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for Alaska Legislative Council

FILED in the TRIAL COURTS
State of Alaska Third District
JAN 28 2022
Clerk of the Trial Courts
By_____Deputy

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

Plaintiffs,

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,

Defendants.

Case No.: 3AN-22-04028 CI

AFFIDAVIT OF KEVIN CUDDY IN SUPPORT OF BRIEF OF AMICUS CURIAE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

KEVIN CUDDY, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 and have personal knowledge of the statements contained in this affidavit.

2. I am an attorney at the law firm of Stoel Rives, LLP, counsel for amicus Alaska Legislative Council, in the above-captioned action.

3. Attached as Exhibit 1 is a true and correct copy of a letter dated July 7, 2021, from Commissioner of Revenue Lucinda Mahoney to Dr. Michael Johnson, Commissioner of the Department of Education and Early Development.

4. Attached as Exhibit 2 is a true and correct copy of the Net Asset Value for the Alaska Higher Education Investment Fund as of December 31, 2021, as obtained from the Alaska Department of Revenue's website on January 27, 2022.

END OF AFFIDAVIT.

DATED this 28th day of January 2022 at Anchorage, Alaska.

/s/ Kevin Cuddy
KEVIN CUDDY

SUBSCRIBED AND SWORN TO before me on this _____ day of _____ 2022 at Anchorage, Alaska.

Notary Public for the State of Alaska
My commission expires _____

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CERTIFICATE OF SERVICE

This certifies that on January 28, 2022, a true and correct copy of the foregoing was served via email on:

Jahna M. Lindemuth Scott M. Kendall Samuel G. Gottstein Cashion Gilmore & Lindemuth 510 L Street, Suite 601 Anchorage, AK 99501 jahna@cashiongilmore.com scott@cashiongilmore.com sam@cashiongilmore.com *Attorneys for Plaintiffs*	Margaret Paton-Walsh Katherine Demarest Department of Law Office of the Attorney General 1031 W. 4th Avenue, Suite 200 Anchorage, AK 99501 margaret.paton-walsh@alaska.gov kate.demarest@alaska.gov *Attorneys for Defendants*

/s/ Karen P. Warne
Karen P. Warne, Practice Assistant

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IN THE ~~DISTRICT~~/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE
(City or town where the court is located)

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiff/Petitioner, v. GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, et al. Defendant/Respondent.	)	Case No. 3AN-22-04028 CI

SELF-CERTIFICATION (NO NOTARY AVAILABLE)

[If a notary public or other person with the power to take oaths is not available to notarize a document that you are filing with the court, you may fill out this form and attach it to your document.]

As allowed by AS 09.63.020, I, *(Name)* Kevin Cuddy, certify under penalty of perjury that the following is true:

1. I am attaching this *Self-Certification* to the following attached document:
   Affidavit of Kevin Cuddy in Support of Brief of Amicus Curiae
   If the attached document is required to be served on another party, I have attached a copy of this *Self-Certification* to the document when I served it.

2. No notary public or other person with the power to take oaths is available to watch me sign because:
   - ☐ I live somewhere with no available notary public or other person who can take oaths.
   - ☐ I cannot access the courthouse or private notary for medical reasons including quarantine.
   - ☒ In light of the global pandemic, the undersigned is unable to gain ready access to a notary. I can provide a notarized version later, if required.

3. I told the truth to the best of my knowledge and belief in the attached document.

Signature: /s/ Kevin M. Cuddy
Signed on: *(date)* 01/28/2022 at: *(city)* Anchorage, *(state)* AK
Mailing Address: Stoel Rives LLP 510 L Street, Suite 500 Anchorage, AK 99501
Cell Phone: _____ Work Phone: 277-1900
Home Phone: _____ Email*: kevin.cuddy@stoel.com
*☒ I authorize the court to email me court documents in this case to the email address above.

THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Revenue

TREASURY DIVISION

Po Box 110405
Juneau, Alaska 99811-0405
Main: 907.465.2300
Fax: 907.465.4397

Date: July 7, 2021

To: Dr. Michael Johnson, Commissioner
Department of Education and Early Development

From: Lucinda Mahoney, Commissioner *lm*

Subject: Alaska Higher Education Fund FY 2022 Budget Information per AS 37.14.750(c)

In accordance with AS 37.14.750(c), as soon as practicable after July 1 of each year, the Commissioner of Revenue shall determine the market value of the Fund as of June 30th of the previous fiscal year. Seven percent of that amount is available for appropriation, of which two-thirds is identified for the Alaska Performance Scholarship and one-third for the Alaska Advantage Educational Grant.

