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, State of Alaska, Office of Management and Budget, and State of Alaska, Department of Administration, Appellees.	)	Supreme Court No.: S-18333

Trial Court Case No.: 3AN-22-04028CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE ADOLF ZEMAN

BRIEF OF APPELLEE
STATE OF ALASKA

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Constitutional provisions:

Alaska Const., Art. IX, § 17. Budget Reserve Fund

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(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 budget reserve fund. The legislature shall implement this subsection by law. [Amended 1990]

Alaska Statutes:

Sec. 37.10.420. "Money available for appropriation" defined.

(a) For purposes of applying art. IX, sec. 17(b), Constitution of the State of Alaska,

(1) "the amount available for appropriation" or "funds available for appropriation" means

(A) the unrestricted revenue accruing to the general fund during the fiscal year;

(B) general fund program receipts as defined in AS 37.05.146;

(C) the unreserved, undesignated general fund balance carried forward from the preceding fiscal year that is not subject to the repayment obligation imposed by art. IX, sec. 17(d), Constitution of the State of Alaska; and

(D) the balance in the statutory budget reserve fund established in AS 37.05.540;

(2) "the amount appropriated for the previous fiscal year" means the amount appropriated from the

(A) constitutional budget reserve fund under the authority granted in art. IX, sec. 17, Constitution of the State of Alaska; and

(B) same revenue sources used to calculate the money available for appropriation for the current fiscal year; and

(3) "the amount of appropriations made in the previous calendar year for the previous fiscal year" means appropriations made from sources identified in (2) of this subsection for a fiscal year that were enacted during the calendar year that ends on December 31 of that same fiscal year.

(b) If the amount appropriated from the budget reserve fund has not been repaid under art. IX, sec. 17(d), Constitution of the State of Alaska, the Department of Administration shall transfer to the budget reserve fund the amount of money comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment. The transfer shall be made on or before December 16 of the following fiscal year.

(c) In this section, "unrestricted revenue accruing to the general fund" or "unreserved, undesignated general fund balance carried forward" is money not restricted by law to a specific use that accrues to the general fund according to accepted principles of governmental or fund accounting adopted for the state accounting system established under AS 37.05.150 in effect on July 1, 1990.

(d) An appropriation under art. IX, sec. 17(b), Constitution of the State of Alaska, requires an affirmative vote of the majority of the members of each house of the legislature. An appropriation under art. IX, sec. 17(c) requires an affirmative vote of three-fourths of the members of each house of the legislature.

Sec. 37.14.750. Alaska higher education investment fund established.

(a) The Alaska higher education investment fund is established in the general fund for the purpose of making grants awarded under AS 14.43.400 — 14.43.420 by appropriation to the account established under AS 14.43.915(a) and of making scholarship payments to qualified postsecondary institutions for students under AS 14.43.810 — 14.43.849 by appropriation to the account established under AS 14.43.915(b). Money in the fund does not lapse. The fund consists of

(1) money appropriated to the fund;

(2) income earned on investment of fund assets;

(3) donations to the fund; and

(4) money redeposited under AS 14.43.915(c).

(b) The legislature may appropriate any amount to the fund established in (a) of this section. Nothing in this section creates a dedicated fund.

(c) As soon as is practicable after July 1 of each year, the commissioner of revenue shall determine the market value of the fund established in this section on June 30 for the immediately preceding fiscal year. The commissioner shall identify seven percent of that amount as available for appropriation as follows:

(1) one-third for the grant account established under AS 14.43.915(a), from which the Alaska Commission on Postsecondary Education may award grants; and

(2) two-thirds for the scholarship account established under AS 14.43.915(b), from which the Alaska Commission on Postsecondary Education may award scholarships.

(d) In this section, unless the context requires otherwise, “fund” means the Alaska higher education investment fund established in (a) of this section.

PARTIES

Madilyn Short, Riley von Borstel, Kjrsten Schindler, and Jay-Mark Pascua are the appellants. Governor Michael J. Dunleavy in his official capacity, the Office of Management and Budget, and the Department of Administration (collectively the "State") is the appellee.

ISSUE PRESENTED

Sweep of the Higher Education Investment Fund. In *Hickel v. Cowper*, this Court held that the "'amount available for appropriation' [under] article IX, section 17 of the Alaska Constitution includes all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure."[1] The parties agree that the legislature can appropriate the Higher Education Investment Fund for any purpose and that it cannot be spent without further appropriation. Did the superior court correctly conclude that section 17(d) requires a sweep of the fund to repay the Constitutional Budget Reserve?

INTRODUCTION

Alaskans wrote the Constitutional Budget Reserve ("CBR") into the Constitution in 1990 to address voter concern that the legislature "consistently spends most or all of the money available in the treasury." [Exc. 57] The amendment was sold to voters as a constitutionally mandated emergency fund—a way to "*effectively* control" spending and "manag[e] the transition to sustainable spending." [Exc. 58] The legislature can "spend

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[1] *Hickel v. Cowper*, 874 P.2d 922, 935 (Alaska 1994).

money from the Budget Reserve" only to cover year-to-year budget shortfalls, or by a three-quarters vote "for a public purpose, such as a disaster." [*Id.*] And "the Legislature [is] required to repay any money it appropriates from" the CBR. [*Id.*] Article IX, section 17(d)—the so-called "sweep" provision of the constitutional amendment—requires that any money withdrawn from the CBR be "repaid" using "general fund" money that is "available for appropriation at the end of each . . . fiscal year."[2]

The Students want to save the Higher Education Investment Fund ("HEIF") from the fate of the sweep. They argue that HEIF money became "[un]available for appropriation" because it was "already appropriated" when the legislature created the fund as a revenue generating mechanism to support future appropriations for scholarship programs. [At. Br. 14]

The Students are not the first to argue to this Court that when the legislature moves money into a different general fund pot and labels it with an intended future purpose, that money becomes unavailable for appropriation.[3] In 1994, the State, through the Hickel administration, defended the legislature's attempt in AS 37.10.420(b) to save funds exactly like the HEIF from the sweep by limiting the phrase "available for appropriation" to only "the unreserved, undesignated general fund balance carried forward" from the preceding fiscal year.[4] That argument failed. In *Hickel v. Cowper*, this

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[2] Alaska Const. Art. IX, § 17(d).

[3] *Hickel*, 874 P.2d at 931-34, n.21, n.26.

[4] *Id.* at 936 (rejecting the State's argument that section .420(b) complied with article IX, section 17(d) because the statutory "definition excludes restricted funds within the general fund from" the sweep).

Court held that AS 37.10.420(b) "fails to consider all amounts which are 'available for appropriation' within the meaning of section 17 in determining the State's repayment obligation" and struck down the statute.[5]

The Students concede that the HEIF is "available for appropriation" under *Hickel*'s subsection (b) analysis.[6] Nevertheless, they persist in calling *Hickel*'s section 17(d) holding "dicta" and ask this Court to reimagine that case as though it involved only section 17(b). For section 17(d), the Students ask this Court to start from scratch and hold that "available for appropriation" has a completely different meaning the second time it appears in section 17. But the Students offer no definition of "available for appropriation" for 17(d) other than the one the Court already struck down. Nor do they point to any reason for this Court to read section 17 inconsistently, other than their belief that the legislature's preference not to repay it should trump the constitutional requirement. In this case and in another recent superior court case, *AFN v. State*,[7] the superior court correctly rejected these arguments and followed *Hickel*.

This Court does not overturn its own precedents lightly. *Hickel v. Cowper* treated the entire CBR amendment as a coherent whole, in which the phrase "available for appropriation" serves the same purpose in sections (b) and (d): preservation of the CBR as an emergency fund. The HEIF is "available for appropriation," and the superior court's ruling should be affirmed.

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5 *Id.*

6 Oral Argument Recording at 40:48-41:23 and 57:58-58:09 (Feb. 8, 2022).

7 3AN-21-06737CI. [Exc. 105, 113-16]

STATEMENT OF THE CASE

I. The Constitutional Budget Reserve is part of the Alaska Constitution's state finance structure, which gives the appropriation power to the legislature and places limitations on that power.

