor's veto, through section 17(d) or otherwise.[25]

---

367 (Alaska 2021); *see also Knowles II*, 86 P.3d at 895-97; *Bradner v. Hammond*, 553 P.2d 1, 5-7 & n.11 (Alaska 1976); *DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 724-25 (Alaska 1962).

22 *See Wielechowski v. State*, 403 P.3d 1141, 1149-52 (Alaska 2017); *Hickel*, 874 P.2d at 930.

23 *See Hickel v. Halford*, 872 P.2d 171, 177 (Alaska 1994) [hereinafter *Halford*] ("[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." (emphasis added) (footnote omitted)); *see also Hickel*, 874 P.2d at 929 ("One of the purposes of the [CBR] . . . was to provide a 'stabilizing mechanism' in the budgetary process." (citation omitted)).

24 Alaska Const. art. IX, § 17(d).

25 *See* Alaska Const. art. II, § 15; *see also* Alaska Const. art. II, § 17.

To bolster its argument, the Executive Branch tries to set up a false dichotomy with the anti-dedication clause,[26] suggesting that the HEIF would violate this provision if its monies are not swept. [Ae. Br. 20 n.78, 21, 23 n.88] The Executive Branch's conception of the anti-dedication clause is entirely without support. In the seminal case on the anti-dedication clause, *State v. Alex* — a case not cited by the Executive Branch — this Court confirmed that the delegates intended to allow the legislature to create and appropriate monies to special funds.[27] All the anti-dedication clause does is prevent the legislature from dedicating a specific stream of revenues or taxes to such a fund, thereby bypassing the ordinary legislative process.[28] Because the legislature remains free to re-appropriate HEIF monies to any other public purpose — just like any other appropriation that has not yet been spent — no dedicated funds problem exists.[29] The anti-dedication clause is irrelevant to whether the HEIF or any other appropriations to other special funds must be swept; appropriations to create these special funds are just as valid as any other appropriation.[30]

---

[26] Alaska Const. art. IX, § 7.

[27] 646 P.2d 203, 210 (Alaska 1982) (noting that the purpose for the anti-dedication clause "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 Proceedings of the Alaska Constitutional Convention (PACC) at 2363 (Jan. 17, 1956))).

[28] *See Wielechowski*, 403 P.3d at 1147.

[29] *See Knowles I*, 21 P.3d at 378 (acknowledging that "the legislature [may] amend[] a prior appropriation in a[subsequent] appropriation act").

[30] The Students note their agreement with the Legislative Council's analysis of the HEIF appropriation. [Am. Br. 9-18] The legislature's appropriations to the HEIF are "final," "spending" appropriations for the public purpose of endowing student education.

The Executive Branch also suggests that current year appropriations are different than appropriations to special funds like the HEIF because once a budget is passed these monies are no longer within the control of the legislature. [Ae. Br. 26-27] This is simply not true. To be clear, the legislature *always* retains the ability to re-appropriate funds to a new public purpose until the monies have actually been expended, including appropriations for the current fiscal year.[31] Such is the nature of the legislature's appropriation power: all state assets remain under the control of the legislature, even after a budget is passed.[32] The Executive Branch's characterization of the HEIF's monies is therefore a distinction without a difference. An appropriation is an appropriation, and all valid, ongoing appropriations must be excluded from the CBR sweep.

Hickel did not redefine the legislature's appropriation power. *Hickel* did not recognize two classes of appropriations; it simply created a framework to count monies for

---

[*See* Am. Br. 9-18] Although the Students' agreement was clear from the opening brief, [*See* At. Br. 25-32] the Executive Branch tries to manufacture a non-existent disagreement between the Students and the Legislative Council to bolster its misplaced anti-dedication clause argument. [*See* Ae. Br. 22-23]

[31] *Knowles I*, 21 P.3d at 378. For example, the legislature could pass a budget in April 2022, appropriating $100 million for Court System operations for FY2023. An appropriation is simply an authorization to spend, and the Court System will not spend its entire year's budget in the first few months of the fiscal year. The legislature always has the power to revisit the Court System's budget at any time, and could cut all budgets by 50 percent if expected revenues for FY2023 dropped so precipitously that the state did not have money to fund its budget. *See Fairbanks N. Star Borough*, 736 P.2d at 1144 (holding that a statute that delegated to the governor the authority to reduce the budget if revenues fell was an unconstitutional delegation of the legislature's appropriation power).

