anc.law.ecf@alaska.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE,

Plaintiff,

v.

HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, KELLY TSHIBAKA, in her official capacity as Commissioner of Administration for the State of Alaska, and MICHAEL JOHNSON, in his official capacity as Commissioner of Education and Early Development for the State of Alaska,

Defendants.

COALITION FOR EDUCATION EQUITY,

Intervenor

Case No. 1JU-19-00753 CI

DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I. Introduction

The same logic that the legislature and the Coalition for Education Equity use to justify one year of forward appropriations for the laudable purpose of public education would allow any legislature to spend future money it does not have, for years into the future, on any purpose. In an ends-justify-the-means approach, both the legislature and the Coalition for Education Equity ignore the structure of Article IX and the undisputed goal of the framers of Alaska's constitution to maximize annual control over the State's budget. Their efforts defend a legislative maneuver that, if allowed by this Court, would

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

permit the gutting of Alaska's constitutionally-mandated annual budget process. They focus only on a handful of sections in Article IX, arguing that forward appropriations are not prohibited by the narrow terms of those sections. In doing this, they miss the forest for the trees. Looking at Article IX as a whole—including the minutes of the constitutional convention and subsequent caselaw interpreting the article—it is apparent that the framers intended that the State would budget and appropriate funds on an annual basis. Because HB 287's forward appropriations violate the annual appropriations model and threaten to destroy one of the foundations of the State's finances—the prohibition against dedicated funds—the governor respectfully asks this Court to hold that those forward appropriations are unconstitutional and grant him summary judgment.

II. Argument

A. It is undisputed that the Alaska Constitution provides for annual budgeting and annual appropriations.

Neither the legislature nor the Coalition offer any meaningful argument disputing the fact that the Alaska Constitution provides for annual budgeting and appropriations. Indeed, the legislature itself quotes Alaska Supreme Court precedent holding that the "anti-dedication clause helps preserve *the state's annual appropriation model*;"[1] [Legislative Council's Motion ("LC's Mot.") at 21] and noting that "[w]ithout earmarked funds, the constitutional framers believed that *the legislature would be required to decide funding priorities annually* on the merits of the various proposals presented."[2] [LC's Mot.

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

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

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ANCHORAGE, ALASKA 99501
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at 22] Instead, they focus narrowly on the source of funds for HB 287's forward appropriations to argue that there is no violation of the dedicated funds clause, ignoring the violation of the annual budgeting model and the implications of that violation for the continued salience of the dedicated funds prohibition. But a violation of the annual budgeting model is a violation of the Alaska constitution; and this Court should not permit it.

1. The dedicated funds clause works in tandem with the annual appropriation model.

Both the legislature and the Coalition argue that forward appropriations do not violate the dedicated funds prohibition because the dedicated funds clause requires *both* a particular source of revenue *and* a specific purpose to which that revenue is dedicated. [LC's Mot. at 21-25; Coalition's Motion ("CEE's Mot.") at 22-23] But this argument misses the point that the dedicated funds clause operates in tandem with the annual appropriation model to preserve maximum annual flexibility and control over spending. Both constitutional principles are necessary to achieve the goals of the framers. The dedicated funds clause was indisputably intended to prevent the locking up of state revenue in advance so that each year the legislature—and the governor[3]—would have to weigh competing policy objectives and decide how best to spend state resources.[4] And it can only serve that function if the legislature cannot easily circumvent it by enacting

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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[3] *Id.* ("[T]he reason for the [dedicated fund] prohibition is to preserve control of and responsibility for state spending in the legislature and *the governor*." (Emphasis added.))

[4] *Id.*; *see also*, *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386, 389 (Alaska 2003).

forward appropriations. This is likely the reason that an Anchorage superior court in 1985 found forward appropriations that are indistinguishable from HB 287 to be unconstitutional.[5]

Contending that the delegates at the constitutional convention thought it worthwhile to prohibit the dedication of specific future tax revenues to specific purposes while simultaneously permitting appropriation of future general fund revenues to specific purposes makes no sense and fails to read the constitutional provisions as a whole. The Alaska Supreme Court has observed: "The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model which assumes that not only will the legislature remain free to appropriate all funds for any purpose on an annual basis, but that government departments will not be restricted in requesting funds from all sources."[6] But if future appropriations are constitutional, the legislature does not "remain free to appropriate all funds for any purpose on an annual basis." And a legislature that wanted to create a dedicated fund could do the equivalent by creating the specific revenue source and separately forward appropriating an equivalent sum from the general fund to the desired purpose for many years into the future. Thus, just as the anti-dedicated funds clause preserves the annual appropriation model, the annual appropriation model preserves the anti-dedicated funds clause. And more importantly, it preserves the vision of the framers—that *each year* the legislature and the governor would together shape and

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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5 *Trustees for Alaska v. State*, 3-AN-84-12053 Civ. (Aug. 30, 1985); Ex. B to defendants' MSJ.

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

control state spending.

The structure of the finance and taxation article of the Alaska Constitution also demonstrates why the Coalition's reliance on the federal government's use of advance appropriations is misplaced. [CEE's Mot. at 27] Although the federal appropriations clause may be "nearly identical to that of the Alaska Constitution," the court will look in vain for any federal provisions comparable to the budget clause, (Article IX, section 12), the debt clauses (Article IX, sections 8, 10, and 11), the dedicated funds clause (Article IX, section 7), or the budget reserve fund clause (Article IX, section 17). Alaska's appropriations clause does not exist in isolation, and it does not grant the legislature a power that is unconstrained by any other constitutional provision. The Alaska Supreme Court has held that "[w]e must give effect to every word, phrase, and clause of the Alaska constitution. '[S]eemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution.'"[7] This Court can do that only by recognizing that the annual appropriation model is woven through Article IX and prohibits the legislature from enacting forward appropriations.

2. If forward-appropriations are permitted, the State's entire budgeting process will be turned on its head.

Although neither the legislature nor the Coalition seriously disputes that Alaska's constitution expressly provides for an annual debate over spending priorities, the legislature argues that future appropriations are permissible because "all budgeting is

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7 *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 786 (Alaska 2005) (quoting Chester James Antieau, *Constitutional Construction* § 2.06, at 18-20 (1982)).

prospective" and the appropriations in HB 287 were "subject to amendment or repeal by the Legislature before taking effect." [LC's Mot. at 20, 29]

But even if budgeting is often prospective, the kind of forward appropriation contemplated by HB 287 is not normal or constitutional. The legislature notes that it "appropriates funds each and every fiscal year before they are deposited into the State treasury," and from that asserts that it has "the authority to appropriate funds in advance of receipt." [LC's Mot. at 20] But the problem with HB 287 was that it sought to commit future state revenues beyond *current revenues*—i.e. beyond those anticipated to come in during the upcoming fiscal year. The fact that state revenues will often come into the state treasury on a different schedule from funds being paid out is expressly recognized and cabined by Article IX, section 10, which permits short-term borrowing to address this problem but also requires that any shortfall in anticipated revenues be immediately accounted for in the succeeding year's budget.[8] And the Alaska Supreme Court has likewise made clear that "the anti-dedication clause would prohibit the legislature from appropriating [revenue] for more than the immediately forthcoming fiscal year."[9] Thus the constitution prohibits the legislature from appropriating in advance amounts greater than anticipated current revenues.

The authority to borrow in order to balance anticipated cash inflows and outflows over the course of a fiscal year is a categorically different power from the one claimed by

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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8 Alaska Const. art. IX, § 10 ("...but all debt so contracted shall be paid before the end of the next fiscal year.").

9 *Myers*, 68 P.3d 386, 391 (Alaska 2003).

the legislature here—i.e. the power to appropriate future revenues now for any future fiscal year, far in advance of any ability to estimate potential state revenues. The authority to forward-appropriate simply does not follow from the authority to appropriate current anticipated revenues for a fiscal year in advance of the receipt of those revenues.

The legislature also argues that the possibility of amendment or repeal of a forward appropriation means that it is "a complete fallacy to suggest that once appropriated, the appropriations failed to compete with other fiscal year 2020 appropriations." [LC's Mot. at 29] But in *Sonneman v. Hickel*, the Alaska Supreme Court invalidated a statute that restricted the executive branch's ability to request appropriation of Marine Highway System revenues for capital improvements, noting that the constitutional convention debates "*make clear*, all departments were to be '*in the same position*' as competitors for funds with the need to 'sell their viewpoint along with everyone else.'"[10] And the real fallacy lies in the suggestion that an existing appropriation is competing with other spending options on any kind of equal playing field.

An existing appropriation can be amended or repealed only with the agreement of majorities in both houses of the legislature and the governor, giving it a very substantial head start over any proposed appropriation, which can be blocked by a majority in either house or by veto. An agency with such an appropriation is not at all "'in the same position' as competitors for funds." This is ably demonstrated by the Coalition's outrage

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ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

10 *Sonneman*, 836 P.2d at 940 (citing 4 PACC 2364-67 (Jan. 17, 1956)) (emphasis added).

at the governor's desire to repeal a $20 million supplemental appropriation for schools in FY 2019 as part of his plan to balance the budget. [CEE's Mot. at 15-16] Indeed, the Coalition filed a separate lawsuit seeking to force distribution of this appropriation and continues to seek a declaratory judgment that a governor may not delay distribution of funds while seeking repeal of an appropriation.[11]

Thus, legislative flexibility would be severely compromised by the existence of already-enacted appropriations undermining the compromise and exchange of votes necessary to enact a budget. After all, if that were not the case, the dedicated funds clause would be unnecessary—because dedications could also always be amended or repealed. And under a system where forward appropriations are permissible, a governor who has a friendly legislature in his first two years in office could conceivably enact a budget for his entire term (or even two) and then force that budget on future legislatures, so long as his opponents were not able to win sufficient seats to successfully override his veto. In such a case, our majority-rule democracy becomes a super-majority-rule democracy.

