IN THE SUPREME COURT FOR THE STATE OF ALASKA

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, Appellants, v. THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, and COALITION FOR EDUCATION EQUITY, Appellees.	Supreme Court Case No. S-17666 Superior Court No.: 1JU-19-00753CI

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

BRIEF OF AMICI CURIAE ALASKA COUNCIL OF SCHOOL ADMINISTRATORS AND ASSOCIATION OF ALASKA SCHOOL BOARDS

Filed in the Supreme Court
for the State of Alaska on
this ____ of _____ 2020.

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CONSTITUTIONAL PROVISIONS

Alaska Const. art. II, § 13. Form of Bills

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

Alaska Const. art. II, § 15. Veto

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

Alaska Const. art. II, § 16. Action Upon Veto

Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses. [Amended 1976]

Alaska Const. art. II, § 17. Bills Not Signed

A bill becomes law if, while the legislature is in session, the governor neither signs nor vetoes it within fifteen days, Sundays excepted, after its delivery to him. If the legislature is not in session and the governor neither signs nor vetoes a bill within twenty days, Sundays excepted, after its delivery to him, the bill becomes law.

Alaska Const. art. VII, § 1. Public Education

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

Alaska Const. art. IX, § 7. Dedicated Funds

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska. [Amended 1976].

Alaska Const. art. IX, § 12. 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.

Alaska Const. art. IX, § 13. Expenditures

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

STATUTES

AS 37.25.010. Unexpended Balances of One-Year Appropriations

(a) The unexpended balance of a one-year appropriation authorized in an appropriation bill lapses on June 30 of the fiscal year for which appropriated. However, a valid obligation (encumbrance) existing on June 30 is automatically reappropriated for the fiscal year beginning on the succeeding July 1 if it is recorded with the Department of Administration by August 31 of the succeeding fiscal year.
(b) A valid approved claim arising from a prior year for which the appropriation has lapsed shall be paid from the current year's appropriations if this claim does not exceed the balance lapsed.
(c) University receipts received on or before June 30 of a fiscal year in excess of the amount expended for that year may be expended in the succeeding fiscal year if an appropriation of university receipts has been made for the succeeding fiscal year. The amount of university receipts expended in a fiscal year may not exceed the amount of university receipts appropriated for that year.
(d) The University of Alaska shall, in the report required under AS 14.40.190, report the amount of university receipts received in one year and expended in the succeeding fiscal year.
(e) In this section, "university receipts" has the meaning given in AS 14.40.491.

AS 37.25.020. Unexpended Balances for Appropriation for Captial Projects

An appropriation made for a capital project is valid for the life of the project and the unexpended balance shall be carried forward to subsequent fiscal years. Between July 1 and August 31 of each fiscal year, a statement supporting the amount of the unexpended balance required to complete the projects for which the initial appropriation was made and the amount that may be lapsed shall be recorded with the Department of Administration.

INTEREST OF AMICI CURIAE

The Alaska Council of School of Administrators ("ACSA") and the Association of Alaska School Boards ("AASB") (collectively "Amici") file this brief in their organizational capacities. ACSA provides a collective professional voice for school administrators across Alaska. AASB represents school boards across Alaska, with over 300 individual school board members. Jointly, Amici focus on providing advocacy and resources towards the goal of making a quality public education available to all of Alaska's students. A primary, and perennial, obstacle to the provision of quality public education in Alaska is the lack of alignment between the typical end of the legislative session and school district budget calendars. This misalignment requires districts to make crucial local budget decisions regarding resources and staffing based on suppositions of what they believe the legislature will appropriate for education.

ISSUES PRESENTED

1. *Legislature's Appropriation Power.* Does the Alaska Constitution contain a temporal restriction on the legislature's power allowing appropriations for only the current fiscal year?
2. *Forward Funding of Education.* Does the Alaska Constitution allow the legislature to remedy the misalignment of legislative and school district budget calendars by appropriating education funds for the next year after the current fiscal year?

3. *Executive Encroachment on the Appropriation Power.* Does the Governor have the power to ignore or void previously appropriated funds after they have been signed into law?

Governor Michael J. Dunleavy ("the Governor") seeks a dramatic expansion of the executive's veto power. He seeks to invalidate the legislature's action in appropriating monies to fund Alaska's education system for fiscal year 2020 ("FY20") at the same time as fiscal year 2019 ("FY19"), by arguing that the Alaska Constitution forbids such "forward funding." Because the Alaska Constitution places no such limitation on the legislature's appropriation power, this Court should affirm the judgment of the superior court.

STATEMENT OF THE CASE

After years of last-minute appropriations, to the detriment of school districts across Alaska, the 30th legislature passed HB 287—an education appropriations bill—relatively early in the 2018 regular legislative session. [Exc. 1-6] Governor Bill Walker then signed the bill, making education appropriations for both FY19 and FY20 law. [Exc. 1-6] By doing so, the legislature and the governor were able to give Alaska's school districts relative certainty regarding a minimum level of education funding for two fiscal years, allowing school districts to develop their own budgets accordingly.

