IN THE SUPREME COURT OF THE STATE OF ALASKA

Governor Dunleavy and Michael Johnson, Appellants, v. Alaska Legislative Council and Coalition for Education Equity, Appellees.	)	Supreme Court No. S-17666

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

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

REPLY BRIEF OF APPELLANTS

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Alaska Const. Art. II, § 15

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

Alaska Const. Art. II, § 16

Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses.

Alaska Const. Art. VII, § 1

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

Alaska Const. Art. VIII, § 2

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Alaska Const. Art. IX, § 7

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

Alaska Const. Art. IX, § 12

The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

Alaska Const. Art. IX, § 13

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

Alaska Laws

Ch. 6, SLA 2018

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

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

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

School Facilities

Maintenance

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

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

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

Funding Source		Amount
Unrestricted General		
1004	Unrestricted General Fund Receipts	12,111,400
*** Total Unrestricted General ***		12,111,400
Designated General		
1005	General Fund/Program Receipts	307,400
*** Total Designated General ***		307,400
Other Non-Duplicated		
1066	Public School Trust Fund	10,000,000
1108	Statutory Designated Program Receipts	170,000
*** Total Other Non-Duplicated ***		10,170,000
Federal Receipts		
1002	Federal Receipts	250,000

1043	Federal Impact Aid for K-12 Schools	20,791,000
*** Total Federal Receipts ***		21,041,000

Other Duplicated

1007	Interagency Receipts	7,473,300
*** Total Other Duplicated ***		7,473,300

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

*** Sec. 5.** FUND CAPITALIZATION.

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

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

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

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

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

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

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

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

INTRODUCTION

The Council and the Coalition fail to reconcile forward appropriations with the framers' intent "that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented," with all departments "'in the same position' as competitors for funds."[1] Instead, they criticize the governor, ask the Court to ignore the constitutional framework, claim that forward appropriations do not really constrain spending decisions, and argue that normal rules do not apply in the education context. The Court should look past these distractions and recognize that forward appropriations are inconsistent with Alaska's annual appropriation model.

To be clear: *saving money for the future* is a wise practice consistent with the annual appropriation model; *spending the future's money* is not. The amici miss the difference between (a) appropriating current-year money to spend in future years, which the governor does not challenge,[2] versus (b) appropriating *future-year money*, which is an unconstitutional "forward appropriation." [ACSA[3] Br. 14] This is the difference between (a) putting aside part of this month's paycheck to buy something next month, versus (b) committing to buy it with next month's paycheck. Every year, the legislature may appropriate current-year money to any purpose, including for spending in future years.[4]

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1 *Sonneman v. Hickel*, 836 P.2d 936, 938 & 940 (Alaska 1992).

2 The governor's opening brief proposes such appropriations as a constitutionally sound solution to the school budget timing problem. [At. Br. 6-7, 36-37; Exc. 31-33]

3 "ACSA Br." refers to the amicus brief. "LC Br." refers to the Legislative Council's brief. "CEE Br." refers to the Coalition for Education Equity's brief.

4 Contrary to the amici's assertions, the governor is not arguing that "all appropriations must be spent in the fiscal year of the appropriation or they lapse or

But it may not appropriate *future-year money*: i.e., money that will not enter the treasury until a future fiscal year. In other words, "this month's legislature" may spend "this month's paycheck" however it likes, including by saving some for the future. But it may not spend next month's paycheck. When the State is not "living paycheck to paycheck," this distinction might seem like a formality. But the State began from—and may soon return to—more modest means. The COVID-19 pandemic is a harsh reminder that past judgments about the best uses of money can quickly grow stale.

