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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Appellants,

v.

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

Appellees.

Case No.: S-18333

Trial Court No. 3AN-22-04028 CI

AMICUS CURIAE ALASKA LEGISLATIVE COUNCIL'S OPPOSITION TO APPELLEES' PETITION FOR REHEARING

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Appellees petition the Court for rehearing on a single sentence in footnote 1 of the Court's opinion, asserting that the Court "misconceived a material question on appeal"[1] when the Court acknowledged that "[t]he legislature has since amended the HEIF statute, removing the HEIF from the general fund and thus making it ineligible for the sweep."[2] Because the Court did not misconceive a question on appeal, Amicus Curiae Alaska Legislative Council ("Legislative Council") asks the Court to deny Appellees' Petition.

Appellees' primary argument is that "[t]his case does not present the issue of whether a fund the legislature describes as 'separate' falls outside the 'general fund,' as that term is used in Article IX, subsection 17(d) of the Alaska Constitution."[3] This is incorrect for several reasons.

First, Appellees expressly relied on the Legislature's authority to designate a fund in or out of the general fund to satisfy the *Hickel v. Cowper* test. They argued:

> 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 the CBR repayment provision. 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? 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* . . . ." 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.[4]

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[1] Appellee's Petition for Rehearing ("Petition") at 1.
[2] Order at *1, n.1.
[3] Petition at 1.
[4] Appellee's Br. at 19–20 (internal footnotes omitted).

Appellees argued that the first part of the *Hickel* test was met because *the Legislature established* the HEIF in the general fund. They cannot change course now when the Legislature exercised that same authority to designate the HEIF as a separate fund outside the general fund.

Second, the question of the Legislature's ability to designate a fund in or out of the general fund for purposes of application of Article IX, subsection 17(d) was before the Court, and it was litigated and resolved. The superior court initially acknowledged it was the Legislature that determined the location of a fund, ruling that "the HEIF is established in the general fund *according to its enabling statute*," which differs from the "PCE Fund [that] is not in the general fund because *its enabling statute* establishes it in a fund outside of the general fund." [Exc. 316 (emphases added)] On appeal, Appellants called this conclusion into question:

> Although the legislature by statute later created the HEIF as a subfund within the general fund, it is unlikely they were using the term 'general fund' in the same way as it was used in section 17(d). There is no evidence that the legislature intended for the HEIF to be subject to the 17(d) sweep.[5]

Appellees responded, explaining the court's prior holding in *AFN v. State* that it is the Legislature's action that dictates the location of a fund for purposes of the sweep:

> To the extent that the Students argue in passing that the HEIF is not in the general fund, that argument has been waived because it was not raised below. Moreover, the suggestion is meritless. The superior

[5] Appellants' Br. at 15 n.43 (internal citations omitted). Appellants' appeal was not limited solely to the second part of the *Hickel* test. Instead, Appellants appealed more broadly the superior court's conclusion that article IX, section 17(d) of the Alaska Constitution subjected the HEIF to the "sweep." *See* Statement of Points on Appeal.

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> 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. 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."[6]

Appellants replied:

> The Executive Branch's claim that the Students have waived their argument about the proper interpretation of "general fund" is incorrect. This lawsuit has always concerned the proper interpretation of section 17(d). Because the undefined term "general fund" is contained within section 17 (d), it well within this Court's purview to consider the plain meaning of that term and how the 1990 framers and voters would have understood that phrase. There is no reason to think the legislature that created the HEIF in 2012 used the term "general fund" in the HEIF statute in the same sense as the 1990 framers. The Executive Branch does not provide any evidence from 1990 in opposition to this argument.[7]

And finally, the Court—in a footnote from its statement "the HEIF is housed within the general fund"—resolved the issue:

> The Students briefly seem to argue that the HEIF is not in the general fund: "Although the legislature by statute later created the HEIF as a subfund within the general fund, it is unlikely they were using the term 'general fund' in the same way as it was used in section 17(d)." The Executive Branch correctly notes that this "suggestion is meritless." ***There is only one general fund, and the HEIF was "established in the general fund" in 2012***, over 20 years after the CBR amendment's adoption. We "presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect,'" and we "consider[ ] the meaning of the statute's language, its legislative history, and its purpose." The Students offer no reason we

[6] Appellee's Br. at 20 n.77 (internal citations omitted).
[7] Appellant's Reply Br. at 14 n.37 (internal citations omitted).

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> should interpret "general fund" as used in AS 37.14.750(a) to mean something different than the term used in article IX, section 17.[8]

The Court affirmed the superior court's ruling that the HEIF was in the general fund because that is *where the Legislature* created the fund as evidenced by its enabling statute. This issue was presented to and resolved by the Court. The Court did not misconceive any material question here.

Third, having successfully persuaded the Court to accept their position that the Legislature had the authority to make the HEIF subject to the sweep in the first place,[9] Appellees cannot pick and choose the implications of their arguments or of the Court's holding.[10] Appellees assert that "if the Court's comment is correct, the legislature can avoid the sweep via a statutory drafting device passed by a simple majority vote, avoiding the three-quarters majority that the Constitution requires."[11] But Appellees argued that it was the Legislature's same exercise of authority that originally made the HEIF subject to the sweep, and the Court agreed. The Court's footnote 1 correctly describes the Legislature's action in moving the HEIF out of the general fund and properly applies part one of the *Hickel* test by acknowledging that the HEIF is no longer within the general fund. The footnote is not dictum. It

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[8] Order at *10 n.30 (internal citations omitted) (emphasis added).
[9] *See supra* notes 4, 6, 8, and accompanying text.
[10] *See, e.g.*, *Zwaicher v. Capstone Family Medical Clinic*, 476 P.3d 1139 (Alaska 2020) (applying the judicial estoppel doctrine). Here, Appellees' inconsistent positions would impose an unfair detriment on Appellants — and the Legislature — by introducing uncertainty as to whether the HEIF would again be subject to the sweep.
[11] Petition at 2.

is consistent with the Court's resolution of the issues and arguments before it on appeal. The Court did not misconceive any material question, but rather simply applied the law. The Appellees' perfunctory substantive argument would seem to require a novel and radical limitation on the Legislature's budgetary authority that cannot be squared either with the Legislature's constitutional authority or with past precedent which recognized that the Legislature of course may (and does) establish funds either inside or outside the general fund. Appellees' requested rehearing would introduce unnecessary uncertainty where there was none.

For these reasons, the Legislative Council respectfully requests that the Court deny Appellees' Petition.

DATED: October 24, 2022

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By: /s/ Kevin Cuddy
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CERTIFICATE OF SERVICE AND TYPEFACE

This certifies that on October 24, 2022, a copy of the foregoing was served via email on:

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This further certifies that this document was substantively produced in Times New Roman 13 in compliance with Alaska Appellate Rule 513.5(c).

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