Chapter 6, section 5 of SLA 2018, the appropriation funding education for both FY19 and FY20, provides:

> Sec. 5. FUND CAPITALIZATION. (a) The amount necessary to fund the total amount for the fiscal year ending June 30, 2019, of state aid calculated under the public school funding formula under

> AS 14.17.410(b), estimated to be $1,189,677,400, is appropriated from the general fund to the public education fund (AS 14.17.300).
>
> (b) The amount necessary, estimated to be $78,184,600, to fund transportation of students under AS 14.09.010 for the fiscal year ending June 30, 2019, is appropriated from the general fund to the public education fund (AS 14.17.300).
>
> (c) The amount necessary to fund the total amount for the fiscal year ending June 30, 2020, of state aid calculated under the public school funding formula under AS 14.17.410(b) is appropriated from the general fund to the public education fund (AS 14.17.300).
>
> (d) The amount necessary to fund transportation of students under AS 14.09.010 for the fiscal year ending June 30, 2020, is appropriated from the general fund to the public education fund (AS 14.17.300). [Exc. 6 (emphasis omitted)]

The appropriation transferred general fund monies to the Public Education Fund for use in both FY19 and FY20. The bill further provided that "[t]he appropriations made in sec. 5 of this Act are for the capitalization of a fund and do not lapse." [Exc. 6]

The Public Education Fund was established in 2005 through amendment of AS 14.17.300.[1] The statute provides that appropriations to this fund do not lapse:

> (a) The public education fund is established. The fund consists of appropriations for
>
> (1) distribution to school districts, to the state boarding school, and for centralized correspondence study under this chapter; and
>
> (2) transportation of pupils under AS 14.09.010.
>
> (b) Money appropriated to the fund may be expended without further appropriation. Money appropriated to the fund does not lapse. The money in the fund may be expended only in aid of public schools and for centralized correspondence study programs under this chapter and for transportation of pupils under AS 14.09.010. Interest

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1 *See* Ch. 4, § 1, SLA 2005 (HB 158).

> earned on money held in the fund before expenditure may be appropriated to the fund by the legislature.[2]

The legislature also appropriated funds in chapter 6, section 4 of SLA 2018, for grants in FY20 that did not go into the Public Education Fund:

> Sec. 4. DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT. The sum of $30,000,000 is appropriated from the general fund to the Department of Education and Early Development to be distributed as grants to school districts according to the average daily membership for each district adjusted under AS 14.17.410(b)(1)(A) - (D) for the fiscal year ending June 30, 2020. [Exc. 6 (emphasis omitted)]

The bill also provided that the effective date of the FY19 appropriations was July 1, 2018, and the effective date of the FY20 appropriations was July 1, 2019.[3] [Exc. 6] Accordingly, what the legislature intended to accomplish is clear and undisputed—simultaneous passage of education funding for both FY19 and FY20 in a single appropriations bill.

The Governor now challenges the legislature's power to enact such "forward funding" not only for education, but apparently for any purpose. [At. Br. 13-39]

STANDARD OF REVIEW

This case presents constitutional issues of law which this Court reviews de novo and determines using its independent judgment.[4] Applying "precedent, reason, and policy," this Court "adopt[s] ' "a reasonable and practical interpretation in accordance with common sense" based upon "the plain meaning and purpose of the provision and the

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2 AS 14.17.300.

3 Ch. 6, §§ 8-9, SLA 2018.

4 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (citations omitted).

intent of the framers." ' "[5] This Court also "assume[s] that an act of the legislature is constitutional. The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality."[6]

ARGUMENT

I. Forward Funding Of Education.

a. Serious and longstanding policy considerations support the use of forward funding for education.

Because the legislative calendar is misaligned with the calendars followed by individual school districts, the legislature's ability to forward fund education is critical for school boards and administrators who have to make strategic funding decisions as they create their annual budgets.

School district staff typically begin the budget process for the next school year in September. School boards usually begin their review of the staff-proposed budgets in January, and begin to amend them in line with the board's goals. This timing is necessary to help ensure compliance with state regulations which require school districts

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[5] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 370 (Alaska 2001) [hereinafter *Knowles I*] (quoting *Cook v. Botelho*, 921 P.2d 1126, 1128-29 (Alaska 1996)) (citing *Langdon v. Champion*, 752 P.2d 999, 1001 (Alaska 1988)); *see also Wielechowski*, 403 P.3d at 1146 ("Our analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. We are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result." (alteration in original) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994))).