ARGUMENT

I. The governor did not violate his obligation to faithfully execute the law.

The governor and the legislature are locked in a good-faith disagreement on an important legal question. The Council disagrees with how the governor raised the question, but he acted appropriately, and regardless, the question remains the same: are forward appropriations constitutional? [LC Br. 12-16]

The Council distorts the events leading to this lawsuit, implying that the governor blind-sided the legislature and forced it to file suit to save education funding. [LC Br. 8-14] But in reality, both sides recognized the need for a judicial resolution and worked together to ensure continued funding in the meantime. During the legislative session, the administration urged the legislature to avoid the legal issue by including an appropriation

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expire." [ACSA Br. 14] Lapsing is irrelevant here because the governor agrees that the legislature can "make appropriations that would not lapse at the end of the next fiscal year." [*Id*. at 20] The legislature simply cannot appropriate a *future fiscal year's* funds.

for education in the 2020 budget.[5] But the legislature refused, and the governor declined to execute the existing appropriation because he considered it unconstitutional. With neither side backing down, they cooperatively negotiated an interim funding agreement before this lawsuit even began, filing their joint motion memorializing that agreement concurrently with the Council's complaint. [Exc. 8-20]

The governor does not seek to "expand the power of the executive" at the expense of "the judiciary's power to adjudicate" constitutional questions, nor does he believe that he or the attorney general can "declare a law unconstitutional." [LC Br. 4, 16-19, 37-38] He recognizes that the Court is the ultimate constitutional arbiter and welcomes a court ruling. In contrast, the *Council* seeks to avoid a court ruling by asserting that "this Court does not need to decide whether the appropriations made in HB 287 were constitutional." [*Id*. at 12] And the *Council* seeks to expand the legislature's power at the expense of the other branches by arguing that the governor had to execute the appropriations no matter what, which would have kept this question from reaching the Court.

No useful purpose would be served by the Court avoiding the core issue on the theory that the governor should have executed the appropriations because they were not "clearly" unconstitutional. [LC Br. 12-16] *Kodiak Island Borough v. Mahoney*, which the Council relies on, was an initiative case.[6] [*Id*. at 13-14] The executive branch must certify an initiative for the ballot unless it is "clearly unconstitutional" in order to avoid an

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5 *See* R. 330-33; Alaska A.G. Op., 2019 WL 2112834 (May 8, 2019).

6 71 P.3d 896 (Alaska 2003).

advisory court ruling on the constitutionality of a bill that might not pass.[7] But here, the appropriations were enacted and such avoidance would serve no similar purpose.

The Court's analogy in *Kodiak Island Borough* to "the power of a state executive agency" to "refuse to give life" to "clearly unconstitutional" laws does not support the Council's position.[8] For this proposition, *Kodiak Island Borough* cited *O'Callaghan*, which concerned whether the executive branch properly ceased applying the blanket primary statute on constitutional grounds.[9] But in *O'Callaghan*, the Court did not avoid ruling on the core issue—the statute's constitutionality—on the theory that the executive branch should have continued applying it because it was not "clearly unconstitutional." Rather, the Court ordered further briefing and then decided the core issue.[10] *O'Callaghan* thus means not that the executive branch must blindly execute laws, but rather that the Court will rule on a law's constitutionality when the issue comes to a head.

By declining to execute the disputed appropriations, the governor simply laid the groundwork to bring this important issue before the Court. The Council says he should have initiated litigation instead, but he cannot sue the legislature (or the Council).[11] [LC

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7 *See Kohlhaas v. State*, 147 P.3d 714, 717-18 (Alaska 2006).

8 71 P.3d at 900.

9 *See id*. (citing *O'Callaghan v. State*, 6 P.3d 728, 730 (Alaska 2000) (*O'Callaghan III*)); *see also O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995) (*O'Callaghan I*); *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996) (*O'Callaghan II*).

10 *See O'Callaghan I*, 888 P.2d at 1305 (holding that blanket primary statute was not "clearly unconstitutional," concluding that the Court "must decide whether the blanket primary statute is constitutional," and ordering supplemental briefing); *O'Callaghan II*, 914 P.2d at 1263 (considering the supplemental briefing and deciding the issue).

11 *See Legislative Council v. Knowles*, 988 P.2d 604, 609 (Alaska 1999).