The framers of Alaska's Constitution gave the legislature the power to appropriate state money.[8] That power exists within a constitutional structure for state finances that includes a number of provisions—including the dedicated funds prohibition, the permanent fund, the limitations on state debt, and the CBR, among others—all designed to restrain legislative largess.[9] The framers of the Alaska Constitution and the CBR amendment wrote these restrictions to constrain the elected branches' natural inclination to elevate short-term desires over long-term stability in the face of uneven budget cycles.

A. Article II assigns the appropriation power to the legislature, and Article IX places some constraints on that power.

Although not explicit, Article II of the Alaska Constitution makes clear that the appropriation power belongs to the legislature.[10] Section 13 of Article II instructs that "[b]ills for appropriations should be confined to appropriations."[11] And section 15 gives the governor power to "veto, strike or reduce items in" the legislature's "appropriation bills."[12]

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8 *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) ("[T]he Alaska Constitution . . . gives the legislature the power to legislate and appropriate." (internal quotation marks and citations omitted)).

9 Alaska Const. Art. IX, §§ 7, 8, 9, 10, 11, 15, 16, 17.

10 *Alaska Legislative Council*, 21 P.3d at 371.

11 *Id.*; Alaska Const. Art. II, § 13.

12 Alaska Const. Art. II, § 15.

After implicitly assigning appropriation authority to the legislature in article II, the framers provided some guideposts in article IX, which covers the subjects of "Finance and Taxation." Article IX adds detail and some constraints on what the legislative and executive branches must do—and may not do—with the budget and the appropriation power. Section 13 of article IX comes closest to providing a constitutional definition of "appropriation": "No money shall be withdrawn from the treasury except in accordance with appropriations made by law."[13] And section 12 assigns the executive the task of providing the legislature with "a budget" for each "fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State," along with a proposed "appropriation bill."[14]

Article IX, section 7 contains the constitution's first major constraint on the appropriation power (besides the veto)—a prohibition on the dedication of state revenue "to any special purpose."[15] The framers took note that in some states, the majority of revenues were dedicated to particular purposes, leaving legislatures little "real control over the finances of th[ose] state[s]."[16] They "believed that 'the dedication of revenues' was 'a fiscal evil,' largely because it failed 'to preserve control of and responsibility for

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[13] Alaska Const. Art. IX, § 13.

[14] Alaska Const. Art. IX, § 12.

[15] Alaska Const. Art. IX, § 7.

[16] *Sonneman v. Hickel*, 836 P.2d 936, 938 (Alaska 1992) (quoting 6 Proceedings of the Alaska Constitutional Convention (PACC) Appendix V at 111 (Dec. 16, 1955)).

state spending in the legislature and the governor.'"[17] The framers thus "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."[18]

In 1976, voters created by constitutional amendment an exception to the dedicated funds prohibition: the Alaska permanent fund.[19] The permanent fund's "twin goals" were "saving for the future" and "preventing wasteful spending of the oil and mineral revenue then expected to 'flood' the state."[20] The principal of the permanent fund is a constitutionally permissible dedicated fund; the legislature has no ability to transfer or spend it absent a constitutional amendment.[21] But the income is not dedicated and remains subject to the ordinary appropriation and veto process.[22]

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[17] *Wielechowski v. State*, 403 P.3d 1141, 1144 (Alaska 2017); *see also State v. Ketchikan Gateway Borough*, 366 P.3d 86, 101 (Alaska 2016) (explaining that "the dedicated funds clause, the appropriations clause[,] and the governor's veto clause [together] address how the State spends state revenue . . . [,] govern[ing] the legislature's and the governor's joint responsibility . . . to determine the State's spending priorities on an annual basis.").

[18] *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1176-77 (Alaska 2009). Article IX contains additional rules relevant to the appropriation power with respect to state debt. Alaska Const. Art. IX, § 8-11; *Forrer v. State*, 471 P.3d 569, 586-87 (Alaska 2020).

[19] Alaska Const. Art. IX, § 15; *Wielechowski*, 403 P.3d at 1143 ("In 1976 voters approved an amendment to the Alaska Constitution creating the Alaska Permanent Fund . . . and dedicating to it certain state revenues.")

[20] *Id.* at 1144.

[21] *Id.* ("The Permanent Fund's principal is a dedicated fund that cannot be accessed without further amending the Alaska Constitution.").

[22] *Id.* at 1151-52.

B. Alaska voters added the Constitutional Budget Reserve fund to Article IX in 1990, made it difficult for the legislature to borrow from the fund, and required repayment of any funds borrowed.

In 1990, Alaska voters added another constitutional constraint on the legislative power of appropriation when they approved Article IX, section 17 by a nearly two-to-one margin, creating the Constitutional Budget Reserve fund (CBR).[23] The CBR serves as an emergency savings account, with constitutionally mandated limitations on the legislature's ability to access the money. [Exc. 57-58] "[T]he purpose of the amendment . . . was to remove certain unexpected income from the appropriations power of the legislature, and to save that income for future need."[24]

Section 17(a) creates the fund, provides that certain oil-derived settlement and tax money must be deposited into the fund and invested, and instructs that "[m]oney may be appropriated from the fund only as authorized under (b) or (c) of this section."[25] Section 17(b) allows the legislature to appropriate from the fund by a simple majority vote to cover a budget gap.[26] That subsection requires a comparison: CBR funds become available for simple majority access "[i]f the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year."[27] And

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[23] Constitutional Amendments Appearing on the Ballot in Alaska, rev. Dec. 28, 2016, *available at* https://www.elections.alaska.gov/doc/forms/H28.pdf.

[24] *Hickel v. Halford*, 872 P.2d 171, 178 (Alaska 1994).

[25] Alaska Const. Art. IX, § 17(a).

[26] Alaska Const. Art. IX, § 17(b).

[27] *Id.*

section 17(c) allows appropriation from the CBR "for any public purpose," but only by a three-quarters supermajority vote of the legislature.[28]

Finally, when the legislature does dip into the CBR, section 17(d) requires that the money spent be "repaid" using "money in the general fund available for appropriation at the end of each succeeding fiscal year."[29] This provision has been nicknamed "the sweep." [Exc. 175] For most of the CBR's history, the legislature has successfully avoided this repayment obligation using a maneuver known as the "reverse sweep"—a three-fourths supermajority-approved appropriation of the money was swept by operation of section 17(d) at the end of one fiscal year back to where it came from at the beginning of the next fiscal year. [Exc. 175-76][30] The reverse sweep is accomplished via section 17(c)'s provision that the legislature may appropriate money from the CBR "for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature." [Exc. 176-77][31]

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[28] Alaska Const. Art. IX § 17(c).

[29] Alaska Const. Art. IX § 17(d).

[30] *See e.g.*, Ch. 17, § 29(a), SLA 2018 ("Deposits in the [CBR] for fiscal year 2018 that are made from subfunds and accounts other than the operating general fund (state accounting system fund number 1004) by operation of art. IX, sec. 17(d), Constitution of the State of Alaska, to repay appropriations from the [CBR] are appropriated from the [CBR] to the subfunds and accounts from which those funds are transferred"); Ch. 1, § 45(a), SSSLA 17 (same except for fiscal year 2017); Ch. 3, § 35(a), 4SSLA 16 (same except for fiscal year 2016).

[31] Alaska Const. Art. IX, § 17(c).

II. In *Hickel v. Cowper*, this Court invalidated as unconstitutional the legislature's limitation of the sweep provision to "undesignated" general funds only.