Thus, forward appropriations threaten legislative power as well as executive power; and threaten to transform Alaska's budgeting process from an annual debate over competing priorities to just the situation that the delegates sought to avoid, whereby a substantial percentage of all state funds are tied up in advance, leaving the legislature and governor with little control. Upholding the legislature's ability to forward appropriate would thus threaten to turn Alaska's budget process on its head, dramatically changing

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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[11] *See* 3AN-19-06692 CI, *Coalition for Education Equity v. Dunleavy and Johnson.*

the way state spending is decided.

B. Education funding does not enjoy a unique status.

Both the Coalition and the legislature argue that education funding has a unique status in the constitution, with the Coalition suggesting that the scope of judicial review is narrower in the realm of education than elsewhere, [CEE's Mot. at 18-20] and the legislature asserting that education funding is exempt from the dedicated funds clause. [LC's Mot. at 27-28] Neither argument has merit; and, moreover, even if they had merit, HB 287 would still be unconstitutional.

1. Article VII, section 1 does not give the legislature enhanced appropriation power.

The Coalition argues that this Court should apply a heightened presumption of constitutionality to appropriations for public education and that the test is whether "the Legislature acted outside the 'limits of rationality.'" [CEE's Mot. at 19, 21] In effect, it claims that the education clause enhances the legislature's appropriation power in the realm of education funding, requiring a more deferential standard of review by the courts. But the authorities it cites do not support these claims; and, even if they did, because forward appropriations are clearly inconsistent with the annual appropriation model, the defendants have met even the inapplicable heightened burden.

The Coalition's argument that education funding enjoys a unique status relies on the erroneous assertion that education is "the *only* public service" mandated by the Alaska Constitution and on a misreading of three cases—*McCauley v. Hildebrand*, *State v. Ketchikan Gateway Borough*, and *Hootch v. Alaska State-Operated School System*—none of which support the Coalition's claims. [CEE's Mot. at 4, 7, 20-22]

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Even a cursory review of Alaska's constitution reveals that there are a variety of "public services" that are mandated by its provisions, not least the court system.[12] Even in Article VII, there are other things that the legislature is instructed to provide for: section 4 states that "[t]he legislature shall provide for the promotion and protection of public health;" and section 5 states the "[t]he legislature shall provide for public welfare." Although these provisions might seem less specific, unless the Coalition believes that their constitutional guarantees are devoid of meaning, they surely require the legislature to take some actions, both in terms of substantive law and appropriations to fund programs intended to promote public health and welfare.[13]

The Coalition also misconstrues *McCauley v. Hildebrand*, suggesting that it recognizes the legislature's special authority over schools as compared with other branches of state government. [CEE's Mot. at 20] But *McCauley* involved a conflict between a state statute and a local ordinance, not a dispute between the legislature and the governor, and the Coalition's selective quotation of the Court's language cannot impart the meaning it desires. In *McCauley*, the Alaska Supreme Court interpreted Article VII, section 1 to create a "constitutional mandate for pervasive *state* authority in the field of

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12 Alaska Const. art. IV provides for a court system.

13 Indeed, many constitutional provisions intended for the public's protection and welfare require appropriations. *See, e.g.,* Alaska Const. art. I, § 7 (due process rights); art. I, § 8 (right to grand jury); art. I, § 11 (rights to speedy and public trial including jury); art. I, § 16 (right to trial by jury in civil suits); art. I, § 24 (rights of crime victims); art. V, § 5 (general elections); art. VIII, § 2 (providing for utilization, development and conservation of State's natural resources for maximum benefit of its people); art. X, § 14 (creating agency to advise and assist local governments).

education,"[14] not unchecked legislative authority. And, as is clear from the context, when the Court stated that "no other unit of government shares responsibility or authority," the "other units of government" that the court was talking about were local school boards not the executive branch (which, after all, includes the Department of Education and Early Development). The sentence that follows—which the Coalition omits—states: "That the legislature has seen fit to delegate certain educational functions to local school boards in order that Alaska schools might be adapted to meet the varying conditions of different localities does not diminish this constitutionally mandated *state control* over education."[15] Thus, *McCauley* establishes the predominance of *the State's* control over education—including both the legislative and executive branches—not solely the legislature's.

And nothing in *McCauley* supports the Coalition's claim that "judicial inquiry into the propriety of [public school funding] is" somehow "limited." [CEE's Mot. at 20] Moreover, the other cases that it cites for the idea of limited judicial review involve congressional determinations regarding immigration—a matter with no real analog in state government; [CEE's Mot. at 20, n. 38] and in fact, in *Wauchope v. U.S. Department of State*, the court held that the congressional determination at issue did not survive constitutional scrutiny even with especially deferential review.[16]

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1031 W. FOURTH AVENUE, SUITE 200
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14 *McCauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971) (emphasis added).

15 *Id.*

16 756 F. Supp. 1277, 1282, 1285 (N.D. Cal. 1991).

Notably, the legislature does not suggest that its authority in the realm of education is so great that judicial review is limited. To the contrary, it emphasizes that "it is the courts...that are primarily responsible for constitutional adjudication." [LC's Mot. at 14][17]

The Coalition also misrepresents the context of the language that it quotes from *State v. Ketchikan Gateway Borough*, claiming that it comes from a discussion of the education clause, [CEE's Mot. at 20] when in fact the Court was talking about article X, section 3, providing for the creation of the borough system.[18] The Alaska Constitution no doubt left many details to be filled in later, but it does not give the legislature an especially outsized authority in the realm of education funding as the Coalition claims.

The Coalition similarly distorts the Alaska Supreme Court's opinion in *Hootch v. Alaska State-Operated School System*, arguing that it "explicitly recognized that the legislature's efforts to address problems related to public school financing are entitled to respect, so long as they are within the 'limits of rationality.'" [CEE's Mot. at 21]

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PHONE: (907) 269-5100

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17 Quoting *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003).

18 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 94–95 (Alaska 2016). The full paragraph from which the Coalition's quotation is pulled reads as follows:

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

According to the Coalition, *Hootch* establishes that appropriations for education "are presumptively constitutional unless the Governor can establish that the Legislature acted outside the 'limits of rationality.'" [CEE's Mot. at 21] Under this standard, because the Coalition believes that forward appropriations "are an eminently rational way to remedy the unique funding problems they were designed to address," HB 287 is constitutional. [CEE's Mot. at 21] But not only is there no exception to the application of constitutional requirements because something is good public policy in the view of an individual litigant, more particularly, *Hootch* does not establish a special standard of review for education appropriations.

In *Hootch*, the plaintiffs argued—among other things—that the education clause required the state to provide secondary schools in the communities in which they lived.[19] In rejecting that claim, the Alaska Supreme Court noted that Alaska's education clause lacked the uniformity requirement found in many other state constitutions' education provisions and then quoted the United States Supreme Court for the language the Coalition relies on, commenting immediately afterward: "We conclude that art. VII, § 1 permits some differences *in the manner of providing education.*"[20] Thus, the discussion in *Hootch* was not about school *funding* at all, but rather about "the constitutional convention's understanding and intent to permit flexibility in the state's provision for services in the unorganized areas."[21] The Court's recognition of the importance of

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1031 W. FOURTH AVENUE, SUITE 200
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19 *Hootch v. Alaska State-Operated School System*, 536 P.2d 793 (Alaska 1975).

20 *Id.* at 804 (emphasis added).

21 *Id.* at 803.

flexibility in designing a public school system for a state like Alaska simply does not translate into an expansive power to ignore constitutional limitations on the legislative appropriations process.

Notably, the Coalition does not cite any convention minutes for its novel theory that education appropriations occupy a unique status under the Alaska Constitution. And in fact, Delegate Fischer expressly rejected this idea during the debate over the final sentence of Article VII, section 1, which prohibits the use of public funds to benefit religious schools:

> while ... education is an important field, I do not feel that *when it comes to an appropriation of public funds it should receive any special, either more restrictive or more favored treatment.* As Mr. White pointed out, the general stipulation is that funds be appropriated only for public purpose. Now it seems to me that the definition of public purpose must be made during every age in view of the conditions prevailing at that time. I think that has been one of the strong points of the Federal Constitution. The fact that it has left itself open to that kind of interpretation and, therefore, it seems that if we give favored treatment or discriminatory treatment to this education section, what are we going to do when it comes to health, welfare and just anything else that may come out. I think the public purpose provision should be the only guidance when it comes to appropriating public funds.[22]

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[22] Proceedings of the Alaska Constitutional Convention at 1526 (Jan. 9, 1956); *see also*, Delegate Fischer discussing giving taxing authority to boroughs to enable decisions about education funding:

> It is just like health; [the borough] will be responsible for health, and we realize *the special needs of education*, and at the same time we feel that education when it comes to the tax dollar, *must compete with all the other necessary services that are required by the people of any area.* It was felt that the borough assembly would best be able to say that so much, on the basis of presentation, say by these [school] districts or [school] boards, that so much can be afforded out of this tax dollar for education, so much for health, so much for police enforcement, etc. So that is the only way you can

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1031 W. FOURTH AVENUE, SUITE 200
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PHONE: (907) 269-5100

There is simply no legal authority supporting the Coalition's argument that education funding exists apart from other state obligations such that the legislature need not comply with the constitutional requirements for budgeting and appropriations.