Br. 12] The Council claims he could have instead "sued the commissioner responsible for enforcing the law, as was done in *State ex rel Hammond v. Allen*." [*Id*. at 12 n.27] But commissioners answer directly to the governor,[12] so suing them would not (in most cases) produce the necessary "controversy[] between parties having adverse legal interests."[13] In *State ex rel. Hammond*, disagreement existed within the executive branch;[14] that case does not support intra-executive-branch litigation when no adverse parties exist. Nor has the Court ever held that a litigant can simply "seek declaratory relief," as the Council also suggests, without naming any defendant. [*Id*. at 12 n.27] Alaska's declaratory judgment statute encompasses normal justiciability requirements, including adversity.[15] The Court would thus create a constitutional imbalance (and insulate the legislature from judicial scrutiny) if it held that the governor cannot do what he did here.

And in the end, even if the governor could have done something differently to tee up this important question for resolution by the Court, the question remains the same: are forward appropriations constitutional?

II. Forward appropriations violate the annual appropriation model.

Alaska's "annual appropriation model" is not a wobbly "three-legged stool"

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12 *See* Alaska Const. Art. III, §§ 24-25.

13 *State v. ACLU of Alaska*, 204 P.3d 364, 369-70 (Alaska 2009).

14 *See* 625 P.2d 844, 845 (Alaska 1981) (explaining that on one side was the governor, and on the other side were the Commissioner of Administration and sixty-one officials, who disagreed about the effect of a referendum repealing a retirement program).

15 *See ACLU of Alaska*, 204 P.3d at 369-70.

assembled from "a few lines of dicta," but rather is a solid edifice constructed by the framers and supported by decades of caselaw.[16] [CEE Br. 2; LC Br. 22] Neither the Council nor the Coalition refutes the governor's detailed account of the framers' intent for the state budget. [At. Br. 14-34] Unable to explain why forward appropriations do not undermine this intent, they argue that because no provision explicitly prohibits them, they are permitted regardless of the constitutional violence they do. [LC Br. 21-24; CEE Br. 17-31] In other words, their position is that the framers mistakenly left an extraordinary loophole in their otherwise careful plan. The Court should reject this position.[17]

In doing so, the Court should not defer to the legislature. Defining the constitutional bounds on the appropriation power is the Court's role.[18] The "legislature's role in making appropriations" does not "somehow alter or increase its authority to define

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[16] *See Sonneman*, 836 P.2d at 940 (the dedicated funds clause "seeks to preserve an *annual appropriation model* . . .") (emphasis added); *Myers v. Alaska Hous. Fin. Corp*., 68 P.3d 386, 389 (Alaska 2003) (the dedicated funds clause "helps preserve *the state's annual appropriation model*"; lawsuit settlements "have a non-recurring nature unlike other sources of state revenue relied upon in *Alaska's annual appropriation process*") (emphasis added); *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 101 (Alaska 2016) ("Together the clauses govern the legislature's and the governor's 'joint responsibility ... to determine the State's spending priorities *on an annual basis*.'") (emphasis added) (quoting *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006)).

[17] When a similar issue arose in the 1980s, the superior court struck down "continuing appropriations" which pre-appropriated funds over several years to pay for power development projects. [Exc. 133; R. 26-28] The governor's citation to that case was not "frivolous," nor is the case meaningfully distinguishable. [LC Br. 14 n.31] If the Council were correct that "no temporal limits" exist then those appropriations should have been upheld, regardless of whether they were in "codified law" or a budget bill.

[18] *See, e.g., Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) (adopting a test to decide whether an appropriations bill violates the confinement clause).

constitutional terms."[19] The legislature may think forward appropriations are useful, but it is for the Court to decide whether the Alaska Constitution includes this tool or not.

A. The absence of an explicit prohibition is not dispositive.

The Council and the Coalition claim that "a violation of an enumerated clause" is necessary for a constitutional violation and that the Court never rules "based only on the constitutional framework and not any particular constitutional provision." [LC Br. 21; CEE Br. 17] But the Court's jurisprudence is not so cramped or short-sighted. "[O]ften what is implied is as much a part of the constitution as what is expressed."[20]

The separation of powers doctrine—which the Coalition itself invokes—is a clear example. [CEE Br. 25, 28] The Court recognizes this unwritten doctrine as "implicit in" our constitution[21] and "part of the constitutional framework."[22] And it bars many acts that are not explicitly prohibited: for example, the legislature may not dictate attorney admission standards,[23] or expand its confirmation power over executive appointments.[24]

The annual appropriation model has the same kind of structural grounding and has been similarly recognized by the Court. [At. Br. 14-34; *supra* n.16] This model bars acts that are inconsistent with the framers' vision even absent an explicit prohibition: the

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19 *Hickel v. Cowper*, 874 P.2d 922, 925 (Alaska 1994).