In 1994, the legislature enacted AS 37.10.420 in an attempt to define "key phrases and concepts used across section 17, including the phrase 'amount available for appropriation.'"[32] That phrase appears in section 17(b), which authorizes spending from the CBR by simple majority vote based on a comparison of one year's appropriated amount to the next year's available amount, and again in the repayment provision of 17(d).[33] The legislature's statutory framework limited "funds available for appropriation" in the section 17(b) comparison to money "accruing to the general fund during the fiscal year," general fund "program receipts," and "*the unreserved, undesignated general fund balance carried forward from the preceding fiscal year* that is not subject to the repayment obligation" of section 17(d).[34] And, for purposes of the repayment provision, AS 37.10.420(b) used the same definitional language, limiting sweepable funds to "the amount of money comprising *the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year*, or as much of it as is necessary to complete the repayment."[35]

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[32] *Hickel*, 874 P.2d at 936 (quoting AS 37.10.420(b)'s language attempting to identify sweepable funds under section 17(d)). Article IX, section 17's repayment provision provides that "[t]he legislature shall implement this section by law." Alaska Const. Art. IX, §17(d).

[33] Alaska Const. Art. IX, §§17(b) & (d).

[34] *Hickel*, 874 P.2d at 924 n.2 (emphasis added) (quoting AS 37.10.420(a)).

[35] *Id.* (emphasis added) (quoting AS 37.10.420(b)).

Former Governor Steve Cowper raised a facial challenge to the constitutionality of AS 37.10.420. He argued that it was inconsistent with sections 17(b) and 17(d).[36] This Court struck down the legislature's definition of "available for appropriation" in both AS 37.10.420(a) and (b).[37] The Court first performed a detailed analysis of the phrase "available for appropriation" in light of "the purposes of the amendment, the intent of the framers, [and] extrinsic indications of the voters' probable understanding of section 17's terms."[38] Section 17(b) limits the legislature's ability to reach the CBR via a simple majority vote to years in which the State experiences a shortfall compared to the previous year.[39] Former Governor Cowper argued for an expansive reading of the phrase "amount available for appropriation" to include essentially all of the State's assets, "however liquid."[40] He proposed that "available for appropriation" meant "all funds which the legislature can make available to itself by a majority vote."[41] The State defended the statute's much narrower definition of "amount available for appropriation," which "include[d] only revenues received by the State within the fiscal year" and "the *unreserved, undesignated general fund balance* carried forward from the preceding fiscal year that is not subject to repayment" under section 17(d).[42]

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36 *Id.* at 924-25.

37 *Id.* at 935-36.

38 *Id.* at 928.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 926-27 (emphasis added).

The Court "reject[ed] both interpretations."[43] Because the statutory definition "would allow [simple] majority access to the budget reserve whenever there was even the slightest decline from year to year in revenues, even if in the prior year a huge sum was left unappropriated or placed in the statutory budget reserve," it was too narrow.[44] And former Governor Cowper's extremely broad reading was problematic in the other direction because it would undermine the voters' intention to "allow[] the budget reserve to be used by a simple majority as necessary to maintain appropriations at a constant level."[45] Ultimately, the Court held that "amount available for appropriation within the meaning of article IX, section 17 . . . includes all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure" and struck down AS 37.10.420(a).[46]

The Court further held that "the text of section 17(b)" required including in the "amount available for appropriation" comparison "all funds which are in fact appropriated for a fiscal year."[47] That amount had to include "trust receipts" such as restricted federal funding not otherwise "available" under the Court's definition.[48] The

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43 *Id.* at 927.

44 *Id.* at 930.

45 *Id.* Governor Cowper's interpretation covered so many state assets—including assets already authorized for expenditure—that it "would require a complete restructuring of the established financial system of the state government." *Id.* at 927.

46 *Id.* at 935.

47 *Id.* at 931-32.

48 *Id.*

adjustment was necessary to maintain "symmetry" such that "the comparison required by section 17(b) fairly measures the need for access to the budget reserve fund."[49]

Next the Court considered the meaning of the phrase "amount appropriated for the previous fiscal year," which appears in section 17(b) as the other side of the "comparison required" to "measure[] the need for access to the [CBR]."[50] That side of the scale, the Court said, must include "all amounts set aside for the previous fiscal year . . . for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."[51] But the "amount appropriated" for the prior year "would *not* include 'appropriations' made to funds from which additional appropriations are necessary before expenditures can be made."[52]

Finally, the Court considered subsection (d) of article IX, section 17. Alaska Statute 37.10.420(b) required a sweep of only "the unreserved, undesignated general fund balance," a "definition" of available for appropriation that improperly "exclud[ed] restricted funds within the general fund" from the sweep.[53] Because the Court "s[aw] no reason to give 'available for appropriation a different meaning in subsection (d) than . . . in subsection (b)," it invalidated AS 37.10.420(b) as well.

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49 *Id.* at 935.

50 *Id.*

51 *Id.* (quoting *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991)).

52 *Id.* at 935 & n.30 (emphasis added).

53 *Id.* at 936.

III. The superior court applied *Hickel v. Cowper* and concluded that the Higher Education Investment Fund is sweepable under section 17(d).

A. The HEIF provides a source of funds for scholarships for Alaska students, but the money is available for other purposes and must be appropriated by the legislature before it can be spent.

The Higher Education Investment Fund ("HEIF") was created by statute in 2012 to provide investment income to support the Alaska Education Grant Program and the Alaska Performance Scholarship Award program.[54] At the same time, the legislature also created the Alaska education grant account and the Alaska performance scholarship account.[55] Alaska Statute 37.14.750(a) provides that the "Alaska higher education investment fund is established in the general fund for the purpose of making grants awarded under AS 14.43.400–14.43.420 by appropriation to the [Alaska education grant account] and of making scholarship payments to qualified postsecondary institutions for students under AS 14.43.810–14.43.849 by appropriation to the [Alaska performance scholarship award account]." The statute declares that "[m]oney in the fund does not lapse,"[56] and that "[n]othing in this section creates a dedicated fund."[57] It also instructs the Commissioner of Revenue to determine, at the start of each fiscal year, the value of the account at the end of the previous fiscal year and "identify seven percent of that

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54 *See* Ch. 74, §§ 3, 11, 13 SLA 2012.

55 Ch. 74, § 11 SLA 2012.

56 AS 37.14.750(a).

57 AS 37.14.750(b).

amount as available for appropriation" to the Alaska education grant account and the Alaska performance scholarship award account.[58]

Although the purpose of the HEIF was to support these two named programs, the parties agree that the legislature may appropriate money from the fund for other purposes. [Exc. 174-75][59] The Students also agree that the legislature has done so.[60] And as the statutory scheme makes clear, money appropriated *into* the HEIF cannot be spent without another appropriation *out of* the fund, either to one of the statutorily-named accounts or to any other use.[61] This fact is also undisputed. [At. Br. 6-7 & n.25; Exc. 20, 31][62]

B. After the legislature failed to pass a reverse sweep in 2021, the Students challenged the determination that the HEIF must be swept into the CBR, and the superior court granted summary judgment in favor of the State.

During the early 2000s, the legislature borrowed annually from the CBR fund to make up budget shortfalls, leading eventually to a debt to the CBR in excess of $400

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58 AS 37.14.750(c).

59 *See Sonneman v. Hickel*, 836 P.2d 936, 939-40 (Alaska 1992) (explaining that the Alaska Marine Highway System Fund is available "for any purpose on an annual basis," despite its statutorily declared purpose, to avoid a violation of the dedicated funds prohibition).