2. Education funding is not exempt from the dedicated funds prohibition and must be appropriated consistent with the annual appropriation model.

The legislature argues that education funding is exempt from the dedicated funds prohibition, citing *State v. Ketchikan Gateway Borough.*[23] [LC's Mot. at 27-28] But *Ketchikan Gateway Borough* did not create or recognize a complete exemption from the dedicated funds clause for all public school funding and was instead narrowly focused on the constitutionality of the state-mandated local portion of school funding.[24] Nothing in *Ketchikan Gateway Borough* establishes that the state's share of public school funding can be appropriated outside of the annual appropriations model.

The Alaska Supreme Court has repeatedly recognized that during the drafting and debate process the delegates to the Alaska Constitutional Convention limited the language of the dedicated funds clause. Rather than prohibiting the dedication of "all public revenue," the delegates amended the provision to instead prohibit dedicating "the proceeds of any state tax or license" in order to create a series of desired exceptions

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1031 W. FOURTH AVENUE, SUITE 200
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PHONE: (907) 269-5100

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get a proper allocation fund. (emphasis added)

23 366 P.3d 86 (Alaska 2016).

24 *Id.* at 100 ("Here we are asked for the first time whether *local contributions* to longstanding cooperative programs . . . run afoul of the dedicated funds clause.") (emphasis added).

identified in a memo prepared by consultants at the Public Administration Service.[25] The Court has also repeatedly held that the implied exceptions listed in that memo should inform interpretation of the clause.[26]

> Those exceptions were described and listed in the original PAS memo as follows:
>
> [l]egal and contractual provisions will require the segregation of certain moneys, e.g., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on behalf of local government units.[27]

The memo's proposed solution included changing the draft to exempt dedications "where necessary to . . . maintain any individual or corporate or other local government equity therein."[28] This memorandum, relied on by the Court in its *Ketchikan Gateway Borough* decision, makes clear that the dedicated fund prohibition was not modified to exempt school funding specifically, or to limit the legislature's ability to annually determine state contributions for schools, but was instead amended to make sure that it did not accidentally result in state coopting or diversion of *local* money that was intended to be

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
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PHONE: (907) 269-5100

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25 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 92-93 (Alaska 2016); *Southeast Alaska Conservation Council*, 202 P.3d at 1169 n.29 (citing the exceptions to the clause from the PAS memo); *see also* Pub. Admin. Serv., Comments from Public Service Administration on Finance Committee Proposal 1 (Jan. 4, 1955), attached as Exhibit D.

26 *Ketchikan Gateway Borough*, 366 P.3d at 93; Southeast *Alaska Conservation Council*, 202 P.3d at 1169 n.29; *Alex*, 646 P.2d at 210 (citing 4 Alaska Const. Conv. Proceed. 2363).

27 PAS memo at 1 [Exhibit D].

28 *Id.* at 1-2. [Exhibit D]

ear-marked for local government units or cooperative programs like schools. With this implied exception, the delegates ensured that the local portion of state–local cooperative programs could remain dedicated to those programs, even if the money went through state coffers.[29] Similarly, under the implied exception for local tax receipts, when state tax collectors received money on behalf of local government units they were able to dedicate that money back to the local government as intended.[30] This simply does not support the legislature's arguments that the state portion of school funding was intended to operate outside of normal constitutional limits on budgeting, appropriations, veto, or dedication.

3. *Myers* does not support the constitutionality of forward appropriations.

Recognizing that forward appropriations "frustrate the purposes of the anti-dedication clause by limiting options for future spending," the Coalition argues that nevertheless: "the Supreme Court has held that the Legislature has the power to act within its constitutional authority even if its actions 'may conflict with the purposes of the anti-dedication clause,'" citing *Myers v. Alaska Housing Corporation*. [CEE's Mot. at 24] But once again, the Coalition misrepresents the case it relies on. In fact, what the Court actually said was: "Clearly the legislature has some power to manage the state's assets and to appropriate those proceeds *in the year received* even though such actions

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29 *Alex*, 646 P.2d at 210 ("[T]he change . . . was intended . . . to allow necessary dedication of funds once they were received and placed in the general fund.").

30 *Id.*

may conflict with the purposes of the anti-dedication clause."[31] This language offers no support for the legislature's claimed authority to appropriate proceeds *before* the year in which they are received.

Similarly, the Coalition claims that the *Myers* Court weighed the competing constitutional values of the dedicated funds prohibition and "the legislative power to manage and appropriate the state's assets," and "held that incidental conflict with the purposes of the anti-dedication clause did not render the Legislature's action invalid in light of the Legislature's core responsibility to manage state assets." [CEE's Mot. at 24] But in fact, *Myers*'s holding was much narrower than that and turned primarily on the unusual nature of the revenue at issue—the settlement proceeds from a lawsuit.[32]

And most importantly, the rule that the Coalition invites this Court to draw from *Myers*—that "incidental conflict with the purposes of the dedicated funds clause" does not make a statute unconstitutional—is the exact opposite of the interpretation of the Alaska Supreme Court in *Southeast Alaska Conservation Council v. State*.[33] In *SEACC*, the Court commented as follows on the lesson of *Myers*: "Instead, *Myers* suggests that the reach of the dedicated funds clause might be extended to statutes that, while not directly violating the clause by dedicating revenues, *in some other way undercut the*

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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31 *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386, 391 (Alaska 2003) (emphasis added).

32 *Id.* at 392 (agreeing with the superior court's express limitation of its ruling to "the sale of the tobacco settlement revenue stream," and four key distinctions between the settlement revenues and "traditional kinds of state revenues.")

33 *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (Alaska 2009).

policies underlying the clause."[34] In this case, the forward appropriations at issue are inconsistent with the state's constitutionally-mandated annual appropriation model and would also effectively gut the dedicated funds clause. As a result, this Court should hold that they are unconstitutional.

C. The public policy arguments offered in support of forward funding are irrelevant.

Both the legislature and the Coalition argue that forward funding of public education is good public policy. [LC's Mot. at 3-4, 6-8; CEE's Mot. at 10-14] But however important these public policy goals may seem, they do not justify violating the Alaska Constitution, not least because forward appropriation is far from the only way to provide greater fiscal certainty for schools. And, in fact, many other solutions lie within the legislature's power: the legislature could pass its annual education appropriation early in each legislative session; it could even promptly enact the state's general operating budget—since public schools are not the only state service that would benefit from greater fiscal certainty. The legislature could also return to forward funding using current revenues as it did between 2006 and 2014.[35] The legislature cannot defend its violation of the constitutionally-mandated annual appropriation model by asserting that it is necessary to address a problem that is of the legislature's own making and within its power to resolve *without violating the constitution.* Alaska's schools have functioned for sixty

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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34 *Id.* at 1170 (emphasis added).

35 That the state's current fiscal situation means this is not a viable proposition merely emphasizes the intuition of the framers that legislatures and governors should retain maximum flexibility annually to decide what to spend available state resources on.

years without forward appropriations; it cannot be that only now public education will collapse without them.

D. The executive branch is not constitutionally required to implement an unconstitutional statute.

The legislature criticizes the governor for not releasing state funds based on an appropriation that the attorney general concluded was unconstitutional, despite the fact that the executive and legislative branches worked cooperatively to ensure that state funding for education continues while the important constitutional issues in this case are considered by the court.[36] According to the legislature, the governor is responsible for the execution of the laws, [LC's Mot. at 13, citing Art. III, § 16] and therefore he should have authorized the expenditure of state funds based on the HB 287 appropriation, even though it is essentially indistinguishable from the future revenue appropriations deemed unconstitutional by the superior court in 1985,[37] and even though the attorney general informed the governor in a formal opinion that the appropriation was unlawful. This makes no sense. The governor is bound to comply with the Alaska Constitution which takes precedence over any particular bill passed by the legislature.[38]

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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36 *See* Joint Motion and Proposed Order Regarding Fiscal Year 2020 Education Funding Pending Resolution of Litigation.

37 *Trustees for Alaska v. State,* 3-AN-84-12053 Civ. (Aug. 30, 1985); Ex. B to defendants' Motion for Summary Judgment.

38 The legislature also suggests that there was another litigation strategy that could have been followed by the governor to have this issue considered by the courts: a suit against another executive branch official. But it also acknowledges that this is a dispute between the executive branch and the legislative branch and the governor is prohibited under Art III, sec. 16 from suing the legislature.

The legislature also attempts to make a separation of powers argument contending that the governor's decision to not simply release state money based on the HB 287 appropriation infringed on the legislature's constitutional duties to maintain a system of public schools under article VII, section 1 and to make appropriations under article IX, section 13. [LC's Mot. at 15] But the governor certainly did not infringe on the legislature's responsibility to maintain a system of public schools—in fact, during the legislative session both the Governor and the Attorney General urged the legislature to act to resolve the legal problem and include an appropriation for education spending in the fiscal year 2020 budget.[39] And when the legislature refused to do so, the Governor requested an order from this Court to ensure that state assistance to school districts would be provided while the important constitutional question would be promptly addressed by the judiciary. The separation of powers doctrine does not require the governor to implement an unconstitutional law.[40]

The Coalition's motion similarly misses the mark by attacking the governor—but not the legislature—for failing to include in the parties' stipulation a $30 million supplemental appropriation. And nothing supports the Coalition's baseless and improper

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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39 *See, e.g.*, Letter from Attorney General Kevin Clarkson to Senate President Cathy Giessel and Speaker of the House Bryce Edgmon (April 9, 2019), attached as Exhibit E; and 2019 Op. Att'y Gen., 2019 WL 2112834, May 8, 2019.