[6] *Knowles I*, 21 P.3d at 379 (footnote omitted) (citing *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998)).

to submit a balanced budget to the Alaska Department of Education & Early Development by July 15 each year.[7]

However, the legislative calendar directly conflicts with this calendar. While individual districts are attempting the refine their final budgets, the legislature is only just beginning its work. The legislature does not even convene until the third week in January.[8] The legislature is scheduled to adjourn 120 days later, which is the third week in May.[9] However, the legislature can vote to extend the regular session by 10 days, to approximately the end of May.[10] Exacerbating this issue are two further facts: (1) it has been common in recent years for the legislature to require special sessions to finish its work, thereby pushing these dates even into late June;[11] and (2) the governor has between 15 and 20 days to decide whether to sign the budget and how much, if any, funding to veto.[12]

This schedule is in clear conflict with the school district budget process as described above—requiring districts to often go through the exercise of preparing, but not enacting, multiple budgets based on varying levels of foundation funding with all of the accompanying scenarios of what individual programs might or might not be funded. This process is inefficient, a waste of district resources, and leads to poor planning.

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7 4 AAC 09.110(a) ("A district must submit its budget for each fiscal year to the department no later than July 15 of the fiscal year.").

8 AS 24.05.090; *see also* Alaska Const. art. II, § 8.

9 Alaska Const. art. II, § 8.

10 *Id.*

11 *See* Alaska Const. art. II, § 9.

12 Alaska Const. art. II, § 17.

More critically, this schedule is in *direct* conflict with school districts' duties under AS 14.20.140. This statute requires that non-tenured teachers *must* be notified in writing of their layoff or non-retention by no later than May 15.[13] In a typical year (and without forward funding), a school district does not know what level of funding it will receive from the state by this date. Accordingly, the district has only two options: (1) issue contracts to every teacher, whether tenured or not, and place itself at grave risk of an unbalanced budget; or (2) lay off many or all non-tenured teachers. Typically, most school districts are forced to make the latter choice, issuing "pink slips" or layoff notices to non-tenured teachers.

Only once the budget eventually passes and is signed by the Governor, with or without vetoes, do school districts finally know the amount of funding they will have available for the following school year. At this point, districts begin attempting to rehire teachers who were laid off. Often these teachers have found other positions, sometimes outside Alaska, leaving dozens of districts in a "scramble" to secure adequate teachers from the same, limited pool of applicants.

Alaska's schools already face a teacher recruitment and retention crisis.[14] Teacher turnover and unfilled teacher positions—exacerbated by the legislative budget calendar—

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[13] AS 14.20.140.

[14] *See* Manuel Vazquez Cano, Hella Bel Jadj Amor, and Ashley Pierson, *Educator Retention and Turnover Under The Midnight Sun: Examining Trends and Relationships in Teacher, Principal, and Superintendent Movement in Alaska*, Regional Educational Laboratory Northwest (Sept. 2019), https://files.eric.ed.gov/fulltext/ED598351.pdf (discussing high turnover in Alaska's educator population); Sean Maguire, *"We're in a crisis": High Teacher Turnover, Huge Humbers of UAA Education Students Gone*, KTUU (Sept. 19, 2019), https://www.ktuu.com/content/news/Were-in-a-crisis-High-

directly undermine school district goals and student achievement. The availability of forward funding as a tool to the Alaska legislature is critical to the education of Alaska's students.

b. Forward funding of education serves an important public purpose.

Article IX, section 6 of the Alaska Constitution provides that "[n]o tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose." This Court has shown deference to the legislature on its findings of public purpose. "[W]here the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, this court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact."[15]

The appropriation at issue in this case has a clear public purpose of ameliorating the disconnect between the academic budgetary process and the state's legislative calendar. The forward funding aspect was justified by Rep. Paul Seaton, the bill's sponsor, as follows:

> The bill is intended to pass separately from the regular operating budget and early in the session to enable school districts to avoid mandatory teacher layoff notices. Many lawmakers agree that

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teacher-turnover-huge-numbers-of-UAA-education-students-gone-560836681.html (highlighting the high recent turnover of educators in Alaska); *see also* NEA-Alaska, *This Is What Teacher Turnover Looks Like In Alaska*, Anchorage Daily News (Feb. 3, 2020), https://www.adn.com/sponsored-content/2020/02/01/this-is-what-teacher-turnover-looks-like-in-alaska/ (explaining the high cost—over $20,000 on average per teacher or about $20 million total annually—of replacing public school teachers in Alaska).

[15] *Dearmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 721 (Alaska 1962) (citations omitted).