60 [At. Br. 6] ("The legislature can always appropriate more or less than 7% from the HEIF, including for other purposes, if the current legislature so desires."); [At. Br. 7 n.55] (listing other purposes for which HEIF money has been appropriated); [Exc. 20-22, 31]

61 AS 37.14.750(a) & (c).

62 The Council seems, somewhat ironically, not to recognize these undisputed truths. Its brief repeatedly describes the HEIF as money that has actually been "expended" or "committed." [*See* Am. Br. 2, 5, 10-12, 14-15, 21]

million.[63] The legislature paid the fund back in full via an ordinary appropriation—not a sweep—in 2010.[64] Then beginning in 2016, the legislature again began dipping into the CBR fund to make up for declining revenues, again avoiding the section 17(d) repayment obligation by passing reverse sweeps. [Exc. 175] Its debt to the CBR now exceeds $10 billion.[65]

Before 2019, prior administrations were not called upon to perform a thorough sweepability analysis. [Exc. 176] That is because the legislature has "rarely," since the creation of the CBR, "failed to pass the reverse sweep in a budget bill for the next fiscal year." [*Id.*] In 2019, the reverse sweep initially failed to pass, presenting the first occasion in OMB's recent institutional memory where the sweep "presented a substantial threat to the continued funding of state programs." [Exc. 176-77] That "major event" in 2019 led OMB, in consultation with the Department of Law and the Division of Finance, to "undert[ake] a thorough review of all funds and accounts to determine which ones were

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[63] *See* Ch. 13, § 19(a), SLA 2010 ("The amount necessary for full repayment of the amounts owed the budget reserve fund (art. IX, sec. 17, Constitution of the State of Alaska), as of June 30, 2010, estimated to be $401,617,000, is appropriated from the general fund to the budget reserve fund . . . .").

[64] *Id.*

[65] *See* Fairbanks Daily News-Miner, *Oil is Not a Cure-all for Fiscal Problems* (October 28, 2018) ("The constitutional budget reserve account, which just a few years ago held more than $10 billion, now holds only about $1.7 billion"); ENP Newswire, Fitch Downgrades Alaska's IDR to A+ (May 7, 2020) ("The CBRF is expected to be near depleted in fiscal 2021. The elimination of this important budget tool further reduces the resiliency of the state's financial position given the significant volatility in the portion of the state's revenues that is derived from petroleum production.").

subject to the CBR fund sweep" under section 17(d). [Exc. 177-78] The legislature eventually did pass the reverse sweep in 2019.[66]

Then in 2021, the legislature did not pass a reverse sweep at all. [Exc. 10, 176-79] Based on the 2019 analysis, the State determined that the HEIF was subject to the mandatory sweep under article IX, section 17(d). [Exc. 178-79] The State's analysis applied *Hickel v. Cowper* to identify the funds that must be swept. [Exc. 178, 186-88] Of the 159 active general fund subfunds OMB analyzed, 54 were deemed sweepable—including the HEIF—and 105 were deemed unsweepable. [Exc. 178-79, 186-91]

In August 2021, a group of rural electric utilities and other plaintiffs won summary judgment that one of the funds the State concluded was sweepable—the power cost equalization ("PCE") endowment fund—fell outside the reach of section 17(d).[67] [Exc. 105, 311] The superior court in that case relied on *Hickel* to reject an argument identical to the one in this case: that the PCE endowment fund was not "available for appropriation" because the money had already been appropriated to it. [Exc. 113-16] The court explained that the "holding in *Hickel* . . . distinguish[ed] between initial appropriations" and "appropriations within the meaning of section 17, particularly with respect to funds established by the Legislature." [Exc. 115] Because "the Legislature has retained [appropriation] authority with respect to" the PCE "and because the fund requires further appropriation before expenditure," it "is available for appropriation

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66 CSSB 2002, sec. 17(a).

67 *Alaska Federation of Natives, et. al v. State*, 3AN-21-06737CI. [Exc. 105]

within the meaning of *Hickel* and within the meaning of article IX, section 17." [Exc. 115-16] However, the superior court in that case held that the PCE—which the legislature described in statute as "a separate fund of the [Alaska Energy Authority]," is not in the "general fund" within the meaning of that term in section 17(d), and therefore, is not sweepable. [Exc. 117-25] The State did not appeal that decision.

The Students filed the case that led to this appeal on January 4, 2022, seeking a "declaration that the HEIF is not subject to the CBR sweep under the Alaska Constitution" and an injunction requiring return of the swept funds to the HEIF. [Exc. 12-13] Both parties moved for summary judgment on this legal question. [Exc. 14, 29, 153, 161] The Alaska Legislative Council ("Council") filed an amicus brief on behalf of the legislature. [Exc. 247]

After briefing and oral argument, the superior court granted the State's motion and entered judgment in its favor. [Exc. 306, 322] Like the superior court in the PCE case, the court followed *Hickel* and rejected the Students' "already appropriated" argument. The court explained that *Hickel* section 17(d) ruling "is not dicta and its holding as to the definition of 'available for appropriation' is binding . . . ." [Exc. 317] Accordingly, the court concluded that the HEIF is sweepable because it remains available to the legislature and cannot be expended without further legislative action. [Exc. 318-19] The Students appeal.

STANDARD OF REVIEW

This Court "review[s] summary judgment rulings de novo."[68] "The proper interpretation of a constitutional provision is a question of law to which this court applies its independent judgment."[69] And the Court "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[70]

ARGUMENT

To affirm the superior court, this Court need only apply controlling precedent. Article IX, section 17(d) requires repayment of "the amount of money in the general fund available for appropriation" to the CBR at the end of the fiscal year "until the amount appropriated [from the CBR in the past] is repaid."[71] In *Hickel v. Cowper*, this Court made clear that a fund must be swept if the legislature retains appropriation authority over it and the money cannot be spent without further legislative action.[72] The parties agree that the HEIF satisfies this standard.

None of the Students' arguments undermine that straightforward result. First, this Court's holding regarding section 17(d) was not dicta. It is binding precedent rejecting the very definition the Students offer. Next, the Students insist that an irrelevant part of the section 17(b) discussion—the "amounts already appropriated" adjustment[73] —must

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

69 *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994).

70 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

71 Alaska Const. Art. IX, § 17(d).

72 *Hickel*, 874 P.2d at 935-36.

73 *Id.* at 932.

be grafted onto the section 17(d) holding, in an attempt to render the decision nonsensical so this Court might look at section 17(d) on a blank slate. But the adjustment creates symmetry when comparing one year's funding sources to the prior year for purposes of controlling simple majority access; it has no relevance to 17(d).[74] And in any event, the Students offer nothing to put on the blank slate other than the very definition of "available for appropriation" that this Court already declared unconstitutional.

The Students offer no plausible reason to overrule *Hickel*. Section 17 must be interpreted as a sensible whole. Applying the same definition of "available for appropriation" in parts (b) and (d), as the Court did, aligns with the text and the purpose of the CBR as an emergency fund, to be accessed with some difficulty and repaid as soon as funds become "available." Funds like the HEIF, which are "available" and must be spent down before a simple majority can access the CBR, should also count as "available" to replenish money the legislature borrows from the CBR.

Finally, applying the CBR amendment to the HEIF creates no separation of powers problem. Neither this Court (by interpreting the CBR amendment) nor the State (by implementing it) has restricted the legislature's appropriation power. Alaskan voters did that when they added the CBR to the Constitution in 1990.

I. This Court's definition of "available for appropriation" in *Hickel v. Cowper* includes the HEIF.

In *Hickel v. Cowper*, this Court explained that the language of article IX, section 17(d) subjects "funds which are 'available for appropriation' and 'in the general fund'" to

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[74] *Id.* at 935.

the CBR repayment provision.[75] The Court thus articulated section 17(d)'s two-part test for the sweepability of funds: (1) is the money in the general fund? (2) is it available for appropriation?[76] The Students did not contest below that the HEIF is in the general fund, and the superior court had no trouble confirming that it is. [Exc. 315-16] Alaska Statute 37.14.750 provides that "[t]he Alaska higher education investment fund is established *in the general fund* . . . ."[77] The sole question here is thus whether the HEIF is "available for appropriation" under article IX, section 17(d) of the Alaska Constitution. *Hickel* provides the answer: it is.

Both sides agree that the HEIF satisfies the conditions set out in *Hickel* to make money "available for appropriation." [At. Br. 6-7; Exc. 20-22][78] The HEIF statute is

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[75] *Id.* at 936.

[76] *Id.* at 936 n.32.