The amounts available for appropriation from the Alaska Higher Education Fund are as follows:

June 30, 2021 market value:	$ 416,411,396
Seven percent to be allocated:	$ 29,148,798
Alaska Performance Scholarship:	$ 19,432,532
Alaska Advantage Educational Grant:	$ 9,716,266

cc: Sana Efird, Executive Director, Alaska Commission on Postsecondary Education
Julie Pierce, Chief Financial Officer, Alaska Commission on Postsecondary Education
Ciara Meek, Department of Administration, Division of Finance
Zachary Hanna, Chief Investment Officer, Department of Revenue
Jesse Blackwell, Cash Manager, Department of Revenue
Pamela Leary, Director, Treasury Division, Department of Revenue

AK Higher Education Investment
Net Asset Value
As of the Month Ending
December 31, 2021

Cash and Cash Equivalents	
Short-term Fixed Income Pool *(Internally Managed)*	$ 4,061,060.34
Total Cash and Cash Equivalents	4,061,060.34
Fixed Income Securities	
Interim-term *(Internally Managed)*	-
Broad-term *(Internally Managed)*	120,825,441.00
High Yield *(Internally Managed)*	-
Total Fixed Income Securities	120,825,441.00
Broad Domestic Equity	
SSgA Russell 3000	171,913,715.93
Total Broad Domestic Equity	171,913,715.93
Global Equity Ex-U.S.	
SOA International Equity Pool	102,604,731.03
Total Global Equity Ex-U.S.	102,604,731.03
Real Assets	
Real Estate Investment Trust Pool *(Internally Managed)*	23,395,312.91
Total Real Assets	23,395,312.91
Receivables and Payables	
Income Receivable/Payable	119.67
Payable To/From	-
Total Receivables and Payables	119.67
Total Assets	**$ 422,800,380.88**

AK Higher Education Investment
Schedule of Investment Income (Loss) and Changes in Invested Assets
As of the Month Ending
December 31, 2021

	1-Month	Fiscal YTD
Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$ 119.67	$ 962.80
	119.67	962.80
Fixed Income Securities		
Interim-term *(Internally Managed)*	-	-
Broad-term *(Internally Managed)*	(339,457.13)	(176,893.71)
High Yield *(Internally Managed)*	-	-
	(339,457.13)	(176,893.71)
Broad Domestic Equity		
SSgA Russell 3000	6,563,188.58	14,665,822.17
	6,563,188.58	14,665,822.17
Global Equity Ex-U.S.		
SOA International Equity Pool	4,059,686.45	(1,219,374.13)
	4,059,686.45	(1,219,374.13)
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*	2,053,750.45	3,132,212.91
	2,053,750.45	3,132,212.91
Total Investment Income (Loss)	**$ 12,337,288.02**	**$ 16,402,730.04**
Payable To/From	-	-
Total Invested Assets, Beginning of Period	**410,549,372.38**	**416,411,393.99**
Net Contribution (Withdrawal)	**(86,279.52)**	**(10,013,743.15)**
Total Assets	**$ 422,800,380.88**	**$ 422,800,380.88**

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Attorneys for Amicus Curiae
Alaska Legislative Council

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

Plaintiffs,

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,

Defendants.

Case No.: 3AN-22-04028 CI

BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

The Alaska Legislative Council, acting on behalf of the Alaska Legislature, offers this amicus curiae brief to address certain arguments raised by the Defendants regarding the application of article IX, section 17 of the Alaska Constitution to the Higher Education Investment Fund ("HEIF"). Defendants claim that the so-called "sweep" requires the reversal of a decade-old appropriation and the dismantling of existing state services. Defendants are mistaken. Defendants' proposed interpretation fails to take into account the framers' intent and extrinsic indications of the voters' probable understanding of the constitutional provision. This unnecessarily hasty and overbroad imposition of the sweep would undermine the core purpose of the constitutional amendment – stability in budgeting and state services – by disrupting existing state services and second-guessing the wisdom of the Legislature's assessment of particular appropriations. The Legislature made a policy decision more than a decade ago to establish a durable, reliable, non-lapsing investment fund that would serve as an endowment for Alaskan students pursuing higher education. Those funds were appropriated and committed a decade ago for a specific purpose, and they are not "available" to be swept now.