20 *Pub. Def. Agency v. Superior Court, Third Judicial Dist*., 534 P.2d 947, 950 (Alaska 1975) (citing *Wade v. Nolan*, 414 P.2d 689, 698 (Alaska 1966)).

21 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc*., 28 P.3d 904, 913 (Alaska 2001).

22 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 34–35 (Alaska 2007).

23 *Application of Park*, 484 P.2d 690, 695 (Alaska 1971).

24 *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

statute in *Sonneman* did not create a dedicated fund, but the Court nonetheless recognized it as unconstitutional.[25] Likewise in *Myers*, the Court did not conclude its analysis with the observation that there was no dedicated fund.[26] Instead, the Court considered whether the challenged action was "contrary to the spirit of" the dedicated funds clause.[27]

Not every constitutional question is answered by an explicit provision. The separation of powers doctrine interprets what the framers intended when vesting the "judicial power" in this Court,[28] and the "executive power" in the governor.[29] Just as vesting the executive power in the governor leaves open questions about what that power entails, vesting the appropriations power in the legislature[30] leaves open questions about what that power entails. The constitution's lack of an explicit prohibition on forward appropriations is thus immaterial. The question still remains: does it authorize them?

B. Forward appropriations do not compete on a level playing field.

As explained in the opening brief, a major problem with forward appropriations is that they do not compete equally with other spending. [At. Br. 26-31] This point is not

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25 *Sonneman*, 836 P.2d at 940.

26 *Myers*, 68 P.3d at 391-93.

27 *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1170 (Alaska 2009) (explaining that in *Myers*, "[n]o dedicated fund was created" but that "[n]onetheless, we were concerned that the transaction might be contrary to the spirit of the clause").

28 *See Application of Park*, 484 P.2d at 695 (holding that a statute dictating the standards by which the Court admits attorneys to practice violated Article IV, section 1, which vests the "judicial power" in the courts).

29 *See Bradner*, 553 P.2d at 6 (holding that the appointment of executive officers is an executive function).

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

based on a "misconception" that they "cannot be considered again by the legislature." [LC Br. 27] Nor is the governor's point that it is more difficult "to amend or repeal an appropriation previously enacted into law than to enact a new one." [*Id*. at 5] Rather, it is more difficult to amend or repeal an existing appropriation than to *reject* a new one.

A forward appropriation thus flips the default rule for spending a fiscal year's revenue: normally, spending on a given item will not occur unless a majority of both houses of the legislature (plus the governor or a veto-proof majority) agree that it should. But when a forward appropriation exists, spending *will* occur unless a majority of both houses (plus the governor, or a veto-proof majority) agree that it *should not*.

This observation does not "fail[] to appreciate the legislative procedure used to adopt appropriations." [LC Br. 30] "Conference committee" negotiations do not change the constitutional fact that a majority in just one house can block a new appropriation, but cannot amend or repeal an existing one. [*Id*.] Negotiations can change minds, but cannot take away anyone's power to vote against a proposal. It takes thirty-two people (a majority of both houses) to amend or repeal an existing appropriation, but few as ten (half the Senate) to reject a new one. It is indisputable that it is harder to persuade thirty-two people than to persuade just ten. The veto power makes this difference even starker: just one person (the governor) can block new spending absent a veto-proof majority.

It is thus incorrect to say that the Thirtieth Legislature's forward appropriations "competed alongside all other general fund appropriations" when the Thirty-First Legislature balanced the FY 2020 budget. [LC Br. 29] Although the Thirty-First Legislature had to find "sufficient revenue" to cover all appropriations (including the

forward ones), and voted to cover revenue shortfalls by drawing from savings, the forward appropriations did not compete equally. [LC Br. 28] They benefitted from a heightened level of political insulation and a substantial head start over normal proposals that could be blocked by a majority in either house or by veto.