[77] To the extent that the Students argue in passing that the HEIF is not in the general fund [At. Br. 15 & n.43], that argument has been waived because it was not raised below. *Wagner v. Wagner*, 218 P.3d 669, 678 (Alaska 2009) ("As a general rule, an issue that was not raised in the trial court will not be considered on appeal."). Moreover, the suggestion is meritless. The superior court in *AFN v. State* held that the legislature can itself define the scope of the "general fund," an undefined constitutional term, and avoid the sweep by statutorily placing a fund outside the "general fund," albeit in name only. [Exc. 117-25] But there can hardly be a serious argument that the legislature *silently* removed the HEIF from the "general fund" simply by assigning it an aspirational purpose, despite expressly placing it "in the general fund." AS 37.14.750(a).

[78] This has to be true because of the constitutional prohibition of dedicated funds. Alaska Const. Art. IX, § 7; *Wielechowski*, 403 P.3d at 1147. The Council's brief acknowledges this reality only in passing, conceding that "the Legislature has the ability to spend the HEIF for other public purposes, and it has done so." [Am. Br. 17 n.52] Overall, though, the Council suggests that the corpus of the HEIF can*not* be used by the legislature. [Am. Br. 16 ("The possibility of subsequent appropriations from *a portion of* the HEIF does not change the outcome." (emphasis added))] But the HEIF is not a dedicated fund; it is available to the legislature in its entirety. AS 37.14.750(b).

clear: funds in the HEIF can be spent only "*by appropriation to*" the scholarship accounts.[79] The legislature has therefore retained the power to appropriate the funds in the HEIF (for any purpose, because the HEIF is not a dedicated fund), and those funds cannot be spent without a further appropriation. Under *Hickel*, the HEIF is "available for appropriation," for purposes of the entire CBR amendment,[80] and it is thus sweepable. This case really is that simple.[81]

The Students conceded at oral argument in the superior court that the HEIF is "available for appropriation" for purposes of section 17(b).[82] Yet they continue to argue that the initial appropriation of money *into* the HEIF somehow rendered the money unavailable for appropriation when it comes time for the 17(d) sweep because it has

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[79] AS 37.14.750(a) (emphasis added) [Exc. 318].

[80] *Hickel*, 874 P.2d at 935-36.

[81] This is the analysis the superior court applied here and in *AFN v. State*. [Exc. 113-16; 313-19]

[82] Oral Argument Recording at 40:48-41:23 and 57:58-58:09 (Feb. 8, 2022)

MPW: "The higher education fund clearly falls within the scope of section 17(b). And I think it's important . . . Ms. Lindemuth didn't say this, but you might want to ask her on rebuttal, whether she thinks the higher education fund is available for appropriation for purposes of section 17(b). Because I don't think there is any conceivable way you can read *Hickel* and argue that it's not available for appropriation under section 17(b). It clearly meets that standard without any question.

57:58-58:09 (Rebuttal)

Judge Zeman: "I'm going to put you on the spot and start with her question on 17(b). Why is the HEIF not subject to 17(b)? Or is it?"

JML: "It is, your honor. Absolutely."

"already been appropriated" and those appropriations were valid and have not lapsed. [At Br. 2, 14, 16, 20] They suggest that "commonsense" dictates that "monies which have already been appropriated—like the previously-appropriated monies to the HEIF—are not 'available for appropriation at the end of [a] . . . fiscal year' *unless* the appropriation has lapsed *and* the funds are no longer obligated." [At. Br. 14] In their view, "only . . . surplus, leftover, unobligated general funds" are subject to the CBR sweep." [At. Br. 2]

The Council's amicus brief takes this argument a step farther, presenting the even more baffling assertion that the appropriation into the HEIF rendered the money "expended," "validly committed," and therefore, not "available for appropriation." [Am. Br. 2, 10, 14] The Council thus apparently disagrees with the Students' concession that the HEIF is "available for appropriation" for purposes of section 17(b). In the Council's view, the "core principles" of *Hickel* render the fund unavailable because it has already been "expended" on income-producing investments. [Am. Br. 9]

Because the Council argues that the HEIF is not "available for appropriation" under *Hickel* at all and because the Students' concession on this point is inconsistent with their "already appropriated" argument, the State will first explain the obvious: the HEIF is "available" for section 17(b) under *Hickel*. The State will then address why the same words—"available for appropriation"—have the same meaning for 17(d) as well.

A. *Hickel* rejected the argument that the initial appropriation into a fund like the HEIF renders the money unavailable for appropriation for purposes of section 17.

Both flavors of the "already appropriated" argument—the Students' and the Council's—flip the constitutional language from the forward-looking question section 17

poses—is the money *available* to the legislature for appropriation?—to a backward looking one absent from the text of section 17—has the money ever been appropriated before? *Hickel* rejected the notion that a prior appropriation into a fund *from which expenditure is not authorized* makes money unavailable for appropriation.[83] "[O]ne of the fundamental characteristics of an appropriation, in the public law context," the Court explained, "is that it authorizes governmental *expenditure* without further legislative action."[84] Monies "appropriated" to a fund from which the legislature "may appropriate" in the future have therefore not been "appropriated" in the section 17 sense, because further legislative action is required to spend the money.[85] "Initial" appropriations into the HEIF, to use *Hickel*'s term, are not spending appropriations.[86] They authorize the transfer of funds between accounts, and the funds are equally available in either one.[87] Such transfers are, under the *Hickel* analysis and in reality, accounting designations and not appropriations in the sense of expenditures of money.[88]

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83 *Hickel*, 874 P.2d at 933-34 & n.26.

84 *Id.* at 933-34 (emphasis added).

85 *Id.* (discussing examples of funds requiring further appropriations to expend).

86 *Id.*

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

88 Funds like the HEIF must be construed as "basically only . . . accounting tool[s] designed to give a clear picture of" funds available to the legislature in each budget cycle, otherwise they would be dedicated funds. *Sonneman v. Hickel*, 836 P.2d 936, 939-40 (Alaska 1992) (striking down part of the Alaska Marine Highway System Fund statute because it purported to restrict the availability of the fund for "for any purpose on an annual basis," impermissibly rendering the statute "more than merely a legislatively mandated system of accounting"). This conclusion is further bolstered by the Court's instruction that the "amount appropriated for the previous fiscal year" does "not include

The Students consider it significant that appropriations into the HEIF do not "lapse." [At. Br. 6, 14] But the lapse of money from a "restricted" fund like the HEIF back to unrestricted general fund money would not alter the money's availability for appropriation by the legislature. The legislature can appropriate it either way. Section 17 plainly asks what is "available" to the legislature in a *forward*-looking sense, and the HEIF is available even though transfers into the fund do not lapse.

The Council argues that because the legislature intended the HEIF to function like an endowment fund, appropriations into it are "final" and the money is "validly committed" and "expended," such that "[a]ppropriating funds [into the HEIF] for the purpose of creating an educational endowment fund is as final an expenditure . . . as is building a road or expanding a port." [Am. Br. 14, 15] The Council further declares that the purchase of investments designed to grow the HEIF for future scholarship appropriations counts as "expenditure," rendering the money unavailable. [Am. Br. 12-14 & n.47]

This wishful argument ignores the dedicated funds prohibition in the Alaska Constitution. The Council offers this Court a fiction that the HEIF is "an existing state program" that guarantees "stability" for scholarship programs. [Am. Br. 9, 19] But the HEIF is an account, not "a scholarship program," and it is not free from "depend[ence] on annual funding by the Legislature and the Governor." [Am. Br. 11]. Nor does it

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'appropriations' made to funds from which additional appropriations are necessary before expenditures can be made." *Hickel*, 874 P.2d at 935 n.30.

provide any guarantee of "continuing availability" beyond each year's budget cycle. [*Id.*] The HEIF was indeed designed to operate as an endowment to produce income to support scholarships. But because of the dedicated funds prohibition, that design has no binding effect.[89] However badly the legislature may wish to promise Alaskans that future legislatures will fund scholarships, or any other important spending priority, "into perpetuity,"[90] the framers of the Constitution took that option away from them.[91] The legislature *must appropriate* scholarship money to the programs every year. And it can do so from *any* available money, including unrestricted general funds or annual revenues. The HEIF—which is funded far beyond any expected annual scholarship need—is every bit as "surplus" as unrestricted general fund money.[92]

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[89] *Hickel*, 874 P.2d at 934 n.26 ("[W]e have previously recognized that statutory statements that the legislature "may" appropriate money from funds within the general fund for specific purposes "impose no legal restraint on the appropriations power of the legislature." (citing *Sonneman*, 836 P.2d at 939-40).