II. INTERESTS OF AMICUS

Article II, section 11 of the Alaska Constitution establishes the Legislative Council as a permanent interim committee of the Alaska Legislature. The Legislature has delegated

the Council authority to "do all things necessary to carry out legislative directives and law."[1]

Article II, section 13 of the Alaska Constitution vests the power of appropriation of the State of Alaska in the Legislature.[2]

The issues raised in this lawsuit have a direct and immediate impact on the scope of the Legislature's appropriation power, including how that appropriation authority is impacted by article IX, section 17(d) of the Alaska Constitution,[3] and thus the Legislature – appearing through its Legislative Council – has an important interest in being heard in this case. The Court granted the Legislative Council's unopposed motion for leave to participate as amicus curiae on January 21, 2022.

III. FACTUAL BACKGROUND

A. In 1990, the Legislature Drafted Article IX, Section 17 of the Alaska Constitution to Help Provide More Stability to the State's Finances.

In 1990, members of the Legislature were deeply concerned with forecasts of an upcoming "gap" between annual general fund revenues and state spending levels.[4] To address these potential future problems, the Legislature drafted bills for a proposed amendment to the Alaska Constitution that would create the Constitutional Budget Reserve

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

[2] *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) ("Our analysis begins with the Alaska Constitution. It gives the legislature the power to legislate and appropriate.").

[3] *See, e.g.*, Complaint ¶¶ 34-39.

[4] *See, e.g.*, Affidavit of Jahna M. Lindemuth (filed Jan. 4, 2022) ("Lindemuth Aff."), Exh. 1, at 1-2.

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Fund (the "CBR").[5] That amendment – article IX, section 17 (referred to below simply as "section 17") – was ultimately adopted by the voters later that year. Briefly, the amendment created a savings account with certain funds and allowed the Legislature to access that account under two sets of circumstances.[6] First, if the amount available for appropriation for a fiscal year was less than the prior year, the Legislature could access the fund (up to a cap of the prior year's appropriation) through a simple majority vote.[7] Second, the Legislature could access the fund for any public purpose through a three-fourths affirmative vote of each house.[8] The Legislature was also required to repay appropriations made from the fund:

> If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.[9]

This is the provision at issue in this lawsuit.

As reflected in both the legislative history and in communications to the voting public, one of the chief goals of the constitutional amendment was to "provide some stability" to the State's finances, thus "minimiz[ing] the effects of a 'boom' one year, and

---

[5] The primary bills were HJR 66 and SJR 5. The ultimate piece of legislation, HCS CSSSSJR 5 (Fin)am H, was signed by the Governor on July 23, 1990, and placed on the November 1990 ballot.
[6] Alaska Const., article IX, section 17(a).
[7] Alaska Const., article IX, section 17(b).
[8] Alaska Const., article IX, section 17(c).
[9] Alaska Const., article IX, section 17(d).

a 'bust' the next."[10] The CBR would help the Legislature maintain the status quo from year to year, offering a consistent level of appropriations and services to the public without abrupt shifts.

B. The Framers' and Voters' Intent with Respect to Section 17(d).

A leading proponent of the underlying bill, Representative Kay Brown, explained on the House Floor how section 17(d) was intended to work: "And then, if money is borrowed or appropriated from the budget reserve fund in that manner, or any money taken out of it, [the money] would be repaid to the budget reserve fund *out of any general fund surpluses* that remain at the end of the fiscal year."[11] This was reiterated in the election pamphlet distributed to the voters that ratified section 17(d). The summary provided by the Legislative Affairs Agency noted that "[m]oney that is appropriated from the reserve fund must be repaid. *Surplus general fund money* must be deposited in the reserve fund at the end of each year until the reserve fund is repaid."[12] Representative Brown and two other legislators informed voters that "[t]he Legislature will be required to repay any money it appropriates from the Budget Reserve. *If the next year['s] revenues are insufficient [and] the Legislature cannot afford to replenish the Budget Reserve, the 'debt'*

[10] Lindemuth Aff., Exh. 1 at 2; *see also Hickel v. Cowper*, 874 P.2d 922, 929 (Alaska 1994) ("One of the purposes of the budget reserve amendment, however, was to provide a 'stabilizing mechanism' in the budgetary process." (quoting testimony of budget officer Mary Halloran before the House Finance Committee)).