Indeed, if this weren't the case—that is, if forward appropriations for education were truly "in the same position"[31] as other spending proposals—they would provide none of the "budgeting certainty" that is used to justify them. [CEE Br. 12] School districts could be no surer that they would ultimately receive the forward-appropriated amounts than they would be without the forward appropriations. A thumb on the scales is not just the effect, but the entire *purpose*, of forward appropriations.

C. Forward appropriations eviscerate the dedicated funds clause.

With the dedicated funds clause, which is "almost unique among state constitutions,"[32] Alaska's framers "believed that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented," with all departments "'in the same position' as competitors for funds."[33] But as explained above, forward appropriations make this untrue. Neither the Council nor the Coalition explains how the dedicated funds clause retains any purpose if they are allowed.

The problem with dedicated funds is that they tie up future revenues, making less money available for the priorities of the moment. For example, if a former legislature has

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31 *Sonneman*, 836 P.2d at 940.

32 *Myers*, 68 P.3d at, 389.

33 *Sonneman*, 836 P.2d at 940.

pre-committed gas tax revenue to roads, that revenue will not be available for more pressing needs—such as a public health crisis. The framers wanted to avoid a situation where "an ever-decreasing amount is available to the general fund," such that "neither the governor nor the legislature has any real control over the finances of the state."[34]

The framers recognized that dedicated funds have upsides for raising revenue. They can "reduce[] taxpayer resistance by guaranteeing that the tax would . . . benefit those who paid it."[35] Or they can incentivize a program like the state ferry system to operate more profitably by giving it a right to its proceeds.[36] Even so, the framers concluded that the drawbacks of dedicated funds outweigh the benefits, so they chose to make the legislature "free to appropriate all funds for any purpose on an annual basis."[37]

Forward appropriations are not classic dedicated funds—they are *worse*. They have the drawbacks without the benefits. As the Council and the Coalition emphasize, they are not classic dedicated funds "because the legislature has not pre-pledged money

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[34] *Sonneman*, 836 P.2d at 938-39 (quoting PACC Appx. V at 111); *see also* PACC at 2368 (Delegate Awes) ("[E]ventually you do get so many funds earmarked that the legislature just does not have the money to work with for current operating expenses.").

[35] *State v. Alex*, 646 P.2d 203, 209 (Alaska 1982) (citing 3 Constitutional Studies pt. IX, at 27); PACC at 2368 ("[T]he other argument that is often given is that it is easier to pass along for a new tax if you allow earmarking. An automobile driver is more willing to pay an extra gasoline tax if he thinks he is going to have better roads as a result.").

[36] *Cf. Sonneman*, 836 P.2d at 938 ("The legislature evidently intended that the Marine Highway System operate under constraints and incentives based partially on the revenues [it] generated . . . In order for this to work, there must be a reasonable expectation that the revenues generated by the system can be used by the system.").

[37] *Id.* at 940. A delegate proposed deleting the clause to "leave it to the legislature" whether to dedicate funds, but his proposal was soundly defeated. PACC at 2406-09.

from a particular source of revenue to satisfy them." [CEE Br. 18-22; LC Br. 25-26] But the legislature *has* pre-pledged a portion of the State's general fund—it just hasn't specified *which* portion. And spending future years' money *without* identifying a source is *worse* than spending future years' money while also creating specific revenues to pay for it. It is also easier, because it does not require new taxes or fees. If this tactic is allowed, there is no point in prohibiting dedicated funds. The same framers who made the considered decision to prohibit dedicated funds despite their benefits would not have also authorized total circumvention of that constraint with no corresponding benefits.

The Council suggests that forward appropriations are easier to repeal (and therefore not *quite* as bad) as dedicated funds, but this is both false and beside the point. [LC Br. 31 n.58] The same number of votes is needed to change existing legislation whether it is an appropriation or a substantive law and whether the change is proposed in a standalone bill or as part of a larger bill.[38] And if a new legislature's power to change legislation meant that existing legislation could not constrain the budget in a way the framers opposed, the dedicated funds clause would have been unnecessary. The framers did not intend the clause to be a marginal, arbitrary provision to police minor differences in legislative procedure between appropriations and substantive bills.