[90] Oral Argument Recording, at 3:19 (Feb. 8, 2022) ("The legislature intended to create an endowment that would last into perpetuity.").

[91] *Wielechowski*, 403 P.3d at 1147 ("Without 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." (*quoting Sonneman* 836 P.2d at 938-39).

[92] The *Hickel* court suggested that even if the HEIF statute authorized expenditure of its full amount on scholarships, the Court might still consider it "available" because it is "funded well beyond any expected need." *Hickel*, 874 P.2d at 934 n.27. This comment—which was dicta since "there is no evidence . . . that any such fund exists," *id.*—supports the State's central argument. The Court in *Hickel* rejected the notion that the legislature can manipulate its access to or its obligation to repay the CBR with empty statutory maneuvers, such as authorizing the expenditure of the entire HEIF on a purpose that in fact requires only a small fraction of the funds it contains.

Nor is the HEIF different from other available funds because it has been invested in a "well-diversified portfolio." [Am. Br. 10] The Department of Revenue invests most state assets.[93] The HEIF statute does not direct that it be used to purchase any specific thing.[94] And investing HEIF money is categorically opposite from the legislature "building a road or expanding a port." [Am. Br. 15] Funds paid to contractors for such projects do not sit, available to be withdrawn and spent on an alternative purpose or swept into the CBR. Money in the HEIF, by contrast, cannot be spent by the executive branch and remains available for the legislature to appropriate.

As the superior court explained, the HEIF is functionally indistinguishable from the Railbelt energy fund,[95] the Alaska marine highway vessel replacement fund,[96] and the educational facilities and construction fund.[97] [Exc. 317] All three are "restricted funds" within the general fund "consist[ing] of money appropriated to the fund by the legislature."[98] The statutes creating those three funds all contemplate that they, like the

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93 AS 37.10.070 ("The commissioner shall invest, as set out in AS 37.10.071, the money in the state treasury above an amount sufficient to meet immediate expenditure needs.")

94 AS 37.14.750(a) ("Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund.").

95 AS 37.05.520.

96 AS 37.05.550.

97 AS 37.05.560.

98 *Hickel*, 874 P.2d at 933.

HEIF, will be managed in income-generating investments.[99] And funds like the HEIF can always be spent on any purpose to which the legislature might appropriate them.[100] *Hickel* therefore held that all three funds are "available for appropriation."[101] If the HEIF had existed in 1994, it too would have been on that list.

The State made the argument in *Hickel* that the Students and the Council make now, asserting that AS 37.10.420 "properly excludes 'restricted funds' because those funds, at least in part, have already been appropriated."[102] The Court was not persuaded. It addressed and rejected both "the State's conception of relevant fund restrictions and the State's definition of when an amount has been validly appropriated."[103] The Students and the Council are simply wrong that the appropriation of money into funds like the HEIF renders the funds "unavailable" under article IX, section 17.[104]

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[99] AS 37.05.520 (the railbelt energy fund consists of "money appropriated to it by the legislature and interest received on money in the fund," and the "department of revenue shall manage the fund); AS 37.05.550 ("The department of revenue shall manage the fund" and report its "earnings" to the legislature); AS 37.05.560 ("The educational facilities maintenance and construction fund shall be invested by the Department of Revenue so as to yield competitive market rates").

[100] *See* Students' Emergency Motion to Expedite Briefing Schedule (arguing that the legislature needs an immediate answer to the question presented in this case so it will know "the number of votes" it needs to "access the $422+ million" HEIF dollars).

[101] *Hickel*, 874 P.2d at 933.

[102] *Id.* at 931 n.21.

[103] *Id.* at 933-34.

[104] The Students' argument about Attorney General Taylor's memorandum, which advised that *spending* appropriations out of otherwise swept funds could be honored in fiscal year 2022, similarly ignores *Hickel*'s distinction between spending and transfers between accounts that remain available for appropriation. [At. Br. 10, 24, 31] The

The State does not argue, and has never argued, that the funding appropriation into the HEIF was outside the legislature's authority. Nor does the State argue that such appropriations are "second class." [At. Br. 13, 26, 28, 32, 38; Am. Br. 14] But no doubt remains after *Hickel* that an appropriation into the HEIF leaves the money "available for appropriation" under section 17.[105]

B. *Hickel* held that "available for appropriation" has the same meaning for purposes of the 17(d) sweep and the 17(b) comparison and invalidated the Students' definition in the context of the sweep.

If—as the Students concede—the HEIF is "available for appropriation" under *Hickel*'s section 17(b) analysis, the next question is whether it is "available" for purposes of the 17(d) sweep as well. The Students argue that the *Hickel* definition of available for appropriation applies only to section 17(b) and is "dicta" as to 17(d). [At. Br. 22, 33] They accuse the State and the superior court of "twisting the words of a single footnote" and place the word "holding" in scare quotes to suggest that the State and the superior court did not correctly read this Court's decision. [At. Br. 22, 25, 33]

But it is the Students who misread *Hickel*. The definition of "holding" is a "court's determination of a matter of law pivotal to its decision," and its opposite is "dictum."[106]

Attorney General's memorandum clearly explains and applies this distinction. [Exc. 128-29] And the superior court agreed with the analysis. [Exc. 320]

[105] *Hickel*, 874 P.2d at 933, 936.

[106] HOLDING, Black's Law Dictionary (11th ed. 2019).

"Dicta," by contrast, means "[o]pinions of a judge which do *not* embody the resolution or determination of the specific case before the court."[107] "Expressions in the court's opinion which go beyond the facts before the court" are "individual views of the author of the opinion and not binding in subsequent cases as legal precedent."[108]

In *Hickel*, the Court expressly considered AS 37.10.420(b), the statute containing the legislature's definition of "available for appropriation" *for the purpose of the sweep to repay the CBR*. The Court asked whether that definition: "the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year," was consistent with the constitutional provision itself.[109] Because the statute improperly "exclude[d] restricted funds within the general fund from the calculation of the amount available to pay back appropriations from the budget reserve fund," the Court struck it down.[110] The Court saw "no reason to give 'available for appropriation' a different meaning in subsection (d) than in subsection (b)."[111]

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[107] *Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595, 601 (Alaska 2021) (emphasis added).

[108] *Id. See also* DICTUM, Black's Law Dictionary (11th ed. 2019) ("A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive.")).

[109] *Hickel*, 874 P.2d at 936.

[110] *Id.*

[111] *Id.* at 936 n.32. The Students disparage this statement because it was made in a footnote. [At. Br. 22] Of course, this statement merely expanded upon the holding in the text, where the Court struck down AS 37.10.420(b). And in any event, courts regularly include binding statements of law in footnotes. *See, e.g.*, *Allison v. AEW Cap. Mgmt., L.L.P.*, 751 N.W.2d 8, 18 (Mich. 2008) ("Language set forth in a footnote can constitute binding precedent if the language creates a 'rule of law' and is not merely dictum.").

When the Court invalidated AS 37.10.420(b), the definition it struck down was the *same definition* the Students now ask this Court to adopt. The unconstitutional statute said only the "unreserved, undesignated general fund balance" should be swept.[112] The Students argue that 17(d) includes only "surplus, leftover, unobligated general funds remaining at the end of each succeeding fiscal year," [At. Br. 2] or "unappropriated, unobligated, surplus general fund monies," [At. Br. 13] or "remaining unrestricted surpluses in the general fund." [At. Br. 18] The Students identify no distinction between their formulations and the unconstitutional definition, because none exists.

