

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

Plaintiffs,

v.

GOVERNOR MICHAEL J. DUNLEAVY in his
official capacity, THE STATE OF ALASKA,
OFFICE OF MANAGEMENT AND BUDGET,
and THE STATE OF ALASKA, DEPARTMENT
OF ADMINISTRATION,

Defendants.

Court No.: 3AN-22-_____CI

COMPLAINT

Plaintiffs Madilyn Short, Riley von Borstel, Kjrsten Schindler, and Jay-Mark Pascua hereby file this complaint against Defendants Governor Michael J. Dunleavy ("Governor"), the State of Alaska, Office of Management and Budget ("OMB"), and the State of Alaska, Department of Administration ("DOA"; collectively "the Executive Branch"), by stating and alleging the following:

I. INTRODUCTION

1. This suit challenges the Executive Branch's decision to transfer the more than \$410 million from the Higher Education Investment Fund ("HEIF") to the Constitutional Budget Reserve ("CBR") under article IX, section 17(d) of the Alaska Constitution, which negatively impacts the Alaska Performance Scholarship ("APS"), the

1 Alaska Education Grant (“AEG”), and the Washington-Wyoming-Alaska-Montana-
2 Idaho medical school (“WWAMI”) programs.

3 2. Because the Executive Branch’s decision to sweep the HEIF into the CBR
4 violates article IX, sections 13 and 17(d) of the Alaska Constitution, Plaintiffs are entitled
5 to declaratory and injunctive relief to protect the long-term funding source for the APS,
6 AEG, and WWAMI programs.
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8 II. PARTIES

9 3. Plaintiff Madilyn Short is a 23-year-old first-year medical student in the
10 WWAMI program through the University of Washington. Ms. Short is originally from
11 Bethel and graduated from Dartmouth College with a degree in Neuroscience in 2020.
12 The WWAMI program’s loan forgiveness program was a determining factor in her
13 decision to join the WWAMI program upon graduation and return to her home state of
14 Alaska. As an Iñupiaq and Yup’ik woman from rural Alaska, Ms. Short understands the
15 value and importance of access to a quality education and health care. It is from that acute
16 understanding that Ms. Short continues to pursue working with Alaska Native
17 communities. Ms. Short believes it is important that Alaska Native medical providers
18 have the option to serve Alaska Native communities. Continued opportunities provided
19 through the WWAMI program reserve the option for future Alaska Native people to
20 pursue quality educational scholarship, and without this program Alaska Native people
21 will face, yet another, barrier to entry. The American Indian and Alaska Native
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1 population account for approximately 2.9% of the U.S. population,¹ and approximately
2 0.4% of the physician workforce.² For her, this lawsuit is about access. It is about
3 fighting against the institutionalization of barriers for underserved, underrepresented, and
4 disadvantaged populations and communities. She believes that the actions taken by the
5 Executive Branch effectively shut out opportunities for Alaskans and destabilizes the
6 pipeline for future Alaskan-grown talent to return home and contribute to our state.
7 Ms. Short is a plaintiff in this lawsuit to ensure the protection of the HEIF so that more
8 Alaskans become doctors, return home to Alaska, and improve health care for all
9 Alaskans. In addition to attending medical school, Ms. Short is assisting with research in
10 cooperation with the Alaska Native Health Tribal Consortium. Most recently, Ms. Short
11 received the 2021 Lu Young Youth Leadership award from the Alaska Federation of
12 Natives.
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15 4. Plaintiff Riley von Borstel is a 21-year-old student of senior standing who
16 is pursuing three majors (justice, political science, and performing arts) at the University
17 of Alaska Fairbanks (“UAF”). She grew up in Seward, Alaska, and graduated from
18 Seward High School. Ms. von Borstel has received annual scholarships through the APS
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21 ¹ See United States Census Bureau, Race and Ethnicity in the United States: 2010
22 Census and 2020 Census (Aug. 12, 2021),
23 [https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-](https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html)
united-state-2010-and-2020-census.html.

24 ² See AMERICAN MEDICAL ASSOCIATION, Report of the Council on Medical
25 Education, *Study of Declining Native American Medical Student Enrollment*, at 2 (2018),
<https://www.ama-assn.org/system/files/2021-05/a18-cme-05.pdf>.