[11] House Floor session on SJR 5, 16th Leg., 2d Sess., Audio 2, 1:02:51-1:03:08. (http://www.akleg.gov/ftr/archives/1990/HFLR/121-HFLR-900508-2.mp3 (May 8, 1990)) (emphasis added). She went on to explain that there was "broad consensus" that section 17 was necessary to help avoid Alaska's "lumpy" revenue stream and its impact on budgeting. *See id.* at 1:03:10-:19.

[12] Lindemuth Aff., Exh. 1 at 1 (emphasis added).

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will carry forward until it is repaid."[13] Taken together, these statements confirm that the Legislature and the voters understood that the repayment (or replenishment) of the CBR would come from annual revenues and any surplus general funds. If those revenues and surpluses were insufficient to satisfy the "debt" to the CBR in any particular year, the debt would be carried over to the next year. It was simply never contemplated that the State would need to sell off assets, de-fund previously established programs, or otherwise undercut existing government services to repay amounts owed to the CBR hastily.

C. The Higher Education Investment Fund.

The HEIF was created in 2012 to operate as an endowment that provides investment income to support the Alaska Education Grant program and the Alaska Performance Scholarship Award program.[14] The Legislature appropriated $400 million in 2011 to create the fund.[15] During this period, it is undisputed that the Legislature was not borrowing any funds from the CBR.[16] While the HEIF is not a dedicated fund,[17] it was created – and funds were appropriated – for a specific purpose: funding scholarships and

[13] Lindemuth Aff., Exh. 1 at 2 (emphasis added).
[14] *See* §§ 3, 11, 13 ch. 74 SLA 2012; AS 37.14.750. Funds from the HEIF have since been appropriated to support the WWAMI program as well, thereby facilitating medical education for Alaskans. *See* Lindemuth Aff., Exh. 6.
[15] *See* § 20(f), ch. 5 FSSLA 2011.
[16] *See* http://www.akleg.gov/basis/get_documents.asp?session=31&docid=47242 at 9-10 (last visited Jan. 21, 2022) (showing net contributions during FY 11, FY 12, and surrounding years); *see also* Affidavit of Neil Steininger ¶ 6 (stating that fiscal year budget deficits began in FY 2016 and required appropriations from the CBR to the general fund at that time).
[17] AS 37.14.750(b).

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grants for Alaska students through the Alaska Commission on Postsecondary Education for a number of years.

The legislative history for the HEIF statute demonstrates that the Legislature intended that its appropriation would be effectuated as a longstanding and durable endowment that would serve students for many years to come. During testimony on the bill that would ultimately create the HEIF, the Executive Director of the Postsecondary Education Commission testified as to the importance of a consistent funding source for the HEIF. Under an earlier scholarship program, many eligible students were not taking advantage of the program because, as confirmed through surveys, these students were wary about the program "given the tentative nature of the funding status."[18] Many of these students left Alaska and pursued educational opportunities in the Lower 48. Thus, in order to be successful, the scholarship program had to have reliable funding. The Legislature responded to this concern by ensuring that "[m]oney in the fund does not lapse"[19] and remains available for future scholarship and grant applicants. When Senator Donny Olson worried aloud that future students may be "left in the lurch" if HEIF's funds were insufficient, a director for the Department of Revenue explained that one way to protect the stability of future funding was to set up a customized asset allocation in an investment portfolio to achieve future expected payments, noting that "this could be set up as an endowment so you pay out X percent per year from the [HEIF] to the other [scholarship or

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

[19] AS 37.14.750(a).