This Court does not strike down unconstitutional statutes in "dicta." The Court unequivocally defined "available for appropriation" for purposes of the *entire CBR amendment*, including section 17(d).[113] The HEIF is sweepable.

C. The "amounts actually appropriated" adjustment in *Hickel* applies only to the section 17(b) comparison and has no relevance to the sweep.

Seeking to avoid the bleak prospects of their argument given *Hickel*, the Students misread the decision in an attempt to render it nonsensical and urge the Court to reverse course. They point out that two types of money fall within the *Hickel* conception of "amount available for appropriation": (1) "all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation;"[114] and (2) "all amounts which the legislature actually

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112 AS 37.10.420(b).

113 *Hickel*, 874 P.2d at 927, 935-36.

114 *Id.* at 927, 935.

appropriates for the fiscal year."[115] The Students insist that the second category, section 17(b)'s "amounts actually appropriated" adjustment, is part of a singular definition, and necessarily applies to section 17(d) as well. [At. Br. 22-23][116] [At. Br. 23] But grafting the adjustment onto section 17(d) would require sweeping actually *expended* money—even restricted federal money "which would not otherwise be counted as 'available'" under *Hickel*'s primary test, "but from which the legislature does in fact appropriate."[117] Because that is obviously wrong, the Students claim the entire section 17(d) holding must be wrong and ask this Court to ignore it and start over. [At. Br. 25]

This convoluted approach can easily be avoided by reading *Hickel* as it was obviously and logically intended. The Students conceive the "amounts actually appropriated" portion as so integral to the *Hickel* definition that at oral argument, they compared it to the "sugar and butter," in a metaphorical "available for appropriation" "cake."[118] But the "key question" in *Hickel* was "what constitutes a valid appropriation such that the funds involved are no longer available."[119] After considering an extensive list of definitions of the term "appropriation," the Court concluded that an appropriation under section 17 means expenditure of money that removes it from legislative control.[120]

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115 *Id*.

116 This argument was raised for the first time in the Students' Reply brief below. [Exc. 217-18]

117 *Id.* at 931, 935.

118 Oral Argument Recording at 13:53-14:03; 1:00:55-1:01:58 (Feb. 8, 2022).

119 *Hickel*, 874 P.2d at 932.

120 *Id.* at 932-35.

Money is "available for appropriation" if the legislature has retained the power to appropriate it and it cannot be spent without further appropriation. That definition is the *Hickel* "cake," and it undisputedly includes the HEIF.

Hickel applied its adjustment to the "amount available for appropriation for a fiscal year" because the "text of section 17(b)" required it.[121] Subsection (b) calls for a comparison of the amount of money the State spent in one fiscal year to the amount available for the next fiscal year.[122] The add-on funds—"amounts which the legislature actually appropriates for the fiscal year"—balances the apples-to-apples comparison to the "amount appropriated for the previous fiscal year." The *Hickel* Court reasoned that if funds were available to the legislature to spend on any public purpose, they must be "available for appropriation" under subsection (b).[123] But the Court recognized that some state funds—which it called "trust receipts"—do *not* fall within this definition, because their use is restricted by law.[124] The legislature, however, "does in fact appropriate" from them each year.[125] This introduces a potential imbalance into the comparison required by

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[121] *Id.* at 932 ("Policy considerations . . . favor including trust receipts in the amount available, so that, for example, declines in federal funding might result in increased [simple majority] access to the budget reserve fund[, and] the text of section 17(b) clearly requires that all funds which are in fact appropriated be counted as 'available for appropriation.'").

[122] Alaska Const. art. IX, § 17(b).

[123] *Hickel* at 931-32.

[124] *Id*. at 931 n.22 ("'Trust receipts' include all funds, whatever the source, which the State can only use for a specific stated purpose under applicable law. The largest 'trust receipt' category is federal funding, which may only be appropriated by the State for the purpose prescribed by the federal government.")

[125] *Id*. at 931.

subsection (b), especially because these "trust receipts" are largely federal funding, which makes up a significant part of the State's annual budget.[126] The "amount appropriated for the previous fiscal year" side of the comparison will always necessarily include the money appropriated from "trust receipts."[127] And those receipts are available for appropriation—for trust purposes only—in the current fiscal year also, so excluding them entirely from the "amount available for appropriation" would mean that the current budget would always appear underfunded compared to the previous year's budget, effectively guaranteeing annual access to the CBR. But, the Court said, "[t]he language of section 17 and the purposes behind the establishment of the [CBR] fund do not support such easy access."[128] To make subsection (b) work as intended, the Court added the adjustment for amounts actually appropriated from restricted funds containing "trust receipts."[129]

Subsection (d), by contrast, requires no year-to-year comparison complicated by federal funding and other "trust receipts." For purposes of the sweep, the relevant

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[126] A breakdown of the revenue sources for the current budget can be found in the Legislative Finance Division's Fiscal Summary. *See* https://www.legfin.akleg.gov/FisSum/FY23-GovReq.pdf at 2.

[127] *Hickel*, 874 P.2d at 935 (explaining that "the 'amount appropriated' [for the previous fiscal year] includes every dollar appropriated by the legislature, whatever its source," and need not "artificially exclude" trust receipts because those amounts are accounted for on the other side of the comparison scale, achieving the "symmetry" that "is necessary . . . to insure that the comparison required by section 17(b) fairly measures the need for access to" the CBR).

[128] *Id.* at 930.

[129] *Id*. at 931-32, 935.

question is simply, what funds remain available to the legislature at one moment in time: the end of the fiscal year. The 17(b) adjustment is not part of the core definition of "available for appropriation." To mix food analogies, the adjustment is not butter and sugar in a cake. It is more like carrots in a carrot cake: an extra ingredient necessary in light of the text and specific purpose of subsection (b)—controlling simple majority CBR access. The adjustment is not mentioned in the section 17(d) part of the opinion because it has no relevance there.[130] This Court need not be distracted by the Students' attempt to undermine *Hickel* by manufacturing confusion that does not exist.[131]

II. This Court should decline the Students' invitation to overrule *Hickel*, which treated section 17 as a logical, coherent whole and gave the phrase "available for appropriation" the same meaning both times it appears in the amendment.

The Students acknowledge that this Court might read *Hickel*, as the superior court did twice, as binding authority making the HEIF sweepable. [At. Br. 36] In that event, they ask this Court to overrule it on the grounds that it is "unworkable in practice" or that it was ill-considered. [*Id*.[132]] But this Court does "not lightly overrule [its] precedent" and has "consistently held that a party raising a claim controlled by an existing decision bears

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130 *See id.* at 936.

131 The Students also criticize *Hickel* because in a recent case, this Court recognized that the decision incorrectly characterized the transfer of funds from the permanent fund's earnings reserve account to the permanent fund dividend fund as "automatic." *Wielechowski*, 403 P.3d at 1151 n.66. But this mistake has no relevance to this Court's analysis of the sweepability of the HEIF. And the Students identify no other misunderstanding of the State's budgetary mechanisms in *Hickel*.

132 *Citing Khan v. State*, 278 P.3d 893 (Alaska 2012).

a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."[133]

The Students cannot even approach this burden. They argue that because subsections (b) and (d) supposedly serve different purposes, this Court should treat them as completely distinct. [At. Br. 37-38] And they suggest that there is no reason to define "available for appropriation" the same way for both sections.

This is incorrect. Even if the AS 37.10.420(d) definition had never been passed and the subsection (d) issue were not part of *Hickel*, leaving this Court theoretically in a position to interpret section 17(d) for the first time, the "new" analysis must still lead to the same result. "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[134] Alaska courts interpreting the constitution "look to the plain meaning and purpose of the provision and the intent of the framers."[135] Where, as with the CBR, the framers are the people themselves, the court avoids "constru[ing] abstrusely any constitutional term that has a plain ordinary meaning," and instead "defer[s] to the meaning the people themselves probably placed on the provision."[136]

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133 *Guerrero ex rel. Guerrero v. Alaska Hous. Fin. Corp.*, 123 P.3d 966, 982 (Alaska 2005).