Because forward appropriations defeat the dedicated funds clause's purposes, they simply cannot coexist with the years of precedent recognizing and protecting those

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[38] Alaska Const. Art. II, § 14. It may even be *harder* for a new legislature to change an appropriation bill if the governor is not on board with the change because Art. II, § 16 requires more votes to override an appropriation veto than a substantive law veto.

purposes.[39] Even the provision invalidated in *Sonneman*—which did not dedicate any funds—was less corrosive to those purposes than forward appropriations because it did not constrain the legislature's budgeting flexibility.[40] Yet the Court struck it down anyway, because it was contrary to the framers' intent that all spending proposals compete on equal footing in the budgeting process.[41] So are forward appropriations.

D. Forward appropriations dampen the governor's veto power.

Forward appropriations are of course subject to veto by the governor in office at the time they are passed, just as they are voted on by the legislature in office at the time they are passed. But just as they nonetheless hamstring *future* legislatures by constraining the budgeting flexibility the framers intended, they also hamstring *future* governors by dampening the "strong control on the purse strings"[42] the framers intended.

The governor is not arguing that each governor "has veto authority over all *expenditures* while he is in office." [CEE Br. 27 (emphasis added)] An incoming governor always inherits the previous budget for the rest of the fiscal year. But an incoming governor must play a meaningful role in any *budgeting process* that occurs while he is in office, which must include real veto authority. This is a crucial part of the

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39 *See Ketchikan Gateway Borough*, 366 P.3d at 92-93; *Se. Alaska Conservation Council*, 202 P.3d at 1168; *Myers*, 68 P.3d at 389; *Alex*, 646 P.2d at 209.

40 836 P.2d at 939 (observing that act "impose[s] no legal restraint on the appropriation power of the legislature.").

41 *Id.* at 940.

42 *See Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (delegates intended "a strong executive branch with 'a strong control on the purse strings' of the state").

governor's job and a role that voters elect a new governor to play.

Forward appropriations sideline a new governor by deeming parts of the state budget off limits. With them, a governor may receive a plan for spending the fiscal year's revenues that is composed partly (or even mostly) of pre-enacted spending items that cannot be vetoed. A governor in this position cannot effectively "tighten or close the state's purse strings"[43] or exercise "joint responsibility" to "determine the State's spending priorities."[44] So although the governor's role in the appropriation process is just a "check" on the legislature's power,[45] forward appropriations eliminate this check.

The Coalition observes that the governor also has an enhanced veto power over revenue bills, and argues that "[t]he Court can no more infer a temporal limitation for appropriation bills" from this power "than it can infer such a limitation for revenue bills." [CEE Br. 31] But the governor does not "infer a temporal limitation" from Article II, section 16's high threshold for overriding appropriations vetoes. Rather, the governor argues that the appropriations veto power—which is meant to be strong—is ineffective if swaths of the annual budget are off-limits, having been pre-committed by politicians no longer in office. Multi-year revenue bills do not raise the same concerns given that they *raise* revenue and do not prevent governors from *tightening* the purse strings.

Finally, the amici incorrectly assert that the governor wants to "reach back" and

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43 *Knowles*, 21 P.3d at 372.

44 *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006) (quoting superior court).

45 *See Thomas*, 569 P.2d at 796 (item veto is a "check on legislative power"); *Knowles*, 21 P.3d at 372 (governor's power is "one of limitation").

veto "items long settled" like past appropriations setting aside money that has not yet been spent. [ACSA Br. 21] But the governor challenges only the recent practice of *forward* appropriations—not past appropriations setting aside money for future spending. [*Supra* 1-2] A past fiscal year's legislature's decisions about how to spend that past fiscal year's money (including saving it for the future) are properly subject to that fiscal year's governor's veto and do not implicate the concerns discussed here.

E. Forward appropriations have no workable limiting principle.

The Council argues that "[t]he Alaska Constitution imposes *no temporal limits* on the legislature's power of appropriation." [LC Br. 21 (emphasis added), 3] In the next breath, the Council reassures the Court that accepting this position "in no way will result in the opening of 'Pandora's Box.'" [*Id*. at 6] But if the power of appropriation has "no temporal limits," then no workable limiting principle exists to prevent abuses.