> education funding cannot withstand further cuts without negatively effecting Alaskan children. An early, separate appropriation for education that has existing funding identified would prevent these problems and will allow school districts to finalize their budgets on time.
>
> Even after the budget has passed the legislature, line item veto or veto reductions can be made by the Governor. In 2015, the Legislature needed to come back in special session to pass a second operating budget that included education funding. In 2016, the state operating budget was passed by the legislature on May 31. Last session, the state operating budget did not pass the Legislature until June 22 and signed by the Governor on July1. All this uncertainty for the funding amount forces school districts to draft multiple budgets. The Anchorage School District is required to submit their budget to the Municipality by the first Monday in March. Anticipating low amounts requires districts to give termination notices (pink slips) to tenured teachers by May 15 and non-tenured teachers by the last day of school. [R. 478-479 (emphasis added)]

Additionally, funding education is a constitutional duty mandated by article VII, section 1 of the Alaska Constitution.[16] This Court has repeatedly addressed the constitutional duty to establish and maintain a public school system as a core function of state government.[17] Therefore there should be no dispute that the public purpose limitation on the legislature's appropriation power does not apply here.

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[16] Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.").

[17] *See generally State v. Ketchikan Gateway Borough*, 366 P.3d 86 (Alaska 2016) (describing the creation of school districts to satisfy this constitutional duty, and holding that the mechanism for school funding did not violate the dedicated funds clause in the Alaska Constitution); *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 801

II. The Legislature Possesses Broad Appropriations Powers.

a. Only the Alaska Constitution may limit the legislature's power of appropriation.

The Alaska Constitution grants the legislative branch "the power to legislate and appropriate."[18] The form and powers of the legislature are described in article II of the Alaska Constitution, and section 13 specifically outlines its appropriation power.[19]

An "appropriation" is "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[20] The legislature must "sufficiently" describe the monetary transfers so they cannot "purposefully fail to include a sum certain in order to avoid the governor's appropriations veto. But the degree of specificity required is only that necessary to allow identification of the monies involved."[21]

(Alaska 1975) (holding that the constitution required legislature to "establish a system of education designed to serve children of all racial backgrounds").

[18] *Knowles I*, 21 P.3d at 371 (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13); *see also State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987) (recognizing that the appropriation power resides in legislature and cannot be delegated to the executive).

[19] *See* Alaska Const. art. II, § 13.

[20] *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) [hereinafter *Knowles II*] (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)). "Appropriation" is more broadly defined in Article XI of the Constitution, which limits the people's power to enact legislation through the initiative process. *Id.* at 894. The key reason for this difference in the meaning of appropriation "is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." *Id.* at 895 (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)).

[21] *Id.* at 898 n.39.

The Governor mischaracterizes the appropriation power as a shared power due to his duty to propose a budget and his veto power, but this is incorrect.[22] The executive can propose a budget and general appropriation bill, and he has the power to exercise line-item vetoes to the legislature's appropriations, and the legislature can override those vetoes with a three-quarter vote.[23] But this constitutional framework "gives the governor no appropriation power."[24] The governor's role in the appropriations process is limited to providing a check on the legislature's process.[25]

The Governor's power to veto is found in article II, section 15 of the Alaska Constitution. The Governor has the power to veto non-appropriation legislation. He also has the power of line-item veto, or the power, "by veto, [to] strike or reduce items in appropriation bills."[26] However, an executive cannot strike descriptive language, only

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22 *Knowles I*, 21 P.3d at 372 ("However the item veto power is characterized, we conclude that it was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power . . . ."); *Rosen*, 569 P.2d at 796 (noting "the item veto power of the governor checks legislative appropriations") (footnote omitted). For example, the governor's veto power does not extend to general obligation bond authorizations because no check is needed there, since such authorizations go to voters for approval. *Rosen*, 569 P.2d at 796-97.

23 Alaska Const. art. II, §§ 15, 16.

24 *Knowles I*, 21 P. 3d at 372.

25 *Id.*

26 Alaska Const. art II, § 15. "Item" means "a sum of money dedicated to a particular purpose." *Knowles I*, 21 P.3d at 371 (citations omitted).

strike or reduce sums of money.[27] The line-item veto also cannot be used to strike the transfer or appropriation of non-monetary state assets.[28]

Apart from the veto, there are only three explicit limits on the legislature's power to appropriate. Like the Governor's veto power, those limits are all expressly found in the text of the Alaska Constitution: (1) the legislature can only appropriate for a public purpose; (2) an appropriation bill must be confined solely to appropriations, and cannot enact substantive legislation; and (3) the legislature cannot appropriate more than $2.5 billion annually, adjusted annually for inflation, subject to certain exceptions.

None of these explicit limits apply in this case:

- As discussed in detail above, it is evident that forward funding of education—and education funding generally—serves the required public purpose.[29]

- Article II, section 13 of the Alaska Constitution provides that "[b]ills for appropriations shall be confined to appropriations."[30] The confinement clause serves the purpose of "prevent[ing] a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure."[31] This case raises no confinement clause issue.

- Article IX, section 16 of the Alaska Constitution was added by amendment in 1982 to place a spending cap on legislative

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27 *Knowles I*, 21 P.3d at 371.

28 *Knowles II*, 86 P.3d at 894 (holding that line-item veto power does not apply to the legislature's transfer of land to the University for public purpose).