40 *See e.g., Alaska Public Interest Research Group v. State*, 167 P.3d 27, 34-35 (Alaska 2007) (noting that the separation of powers doctrine is complemented by the doctrine of checks and balances and that it serves "to preclude the exercise of arbitrary power.")

allegation that the governor will not distribute the supplemental funding if it is found to be a constitutionally-valid appropriation.[41]

The legislature also briefly attempts to cast doubt on the sincerity of the attorney general's formal opinion of May 8, 2019 concluding that the HB 287 future revenue spending was unconstitutional[42] by noting that the Department of Law's bill review for HB 287 written in 2018 did not raise a similar legal concern. But a bill review letter is, by its nature, a brief legal review intended to alert the governor to legal issues he may want to consider before taking action on a bill. Because of the nature of a bill review and the short timeframe[43] in which it must be written, it generally does not go into great depth on any particular legal issue and may not anticipate the precise legal question that will arise in future litigation, particularly where no legal concerns appear to have been publicly

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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41 The Coalition suggests that the governor's conduct in declining to distribute money that he believes in good faith has not been constitutionally appropriated is somehow consistent with a delay in distributing funding that he had asked the legislature to repeal. But the governor's distribution of the FY 2019 grant money once the repeal effort had failed contradicts the Coalition's claim that he will not implement the FY 2020 appropriation even if it is found to be constitutional.

42 2019 Op. Att'y Gen., 2019 WL 2112834, May 8, 2019.

43 Bill reviews must be completed before the governor has to take action on a bill, and because the governor has only 20 days excluding Sundays outside of a legislative session to take action, the Department of Law has a very limited window to complete the bill review letter.

raised during consideration of the bill.[44] And the legislature notably fails to acknowledge the similar inconsistency between its current position and the February 28, 2019 legal advice offered by its counsel that appropriations of future year revenues presents a major constitutional issue:

> [if a budget bill] contains appropriations of future revenue receipts, a court may invalidate those appropriations as a dedicated fund as the Alaska Supreme Court did in *SEACC v. State*. In addition, a superior court has determined that a continuing appropriation, that is, money appropriated during a current year from future fiscal year receipts, violates the prohibition against dedicated funds. Consequently, while the legislature can appropriate money received during past or current years that is available, it may not be able to appropriate money that may be received in future years.[45]

And just as inconsistent legal opinions do not help this Court decide the question before it, neither does the fact that the 24th Legislature enacted two forward appropriations for school district capital projects in 2005 and 2006. [LC's Mot. at 5] These appropriations were not challenged, unlike the forward appropriations struck down by the superior court in 1985 in *Trustees for Alaska v. State*.[46]

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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[44] As is typical with bill reviews, this particular bill review referred only generally to forward funding—raising the legal issue—but did not focus on the specific future revenue source for the appropriation or the implications that appropriations of future revenues would have on the dedicated funds clause and the ability of each year's governor and legislature to utilize current year revenues. In contrast, these issues were fully analyzed in the 2019 Attorney General Opinion, which also underwent the editing and vetting process required of such opinions. One short paragraph in a bill review is simply not the same as an Attorney General Opinion.

[45] February 28, 2019 memorandum Legal Services, Division of Legal and Research Services, Legislative Affairs Agency, attached as Exhibit F.

[46] *See Trustees for Alaska v. State,* 3-AN-84-12053 Civ. (Aug. 30, 1985) (Exhibit B to defendants' Motion for Summary Judgment).

In sum, the procedural quibbles offered by the legislature do not establish that the governor failed to comply with the Alaska Constitution by relying on a court order rather than an unconstitutional appropriation to fund education spending in fiscal year 2020.

E. Alaska's public schools will be funded whichever way this Court rules.

Even before this lawsuit was filed, the Governor and the legislature's attorneys, recognizing the importance of ensuring that Alaska's public schools continued to receive state funding throughout FY 2020, agreed to ask this Court to enter an order authorizing the executive branch to distribute funding consistent with the statutory formula for state aid under AS 14.17.410(b) during the litigation. And, contrary to the Coalition's hyperbolic briefing, that order does not provide that "state education funding will immediately cease" when this Court issues a decision on the cross-motions for summary judgment. [CEE's Mot. at 27] Instead, the Court's order directs the executive branch to disburse state aid to school districts "until this Court enters a *final order* in this matter, or June 30, 2020, whichever occurs first."[47] And, in case there should be any ambiguity about the phrase "final order," the parties' joint motion expressly refers to entry of final judgment, rather than the decision on summary judgment.

Thus, if this Court grants summary judgment to the Governor, it can delay issuing final judgment until one of two eventualities has occurred: either the legislature convenes and enacts a valid appropriation for education funding for FY 2020; or the Legislative Council declares its intention to file a notice of appeal and, pursuant to a further

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

47 *See* Order dated July 16, 2019.

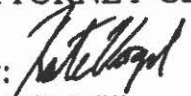
agreement of the parties, the Court extends the current order through resolution of the appeal. The defendants have no intention of allowing this litigation to "derail the entire public school system," [CEE's Mot. at 27], nor is there any reason to imagine that the legislature would oppose an extension of the court's order if it decides to appeal. There is, therefore, no threat to this year's school funding.

III. CONCLUSION

Because the forward appropriations in HB 287 violate the annual appropriation model and threaten to eviscerate the dedicated funds prohibition, fundamentally reshaping the state's budgeting process and repudiating the vision of the framers of Alaska's constitution, the Governor respectfully asks this Court to deny the legislature's and the Coalition's motions for summary judgment and instead grant summary judgment to the defendants.

DATED: September 27, 2019.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: 
For: Bill Milks
Alaska Bar No. 0411094
Margaret Paton Walsh
Alaska Bar No. 0411074

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Constitutional Convention
XI/Finance/27
January 4, 1955

MEMORANDUM

Subject: Comments from Public Administration Service on Finance Committee Proposal

At the request of the Committee on Finance and Taxation, finance specialists on the Public Administration Service staff in Chicago prepared comments on the Finance Committee proposal. These comments, supplemented as a result of Mr. Sady's discussions with these specialists, follow:

Section 8: The intended purpose of this section to prohibit the earmarking of certain revenues for special purposes is certainly laudable. It is doubtful, however, that a strict interpretation of this provision could be applied. Legal and contractual provisions will require the segregation of certain moneys, e.g., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on behalf of local government units.

This section might be revised by the deletion of the words in brackets and by the addition of the underlined words, as follows:

"Section 8: All public revenues shall be deposited in the State treasury without allocation for special purposes. [; except where state participation in Federal programs will thereby be denied.] This provision shall not prohibit the continuance of any allocation existing upon the date of ratification of this Constitution by the people of Alaska, nor the earmarking of tax revenues and other receipts where necessary to enable the State to participate in Federal programs, to repay public debt, to maintain any individual or corporate or other

local government equity therein, or to maintain duly established revolving funds."

Section 10: It is believed that the intent of this section is to require payment of tax anticipation loans from revenues of the fiscal period in which the loan was made. As the section is worded, ("shall be paid within one year.")it could be interpreted as requiring payment within one year from the date of borrowing, which would make it conflict with Section 9.

Section 9 and Section 11. The prohibition against incurring debt except by referendum in Section 9 and the exceptions in Section 11 as pertains to revenue bonds of public corporations would appear to be an open invitation to create "authorities," in the Pennsylvania pattern, for the financing of public improvements. A very good argument can be made that permitting the legislature to create debt, perhaps requiring a 2/3 vote, within prescribed limits is preferable to the creation of debt through use of authorities. (See recent publication by the Pennsylvania State Chamber of Commerce on the "hidden" debt of that state.) An alternative might be to allow the legislature to create debt up to a certain percentage of the assessed value of property and then to require a referendum for contraction of debt in excess of that amount.

Section 12: To make the concept of an executive budget complete, something on the order of the following (based on the Deleware Financial Reorganization Act) might be added at the end of this section:

"The legislature may increase, decrease, or eliminate items in the general appropriation bill in any way that is not contrary to law, but

no further or special appropriation bills, except in case of an emergency, which fact shall be clearly stated in the appropriation bill therefor, shall be considered until the general appropriation bill shall have been finally acted upon by the legislature. The total appropriation items may not be increased in the aggregate, nor may supplementary appropriation bills be passed, to the point that they would exceed the state revenues from all sources as estimated in the budget."

Section 13: Consideration should be given to deleting this section. Although provisions generally similar to this may be found in other constitutions, strict compliance is pretty much a practical impossibility. States, where such provisions exist, either achieve token observation by ingenious wording of expenditure authorizations or ignore the restrictions in certain cases. Many types of disbursements from a state treasury are not properly subject to specific appropriation, e.g., refunds of current receipts, purchase of investments, pension payments, payments from working capital funds subject to reimbursement from appropriations, and release of trust or agency moneys.