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grant] fund. And then you could, you know, in a down year – depending on how it's invested – you could have that kind of a mechanism so students wouldn't ever [be left in the lurch]. You'd build up larger fund balances in good years, and feed off the corp . . . utilize some of the corpus in a bad year, as an endowment model is set up."[20]

That is precisely what the Legislature did. The Legislature adopted this endowment model with the HEIF, choosing to fund scholarships and grants by creating an "investment fund" with an appropriate asset allocation and making "seven percent of that amount [] available for appropriation[.]"[21] The HEIF is therefore invested in a range of equities, fixed income securities, real assets, and cash. As of December 31, 2021, total assets in the HEIF were in excess of $422 million. Of that amount, roughly 65% was invested in equities, 29% in fixed income securities, 5% in a real estate investment trust pool, and 1% in cash and cash equivalents.[22] Since its inception, the HEIF has sustainably provided tens of millions of dollars in scholarships and grants to deserving Alaskan students while still preserving the original corpus of the investment.

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

[21] AS 37.14.750(c). Each July the Commissioner of Revenue determines the market value of the HEIF as of June 30 for the immediately preceding fiscal year and identifies seven percent of that amount as available for these grants and scholarships. This past July, Commissioner of Revenue Lucinda Mahoney identified nearly $30 million in scholarships and grants that were to be provided. *See* Exh. 1.

[22] *See* Exh. 2. This information is also available on the Department of Revenue's website. (https://treasury.dor.alaska.gov/docs/treasurydivisionlibraries/investments/alaska-higher-education-fund/fiscal-year-2022/2021_12-alaska-higher-education-fund-financials.pdf?sfvrsn=d43c5898_3). The remaining $119.67 in assets is in the form of income receivable / payable.

Defendants seek to "sweep" the entirety of the HEIF, effectively eliminating this decade-old program and disrupting the academic plans of all those students who are relying on these scholarships and grants to help finance their education.

Through the passage of the HEIF statute, the Legislature determined that educational investments were a significant priority for Alaskans and that this program was deserving of funding. While the Governor previously introduced legislation to repeal the HEIF statutes,[23] the Legislature disagreed with that policy choice and has continued to support Alaskan students with the HEIF program.

IV. APPLICABLE STANDARDS

Questions of constitutional interpretation are legal questions, and the courts "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[24] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. The court should look to the plain meaning and purpose of the provision and the intent of the framers."[25] The Legislature's interpretation of constitutional terms relating to appropriations may be considered more persuasive than otherwise, although it is only one of several tools for use by the courts in interpreting the constitution.[26] Because section 17(d) was ratified by the people, courts "defer to the meaning the people themselves probably placed on the provision. Normally, such

[23] *See* Lindemuth Aff., Exhs. 10-11.
[24] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (internal quotation omitted).
[25] *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994) (quoting *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).
[26] *See id.* at 925 n.7.

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deference to the intent of the people requires adherence to the common understanding of words."[27]

V. ARGUMENT

Section 17(d) provides that, when money has been appropriated from the CBR (and not yet been 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 [CBR]." The reasonable, practical, and common sense interpretation of this language is that the "sweep" does not apply to a decade-old appropriation to the HEIF, especially when it would disrupt an existing state program and improperly intrude on the Legislature's authority to evaluate the wisdom of appropriations. The Defendants' proposed interpretation of section 17(d) is contrary to the framers' intent, the purpose of section 17, and the plain meaning of the provision.

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

The intent of the framers and the extrinsic indications of the voters' probable understanding of section 17 – and in particular section 17(d) – are clear and have not been disputed by Defendants.[28]

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

[28] *See generally* Opposition and Cross-Motion for Summary Judgment ("Opp."). Defendants cite to just one exhibit regarding the voters' understanding and intent, noting that the election pamphlet demonstrated a desire by voters to limit when the CBR could be accessed, and to require repayment of appropriations to the CBR. *See id.* at 19 n.80. No one disputes that repayment is required, however. The key question is *how* repayment is to be accomplished, and Defendants point to no evidence suggesting that the framers or

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As shown above, both the Legislature and the voters understood that section 17 would help instill greater predictability, reliability, and stability to Alaska's budgeting process. A drop in state revenues would enable the Legislature to access the CBR with a simple majority vote, ensuring the continuation of vital state services and preserving the status quo without the need to liquidate any state assets: "[B]oth the legislative history of section 17 and extrinsic evidence of the voter's [sic] understanding of the amendment's provisions indicate that elimination of state services and/or liquidation of state assets was not considered a necessary prerequisite to simple majority access to the budget reserve."[29] This would avoid jarring disruptions to existing state programs whenever there was a dip in revenues.