This case has serious implications: it is not about picking sides between this particular legislature and governor, but about protecting the power of *future* legislatures and governors. To "adopt the rule of law that is most persuasive in light of precedent, reason, and policy,"[46] the Court cannot limit this case to its facts as the Council suggests. [LC Br. 6] That is not how the common law works. Approving of these forward appropriations will inspire others, hamstringing future legislatures and governors.

With "no temporal limits," a particularly productive legislature could pass complete budgets for the next two decades, on the theory that this advance planning

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46 *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 192 (Alaska 2007).

would provide "needed certainty" to agencies and citizens. Thereafter, regardless of changing economic conditions, that legislature's desired spending would occur by default unless both houses (plus the governor, or a veto-proof majority) could agree otherwise. Future legislatures would lack "any real control over the finances of the state."[47] And future governors could do nothing to "tighten or close the state's purse strings."[48]

As a more realistic example, a legislature could forward-appropriate funds for permanent fund dividends (PFDs) of a certain amount years into the future, giving PFDs a perennial advantage over other spending.[49] [At. Br. 31] Indeed, the governor proposed forward appropriations for PFDs in 2019. [R. 101-03] This does not, as the amici assert, "bely" his argument against forward appropriations. [ACSA Br. 17] Rather, it shows that if the Court upholds them, elected leaders will use them for their preferred programs, leading to spending "in the hodgepodge fashion [of] the past."[50] [At. Br. 17-19]

The amici criticize the governor's PFD proposal—citing "recent economic headwinds"—while also acknowledging that their view would allow it. [ACSA Br. 18] But the framers accounted for "economic headwinds" by requiring the legislature to set funding priorities "anew on an annual basis."[51] The recent "headwinds"—caused by a pandemic and falling oil prices—confirm that the framers were wise to choose an annual

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47 *Sonneman*, 836 P.2d at 938-39 (Alaska 1992) (quoting PACC Appx. V at 111).

48 *Knowles*, 21 P.3d at 372.

49 The legislature could thus use forward appropriations to accomplish essentially what the Court struck down in *Wielechowski v. State*, 403 P.3d 1141 (Alaska 2017).

50 PACC at 1740 (statement of Del. McCutcheon).

51 *See Sonneman*, 836 P.2d at 938-39, 940.

budgeting model rather than allowing legislatures to pre-set spending years in advance.

The Council suggests that the forward appropriations here are less problematic because the legislature has set education funding only one year in advance. [LC Br. 36-37] But the Council claims "no temporal limits." [*Id*. at 21] And a temporal limit allowing the legislature to hamstring just *one* future legislature and governor by tying up just *one* future year's funds is nothing but an arbitrary carve-out for this case. The limit supported by text, precedent, and common sense is that "this month's legislature" can spend only "this month's paycheck" (i.e., funds available in "the next fiscal year"[52]).

The Coalition argues that temporal limits are not needed because the constitution's "public purpose" requirement will prevent the legislature from "get[ting] too far out over its skis." [CEE Br. 13, 31] But the Council does not join in this argument. The public purpose requirement asks only whether the legislature is "motivated by considerations other than the public interest."[53] That is, the Court contrasts "public purposes" with "*private* purposes"—not with bad choices.[54] The requirement is easy to satisfy: the Court has never found it unsatisfied and will not find it unsatisfied "unless it clearly appears" that the legislature's judgment "is arbitrary and without any reasonable basis in fact."[55]

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52 Alaska Const. Art. IX, § 12.

53 *Weber v. Kenai Peninsula Borough*, 990 P.2d 611, 614 (Alaska 1999).

54 *See, e.g., id.* ("there are no rigid categories establishing public versus private purposes"); *Suber v. Alaska State Bond Comm*., 414 P.2d 546, 551 (Alaska 1966) (rejecting argument that "private purpose alone will be satisfied and no public purpose will be achieved").

55 *Dearmond v. Alaska State Dev. Corp*., 376 P.2d 717, 721 (Alaska 1962).