1 program at the highest level (\$4,755) based on her coursework, GPA, and college
2 admissions test scores. She decided to attend UAF in part because of the availability of
3 the APS scholarships, which have helped make it possible for her to graduate college
4 without student loans. Ms. von Borstel currently plans to attend law school after
5 graduating college. She is a plaintiff in this lawsuit to help protect the HEIF so that others
6 like her will be able to take advantage of educational opportunities at home in Alaska,
7 since losing funding for the APS program would be devastating for students. In addition
8 to school, Ms. von Borstel has served as the student body president at UAF for two years,
9 and has been involved in multiple theatrical productions on campus.

11 5. Plaintiff Kjrsten Schindler is a 20-year-old junior studying biology at UAF.
12 She and her family moved to Delta Junction in 2012, where she lived on a farm and
13 graduated from a homeschool program (Raven Homeschool) with honors. Ms. Schindler
14 has received annual scholarships through the APS program at the highest level (\$4,755)
15 based on her coursework, GPA, and college admissions test scores. She decided to attend
16 UAF in part because of the availability of the merit-based APS scholarship, which she
17 and her family understood she could be eligible for if she worked hard in school after she
18 moved to Alaska. Ms. Schindler currently has plans to become a veterinarian and move
19 back home to Delta Junction, a community which recently lost its one veterinarian. She
20 is a plaintiff in this lawsuit to protect the HEIF so that other Alaskans will have the same
21 opportunity to obtain a great education and have a future career at home in Alaska. In
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1 her spare time, Ms. Schindler enjoys visiting the family farm and running dog teams
2 recreationally.

3 6. Plaintiff Jay-Mark Pascua is a 20-year-old junior studying computer science
4 at the University of Alaska Anchorage ("UAA"). He was born and raised in Anchorage,
5 and graduated from West Anchorage High School. Mr. Pascua has received annual
6 scholarships through the APS program at the highest level (\$4,755) based on his
7 coursework, GPA, and college admissions test scores. Mr. Pascua has also received
8 grants (including \$4,000 in his sophomore year) through the AEG program. He would
9 not have been able to afford to attend college without the financial support provided by
10 the APS and AEG programs, and he is the first in his family to pursue a postsecondary
11 education. Mr. Pascua currently plans to become a software engineer after graduation.
12 He is a plaintiff in this lawsuit to protect the HEIF because the programs it supports
13 provide substantial financial benefits for students who are already struggling to make ends
14 meet, and he wants future students to have the same opportunity to receive those benefits.
15 When his coursework schedule permits it, Mr. Pascua works a part-time job in the
16 evenings as an IT student assistant at UAA.
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20 7. Defendant Governor Michael J. Dunleavy is the chief executive for the
21 State of Alaska, and is being sued in his official capacity.

22 8. Defendant OMB is an entity within the Office of the Governor, and acted
23 at the Governor's direction to issue a list identifying new funds subject to a sweep into
24 the CBR, including the HEIF.
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1 9. Defendant DOA is the State agency charged with effectuating the annual
2 CBR sweep.

3 10. Plaintiffs have standing as citizen taxpayers, and bring this suit of great
4 import in the public interest of all Alaskans. Plaintiffs also bring this suit because of
5 particularized harms to Plaintiffs as current and prospective recipients of prior awards and
6 benefits derived from the HEIF.
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8 III. JURISDICTION AND VENUE

9 11. This court has jurisdiction over this dispute, as well as the ability to enter a
10 declaratory judgment and provide injunctive relief, under AS 22.10.020.

11 12. Venue is proper in the Third Judicial District as Defendants maintain offices
12 and may be served within Anchorage, Alaska, and the claims arise from actions that will
13 have impacts, in part, within the Third Judicial District.
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15 IV. RELEVANT FACTUAL ALLEGATIONS

16 13. Voters approved the creation of the Budget Reserve Fund — commonly
17 referred to as the CBR — in 1990, which now exists in article IX, section 17 of the Alaska
18 Constitution.
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20 14. Article IX, section 17(d) of the Alaska Constitution provides, in full: “If an
21 appropriation is made from the budget reserve fund, until the amount appropriated is
22 repaid, the amount of money in the general fund available for appropriation at the end of
23 each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature
24 shall implement this subsection by law.”
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1 15. Subsection 17(d) establishes the budgetary mechanism commonly referred
2 to as a “sweep,” where any funds that are “in the general fund” and “available for
3 appropriation at the end of each succeeding fiscal year” are “swept” back into the CBR
4 to repay prior appropriations from the CBR.