Likewise, the Legislature and the voters recognized that section 17(d)'s repayment obligation may take some time to accomplish, depending on annual revenues and the size of any general fund surpluses that existed at the end of any given fiscal year.[30] If those amounts were not sufficient to cover the outstanding debt to the CBR, the debt would roll over to succeeding years until it was fully repaid. Consistent with the framers' and voters' recognition that section 17 would help stabilize Alaska's budget and avoid the elimination of existing state services (or liquidation of state assets), there is no indication whatsoever that either the framers or voters believed that section 17(d)'s "sweep" must be done rashly so as to require the elimination of existing state services. The two constitutional sections

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voters wanted to dismantle existing state programs in order to repay the CBR as quickly as possible.

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

[30] *See supra* at 5-6.

should be interpreted consistently so as to create a harmonious whole, with neither one requiring the elimination of pre-existing state services.[31] This Court should interpret section 17(d) as intended by the framers and the voters.[32]

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

The framers' expressed intent (and the voters' probable understanding) is consistent with the reasonable, practical, and common sense understanding of section 17(d). At its core, section 17 was designed to provide greater stability to state government and year-to-year budgeting.[33] It specifically sought to avoid "boom" and "bust" cycles whereby state assets would be liquidated and existing state services would be dismantled when there was a dip in the State's finances. The *Hickel* Court went on to explain why such drastic steps were inconsistent with a reasonable common sense understanding of section 17:

> [T]he purpose and common understanding of the language in 17(b) allows the budget reserve to be used by a simple majority as necessary *to maintain state appropriations at a constant level.* Although all funds might be available by some means, counting funds already validly 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.[34]

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[31] *See Forrer v. State*, 471 P.3d 569, 585 & n.164 (Alaska 2020) (noting that constitutional provisions should be read in harmony with one another).
[32] *See Hickel*, 874 P.2d at 927 ("We are unwilling . . . to interpret existing constitutional language more broadly than intended by the framers or the voters.").
[33] *See supra* at 4-5 & n.10.
[34] *Hickel*, 874 P.2d at 930 (emphases added).

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

It is worth pausing here to consider the implications of the Defendants' preferred interpretation of section 17. According to Defendants, section 17(b) allows for the "borrowing" of funds from the CBR in one year – precisely so that no existing state services would be eliminated – but would then immediately require the elimination of those same services under section 17(d) in order to enable the fastest possible repayment to the CBR. This makes little sense. It effectively precludes any long-term projects or services involving multi-year appropriations if the monies reside in the general fund. This "radically different approach to government financing"[35] would eliminate the stability that section 17 was specifically designed to protect. Under the Defendants' approach, Alaska would be unable to provide any reliable, durable source of funding for these multi-year projects or services if any debt was owed to the CBR.

Hickel is especially instructive here. In that case, Governor Cowper interpreted section 17(b)'s majority access formula to include all net state assets as part of the "amount available for appropriation" that must be expended before a simple majority could reach the CBR. Noting that this would "require a complete restructuring of the established financial system of the state government,"[36] the Supreme Court rejected his reading as inconsistent with the purpose of section 17, the framers' intent, and the voters' probable understanding of section 17's terms. The Supreme Court explained that, even if it only

[35] *Id.* at 928.
[36] *Id.* at 927.

considered net assets that existed in a cash form (e.g., balances in a revolving loan fund), all "existing state programs dependent on those funds would have to be curtailed if these funds were expended on another purpose."[37] In other words, these existing programs would suddenly be scaled back – or dismantled altogether – if section 17 was interpreted broadly to encompass all net state assets. These proposed "reductions in the level of government service" were inconsistent with section 17's clear stabilizing purpose, and that interpretation was therefore rejected.[38] Defendants' insistence that section 17(d) be interpreted and applied to curtail, reduce, and effectively destroy the HEIF is likewise at odds with section 17's purpose.