The last sentence of the section refers to "appropriated funds unexpended." There is some question whether this would be interpreted as prohibiting the carrying forward of unexpended but encumbered appropriations, and, if so, if such is the intent of the section.

Also in this sentence, the reference "returned to the state treasury" is technically incorrect since the "unexpended appropriated funds" will have ordinarily never left the treasury. There will be many types of appropriations which should not lapse at the end of the

fiscal period, e.g., for capital improvements, to provide working capital, and to pay certain fixed charges. A sentence such as follows, if any reference at all is required, would serve the intent in a more practical fashion:

"Except as specifically provided for in appropriation bills, all appropriated funds remaining unexpended or unencumbered at the end of the fiscal year shall lapse."

THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
Main: (907) 269-5100
Fax: (907) 269-5110

April 9, 2019

Delivered Via Email

The Honorable Cathy Giessel
Senate President
Alaska State Senate
State Capitol Room 111
Juneau, AK 99801
Email: Senator.Cathy.Giessel@akleg.gov

The Honorable Bryce Edgmon
Speaker of the House
Alaska State House of Representatives
State Capitol Room 208
Juneau, AK 99801
Email: Representative.Bryce.Edgmon@akleg.gov

Re: *Fiscal Year 2020 Operating Budget Legislation*

Dear Senate President Giessel and Speaker Edgmon:

The Department of Law believes that recent legislative action regarding education spending for fiscal years 2020 and 2021 presents a constitutional problem. Although proposed spending for K-12 education was included in each of the budget proposals presented by the executive branch (November 30, December 15, and February 13), the operating budget bill being debated by the House does not include a K-12 appropriation for FY20. It appears that the intent of the House of Representative is to rely solely on an appropriation included in the education funding bill enacted in 2018 (HB 287). It appears that the House is also proposing a similar approach to funding education for FY21.

In the Department of Law's opinion, the 2018 appropriation that "forward funded" education by committing a future legislature and governor to spend future revenues on education, is unconstitutional. This forward funding violates the Alaska Constitution's: (1) prohibition against dedicating revenues, (2) general framework providing for an annual budget where the legislature and the governor can consider funding priorities in comparison to revenues and make decisions accordingly, and (3) provision granting the

Governor line item veto authority. Unless the Legislature appropriates education funding for FY20, there will be no lawful appropriation for education funding for that year. Repeating the same practice would risk education funding for FY21.

Unlike past forward funding appropriations that committed *current* year revenues to be spent in future years, both the appropriation in HB 287 for FY20 education spending and the appropriation included in the current committee substitute for HB 39 for FY21 education spending would require the expenditure of *future* year revenues. This action unconstitutionally dedicates revenues and sidesteps the constitutionally required annual budgeting process including the governor's line-item veto.

Article IX, section 7 of the Alaska Constitution provides that "the proceeds of any state tax or license shall not be dedicated to any special purpose."[1] In considering this constitutional prohibition against dedicating state revenues, the Alaska Supreme Court has emphasized the importance the constitutional convention delegates placed on "preserv[ing] control of and responsibility for state spending in the legislature and the governor,"[2] and that the purpose of the dedicated funds prohibition was to ensure "that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented."[3]

The Alaska Constitution includes a specific provision setting forth a budget process in which all state spending needs are considered on an annual basis. Article IX, section 12 mandates that the governor submit a budget "for the next fiscal year" that sets forth "all proposed expenditures and anticipated income of all departments, offices, and agencies of the State."[4] The legislature, in turn, has the responsibility to determine how much to spend and on what and to pass appropriation bills authorizing annual spending which are then subject to the governor's line item veto power and the legislature's authority to override a veto.[5] In light of these provisions, the Alaska Supreme Court has described Alaska's budget process as requiring that legislators consider the competing

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1 Art. IX, sec. 7.

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

3 *Id.* at 938–39.

4 Art. IX, sec. 12. The budget must be submitted "at a time fixed by law" which the legislature has established as December 15 in the Executive Budget Act. AS 37.07.020.

5 Art. IX, sec. 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations at the end of the period of time specified by law shall be void."); Art. II, secs. 15 and 16 (Governor's authority to strike or reduce items in an appropriation bill and the legislature's authority to override a veto).

demands for state funding each year. For example, the Court ruled that the legislature and the governor have a "joint responsibility … to determine the State's spending priorities on an *annual* basis."[6] And the Court in its recent permanent fund dividend decision pointed out that "[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for *annual* legislative funding just as other state programs."[7]

As you are aware, the operating budget proposals provided on November 30, December 15, and February 13 all included proposed appropriations for FY20 K-12 spending. But as of the date of this letter, the operating budget bill being debated by the House does not include a K-12 appropriation.[8] The Department of Law believes that the Alaska Supreme Court would find that the 2018 forward funded appropriation was (1) an unconstitutional dedication of state revenues, (2) a violation of the Alaska Constitution's annual budget process, and (3) an unconstitutional attempt to circumvent the governor's line item veto power. Under this analysis removing K-12 education appropriations from the FY20 operating budget and relying solely on an action of the legislature in 2018 that committed future revenues would leave education unfunded in FY20.

The legal analysis does not change simply because of the importance of education funding. The Supreme Court pointed out in *Southeast Alaska Conservation Council*:[9]

> dedicating funds for a deserving purpose or a worthy institution is an attractive idea. Our constitutional founders were aware of the power of the dedication impulse. They decided that the good that might come from the dedication of funds for a particular purpose was outweighed by the long-term harm to state finances that would result from a broad application of the practice.[10]

We are aware that in a context other than education funding Legislative Legal Services has expressed a similar concern that an appropriation that seeks to commit future revenues rather than current year revenues is an unconstitutional dedication of revenues.

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6 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 93 (Alaska 2016) (emphasis added).

7 *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017) (emphasis added).

8 Moreover, additional forward funding appropriations based on future revenues have been included in the proposed budget bill for FY21: (1) FY21 education funding that would not go into effect until July 1, 2020 and (2) a future appropriation from the Constitutional Budget Reserve Fund for a reverse sweep.

9 202 P.3d 1162 (Alaska 2009).

10 *Id.* at 1176-77.

I am in the process of fully vetting this issue and plan on issuing a formal attorney general opinion on the subject in the near future. But I thought it was important to raise this concern with you now so you can consider this information as you continue your deliberations on the FY20 budget.

Sincerely,

Kevin G. Clarkson
Attorney General

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 28, 2019

SUBJECT: Two-year budget (Work Order No. 31-LS0606)

TO: Senator Mike Shower
Attn: Scott Ogan

FROM: Megan A. Wallace
Director

You have asked whether the legislature could pass a two-year (or biennial) budget in one session.

There is no specific restriction on the legislature's appropriation power under the Constitution of the State of Alaska that would limit the ability of the legislature to forward fund state programs. However, several provisions of the Constitution of the State of Alaska are potentially implicated by forward funding state programs. This includes: (1) art. IX, sec. 12, relating to the duty of the governor to prepare the annual state budget; (2) art. IX, sec. 17(d), relating to repayment of money appropriated from the constitutional budget reserve fund (CBR); and (3) art. IX, sec. 7, relating to dedicated funds.[1]

Under art. IX, sec. 12, Constitution of the State of Alaska, the governor is required to prepare a budget for the next fiscal year and to prepare a general appropriation bill to authorize the proposed expenditures contained in the budget.[2] Though sec. 12 could be read strictly to require the governor to prepare a budget and appropriation for the next

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[1] It is also not entirely clear how art. IX, sec. 16, Constitution of the State of Alaska (appropriation limit), would be applied in light of a biennial budget.

[2] Article IX, sec. 12, Constitution of the State of Alaska, states:

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

fiscal year, thus preventing the governor from preparing budgets for future fiscal years, it is unlikely that the courts would construe sec. 12 so narrowly as to preclude forward funding of state programs.[3] Also, sec. 12 would not prevent the legislature from making appropriations for forward funding a program more than a year in advance because the governor's duty to prepare a budget and appropriation for the next fiscal year does not place any limitation on the authority of the legislature to enact appropriations to be expended in future years.

A more significant issue in regard to forward funding state programs is the repayment or "sweep" provision of the CBR in art. IX, sec. 17(d) of the Constitution of the State of Alaska.[4] The repayment provision of sec. 17(d) requires that any money in the state's general fund that is available for appropriation at the end of a fiscal year must be transferred into the CBR to repay prior appropriations that were made from the fund. If funds held in the general fund (or other fund) are "swept" to repay prior appropriations from the CBR, then they would not be available to fund the programs when the time came for the funds to be expended.

The Alaska Supreme Court has determined that funds are available for appropriation (and thus available to repay the state's indebtedness to the CBR) at the end of the fiscal year if the legislature has retained the power to appropriate the funds, and a further appropriation by the legislature is required before the funds may be expended.[5]

If, on the other hand, a two-year budget contains appropriations of future revenue receipts,[6] a court may invalidate those appropriations as a dedicated fund as the Alaska

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[3] You may want to consider a constitutional amendment to specifically allow for a biennial budget. *See e.g.* HJR 2 (21st Alaska State Legislature). Please note, however, that if a court decides that such an amendment is a revision to the state constitution, it cannot be submitted to the voters by the legislature and validly adopted. *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). There are also numerous statutory changes that would be needed to conform to a biennial state budget. In particular, provisions of the Executive Budget Act (AS 37.07) will need changes.

[4] Article IX, sec. 17(d), Constitution of the State of Alaska, states:

> (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 constitutional budget reserve fund. The legislature shall implement this subsection by law.