29 *See supra* Subsection I.b.

30 Alaska Const. art. II, § 13; *see also* AS 24.08.030 ("Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner, and other related conditions of payment.").

31 *Knowles I*, 21 P.3d at 377 (adopting five-part test set forth in *Alaska State Legislature v. Hammond*, No. 1JU-80-1163 CI (Alaska Super. May 25, 1983)).

> expenditures.[32] This spending cap provides that the legislature can appropriate no more than $2.5 billion annually, adjusted for inflation.[33] There is no spending cap issue in this case.

Because the legislature's appropriation power can only be limited by the constitution, and because none of those explicit limits prohibit forward funding, the legislature's actions were lawful.

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[32] Alaska Const. art. IX, § 16. This Court has held that the spending cap does not apply to non-monetary appropriations, such as land transfers. *Knowles II*, 86 P.3d at 897.

[33] Article IX, section 16 of the Alaska Constitution provides:

> Except for appropriations for Alaska permanent fund dividends, appropriations of revenue bond proceeds, appropriations required to pay the principal and interest on general obligation bonds, and appropriations of money received from a non-State source in trust for a specific purpose, including revenues of a public enterprise or public corporation of the State that issues revenue bonds, appropriations from the treasury made for a fiscal year shall not exceed $2,500,000,000 by more than the cumulative change, derived from federal indices as prescribed by law, in population and inflation since July 1, 1981. Within this limit, at least one-third shall be reserved for capital projects and loan appropriations. The legislature may exceed this limit in bills for appropriations to the Alaska permanent fund and in bills for appropriations for capital projects, whether of bond proceeds or otherwise, if each bill is approved by the governor, or passed by affirmative vote of three-fourths of the membership of the legislature over a veto or item veto, or becomes law without signature, and is also approved by the voters as prescribed by law. Each bill for appropriations for capital projects in excess of the limit shall be confined to capital projects of the same type, and the voters shall, as provided by law, be informed of the cost of operations and maintenance of the capital projects. No other appropriation in excess of this limit may be made except to meet a state of disaster declared by the governor as prescribed by law. The governor shall cause any unexpended and unappropriated balance to be invested so as to yield competitive market rates to the treasury.

b. The Governor's attempt to place a temporal limit on appropriations is without basis.

i. There is no temporal limitation in the Alaska Constitution.

This Court is "not inclined to pass judgment on the means selected by the legislature to accomplish legitimate purposes unless they are clearly in violation of the constitution."[34] This Court typically declines to interfere when "[t]he legislature chooses the means to effect a public purpose in the exercise of a broad discretion," unless a clear violation of the Constitution can be shown.[35]

The Governor propounds a new and novel theory that the Alaska Constitution somehow prohibits the ability of the legislature to appropriate sums of money for a public purpose in a way that allows that appropriation to be spent in future years. [At. Br. 13-39] According to this theory, all appropriations must be spent in the fiscal year of the appropriation or they lapse or expire. [At. Br. 13-39] While lapsed appropriations occur from time to time in the usual course of state government, there is no temporal limitation on appropriations in the Alaska Constitution. The Governor's argument for this temporal limitation finds no basis in the constitution and appears to have never before been asserted as a limitation in Alaska's 60-year history. The constitutional basis the Governor stakes his argument is actually language that only requires <u>him</u> to submit a draft budget to the legislature for consideration:

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[34] *Dearmond v. Alaska State Dev. Corp.,* 376 P.2d 717, 724-25 (Alaska 1962) (upholding the power of the legislature to create a state public corporation and appropriate state funds to it).

[35] *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 552 (Alaska 1966).

> 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.[36]

This Court must reach "a reasonable and practical interpretation [of this section] in accordance with common sense."[37] And by the plain language of this passage the constitution only imposes a duty on the governor to submit a "starting point" budget to the legislature every year.[38] What is missing from the Governor's argument is any language—either here or in any other part of the constitution—that states the legislature cannot appropriate in one year certain funds that would be spent on government services in a subsequent year.

The Governor's requirement to draft an annual budget does not mean that the legislature cannot fund projects, programs, or priorities into the future. Although annual appropriations typically expire at the end of the fiscal year, with any unused funds lapsing back into the general fund,[39] there are numerous examples of the legislature appropriating money to a fund—such as the Public Education Fund—while "providing by law" that the monies do not lapse back at the end of the year, but remain in place to

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36 Alaska Const. art. IX, § 12.

37 *Knowles I*, 21 P.3d at 370 (quoting *Cook v. Botelho*, 921 P.2d 1126, 1128-29 (Alaska 1996)).

38 *See* Alaska Const. art. IX, § 12.

39 AS 37.25.010(a) ("The unexpended balance of a one-year appropriation authorized in an appropriation bill lapses on June 30 of the fiscal year for which appropriated.").

serve the public purpose of the fund.[40] By their very language, both the appropriation challenged by the Governor in this case—*and* the statute creating the Public Education Fund—specify that appropriations into the Fund do not lapse.