C. *Hickel* supports the Legislature's reading of section 17(d).

When defining the scope of section 17(b),[39] the *Hickel* Court laid out several core principles that help guide the Legislature, the Executive Branch, and the courts when assessing which funds are available. Importantly, *Hickel* did not classify the HEIF (which postdated *Hickel*) or many other funds as either "available" or "unavailable" under section 17, leaving that in the first instance to executive and legislative branch officials more

[37] *Id.* at 928-29.
[38] *Id.* at 929.
[39] *See id.* at 926 ("The *primary* issue in this case is the meaning of the term 'amount available for appropriation' as used in article IX, *section 17(b)* of the Alaska Constitution." (emphases added)). The *Hickel* Court then concluded, without further analysis, that it could see no reason to give that language a different meaning in subsection (d) than it had in subsection (b), even though subsection (d) includes a temporal limitation and serves a different purpose than subsection (b)'s provision regarding access to the CBR. *See id.* at 936 n.32.

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familiar with the funds to sort out.[40] These principles confirm that the HEIF is not sweepable.

The *Hickel* Court explained that "monies which already have been validly committed by the legislature to some purpose should not be counted as available."[41] Further, monies are not deemed available if they have been "converted from cash to some other type of asset."[42] This is because "any given sum of money can only be appropriated once during a given time period."[43] It is undisputed that the Legislature did appropriate and commit the HEIF funds to an express purpose: the establishment of an "investment fund" (i.e., an endowment) that would yield investment returns and allow seven percent of the endowment to be used "for the purpose of making grants . . . and scholarship payments."[44] Because the purpose of the appropriation was to create an investment fund that would serve as an endowment, there was and is no need for further appropriation to complete the expenditure that the Legislature intended when it funded the HEIF. The Legislature created this stable, non-lapsing funding source to reassure students that if they worked hard and performed well, funding would be available for scholarships and grants when the time came for them to pursue higher education opportunities. In addition, the appropriation was intentionally converted from cash to other assets (i.e., a well-diversified

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[40] *See id.* at 934 n.27. Prior to the current administration, these officials determined that the HEIF was not sweepable. *See* Lindemuth Aff., Exh. 2 at 2.
[41] *Hickel*, 874 P.2d at 930-31
[42] *Id.* at 930-31 n.20. Even Governor Cowper limited his overbroad argument to cash funds, which the *Hickel* Court found to be "a reasonable limitation." *Id.* at 928 n.14.
[43] *Id.* at 930-31 n.20.
[44] AS 37.14.750(a).

portfolio including equities and real assets), further confirming that it is not "available." This is not a "general fund surplus." Instead, the HEIF is a deliberate commitment of monies to a specific purpose and an expenditure of those monies in obtaining revenue-producing assets to help fund scholarships and grants.

The HEIF is not like other funds cited by Defendants precisely because it operates as an endowment. Certain other funds have been deemed to be "available for appropriation" because initial appropriations were provided to those funds, and the appropriations then sit there until appropriated again for an ultimate expenditure.[45] Analogizing to these funds, Defendants claim that "'appropriations' to the HEIF are not true appropriations [because] [t]hey do not authorize any expenditure of funds out of the state treasury."[46] Defendants are wrong for at least two reasons. First, there is no requirement that any appropriation authorize an expenditure of funds out of the state treasury to be a "true" appropriation, whatever Defendants think that means. An appropriation is an appropriation; there are no second-class appropriations. As described by the *Hickel* Court, "[a]n appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[47] The appropriation to the HEIF was the setting aside from the public revenue of a

[45] *See Hickel*, 874 P.2d at 933 (citing the Railbelt energy fund, the Alaska marine highway system vessel replacement fund, and the educational facilities maintenance and construction fund); *see also* Opp. at 14 (referencing the same).
[46] Opp. at 14.
[47] *Id.* at 932-33 (quoting *Thomas v. Rosen*, 549 P.2d 793, 796 (Alaska 1977) and *State ex rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936)).

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certain sum of money ($400 million) for a specified object (setting up an investment fund for funding long-term scholarships), in such manner that the Department of Revenue was authorized to use that money, and no more, to set up that investment fund through an appropriate investment portfolio (i.e., expend the money), and no other. Second, Defendants misapprehend the essential nature of the HEIF's endowment structure. Just like any other endowment or annuity, the monies must be invested in revenue-producing assets in order to effectuate their purpose (i.e., so that a percentage of the whole can be drawn from it). This is not merely an "accounting designation" or a "savings account"[48] – it is the Legislature's appropriation for the creation of an investment fund that will make current and future scholarships and grants possible for Alaska's students. The appropriation has been expended in establishing this investment fund and purchasing the assets that comprise it. Defendants thus may not sweep the HEIF under the test articulated by the *Hickel* Court.