[32] *See Knowles II*, 86 P.3d at 895 ("[T]he legislature, and only the legislature, retains control over the allocation of state assets among competing needs." (quoting *McAlpine*, 762 P.2d at 88)); *see also Knowles I*, 21 P.3d at 371, 378.

the apples-to-apples comparison required by section 17(b).[33] There have never been second-class appropriations under the Alaska Constitution, and there is *no* support for this Court to throw out decades of precedent on appropriations to conclude that they exist today. The HEIF, along with all other valid appropriations, should not be subject to the CBR sweep.

III. The Executive Branch Does Not Provide Any Of Its Own Constitutional Analysis To Counter The Students' Interpretation Of Article IX, Section 17(d).

This Court has explained that it interprets the Alaska Constitution by "look[ing] to the plain meaning and purpose of the provision and the intent of the framers,"[34] along with "any published arguments . . . to determine what meaning voters may have attached to the [proposed constitutional amendment]."[35] The Students provided this Court with such an analysis of section 17(d) within this well-established framework. [At. Br. 13-22] In contrast, the Executive Branch has not articulated *any* independent reasoning or provided *any* evidence in support of its position for this Court to consider when determining the plain language and purpose of section 17(d). [Ae. Br. 19-41]

As the Students have explained, section 17(d)'s language is different from that contained in section 17(b), and those differences are consistent with that provision's different purpose. [At. Br. 13-15] The Executive Branch now concedes that section 17(d) contains a key (and unique) temporal element when contrasted with section 17(b) — "at

---

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

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

35 *Id.* at 1150 (alterations in original) (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007)).

the end of each succeeding fiscal year"[36] — which necessarily demands a different analysis and test. [Ae. Br. 30-34] That temporal phrase makes it clear that identifying what funds are subject to the CBR sweep can only be determined after a fiscal year, i.e., after the legislature (and the governor through vetoes) has passed an appropriation bill that determines the spending priorities for the year. In contrast with section 17(b), there is no apples-to-apples comparison for section 17(d); all that matters is whether there are any leftover surplus monies that are not needed to fund those legislative priorities that can be used to repay the CBR. The parties agree that the different words and phrases between sections 17(b) and 17(d) require a different plain language interpretation, [At. Br. 13-15; Ae. Br. 30-34] and the Students' reading of that plain language should be adopted.[37]

The Students' plain language interpretation of section 17(d) also aligns with the 1990 framers' intent: the CBR's sweep provision was intended to apply only to any

---

[36] Alaska Const. art. IX, § 17(d).

[37] The Executive Branch's claim that the Students have waived their argument about the proper interpretation of "general fund" is incorrect. [Ae. Br. 20] This lawsuit has always concerned the proper interpretation of section 17(d). [*See* Exc. 12; *see also* At. Br. 3; Ae. Br. 1] Because the undefined term "general fund" is contained within section 17(d), [*See* At. Br. 15] it well within this Court's purview to consider the plain meaning of that term and how the 1990 framers and voters would have understood that phrase. *See Wielechowski*, 403 P.3d at 1146-47; *Pitka v. Interior Reg'l Hous. Auth.*, 54 P.3d 785, 788 (Alaska 2002) ("[W]e take a 'liberal approach towards determining whether an issue or theory of a case was raised in a lower court proceeding.' " (quoting *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985))). There is no reason to think the legislature that created the HEIF in 2012 used the term "general fund" in the HEIF statute in the same sense as the 1990 framers. *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] (explaining that the legislature appropriates from "unrestricted general funds"). The Executive Branch does not provide any evidence from 1990 in opposition to this argument. [*See* Ae. Br. 20]

"remain[ing]," "unrestricted," "surpluses" in the general fund at the end of each fiscal year.[38] [At. Br. 15-20] As the Students predicted, [At. Br. 19] the Executive Branch has not cited ***any*** legislative history to support its radical and "sweeping" belief that the framers somehow intended to dramatically restructure and limit the legislature's appropriation power through section 17(d).[39] [Ae. Br. 7-8, 19-41] This Court has refused to reconfigure the Alaska Constitution's budgetary framework without *any* discussion about such changes by the framers, and it should decline to do so here.[40]

As with the framers' intent, the Students' analysis of voters' understanding of the 1990 ballot initiative which created the CBR is also uncontested. [At. Br. 20-22; *see also* Ae. Br. 39] The only "support" the Executive Branch cites to support its position — that the voters would have understood the sweep provision to dramatically limit the legislature's appropriation power [*See* Ae. Br. 39] — is actually nothing more than a

---

38 *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) (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." (emphasis added)); Statement of Senator Jan Faiks ("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 Legislature appropriates, which is *unrestricted* general funds[.]" (emphasis added)).