5 16. The CBR sweep in subsection 17(d) has been routinely counteracted
6 through a “reverse sweep” action by the legislature through appropriation bills. A
7 “reverse sweep” requires a three-quarters vote in both houses of the legislature, consistent
8 with article IX, section 17(c) of the Alaska Constitution.

9 17. The HEIF was established in 2012. *See* AS 37.14.750. The legislature
10 funded the HEIF through a 2011 appropriation totaling \$400 million (Ch. 5, §20(f),
11 FSSLA 2011). The HEIF also permits cash contributions by Alaska corporations who
12 receive tax credits by statute for contributions to the HEIF.

13 18. The legislature originally established the HEIF and appropriated funds to it
14 to provide a long-term, stable funding source for scholarships and grants under the APS
15 and AEG programs. The HEIF statute provides that that the commissioner of revenue
16 shall identify 7% of the HEIF’s value as being available for appropriation to the APS and
17 AEG programs annually, confirming that the HEIF is intended to act as an endowment
18 for those programs. Two thirds of this amount is identified for the APS program
19 (AS 14.13.915(b)), and one third is identified for the AEG program (AS 14.13.915(a)).
20 Over 5,500 students receive funding through these two programs each year. More
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1 recently, in addition to providing funding for the APS and AEG programs, the legislature
2 has appropriated money from the HEIF to support the WWAMI program.

3 19. The APS program provides annual merit scholarships to Alaskans who
4 attend qualified postsecondary educational institutions. Each APS recipient receives
5 between \$4,755 and \$2,378 annually based on that student's GPA and college entrance
6 exam test scores. Approximately 3,000 students receive money from the APS program
7 each year.
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9 20. The AEG program provides annual needs-based grants to Alaskans who
10 attend qualified postsecondary educational institutions. Each AEG recipient receives up
11 to \$4,000 annually. Over 2,000 students receive money from the AEG program each
12 year.
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14 21. The WWAMI program provides loans to Alaskans attending the four-year
15 medical school at the University of Washington, through the Alaska Commission on
16 Postsecondary Education ("ACPE"). Twenty Alaskans are admitted to the WWAMI
17 program each year, and 60 students in their second, third, and fourth years of medical
18 school receive those loans through ACPE. The WWAMI program loans are forgiven for
19 those who return to Alaska for work as doctors and residents after completing their
20 medical training. Those who do not return to Alaska must repay half of their loans, and
21 those repayments have recently been appropriated back into the HEIF from the ACPE.
22 Students who receive WWAMI program loans receive approximately \$30,000 in loans
23 annually, resulting in hundreds of doctors returning to Alaska.
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1 22. The Governor introduced legislation in the 2019 legislative session that
2 sought to terminate the HEIF and return all funds in it to the general fund. That legislation
3 did not pass.

4 23. After the failure of that legislation, a legislative budget impasse occurred in
5 2019, and OMB took a very expansive view of what funds are subject to the annual sweep
6 to repay the CBR. Previous administrations had identified only 32 out of 71 subfunds
7 (and some only partially) as being subject to the sweep. Using inconsistent legal
8 explanations and justifications, OMB identified a different, larger list of 54 funds and
9 subfunds as being subject to the sweep. The HEIF was among the new funds or subfunds
10 that the administration for the first time identified as subject to the annual sweep.
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12 24. Former OMB Director Donna Arduin provided a letter and a new list to the
13 co-chairs of the house and senate finance committee in July 2019 explaining why the
14 Executive Branch believed the HEIF and other funds and subfunds were subject to the
15 sweep. That letter, despite acknowledging that donations to funds and subfunds are not
16 sweepable, nevertheless designated the entirety of the HEIF as being subject to the sweep
17 for the first time in its history.
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19 25. For a number of years, the legislature has been spending funds from the
20 CBR to balance the budget. At the same time, the legislature has counteracted the sweep
21 of monies into the CBR with a vote for a reverse sweep accompanying appropriation bills.
22 After the new list was published, the legislature in 2019 enacted the “reverse sweep,” so
23 the funds on the 2019 list, including the HEIF, were not swept into the CBR.
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26. A similar budget impasse occurred in 2021, but the legislature failed to achieve the required three-quarters vote in both houses for the reverse sweep in 2021.