134 *Hickel*, 874 P.2d at 926 (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

135 *Id.*

136 *Id.* (quoting *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991) (citations omitted)).

This Court "do[es] not interpret constitutional provisions in a vacuum—the document is meant to be read as a whole with each section in harmony with the others."[137] "Terms and phrases chosen by the framers" of a constitutional provision "are given their ordinary meaning as they were understood at the time, and usage of those terms is *presumed to be consistent throughout*."[138] The "presumption of consistent usage, which states that words are 'presumed to bear the same meaning throughout a text,' is not a canon of construction [this Court] cast[s] aside lightly—especially when those terms appear multiple times within the same article" of the Alaska Constitution."[139]

Applying these principles, this Court would require the strongest possible evidence of framer intent before interpreting the same phrase to mean different things in the same constitutional amendment.[140] The Students cite nothing suggesting that a different meaning was intended for the very same phrase in these two sections of the CBR amendment. Certainly nothing in the explanations of the measure provided to voters could be read to alert them that the same words had different meanings in subsections (b) and (d). [*See* Exc. 57-58]

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137 *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020).

138 *Id.* at 597 (emphasis added).

139 *Id. See also* Exc. 115; *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) ("We adhere to the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted); *Fancyboy v. Alaska Vill. Elec. Co-op., Inc.*, 984 P.2d 1128, 1133 (Alaska 1999) ("We assume as a rule of statutory interpretation that the same words used twice in the same statute have the same meaning.").

140 *Forrer*, 471 P.3d at 597.

To the contrary, revitalizing the stricken legislative definition of AS 37.10.420(b), as the Students ask this Court to do, would *undermine* the purpose of the amendment. The subsections of the CBR amendment work together in service of one unified purpose: protecting the CBR as a rainy day fund to be used to stabilize state budgets, and making sure it is replenished when funds are "available" to do so. [*See* Exc. 57-58] Subsection (b)—in conjunction with subsection (c)—serves to protect the CBR from being spent by the legislature, limiting the circumstances in which the legislature can appropriate from the fund to budgetary shortfalls and, as the public was told, "disaster[s]." [Exc. 58] Subsection (d) serves a similar purpose by imposing a constitutional obligation to repay the fund. If the presence of money in a state account would prevent the legislature from accessing the CBR by a simple majority under subsection (b), that money should also logically be available to repay the CBR under (d).[141]

Imagine that the State needs $5 billion to cover annual expenses. It has $400 million in an endowment fund created to produce income to support education programs. Suppose that fund generates $25 million of income, which the legislature appropriates to those programs. Now imagine that the State has only $4.6 billion (besides the endowment fund) to cover annual expenditures in the coming fiscal year. The parties agree that the

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[141] The one notable exception to this principle of access/repayment symmetry is the earnings reserve account, which this Court held in *Hickel* must be spent down before the CBR can be accessed, but which cannot be swept to repay the CBR because it is in the permanent fund, not the general fund. *Hickel*, 874 P.2d at 934, 936 n.32. Exempting that fund from the sweep has strong footing in the constitutional language itself and arguably, in the "unique[ness]" of the earnings reserve account, which is "treated differently than other state revenues because of public expectations." *Wielechowski*, 403 P.3d at 1151.

money in the endowment fund would be "available for appropriation" under subsection (b), and its existence would therefore prevent the legislature from appropriating money from the CBR without the three-quarter majority required by subsection (c). Imagine further that the legislature, preferring not to spend the endowment fund, musters the votes to leave it alone, appropriating $400 million from the CBR instead. At the end of the fiscal year, the legislature will owe the CBR $400 million, and the endowment fund will have almost that much still on its balance sheet.

The legislature needed a three-quarter vote to keep that money in the endowment fund at the start of the fiscal year. It is therefore only logical that it should require the same supermajority to keep that money in the fund—and out of the CBR—at the end of the year. The Students offer no explanation for why this symmetry is not required by both the language and purpose of the CBR amendment, other than their argument that "[t]here is no evidence that the legislature intended for the HEIF to be subject to the section 17(d) sweep." [At. Br. 15 n.43, 18] But this Court made clear in *Hickel* that "the legislature's role in making appropriations" does not "somehow alter or increase its authority to define constitutional terms merely because the terms contain the word 'appropriation.'"[142] In other words, the legislature's preference that funds stay in the HEIF rather than the CBR does not control: the *constitution* mandates repaying the CBR as the priority use of all money that is "available," absent a three-quarters vote to prevent that result.

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[142] *Hickel*, 874 P.2d at 925.

The CBR is one of only two constitutional savings accounts.[143] Yet the Students would relegate this *constitutional* savings account to inferior status below the *statutory* savings accounts created by the legislature, making its repayment the lowest imaginable priority for any money in the general fund at the end of the year. Under the Students' analysis, all the legislature has to do is label a statutory savings account with a possible future use to exempt the funds in the account from being used to meet the repayment obligation. This would essentially write section 17(d) out of the amendment.

The legislature gave itself section 17(c) as a way around the constitutionally mandated repayment obligation. Indeed, opponents of the CBR amendment criticized this choice, arguing that the CBR was inadequately protected because the legislature "can easily get a ¾ majority" to access the reserve. [Exc. 58] This Court should not provide the legislature a tool to evade the amendment's purposes even more easily, avoiding the sweep with only a simple majority, through a convoluted rewriting of section 17(d) that would assign the same words opposite meanings in different subsections of the same amendment. This Court should confirm, as it already held in *Hickel*, that "available for appropriation" means the same thing both times the phrase appears in section 17.

III. This case presents no separation of powers issue.

In a final plea, the Students (and the Council) conjure a separation of powers argument out of thin air. They complain that reading the CBR amendment as this Court did frustrates the purpose of funds like the HEIF and fails to respect "the legislature's

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[143] The other, of course, is the permanent fund. Alaska Const. art. IX, § 15.

broad power" over appropriations. [At. Br. 29] They assert that applying *Hickel* would "undo" or "void" the legislative appropriation into the HEIF, by sweeping it into the CBR, [At. Br. 18, 25] and that this "would be a radical, new, and unconstitutional infringement on the legislature's appropriation power." [At. Br. 26]

This is nonsense. The appropriation into the HEIF is not "void," and it has not been "undone." The money in the fund has been swept because the plain text of article IX, section 17 commands that money in the general fund available for appropriation at the end of the fiscal year "*shall be deposited* in the budget reserve fund."[144] Any limitation on the legislature's power of appropriation is a product of the voters' clear choice to enact a constitutional amendment *for that precise purpose*.[145] The legislature's appropriation power is not curtailed by any discretionary action of the executive branch, which obviously does not violate the separation of powers by obeying a constitutional mandate.

The whole point of the CBR amendment was to limit the legislative power of appropriation. Section 17 takes revenues that would otherwise have been available to the legislature, locks them away in a savings account requiring either a three-quarters majority or a decline in the state's funds to access, and requires the legislature to repay any money it withdraws from that account. Nothing in the State's argument effectuates

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144 Alaska Const. art. IX, § 17(d).

145 *See* Exc. 57-58 ("The Legislature will be able to spend money from the [CBR] only if . . .;" "The Legislature will be required to repay any money it appropriates from the [CBR]."); *Hickel v. Halford*, 872 P.2d 171, 178 (Alaska 1994). ("[T]he purpose of the amendment . . . was to remove certain unexpected income from the appropriations power of the legislature, and to save that income for future need.").

the slightest infringement on the legislative power of appropriation. The CBR amendment did that, by mandating repayment of debt to that fund as the highest priority use of money in the legislature's control at the end of each fiscal year.

In sum, *Hickel* controls the outcome here and confirms that the HEIF is sweepable. The Students offer no reason for this Court to second-guess precedent nearly three decades old.

CONCLUSION

For these reasons, the Court should affirm the judgment of the superior court.