The specific goal of the appropriation in HB 287 was to prevent the annual budget chaos for school districts by creating funding certainty for the current and future fiscal

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[40] *See e.g.*, AS 18.67.162 (establishing the Crime Victim Compensation Fund, which "consists of money appropriated to it by the legislature," the funds of which "do not lapse"); AS 18.74.210 (establishing the Fire Prevention and Public Safety Fund, where "[m]oney appropriated to the fund may be spent for the purposes of the fund without further appropriation" and "does not lapse"); AS 29.60.800 ("Money in the [Harbor Facility Grant] fund does not lapse and remains available for expenditure in successive fiscal years."); AS 29.60.850(a) (establishing the Community Assistance Fund, which "consists of appropriations," and where "[m]oney in the fund does not lapse"); AS 37.05.550(a) (creating the Alaska Marine Highway System Vessel Replacement Fund, and providing that the "money appropriated to it by the legislature . . . does not lapse"); AS 37.05.555(b) ("Appropriations to the University of Alaska building fund are not one-year appropriations and do not lapse under AS 37.25.010."); AS 37.05.570(c) ("Appropriations to the Alaska public building fund are not one-year appropriations and do not lapse under AS 37.25.010."); AS 37.06.010(a)-(b), (f) ("Appropriations to the [Municipal Capital Project Matching Grant Program] do not lapse except" with provision that funds lapsed if not used within five years of the appropriation); AS 37.06.020(a)-(b), (h) (establishing the Unincorporated Community Capital Project Matching Grant Program, and providing that "[a]ppropriations to the fund do not lapse except" under certain circumstances after "five years after the effective date of the appropriation"); AS 41.17.310(b) ("Money appropriated to or paid into the state land reforestation fund does not lapse."); AS 43.23.045(a), (d) (establishing the Dividend Fund, and providing that "[u]nless specified otherwise in an appropriation act, the unexpended and unobligated balance of an appropriation to implement this chapter lapses into the dividend fund on June 30 of the fiscal year for which the appropriation was made"); AS 43.90.400 (establishing the Alaska Gasline Inducement Act Reimbursement Fund, where "[a]ppropriations to the fund do not lapse under AS 37.25.010, but remain in the fund for future disbursements"); AS 44.33.115 (creating the Exxon Valdez Oil Spill Unincorporated Rural Community Grant Fund, where "[a]ppropriations to the fund do not lapse unless otherwise provided by the legislature in the bill making the appropriation to the fund.").

year.[41] This would allow districts to engage in better planning and avoid the harm caused by "pink-slipping" non-tenured teachers. Once this appropriation was passed and signed by Governor Walker, it became law.

It is not unusual for the legislature to authorize the expenditure of state funds for future fiscal years. For example, funds for capital projects do not lapse and are "valid for the life of the project" so long as, by statute, the project begins within five years of the date of the appropriation.[42] All of the funds for a particular project are not in the treasury in the year of the appropriation, especially as there often is federal funding tied to capital projects that involve highways. Essentially, the appropriation is authorization by the legislature to spend public funds in future years—sometimes far into the future—under the instructions and limitations imposed by the legislature. In short, the legislature has commonly expended future revenues for ongoing appropriations, and there is no restriction anywhere in the Alaska Constitution prohibiting this practice.

ii. The Governor's own proposed legislation belies his argument against education forward funding.

During the regular 2019 legislative session the Governor *himself* introduced legislation that would have appropriated funds in three separate fiscal years. This proposed legislation—which called for multiple appropriations from the Alaska Permanent Fund earnings reserve account to distribute "back pay" for prior permanent

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41 *See supra* Section I.

42 AS 37.25.020 ("An appropriation made for a capital project is valid for the life of the project, and the unexpended balance shall be carried forward to subsequent fiscal years if substantial, ongoing work on the project has begun within five years after the effective date of the appropriation.").

fund dividends—was a centerpiece of the Governor's legislative package in 2019. Although the Governor's legislation did not progress—for lack of legislative, public, and logical support[43]—it would have appropriated those monies in FY20, FY21, and FY22 for supplemental PFD payments in those years. [*See* R. 100-103] As a matter of common sense, but especially in light of recent economic headwinds related to the COVID-19 pandemic, "back pay" of $3,678 in dividends to every eligible Alaskan (*on top of* payments for statutory dividends and funds needed for state services) would likely exceed the funds currently available in the earnings reserve account.[44]

Not only would the Governor's legislation have appropriated funds in future fiscal years just like HB 287, it utilized a mechanism and language that is *identical* to the legislation he now challenges as unconstitutional:

> **Sec. 3**. Section 1(b) and (e) of this Act take effect July 1, 2020.
>
> **Sec. 4**. Section 1(c) and (f) of this Act take effect July 1, 2021.
>
> **Sec. 5**. Section 1(g) of this Act takes effect July 1, 2022.
>
> **Sec. 6**. Except as provided in secs. 3 - 5 of this Act, this Act takes effect immediately under AS 01.10.070(c). [R. 101]

If it had garnered legislative support and passed, the Governor's mechanism would have been sound and not a violation of the constitution. The same is true with HB 287.