27. The HEIF contained over \$410 million as of November 30, 2021, and had accrued nearly \$75 million with over a 27% rate of return in FY2021. DOA must, by statute, effectuate the sweep by December 16 of each year. Presumably, the Executive Branch has now swept the funds in the HEIF into the CBR.

28. In 2021 for FY2022, the legislature appropriated over \$21 million from the HEIF, which included: (1) \$11.75 million to the APS program; (2) over \$6.356 million to the AEG program; and (3) \$3.258 million to the WWAMI program. Those appropriations were not vetoed by the Governor. Originally, as with other appropriations from funds that were on OMB's new list, the Executive Branch took the position that it could not honor the appropriations from the HEIF in FY2022 because the funds no longer existed in the HEIF as of July 1, 2021.

29. In July 2021, the Alaska Federation of Natives and nineteen other plaintiffs sued the Executive Branch over its decision to designate the Power Cost Equalization Endowment Fund as being subject to the sweep. In August, the superior court agreed with those twenty plaintiffs, concluding that the Executive Branch's interpretation of article IX, section 17(d) of the Alaska Constitution was unconstitutional. The Executive Branch did not appeal that decision.

30. Later that month, Attorney General Treg Taylor authored a memorandum concerning all of the FY2022 appropriations that OMB had previously determined could

1 not be honored because of the lack of votes for a reverse sweep. And because Attorney
2 General Taylor recognized that “monies which already have been validly committed by
3 the legislature to some purpose should not be counted as available,” (quoting *Hickel v.*
4 *Cowper*, 874 P.2d 922, 930-31 (Alaska 1994)) he concluded that “it is legally defensible
5 to release the funds and pay out the validly enacted appropriations for” FY2022.
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7 31. Based on this new analysis the Governor directed OMB to “immediately”
8 honor the FY2022 appropriations from the HEIF and other funds and subfunds designated
9 to be swept. But the Executive Branch refuses to honor the original appropriations the
10 legislature made to the HEIF, and still swept the funds remaining in the HEIF into the
11 CBR.
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13 32. There is no logical distinction between the legislature’s prior appropriations
14 to the HEIF from the legislature’s recent appropriations from the HEIF for FY2022. All
15 funds in the HEIF, whether appropriated to it by the legislature or donated by private
16 entities, are not subject to the sweep under article IX, section 17(d) of the Alaska
17 Constitution.
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19 V. CLAIMS FOR RELIEF

20 COUNT I

21 (Violation of the Alaska Constitution)

22 33. Plaintiffs reallege and incorporate by reference all previous and subsequent
23 paragraphs as set forth herein.
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1 34. The Executive Branch’s interpretation of article IX, section 17(d) of the
2 Alaska Constitution, as set forth in letters and analysis from July 2019, is incorrect as a
3 matter of law.

4 35. The HEIF includes valid appropriations by the legislature and any funds
5 contributed by private entities, and as a matter of law is not subject to transfer to the CBR
6 under article IX, section 17(d).

7 36. Plaintiffs are entitled to a declaration that the HEIF is not subject to the
8 CBR sweep under the Alaska Constitution.

9 37. Because the Executive Branch transferred funds to the CBR without a valid
10 appropriation by the legislature, the Executive Branch also violated article IX, section 13
11 of the Alaska Constitution which reserves the power of appropriation to the legislature.

12 38. Plaintiffs are entitled to injunctive relief requiring the Executive Branch to
13 return all monies transferred from the HEIF to the CBR and preventing any future
14 transfers from the HEIF to the CBR without an appropriation by the legislature.

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17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs respectfully request relief as follows:

19 A. An order declaring that the Executive Branch’s decision to sweep the HEIF
20 into the CBR is unconstitutional;

21 B. An order setting aside and enjoining any past, current, or future act by the
22 Executive Branch to unlawfully sweep the HEIF, and returning all such funds that were
23 unconstitutionally “swept” into the CBR;
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1 C. An order awarding Plaintiffs their full reasonable costs and attorneys' fees
2 as required by AS 09.60.010(c); and

3 D. An order granting any and all additional relief to which Plaintiffs are
4 entitled that the court deems equitable and appropriate.
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7 CASHION GILMORE & LINDEMUTH
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9 DATE: 1/4/2022

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