39 *See Wielechowski*, 403 P.3d at 1149-50 ("There was little evident recognition, let alone the robust discussion that would be expected, for what [the Executive Branch] now posits was a sweeping constitutional change and a consequent sweeping change to the state's budgetary framework.").

40 *Id.*

criticism about section 17(c) contained within the official election pamphlet. [Exc. 58 ("Legislative leaders can easily get a ¾ vote out of their members by dangling capital project plums in front of them.")] Just like the legislative history from 1990, there are only a handful of statements about what voters may have understood section 17(d) to mean. [At. Br. 20-22] But *all* of those statements — including language on the ballot itself,[41] the legislative affairs agency summary,[42] statements in support,[43] and statements in opposition[44] — confirm that voters would have understood that the CBR would only be "replenish[ed]" with "leftover," "surplus" monies. [At. Br. 20-22] As the Students again predicted, [At. Br. 21] the Executive Branch did not cite a ***single*** source to support its position that the voters would have understood that section 17(d) would nullify existing legislative appropriations. [Ae. Br. 19-41] The absence of *any* support for the Executive Branch's position that voters understood that section 17(d) would require repayment of the

---

41 "At the end of each year, the [CBR] would have to be paid back from money *left* in the treasury's general fund." [Exc. 57 (emphasis added)]

42 "Money that is appropriated from the [CBR] must be repaid. *Surplus* general fund money must be deposited in the [CBR] at the end of each year until the [CBR] is repaid. [Exc. 57 (emphasis added)]

43 "The Legislature will be required to repay any money it appropriates from the [CBR]. If 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] *See also* 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)).

44 *See* 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 [CBR] any *surplus* left in the General Fund at the end of each year, until restoration is complete." (emphasis added)).

CBR at the expense of existing appropriations, "like the absence of discussion in the [1990] legislature, is telling."[45]

Nothing in the plain language of section 17(d) suggests that valid appropriations must be undone or invalidated to repay the CBR. Nothing during the 1990 legislative session suggests that *any* of the framers intended for the CBR's contingent repayment provision to have priority over existing appropriations. [At. Br. 16-20] And nothing suggests that voters even *considered the possibility* that section 17(d) would somehow have the power to nullify valid appropriations over thirty years after the CBR's adoption. [At. Br. 20-22]

Taken together, the plain language, framers' intent, and voters' understanding of section 17(d) all support the Students' constitutional analysis of that provision. The CBR sweep applies only to unappropriated, unobligated, surplus general fund monies. The Executive Branch has not provided any alternative independent analysis or reasoning to the contrary.

IV. There Is No Procedural Bar To Adopting The Student's Interpretation.

The Students firmly believe that their interpretation of section 17(d) is entirely consistent with *Hickel*, and is well supported by the plain language and purpose of that provision, for the same reasons outlined in Attorney General Taylor's memorandum. [At. Br. 31-32; *see* At. Br. 13-22; Exc. 127-129] But if this Court nevertheless believes that *Hickel* either suggests or demands a different result, then that language in *Hickel* is either

---

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

dicta or an ill-considered decision that should be re-evaluated.[46] [At. Br. 33-39] The Executive Branch concedes that the section 17(b) test is not well-suited to the section 17(d) analysis without first making its own "adjustments," [Ae. Br. 30-34] agreeing that the impacts of using the same definition would be "obviously wrong."[47] [Ae. Br. 31] The Students' interpretation of section 17(d) should be adopted over the Executive Branch's because it would do more good than harm.[48]

The Executive Branch essentially has two arguments for why *Hickel* should not be overturned. [Ae. Br. 34-39] First, the Executive Branch makes the remarkable claim — without citing *any* source from 1990 itself — that "[t]he Students cite nothing suggesting that a different meaning [of 'available for appropriation'] was intended" by the framers or understood by the voters. [Ae. Br. 36] But the Students *have* provided independent reasoning, analysis, and sources on the plain language and purpose behind section 17(d). [At. Br. 13-22] And the Executive Branch has itself conceded that the temporal language in section 17(d) means that the test must be applied at the end of the fiscal year, and that, contrary to the test for section 17(b), current valid appropriations should be excluded from the sweep. [Ae. Br. 30-34] The parties agree that the phrase "amount available for

---

46 *See Hickel*, 874 P.2d at 936.