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[43] With the end of the 2020 regular legislative session, this legislation has presumably expired, unless the Governor calls a special session in calendar year 2020 and places it on the agenda.

[44] Ultimately, the legislature chose not to fund "full" statutory dividends in FY20 and FY21, despite the Governor's budget and public advocacy calling for them.

iii. The Constitution's drafters specifically considered, but rejected, the idea of a temporal limitation on the legislature's appropriation power.

During the drafting of Alaska's constitution, the convention delegates actually considered the possibility of a temporal restriction on the legislature's appropriation power. And when given the opportunity to put temporal limits on the legislature's power, the delegates made it clear that no such barrier should be imposed.

The finance and taxation committee at the constitutional convention considered what should happen to leftover funds from unspent appropriations. Original proposed language for the Constitution stated that: "[a]ll appropriated funds unexpended at the end of a period of time specified by law shall be returned to the state treasury."[45] Accompanying commentary simply noted that this sentence was intended to "recapture . . . unexpended balances."[46]

But a consultant to the Convention commented on this language and critiqued its vagueness regarding whether the legislature's appropriation powers would be limited by time:

> 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. . . . A sentence such as follows . . . would serve the intent in a more practical fashion: "Except as specifically provided for in

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[45] Constitutional Convention Finance & Taxation Preliminary Draft, § 13 (Dec. 9, 1955) (emphasis added).

[46] Constitutional Convention Commentary on the Article on Finance and Taxation, No. 9, § 13 (Dec. 16, 1955).

> appropriation bills, all appropriated funds remaining unexpended or unencumbered at the end of the fiscal year shall lapse."[47]

In response to this concern, the delegates on the finance and taxation committee settled on language which rejected the consultant's suggested "end of the fiscal year language" while agreeing to clarify what happens to appropriated but outstanding funds, which shows an intent to make clear that the legislature could make appropriations that would not lapse at the end of the next fiscal year:

> All appropriations outstanding at the end of a period of time specified by law shall be void.[48]

In short, the convention delegates were specifically confronted with the question of whether to limit appropriations to a specific fiscal year, and they responded with a firm "no." The framers deliberately acknowledged that the legislature has the power to "specif[y] by law" the duration of individual appropriations.[49]

iv. The Governor's actions unlawfully encroach on the domain of the legislative branch.

Given that the challenged appropriations have now been expended, it is evident that the Governor's ongoing challenge is intended to expand the power of the executive

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[47] Memorandum, Comments from Public Administration Service on Finance Committee Proposal, § 13 (Jan. 4, 1955) (emphasis in original).

[48] Constitutional Convention Amendments to Proposal No. 9, § 5 (Jan. 16, 1955) (emphasis added). Only a slight stylistic change to the beginning of this section was made after the finance and taxation committee submitted this proposed language. *See* Alaska Const. art. IX, § 13 ("*Unobligated* appropriations outstanding at the end of the period of time specified by law shall be void." (emphasis added)).

[49] Although a subsequent legislature would always have the power to undo or redirect an appropriation in a subsequent year, this provides no basis for a future governor to attempt to veto or ignore a prior appropriation that has been passed and signed.

branch to the detriment of the legislative branch. If the Governor succeeds in imposing a new, temporal limitation on appropriations, the legislature will be constrained as never before. This Governor, and all future governors, will be able to undo and veto not only forward funding of education, but countless other appropriations of funds made in prior years long after the time limits on vetoes ordinarily expires.[50] The Governor would have unprecedented power to reach back into appropriations from prior years to veto and reduce items long settled. And it would set a uniquely problematic precedent in this case, where the legislature specifically acted here to correct the inherent problems that the ordinary appropriation process causes school districts. This Court should reject the Governor's attempt to encroach on the legislature's powers as established in the Alaska Constitution.

This Court has confirmed that Alaska's constitutional framers followed the traditional framework by dividing governmental powers between three branches. Further, this Court has confirmed that this framework limits each branch only to its enumerated powers.[51]

The framework (sometimes referred to as the doctrine of "separation of powers") was applied by this Court in *State v. Fairbanks North Star Borough*.[52] The legislature attempted in that case to pass a statute giving the Governor the new power to adjust, in the middle of a fiscal year, the amount the state spent on governmental services to less

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50 Alaska Const. art. II, § 17.

51 *See Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).

