IN THE SUPREME COURT OF THE STATE OF ALASKA

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Appellants, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Appellees.	Case No.: S-18333 Trial Court No.: 3AN-22-04028CI

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APPELLANTS' RESPONSE TO PETITION FOR REHEARING

The Executive Branch argued throughout this appeal that *Hickel v. Cowper* was binding precedent that should be applied to the Higher Education Investment Fund ("HEIF"). This Court agreed with the Executive Branch, holding that the HEIF (in its then-current iteration) was subject to the annual "sweep" of funds into the Constitutional Budget Reserve ("CBR") because it failed to satisfy the two-part *Hickel* test.[1] This Court reached its decision, in part, because the prior HEIF statute explicitly stated that it resided in the general fund, thereby satisfying the first part of the *Hickel* test.[2]

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[1] *See* Opinion No. 7622 at 2 (Sept. 30, 2022); *see also* Order (May 3, 2022).

[2] *See* Opinion at 10 n.30 ("We 'presume "that the legislature intended every word, sentence, or provision of a statute to have some purpose force, and effect," ' and we 'consider[] the meaning of the statute's language, its legislative history, and its purpose.' " (citations omitted)); *see also* former AS 37.14.750(a) (2021) ("The [HEIF] is established in the general fund[.]").

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The Executive Branch has filed a petition for rehearing asking this Court to reconsider this sentence in the first footnote to this Court's decision: "The legislature has since amended the HEIF statute, removing the HEIF from the general fund and thus making it ineligible for the sweep."[3] Although the Executive Branch does not say it directly, its petition implies that the Executive Branch somehow believes that the *current* version of the HEIF is subject to the annual CBR sweep under *Hickel*.

This Court should deny the Executive Branch's petition for rehearing. It is accurate to state that a fund (like the HEIF is now) that does not exist in "the general fund" is "ineligible for the [annual CBR] sweep."[4] In fact, any conclusion to the contrary would completely unravel *Hickel*'s two-part test that this Court just upheld at the Executive Branch's behest.

As the parties (and this Court) recognized, the Executive Branch's recent determination of what funds are subject to the annual CBR sweep was first litigated with respect to the Power Cost Equalization Endowment Fund ("PCE").[5] The superior court in that case held that the PCE was not subject to the sweep because that fund's plain statutory language made it clear that its monies were "not sweepable because article IX, section 17(d) mandates only that *general fund* monies be swept.[6] The Executive Branch

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3 Opinion at 2 n.1 (emphasis added).

4 *Id.*

5 *See id.* at 12-13.

6 *Id.* at 13 (emphasis in original).

did not appeal that decision.[7] In fact, relying on the superior court decision in that case to support its argument in this case, the Executive Branch conceded that that decision confirmed that "the legislature can itself define the scope of the 'general fund' . . . and avoid the sweep by statutorily placing a fund outside the 'general fund.' "[8]

The two-part test articulated in *Hickel* — which the Executive Branch successfully argued was controlling law — provides that monies that are: (1) "in the general fund" and (2) "available for appropriation" are subject to the annual CBR sweep.[9] The first part of that two-part test, whether monies exist in the general fund, is a fundamental component of determining sweepability; it is *the* defining characteristic between what funds are available for the annual CBR sweep in section 17(d), as opposed to the determination of what majority is required to access the CBR's funds with a simple majority vote in section 17(b).[10]

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[7] *Id.*

[8] Ae. Br. 20 n.77 (citing Exc. 117-125). It is also worth noting that the PCE was not enacted by a three-quarters vote that the Executive Branch now suggests is a silent requirement of *Hickel*'s two-part test. *See* 2000 House Journal 3748 (showing a 26 to 14 concurrence vote in the House to establish the PCE).

[9] *See Hickel v. Cowper*, 874 P.2d 922, 936 n.32 (Alaska 1994) ("We recognize . . . that the payment provision in section 17(d) is limited to only those funds which are 'available for appropriation' and 'in the general fund.' " (emphasis in original)). Article IX, section 17(d) of the Alaska Constitution also uses the phrase "in the general fund." *See* Alaska Const. art. IX, § 17(d) (providing that "the amount of money *in the general fund* available for appropriation at the end of each succeeding fiscal year shall" be used to repay any CBR debts (emphasis added)).

[10] *See Hickel*, 874 P.2d at 936 n.32; *see also* Opinion at 9 ("We saw 'no reason to give "available for appropriation" a different meaning in subsection (d) than we did in

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The parties disputed the meaning of "general fund" in this case, and this Court held that the legislature's decision to either use the term "general fund" or not must be given meaning.[11] Although the Students had certainly hoped that this Court would reach a different outcome in this case, casting doubt on *Hickel*'s "general fund" requirement would eviscerate the very test the Executive Branch fought hard to maintain, and would create internal inconsistencies within this Court's decision and precedent surrounding article IX, section 17(d) of the Alaska Constitution.

All parties to this case always recognized that placing the HEIF (or any other legislatively-created fund) outside the general fund would place those monies out of reach of the annual CBR sweep.[12] Indeed, that is why this Court granted the Students' request for this case to be heard on an expedited basis; this Court's accelerated briefing and decision schedule gave the legislature the opportunity to amend the HEIF statutes before the end of the prior legislative session.[13] And the legislature did ultimately enact

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subsection (b),' *though we noted that only monies in the general fund were subject to the sweep*." (emphasis added) (quoting *Hickel*, 874 P.2d at 936 n.32)).

[11] *See* Opinion at 10 n.30 ("We 'presume "that the legislature intended every word, sentence, or provision of a statute to have some purpose force, and effect," ' and we 'consider[] the meaning of the statute's language, its legislative history, and its purpose.' " (citations omitted)).

[12] Ae. Br. 20 n.77 (citing Exc. 117-125).

[13] *See* Order (Mar. 2, 2022); *see also* Emergency Motion to Expedite Briefing Schedule at 2 (Feb. 22, 2022) ("[A] decision would be needed by no later than May 4, 2022, so that the legislature could incorporate this Court's decision in the FY2023 budgeting process."); Emergency Motion for Reconsideration of Order Denying

legislation in the wake of this Court's decision to protect a modified HEIF from the threat of future CBR sweeps.[14]

In its decision, this Court confirmed that the two-part *Hickel* test remains good law. "General fund" means "general fund." This Court should deny the Executive Branch's petition for rehearing.

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DATE: October 24, 2022

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Emergency Motion to Expedite Briefing Schedule at 2 (Feb. 28, 2022) (recognizing the possibility of a legislative "remedy . . . by amending the HEIF statute").

[14] *See* ch. 15, § 3 SLA 2022. The legislation became law after the governor signed the legislation. *See* 2022 House Journal 3199-3200. The Executive Branch therefore now has an obligation to protect the new HEIF statutes, like all other state statutes, from constitutional challenges. *See* Alaska Const. art. III, § 16 ("The governor shall be responsible for the faithful execution of the laws.").

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email on October 24, 2022, on the following:

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