47 This meets this Court's "unworkable in practice" requirement for stare decisis that the Executive Branch acknowledges the Students asked this Court to apply. [Ae. Br. 34] *See Khan v. State*, 278 P.3d 893, 901 (Alaska 2012) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004)).

48 *See Meyer v. Alaskans for Better Elections, Inc.*, 465 P.3d 477, 495 (Alaska 2020) ("We 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." (quoting *Thomas*, 102 P.3d at 943)).

appropriation" contained within section 17(b) must be interpreted differently than "available for appropriation at the end of each succeeding fiscal year" contained in section 17(d).[49] [At. Br. 13-15; Ae. Br. 30-34] It is the Executive Branch, not the Students, that has provided *no* independent support or reasoning to justify its results-oriented test aimed at sweeping special funds like the HEIF.[50]

Second, the Executive Branch implies that the HEIF monies, intended to generate funds to support student scholarships and grants in perpetuity, [Ae. Br. 25] would somehow do more good than harm if they were "swept" from the HEIF and kept in the CBR absent a three-quarters vote from both houses of the legislature. [*See* Ae. Br. 37-39] But having a slightly-smaller repayment obligation to the CBR does not mean that more good than harm would come from an expansive definition of what funds are subject to the sweep, especially where section 17(d)'s definition would impinge on and unravel the legislature's

---

[49] *See* Alaska Const. art. IX, §§ 17(b), (d). Attorney General Taylor also agrees that section 17(d) exempts appropriations from the sweep. [Exc. 127-129]

[50] The two reasons why the Students' referenced this Court's discussion of *Hickel* in *State v. Wielechowski* appear to have been lost on the Executive Branch. [Ae. Br. 34 n.131; *see* At. Br. 35 n.104] First, the *Wielechowski* Court explicitly noted that *Hickel* was a case about defining " 'available for appropriation' within the meaning of article IX, section 17(b)," *not* section 17 as a whole. *See Wielechowski*, 403 P.3d at 1151 n.66 (quoting *Hickel*, 874 P.2d at 925-26). Second, this Court recognized that not everything in *Hickel* was properly articulated, in part because the lengthy decision was decided on an expedited basis. *See id.* Both points are relevant here because *Wielechowski* impliedly recognizes that the *Hickel* Court did not fully consider section 17(d), and that *Hickel*'s language should not be treated as correct if there is no independent support for it. In fact, the *Wielechowski* Court specifically declined to follow otherwise "clear" language in *Hickel* precisely because that language was not supported by the plain language, framers' intent, and voters' understanding of the constitutional amendment at issue in that case. *See id.* at 1148-52.

appropriation decisions. The CBR has accomplished its purpose; it prevented the legislature from spending certain windfall profits through simple majority votes.[51] [*See* Ae. Br. 7] And a properly-defined sweep provision which repays the CBR with any leftover surpluses will continue to provide the legislature with a tool to stabilize state government for years to come.

As outlined in their opening brief, there are three reasons why adopting the Student's constitutional analysis would do more good than harm. [At. Br. 38-39; *see also* At. Br. 37-38 (explaining how *Hickel* could be seen as "originally erroneous" with respect to section 17(d))] First, it more faithfully implements the correct constitutional analysis based on the plain language, intent, and understanding of section 17(d). Second, it respects the legislature's article II appropriation power. And finally, it fulfills the legislature's intent in creating the HEIF as an endowment to provide long-term financial certainty for Alaska's students who rely on scholarships and grants from this program.

CONCLUSION

For these reasons, this Court should REVERSE and hold that the HEIF is not subject to the annual CBR sweep contained in article IX, section 17(d) of the Alaska Constitution.

---

[51] *See Hickel*, 874 P.2d at 929 ("One of the purposes of the [CBR] . . . was to provide a 'stabilizing mechanism' in the budgetary process." (citation omitted)); *Halford*, 872 P.2d 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." (emphasis added) (footnote omitted)).

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 4th day of April, 2022.

CASHION GILMORE & LINDEMUTH

By: _____

Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No.1511099