52 *See generally* 736 P.2d 1140 (Alaska 1987).

than that appropriated based on actual revenues.[53] Even though the legislative branch supported the change, this Court found the attempt to grant the governor "the exercise of sweeping power over the entire budget with no guidance or limitation" was an unconstitutional delegation of legislative power,[54] calling it a "legislative abdication" of its power of appropriation.[55]

As in the *Fairbanks North Star Borough* case, the principle of separation of powers precludes the Governor's attempt to expand his power over appropriations. On the subject of appropriations, the constitution already explicitly provides him with his veto power only when a budget is placed before him, and only for a short period of time.[56] Any attempt to somehow expand that power backwards in time as suggested by the Governor in this case, or to limit the legislature's ability to appropriate for future years as it sees fit, directly violates the doctrine of separation of powers and the very structure of Alaska's constitution.

III. Forward Funding Of Education Does Not Violate The Dedicated Funds Clause.

The Governor also alludes that HB 287 is an unconstitutional dedication under article IX, section 7 of the Alaska Constitution. Ignoring for the moment that this

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53 *Id.* at 1142-43.

54 *Id.*

55 *Id.* at 1144.

56 Alaska Const. art. II, § 17.

argument would also render impotent the crown jewel of his legislative agenda—the proposed PFD "back pay" legislation[57]—it is evident the claim is without basis.

The dedicated funds clause provides in relevant part that "[t]he proceeds of any state tax or license shall not be dedicated to any special purpose. . . ."[58] The Public Education Fund is not a dedicated fund as defined by the constitution and this Court.

In *State v. Alex*, this Court examined the constitutional convention history of the dedicated funds clause.[59] This Court found it decisive that the founders specifically changed the draft clause from precluding the dedication of "all revenues" to the less inclusive language against dedicating the "proceeds of any tax or license."[60] This Court concluded that the purpose of this change was to allow "necessary dedication of funds once they were received and placed in the general fund.[61]

Accordingly, the legislature is free to create special funds and place monies into them,[62] so long as they are available for the next legislature to amend through another

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57 *See supra* Subsection II.b.ii.

58 Alaska Const. art. IX, § 7 ("The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.").

59 646 P.2d 203, 209-10 (Alaska 1982) (holding that mandatory language in statute requiring fish tax assessments to be placed in a fund under the ownership and control of aquaculture associations created unconstitutional dedicated fund).

60 *Id.*

61 *Id.* at 210 (citing 1975 Alaska Op. Atty. Gen. No. 9 at 10 (May 12)).

62 The Alaska Supreme Court has long recognized that "public revenue" includes monies both in the general fund and in special funds, both from which the legislature can

bill.[63] What it *cannot* do is permanently dedicate "the [future] proceeds of any state tax or license" to a fund without further appropriation.[64] This Court reiterated this reasoning in *Hickel v. Cowper*, holding that a fund dedicated to a certain purpose is not improper so long as "the executive branch [can request] . . . that these funds be reassigned to different purposes or the legislative branch [can] allocat[e] these funds differently."[65]

Although the Governor cannot veto the funds from HB 287 there is no dedicated fund violation because he can request a change and the legislature can make such a change if it wishes.[66] The legislature appropriated funds in 2018 from the general fund for education in FY20, but the Governor could (and did) request a change, and it is uncontested that the legislature could have adjusted the appropriation.[67]

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appropriate monies. *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977) (citation omitted).

[63] The Alaska Supreme Court has confirmed the legislature can amend a prior appropriation in an appropriation bill. *Knowles I*, 21 P.3d at 378.

[64] *See Alex*, 646 P.2d at 208-10.

[65] 874 P.2d 922, 927 n.8 (Alaska 1994) (citing *Sonneman v. Hickel*, 836 P.2d 936, 940 (Alaska 1992)).

[66] *See id.*; *see also Sonneman*, 836 P.2d at 940.

[67] Other parties argue that there is no dedicated fund violation because education funding existed prior to Alaska's statehood, falling into the exception for such dedications. *See* Alaska Const. art. IX, § 7 ("This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska."). Because there is no dedication of funds in this case, application of the exception is not necessary. Assuming that this Court finds that such a dedication exists, Amici join the other parties in concluding that the pre-statehood exception applies to HB 287 under this Court's decision in *State v. Ketchikan Gateway Borough*, 366 P.3d 86 (2016).

CONCLUSION

Alaska stands at a critical juncture. The Governor and the legislature are fundamentally at odds with one another, and our constitutional framework hangs in the balance. This Court should act to restore the balance between the branches of government.

Because the Governor has not met his burden of even making a prima facie showing that forward funding of education violates the constitution, and because "doubtful cases should be resolved in favor of constitutionality,"[68] this Court should affirm the judgment of the superior court.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 29th day of July 2020.

HOLMES WEDDLE & BARCOTT, PC

By: _____
Scott M. Kendall
Alaska Bar No. 0405019

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68 *Knowles I*, 21 P.3d at 379.