[5] *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994).

[6] For example, even if the legislature made appropriations effective in fiscal year 2021, the legislature would be appropriating those future revenues during this legislature.

Supreme Court did in *SEACC v. State*.[7] In addition, a superior court has determined that a continuing appropriation, that is, money appropriated during a current year from future fiscal year receipts, violates the prohibition against dedicated funds.[8] Consequently, while the legislature can appropriate money received during past or current years that is available, it may not be able to appropriate money that may be received in future years.

If I may be of further assistance, please advise.

MAW:boo
19-097.boo

[7] 202 P.3d 1162 (Alaska 2009).

[8] *Trustees for Alaska v. State*, 3-AN-84-12053 Civ. (Aug. 30, 1985).

anc.law.ecf@alaska.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE ,

Plaintiff,

v.

HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, KELLY TSHIBAKA, in her official capacity as Commissioner of Administration for the State of Alaska, and MICHAEL JOHNSON, in his official capacity as Commissioner of Education and Early Development for the State of Alaska,

Defendants.

COALITION FOR EDUCATION EQUITY,

Intervenor

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

SEP 27 2019

By AS Deputy

Case No. 1JU-19-00753 CI

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Defendant's Opposition to Motion for Summary Judgment** and this **Certificate of Service** were provided to the following via electronic and U.S. mail:

Hilary V. Martin
Megan A. Wallace
Alaska State Legislature
Legislative Affairs Agency
120 4th Street, State Capitol, Room 3
Juneau, AK 99801
Megan.Wallace@akleg.gov
Hilary.Martin@akleg.gov

Howard Trickey
Peter A. Scully
Holland & Knight LLP
420 L Street, Suite 400
Anchorage, AK 99501
Howard.trickey@hklaw.com
Peter.scully@hklaw.com

9/27/19
Kyle Emili — Date
Law Office Assistant I

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

)7

howard.trickey@hklaw.com
peter.scully@hklaw.com

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE,

Plaintiff,

v.

HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, KELLY TSHIBAKA, in Her official capacity as Commissioner of Administration for the State of Alaska, and MICHAEL JOHNSON, in his official capacity as Commissioner of the Alaska Department of Education and Early Development,

Defendants.

COALITION FOR EDUCATION EQUITY,

Intervenor.

Case No. 1JU-19-00753 CI

COALITION FOR EDUCATION EQUITY'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Governor's motion for summary judgment starts by acknowledging that "[t]he drafters of Alaska's Constitution established a comprehensive system governing the expenditure of state funds."[1] But the constitutional rule against forward funding that the

[1] Defendants' Motion for Summary Judgment at 1 (Defs. MSJ) (September 13, 2019).

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

Governor asks the Court to adopt is conspicuously missing from this "comprehensive system." This court is "not vested with the authority to add missing terms" to the Constitution, and the Governor's arguments must therefore be rejected.[2]

The Governor also advocates for an expansive interpretation of his Article II veto authority, contending that any encroachment on this authority violates the separation of powers doctrine. But the Governor's analysis is exactly backwards. As the Alaska Supreme Court has explained, the starting point for evaluating an alleged violation of the separation of powers doctrine is determining whether the disputed constitutional power is a legislative or executive function.[3] In this case, there is no dispute that the constitutional powers to appropriate state funds and maintain a system of public education are both legislative functions. The Governor's veto, which is established among other legislative powers in Article II, also serves a legislative function. The plain language of the veto clause therefore establishes the "maximum parameters" of the Governor's veto power, and the "full extent of the constitution's express grant" to the executive branch of checks on the Legislature's appropriation and education powers.[4] The Governor's effort to expand his veto powers beyond those granted in the text of Article II, section 15 must be rejected.

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2 *Hickel v. Cowper*, 874 P.2d 922, 927–28 (Alaska 1994).

3 *Bradner v. Hammond*, 553 P.2d 1, 6–7 (Alaska 1976) ("In determining if Chapter 82 violates the doctrine of separation of powers, which is implicit in Alaska's constitution, it is necessary to answer the threshold question whether the appointment of executive officers is a legislative or executive function.").

4 *Id.* at 7.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

The Governor next argues that affirming the constitutionality of the advance appropriations in Ch. 6, SLA 2018 will set a dangerous precedent because there is no limiting principle to reign in runaway legislatures from appropriating funds years or decades into the future. But this argument ignores reality and the natural checks that are built into our democratic system of government. The suggestion that the Legislature, which struggles to agree even on annual operating budgets, will come together to forward fund the entire state budget for years to come is farfetched. And even in that unlikely event, such legislation would be subject to the same limiting principles as any other piece of legislation: political accountability, elections, and the legislature's ability to undo its previous work.

Finally, the Governor attempts to reassure the Court that striking down Ch. 6, SLA 2018 will do no harm to Alaska's schools because his "expectation" is that "the Legislature will promptly fund the amount necessary for FY20 education."[5] The Governor's "expectations" are inadequate given the turmoil that will result if these expectations are wrong. The Governor's expectations are also unduly optimistic. Regardless of who prevails in this case, an appeal to the Supreme Court is virtually guaranteed. That process is likely to take weeks or months, even if the Supreme Court agrees to take it up on an expedited basis. And in the event the Legislature must reconvene to pass a new spending bill, there is no telling how long that might take. Given the well-publicized disagreement over budgeting priorities between the Governor

[5] Defs' MSJ at 8.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

and the Legislature, and between different factions within the legislature, it is far from certain that a new appropriations bill could be passed quickly enough to avoid harm to Alaska's schools and students.

II. ARGUMENT

The Governor spends much of his brief arguing that the Alaska Constitution contemplates that the State will follow an annual budgeting model. But that proposition is unremarkable, and does not resolve the constitutional issues presented in this case. The fact that the Governor and Legislature have various annual budgeting obligations does not imply an inflexible and categorical constitutional prohibition against multi-year appropriations. Lacking any express constitutional prohibition on forward funding, the Governor asks the Court to infer one from the separation of powers doctrine and some amalgamation of the veto, appropriation, and dedicated funds clauses. But for the reasons stated below, none of these provides a basis for the Court to add limitations to the Legislature's appropriation power that the Governor believes are "missing" from the Constitution.

A. Ch. 6, SLA 2018 Does Not Violate the Separation of Powers Doctrine

The Governor asserts that the advance appropriations in Ch. 6, SLA 2018 violate the separation of powers doctrine because they are "being used to thwart his veto power."[6] But his argument fails to engage in the separation of powers analysis

[6] Defs. MSJ at 18. As the legislative history makes clear, the advance appropriations in Ch. 6, SLA 2018 were not intended to thwart yet-to-be elected Governor Dunleavy's veto power. They were intended remedy a budgeting problem plaguing Alaska's public schools.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

established in our case law. That analysis is fatal to the Governor's claims.

The Alaska Supreme Court adopted an analytical framework for separation of powers disputes in *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976). In that case, Governor Hammond refused to comply with a law that required him to submit subcabinet officials and division heads for legislative confirmation. The Governor contended that the legislature's confirmation power under Article III, section 25 was limited to approving "the head of each principle department," and that requiring confirmation of lower officials intruded on his appointment powers.

The Supreme Court analyzed the dispute under the separation of powers doctrine. It held that the "threshold question" in separation of powers cases is whether the governmental power at issue "is a legislative or executive function."[7] The Court concluded that the appointment power was an executive function, that legislative confirmation was "a delegated function taken from an executive function, [and that] ...the breadth of this delegated authority must be strictly construed."[8] Accordingly, the Court held that Article III, section 25 set the ceiling, rather than the floor, of the legislature's confirmation power, and that the express provisions of that section:

> embody[ ] not only the maximum parameters of the delegation of the executive appointive authority through the legislative confirmation function but, further, that they delineate the full extent of the

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[7] *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976) ("In determining if Chapter 82 violates the doctrine of separation of powers, which is implicit in Alaska's constitution, it is necessary to answer the threshold question whether the appointment of executive officers is a legislative or executive function.").

[8] *Id.* at 4.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

> constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers.[9]

In the present case, the analysis is the same but the polarity is reversed. The appropriation power and the obligation to fund Alaska's public education system are core legislative functions.[10] The Governor's veto power under Article II, section 15 is quite clearly a "delegated function" taken from these legislative functions—the veto power is set forth in Article II of the Constitution, which establishes the legislative powers of state government. Accordingly, as in *Bradner*, "the breadth of this delegated authority must be strictly construed."[11] The express and unambiguous language of Article II, section 15 must be interpreted as "embodying not only the maximum parameters of the delegation" of the legislative appropriation power, but also as "delineat[ing] the full extent of the constitution's express grant"[12] to the executive branch of checks on the legislature's power to appropriate state funds in furtherance of its public education obligations. In sum, the Governor's veto power is no greater than what is provided by the express language of Article II, section 15 — he may veto or reduce items in appropriations bills passed while he is in office and nothing more.

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9 *Id.* at 7.

10 *See Alaska Legislative Council v. Knowles,* 21 P.3d 367, 371 (Alaska 2001) (noting that the Alaska Constitution "gives the legislature the power to legislate and appropriate"); *see also* Alaska Const. art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law."); *id.* at art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State....").

11 *Bradner*, 553 P.2d at 4.