D. Subsequent Possible Appropriations from a Portion of the HEIF Do Not Change the Outcome.

Defendants contend that the HEIF as a whole may be swept because some funds in the HEIF are expended (e.g., as scholarships and grants to Alaskan students) through a further appropriation by the Legislature.[49] For the reasons stated above, the HEIF is not available for appropriation. It is properly understood as an excluded, non-sweepable fund because that result is consistent with the framers' and voters' intent, the purpose of section

[48] Opp. at 14, 15.
[49] *See id.* at 11, 14-16.

17, and the key elements of the *Hickel* test. Even assuming arguendo that any part of the HEIF is vulnerable to the sweep, Defendants overreach when they seek to use certain appropriations as the basis for sweeping the entire fund for two reasons.

First, an appropriation from an otherwise excluded fund does not somehow transform that fund into a sweepable fund. As the *Hickel* Court explained, "if an appropriation lapses or if the legislature does in fact reappropriate money from an excluded fund to another purpose, it is no longer necessary to exclude that money from the 'amount available for appropriation' in order to protect the legislature's authority to make such decisions."[50] Insofar as this finding from *Hickel* as to section 17(b) can be logically applied to section 17(d), which appears unlikely, it would mean that only the appropriated money would be considered "available for appropriation" because it was appropriated from the excluded HEIF to another purpose – but the rest of the HEIF would be unaffected.

Second, as defined in the HEIF statute, the only portion that is regularly made available for appropriation is the seven percent that the Commissioner of Revenue annually identifies as being available for grants and scholarships.[51] By the statutory terms, the rest of the HEIF is not available for grants and scholarships. The HEIF "corpus" (as opposed to the subsequent appropriations) remains "set[ ] aside from the public revenue ... for a specified object, in such manner that the executive officers of the government are

[50] *Hickel*, 874 P.2d at 930-31 n.20.

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

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authorized to use that money, and no more, for that object, and no other."[52] Importantly, however, the appropriations for grants and scholarships are not made on or before June 30 of any given fiscal year. Instead, by operation of law, the Commissioner of Revenue determines the market value of the HEIF "[a]s soon as is practicable *after July 1* of each year."[53] In other words, when the sweep occurs at 11:59 p.m. on June 30, it is undisputed that the seven percent of the HEIF (which would eventually fund grants and scholarships) has not been made available for appropriation. That only occurs after July 1. Because that segregated portion of the HEIF has not been made available for appropriation as of June 30, it is not sweepable. After the Commissioner of Revenue identifies the seven percent portion of the HEIF for grants and scholarships in early July, those funds could theoretically be sweepable if they have not been expended by the following June 30. That question, however, is likely beyond the scope of issues that the Court needs to address at this time. For present purposes, it suffices to say that the HEIF is not subject to the sweep.

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[52] *Hickel*, 874 P.2d at 932-33 (quoting *Thomas v. Rosen*, 549 P.2d 793, 796 (Alaska 1977) and *State ex rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936)). Defendants note that the Legislature has the ability to spend the HEIF for other public purposes, and has done so. *See* Opp. at 8. As explained above, any appropriation from the excluded HEIF to another purpose could render the appropriated funds vulnerable to being swept, but it would not impact the status of the remainder of the HEIF. Appropriations of a portion of the HEIF do not alter the fact that funds were appropriated and committed to HEIF for a particular purpose – establishing a funding source for grants and scholarships – which is continuing to be served to this day.

[53] AS 37.14.750(c) (emphasis added); *see also* Exh. 1 (reflecting a July 7, 2021 determination by the Commissioner of Revenue).

VI. CONCLUSION

Section 17(d) was never intended, nor drafted, to require the dismantling of existing state services like the HEIF in order to allow for expedited repayment of the CBR. Because the HEIF was expressly committed to a specific purpose by the Legislature, and the appropriation has been expended for the creation of an investment fund that serves as an endowment for future scholarships and grants, its funds are not available for appropriation or for expedited repayment of the CBR. The Court should reject the Defendants' misreading of section 17(d) and grant Plaintiffs' motion for summary judgment.

DATED: January 28, 2022

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CERTIFICATE OF SERVICE

This certifies that on January 28, 2022, a true and correct copy of the foregoing was served via email on:

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