The Coalition's own arguments show why this proposed safeguard is illusory. It asserts that the forward appropriation in this case satisfies the public purpose requirement because it "funds public education and provides budgeting certainty for school districts, both of which are quintessential public purposes." [CEE Br. 12] But the same could be said of forward appropriations for most programs. Roads and public safety are "quintessential" public purposes and could similarly benefit from "budgeting certainty." Alaskans could likewise benefit from "certainty" about future PFD amounts. The public purpose requirement provides no effective means to scrutinize forward appropriations.

III. The public education clause does not enhance the appropriations power.

The final limiting principle proposed is that forward appropriations are constitutional as long as they are for education. But the public education clause gives the legislature flexibility in designing the State's education system—it does not give the legislature a special exemption from the constraints that otherwise govern its powers.

The Coalition argues that "legislative judgments" about education are entitled to deference if "within the limits of rationality." [CEE Br. 5, 8, 16] But unlike the cases the Coalition cites, this case is not about "legislative judgments" about education or the "propriety of its funding decisions." [*Id*. at 16] It is about the constitutional limits on the legislature's appropriation power. To defer to the legislature's judgment about the limits on its appropriation power would be to allow the fox to guard the proverbial henhouse.

Other constitutional constraints on the legislature's power apply in the education context just the same as in other contexts. For instance, when passing an education bill, the legislature still needs a majority of each house under Article II, section 14. And no

matter how critical the legislature believes the bill is, it will still be subject to veto under Article II, section 15. Nor is the legislature freer to violate the separation of powers or the confinement clause when legislating on education. Similarly, if forward appropriations exceed the legislature's power, they exceed it for education appropriations too. *State v. Alex* is directly on point: just as the legislature's constitutional power over natural resources did not exempt it from limits on its taxing power there,[56] its constitutional power over education does not exempt it from limits on its appropriations power here.

Nothing in the constitutional history suggests that the framers intended education appropriations to be exempt from normal rules. [At. Br. 40-41] Education is not the only "public service" mandated by the constitution—for example, Article IV requires a court system; Article VII requires providing for "public health" and "public welfare"; and Article VIII requires providing for "the utilization, development, and conservation" of natural resources. [CEE Br. 5] Nor does the education clause vest special authority in the "legislative branch, rather than the executive branch" merely because the *style and drafting* committee revised it to instruct "the legislature" (rather than "the state") to "establish and maintain a system of public schools."[57] [*Id*. at 6-7] This stylistic change merely made it mirror the nearby sections that require "the legislature" to provide for public health and welfare. The legislature fulfills all of these obligations by passing

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[56] 646 P.2d at 210-11 ("Nothing contained in article VIII can be construed to grant the legislature the power to ignore other express constitutional limitations on its taxing power just because it is legislating in an area that concerns natural resources.").

[57] PACC at 3312 (statement of Delegate Hurley explaining that "the Committee on Style and Drafting" changed the word "state" to "legislature").

statutes and appropriating funds; it does not "manage" education any differently. [*Id*. at 5] Just as its responsibility to provide for the public welfare does not exempt it from normal constraints, its responsibility to provide for public education does not either.

The amici claim that "[t]he availability of forward funding as a tool" is "critical to the education of Alaska's students," but this is not true. [ACSA Br. 8] As explained above, the amici confuse forward appropriations with appropriations of current-year funds for spending the next year, which are a permissible and logical way to solve the timing problems with education funding. [*Id*. at 14, 20; *supra* at 1-2]

The Council and the Coalition, by contrast, do not claim that forward appropriations are critical for education. The Council barely discusses education, and the Coalition concedes that forward appropriations are unnecessary by arguing that their necessity is irrelevant. [CEE Br. 9; LC Br. 19-21] This concession is well-taken because the legislature can provide the same level of certainty to schools by passing a budget early in the session or appropriating current-year money into the education fund for spending in the next fiscal year. [At. Br. 36-37] This may be harder because it forces the legislature to make tradeoffs about the money currently at its disposal, instead of leaving those tradeoffs for future legislatures. But this is the legislature's job.

CONCLUSION

For these reasons, the Court should vacate the judgment of the superior court and remand for entry of judgment in favor of the governor.