12 *Id.* at 7.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

The Governor's separation of power argument ignores this analysis. He repeatedly insists that he has "enhanced" authority over the budget, the contours of which are ill-defined but nevertheless require the Court to broadly construe his veto power. Describing this grand budgetary authority, the Governor asserts that he has: "robust veto power";[13] "enhanced authority over the budget";[14] "constitutional power to limit state spending;"[15] "a greater role in the development and control of the state's budget";[16] "especially strong veto power over appropriations";[17] "greater authority over legislative decisions regarding state spending";[18] "expanded power with respect to budget issues";[19] and "enhanced authority to check legislative spending."[20] Relying on this general aura of budgetary authority, the Governor asks the Court to expand his veto power beyond the constitutional text and graft limitations onto the Legislature's appropriation power that the Constitution does not impose.

The Governor's analysis is exactly backwards. His veto power is a delegated legislative function and, under *Bradner*, must be narrowly construed. However "robust" or "enhanced" that power is, it is completely circumscribed by the express language of

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13 Defs. MSJ at 1.

14 *Id.* at 9.

15 *Id.*

16 *Id.* at 10.

17 *Id.* at 12.

18 *Id.* at 14.

19 *Id.*

20 *Id.* 18.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

the Constitution, *i.e.* the veto clause "delineates the full extent" of the Governor's veto power. It cannot be interpreted to grant powers beyond those expressly given, or to add limitations to the Legislature's appropriation that do not exist in the text of the Constitution. As amici point out, the Constitution does impose express limitations on the Legislature's appropriation power.[21] But the temporal limitation the Governor proposes is not among them, and this Court is not "vested with the authority to add missing terms [to the Constitution] or hypothesize differently worded provisions in order to reach a particular result."[22] This is especially so where the Governor asks the Court to add missing terms by broadly construing his delegated legislative powers, in violation of the analysis required by *Bradner*. The advance appropriations in Ch. 6, SLA 2018 were subject to executive veto by the Governor in office when it was passed. That is all the Constitution requires.

The Governor's logic also has some fairly glaring holes. He contends, for example, that the three-fourths majority required to override appropriation vetoes under Article II, section 16 demonstrates his "enhanced" budgetary powers, and supports placing a temporal limitation on appropriation bills.[23] But Article II, section 16 also

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21 Brief of Amici at 8–17 (noting the three express limitations on the Legislature's appropriation power).

22 *Hickel v. Cowper*, 874 P.2d 922, 927–28 (Alaska 1994).

23 Defs. MSJ at 14 ("[T]he framers of Alaska's constitution gave the governor greater authority over legislative decisions regarding state spending than over other legislative enactments. The legislature needs only a two-thirds majority to override the veto of regular legislature under Art. II, § 16, but the agreement of three-fourths of the legislature is necessary to override the veto of an item in an appropriations bill.").

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

imposes a three-fourths requirement for overriding ***revenue*** bill vetoes.[24] Yet, there is no plausible argument that the Constitution limits the Legislature's ability to pass multi-year revenue bills. The Court can no more infer a temporal limitation for appropriation bills under Article II, section 16 than it can infer such a limitation for revenue bills.[25]

The Governor also complains that if the advance appropriations in Ch. 6, SLA 2018 are constitutional, then there is no meaningful limit to the Legislature's forward funding power. He envisions an extreme scenario in which the Legislature forward funds the entire operating budget for years and decades in advance in order to tie the hands of future lawmakers and subvert the will of the people. As a preliminary matter, the Governor's hypothetical worst-case scenario is not before the Court. The appropriations at issue in this lawsuit forward fund a single state service (education) for a single year, and are intended to remedy a specific and unique budgeting problem. And the scenario the Governor envisions is highly unlikely to ever happen. The legislature that attempted to future fund state government for an extended time frame would be acting without sufficient facts, funding information, or information about future needs to have any kind of rational basis for its appropriations. Given the difficulty that the Legislature has

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[24] Alaska Const. art. II, § 16 ("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.").

[25] The Governor also raises a novel separation of powers argument. He contends that by passing the advance appropriations in Ch. 6, SLA 2018, the Legislature is actually encroaching on its own legislative power. *See* Defs. MSJ at 18–19. This argument is creative, but has no support in the case law. The Governor fails to cite a single case from any court holding that one branch of government can violate the separation of powers doctrine by encroaching on its own constitutional powers.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

historically had reaching agreement on even an annual operating budget, the prospect of a future legislature forward funding state government for years to come is pure fantasy. Adopting a new non-textual constitutional rule based on a hypothetical parade of horribles that is virtually certain not to occur is a recipe for bad law. Moreover, the Governor's contention that there would be no check on a future legislature or governor inclined to abuse advance appropriations is incorrect. The Legislature and the Governor are politically accountable. An engaged electorate would serve as a check on the incompetence or abuse of power by either or both branches, or more generally, by the political parties represented in office. In the absence of an express or implied prohibition, the Constitution entrusts these disputes to the democratic process. Appropriations are no exception.

For all of the foregoing reasons, the Governor's separation of powers argument fails. His veto authority is a delegated legislative function and must be strictly construed according to the express language of the Constitutional grant. It cannot serve as a basis for grafting new and unexpressed limitations onto the Legislature's appropriation power. In this case, Ch. 6, SLA 2018 was fully consistent with the Legislature's appropriation power and properly subject to gubernatorial veto, which is all that the Constitution requires.

B. Ch. 6, SLA 2018 Does Not Violate the Dedicated Funds Clause because It Does Not Dedicate a Specific Revenue Stream

The Governor argues that Ch. 6, SLA 2018 violates the dedicated funds clause

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

because it appropriates "future" rather than "current revenues." According to the Governor, whether legislation survives a dedicated funds challenge "has depended on whether the means involved use current or future money and whether they are binding self-executing appropriations or only guidelines requiring future legislative action."[26] This is decidedly ***not*** the analysis the Supreme Court has applied to evaluate whether legislative enactments violate the dedicated funds clause. In each and every case, the Court has instead considered whether a *specific stream of future revenue* has been impermissibly set aside, *i.e.* whether the "proceeds of any state tax or license" have been dedicated to a particular purpose.[27]

For example, in *State v. Alex*, 646 P.2d 203 (Alaska 1982), the specific stream of revenue was a mandatory tax on the sale of salmon, the proceeds of which were to be allocated to regional associations for enhancement of salmon production. In *Sonneman v. Hickel*, 836 P.2d 936 (Alaska 1992), the specific stream of revenue consisted of Alaska Marine Highway System receipts, which were to be deposited into a special account within the general fund. In *State v. Ketchikan Gateway Borough*, 366 P.3d 86 (Alaska 2016), the specific stream of revenue under consideration was the required local contribution of cities and the borough towards public education, which the Supreme Court concluded did not constitute the "proceeds of any state tax or license." *Id.* at 91. In *Wielechowski v. State*, 403 P.3d 1141 (Alaska 2017), the specific stream of revenue at

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26 Defs. MSJ at 2.

27 Alaska Const. art. IX, § 7.

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420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

issue was investment income from the Permanent Fund income. *Id.* at 1143. In *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1164 (Alaska 2009), the specific stream of revenue was the "net proceeds from the University's sale or use" of roughly 250,000 acres of state land. In *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1153 (Alaska 1991), the specific revenue stream was the proceeds of a "motel and hotel bed tax." And in *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386, 387 (Alaska 2003), the specific revenue stream consisted of annual payments from a tobacco settlement fund.

The common question in all of these cases is whether *a specific source of state revenue* had been dedicated in violation of Article IX, section 7. That is the required analysis because, as the Supreme Court has noted, a legislative enactment "cannot implicate the prohibitions of section 7" if the act "does not dedicate any state *revenue* to any particular fund."[28] This analysis is consistent with the framers' intent that the dedication clause "apply to the allocation of particular taxes to a particular purpose and no more than that."[29] The Governor's contention that the validity of an appropriation under Article IX, section 7 turns on a distinction between "current and future money" is therefore inconsistent with the plain language of the Constitution, the framers' clearly

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28 *Hickel v. Cowper*, 874 P.2d 922, 927 n.8 (Alaska 1994) (emphasis added).

29 4 PACC 2405 (Jan. 17, 1956). *See also* 4 PACC 2969 (Jan. 24, 1956) ("[W]hat we are trying to get at is the allocation or dedication or earmarking of the proceeds of a particular tax to a particular purpose."); *id.* at 2971 ("A 'dedicated' revenue, for instance, is the idea that tobacco taxes are used for school construction or maintenance. That is a 'dedicated' revenue right from the time it is collected. It can't be used for anything else.").

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

expressed intent, and the long line of case law interpreting the dedicated funds prohibition.

Any analytical distinction between "current and future money" would also be impossible to apply. The Governor does not explain what he means by "current money," but to the extent he is suggesting that the Legislature can only appropriate funds that are sitting in the treasury, he is clearly mistaken. Appropriation bills *always* authorize the expenditure of "future money," *i.e.* anticipated revenues that have neither been received by the state nor deposited in the treasury. The State could not function if the Legislature lacked the authority to appropriate funds in advance of receipt. And the Supreme Court has expressly recognized that the "availability" of funds is not a pre-requisite for appropriation.[30]

Moreover, the Governor's contention that the Alaska Constitution categorically prohibits the Legislature from making appropriations that obligate future-year funds is at odds with express provisions that allow exactly that. Article IX, section 10 permits the state to borrow money to meet appropriations in one fiscal year and repay that money with subsequent fiscal year funds. Accordingly, the Constitution expressly contemplates that multi-year budgeting may be necessary, and does not mandate the type of inflexible, categorical rules the Governor proposes. To the contrary:

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[30] *See Hickel*, 874 P.2d at 931 ("The 'amount available for appropriation' would include...all monies from which the legislature can make an appropriation and which require a legislative appropriation before they can be expended, *as well as any amount which would not otherwise be counted as 'available' but from which the legislature does in fact appropriate.*") (emphasis added).

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

> In allocating power and responsibility under the Alaska Constitution, the delegates sought to provide the State with room to grow and to adapt. They designed the constitution to be flexible so that the legislature could fill in the exact details [later]. Though the delegates sought to limit certain powers and to avoid certain pitfalls, they did not intend to compel the State to unravel existing programs nor did they intend to prevent the State from experimenting and adapting to changing circumstances.[31]

C. The Education Clause is Patently Relevant to this Case

The Governor contends that the education clause of the Alaska Constitution is irrelevant to this case because the prohibition against dedicated funds applies even when revenues are dedicated to a deserving or worthy purpose. This argument misses the mark for at least five reasons.

First, there is no dedicated funds problem for the reasons stated above. Ch. 6, SLA 2018 does not allocate "the proceeds of any state tax or license" and therefore "cannot implicate the prohibitions of section 7." The premise of the Governor's relevance argument fails, and the education clause is patently relevant to his remaining constitutional arguments.

Second, the education clause is patently relevant to the Governor's separation of powers argument. As noted above, the threshold question in a separation of powers analysis is whether the powers being exercised further an executive or legislative function. In this case, establishing a system of public education, and maintaining that system with constitutionally adequate funding, are squarely and exclusively legislative

[31] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 94–95 (Alaska 2016) (internal quotations and citations omitted).

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

functions.[32] The Court must therefore evaluate the Governor's separation of powers argument in light of the mandates of Article VII, section 1.

Third, the Alaska Supreme Court has explicitly recognized that legislative actions in the public school financing arena are entitled to respect so long as they are "within the limits of rationality":

> The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect.[33]

Because the advance appropriations in Ch. 6, SLA 2018 were made in furtherance of the Legislature's obligations under the education clause, they are entitled to heightened deference and must be upheld unless they exceed the bounds of reason.

Fourth, the Alaska Supreme Court has further held that the cooperative state-local education funding formula adopted in furtherance of the Legislature's education clause obligations, of which Ch. 6, SLA 2018 is a part, is not subject to the prohibition against dedicated revenues:

> [T]he delegates did not intend for state-local cooperative programs like the school funding formula to be included in the term "state tax or license." These factors distinguish this case from previous cases where we found that state funding mechanisms violated the dedicated funds clause. We therefore

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32 *See Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971) (noting that "no other unit of government shares responsibility or authority" with the legislature under the education clause).

33 *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 803–04 (Alaska 1975) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973)).

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

> hold that the existing funding formula does not violate the constitution, and we reverse the superior court's grant of summary judgment.[34]

And fifth, the education clause will be unavoidably implicated if this Court strikes down Ch. 6, SLA 2018 as unconstitutional. As CEE explained in its opening brief, and as further set forth below, the education clause obligates the State to fund public education to constitutionally adequate levels, and confers a corresponding constitutional right on every school age child to receive that education. In the event the Court invalidates Ch. 6, SLA 2018, the current stipulation between the Governor and Legislature will lapse, public school funding will cease, and the State will be in immediate violation of its constitutional obligations under the education clause. The Governor cannot simply ignore that possibility in the midst of his power struggle with the Legislature.

D. The Governor's "Expectation" that School Funding Will Not be Interrupted by a Ruling in His Favor is Inadequate and Misplaced

The State has a constitutional obligation to maintain a system of public education by funding Alaska's public schools to a constitutionally adequate floor. Alaska's children have a corresponding constitutional right to receive the education that the framers promised them. The current stipulation between the Governor and the Legislature does not take these constitutional obligations and guarantees seriously. The stipulation, and all state public school funding, will immediately lapse if the Court rules

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34 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 87 (Alaska 2016).

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

in the Governor's favor. In response to this serious problem, the Governor can only offer his "expectation that should the Court rule that HB 287 does not validly fund education for this year, the Legislature will promptly fund the amount necessary for FY20 education."[35]

The Governor's "expectations" are inadequate and unrealistic under the circumstances. First, it is virtually certain that there will be an appeal from whatever judgment this Court enters. Even if the Supreme Court agrees to hear an appeal on an expedited basis, it will likely be several weeks or months before it issues a decision. If the Governor prevails in this court, how will the State meet its constitutional obligation to fund public education during the pendency of the appeal? The current funding stipulation provides no assurances.

Second, the notion that the Governor and Legislature will quickly pass a FY20 education budget is hopeful, but by no means guaranteed. If recent history is any guide, even a limited appropriation bill for public education is likely to be contentious and drawn out. There is already significant disagreement between the Governor and Legislature on this issue, with the Governor seeking to cut roughly 25% of the amount necessary to fully fund public education under the statutory formula that has been in place for decades,[36] as well as the entirety of the Legislature's $30 million supplemental

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35 Defs. MSJ at 8.

36 The Governor's insistence that the Legislature "follow the law" by fully funding the PFD in accordance with the statutory formula is ironic in light of his willingness to defund public education by ignoring a similar statutory formula for public school funding.

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

appropriation.[37] These are not minor disagreements. While CEE is hopeful that the Governor and Legislature would be able to put their differences aside in order to mitigate harm to Alaska's public schools, a concern for education has not been a priority for the Dunleavy administration, and he has not hesitated to sacrifice the needs of Alaska's students in furtherance of his own agenda and outsized view of executive power.

The Governor must do more than hope that the Court's ruling in this case will not create chaos for Alaska's schools, students and families. This Court should require adequate assurances that the State will meet its constitutional obligation to adequately fund public education during the pendency of any appeal, and during any gap in time between a ruling for the Governor and passage of a new appropriations bill.

III. CONCLUSION

For all of the foregoing reasons, Defendants' motion for summary judgment must be denied, and CEE and the Alaska Legislative Council's motions for summary judgment should be granted.

DATED at Anchorage, Alaska this 27th day of September, 2019.

HOLLAND & KNIGHT LLP
Attorneys for Intervenor Coalition for
Education Equity, Inc.

By: _____
Howard S. Trickey, Alaska Bar No. 7610138
Peter A. Scully, Alaska Bar No. 1405043

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

37 *See* Legislative Council's Motion for Summary Judgment at 8–9 (September 13, 2019).

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2019, a true and correct copy of the foregoing was served by email and mail, postage prepaid, upon the following:

Hilary V. Martin
Megan A. Wallace
Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services
120 4th Street, State Capitol, Room 3
Juneau, AK 99801
hilary.martin@akleg.gov
megan.wallace@akleg.gov

William E. Milks, Asst. Attorney General
Attorney General's Office
Legislation & Regulations Section
P.O. Box 110300
Juneau, AK 99811
bill.milks@alaska.gov

Margaret Paton-Walsh, Statewide Section Chief
Attorney General's Office
Special Litigation Section
1031 W. Fourth Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

Kathryn R. Vogel, Asst. Attorney General
Office of the Attorney General
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
kathryn.vogel@alaska.gov

Jahna M. Lindemuth
Scott Kendall
Holmes Weddle & Barcott, PC
701 W. 8th Avenue, Ste. 700
Anchorage, AK 99501
JLindemuth@hwb-law.com
SMKendall@hwb-law.com

Jeanine M. Huston

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Plaintiff, v. HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, KELLY TSHIBAKA, in Her official capacity as Commissioner of Administration for the State of Alaska, and MICHAEL JOHNSON, in his official capacity as Commissioner of the Alaska Department of Education and Early Development, Defendants. COALITION FOR EDUCATION EQUITY, Intervenor.	Filed in the Trial Courts STATE OF ALASKA, FIRST DISTRICT AT JUNEAU SEP 27 2019 By AS Deputy Case No. 1JU-19-00753 CI

LODGED 09/27/19 BY AS INITIALS
DATE

[PROPOSED] ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Upon consideration of Defendants' Motion for Partial Summary Judgment, all Oppositions to that motion, and any reply thereto, Defendants' motion is DENIED.

DATED at Juneau, Alaska this _____ day of _____, 2019.

_____
Hon. Daniel Schally
Superior Court Judge

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2019, a true and correct copy of the foregoing was served by email and mail, postage prepaid, upon the following:

Hilary V. Martin
Megan A. Wallace
Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services
120 4th Street, State Capitol, Room 3
Juneau, AK 99801
hilary.martin@akleg.gov
megan.wallace@akleg.gov

William E. Milks, Asst. Attorney General
Attorney General's Office
Legislation & Regulations Section
P.O. Box 110300
Juneau, AK 99811
bill.milks@alaska.gov

Margaret Paton-Walsh, Statewide Section Chief
Attorney General's Office
Special Litigation Section
1031 W. Fourth Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

Kathryn Rebecca Vogel, Asst. Attorney General
Office of the Attorney General
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
kathryn.vogel@alaska.gov

Jahna M. Lindemuth
Scott Kendall
Holmes Weddle & Barcott, PC
701 W. 8th Avenue, Ste. 700
Anchorage, AK 99501
JLindemuth@hwb-law.com
SMKendall@hwb-law.com

Jeanine M. Huston

Jeanine M. Huston

HOLLAND & KNIGHT LLP
420 L Street, Suite 400
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345