IN THE SUPREME COURT OF THE STATE OF ALASKA

Bill Wielechowski, Rick Halford, and Clem Tillion,	)	
Appellants,	)	
v.	)	
State of Alaska and the Alaska Permanent Fund Corporation,	)	
Appellees.	)	Supreme Court No.: **S-16558**

Trial Court Case No: **3AN-16-08940CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE WILLIAM F. MORSE, JUDGE

BRIEF OF APPELLEES STATE OF ALASKA and ALASKA PERMANENT FUND CORPORATION

JAHNA LINDEMUTH
ATTORNEY GENERAL

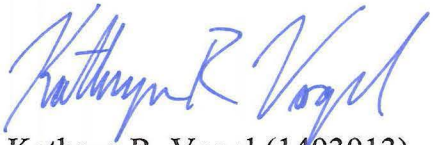

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ALASKA CONSTITUTIONAL PROVISIONS

ALASKA STATUTES

SESSION LAW AND ENROLLED BILLS

ATTORNEY GENERAL OPINIONS

OTHER AUTHORITIES

HOUSE

AUTHORITIES PRINCIPALLY RELIED UPON

CONSTITUTIONAL PROVISIONS

Alaska Const. art. II, § 13. Form of Bills.
Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

Alaska Const. art. II, § 15. Veto.
The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.

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

Alaska Const. art. IX, § 13. Expenditures.
No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Alaska Const. art. IX, § 15. Alaska Permanent Fund.

At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

STATUTES

AS 37.13.010. Alaska permanent fund
(a) Under art. IX, sec. 15, of the state constitution, there is established as a separate fund the Alaska permanent fund. The Alaska permanent fund consists of
(1) 25 percent of all mineral lease rentals, royalties, royalty sale proceeds, net profit

shares under AS 38.05.180(f) and (g), and federal mineral revenue sharing payments received by the state from mineral leases issued on or before December 1, 1979, and 25 percent of all bonuses received by the state from mineral leases issued on or before February 15, 1980;
(2) 50 percent of all mineral lease rentals, royalties, royalty sale proceeds, net profit shares under AS 38.05.180(f) and (g), and federal mineral revenue sharing payments received by the state from mineral leases issued after December 1, 1979, and 50 percent of all bonuses received by the state from mineral leases issued after February 15, 1980; and
(3) any other money appropriated to or otherwise allocated by law or former law to the Alaska permanent fund.
(b) Payments due the Alaska permanent fund under (a) of this section shall be made to the fund within three banking days after the day the amount due to the fund reaches at least $3,000,000 and at least once each month.
(c) The Alaska permanent fund shall be managed by the Alaska Permanent Fund Corporation established in this chapter.

AS 37.13.140. Income
Net income of the fund includes income of the earnings reserve account established under AS 37.13.145. Net income of the fund shall be computed annually as of the last day of the fiscal year in accordance with generally accepted accounting principles, excluding any unrealized gains or losses. Income available for distribution equals 21 percent of the net income of the fund for the last five fiscal years, including the fiscal year just ended, but may not exceed net income of the fund for the fiscal year just ended plus the balance in the earnings reserve account described in AS 37.13.145.

AS 37.13.145. Disposition of income
(a) The earnings reserve account is established as a separate account in the fund. Income from the fund shall be deposited by the corporation into the account as soon as it is received. Money in the account shall be invested in investments authorized under AS 37.13.120.
(b) At the end of each fiscal year, the corporation shall transfer from the earnings reserve account to the dividend fund established under AS 43.23.045, 50 percent of the income available for distribution under AS 37.13.140.
(c) After the transfer under (b) of this section, the corporation shall transfer from the earnings reserve account to the principal of the fund an amount sufficient to offset the effect of inflation on principal of the fund during that fiscal year. However, none of the amount transferred shall be applied to increase the value of that portion of the principal attributed to the settlement of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) on July 1, 2004. The corporation shall calculate the amount to transfer to the principal under this subsection by
(1) computing the average of the monthly United States Consumer Price Index for all urban consumers for each of the two previous calendar years;

(2) computing the percentage change between the first and second calendar year average; and
(3) applying that rate to the value of the principal of the fund on the last day of the fiscal year just ended, including that portion of the principal attributed to the settlement of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District).
(d) Notwithstanding (b) of this section, income earned on money awarded in or received as a result of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District), including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund or for transfers to the principal under (c) of this section, and shall be annually deposited into the Alaska capital income fund (AS 37.05.565).

AS 43.23.025. Amount of dividend
(a) By October 1 of each year, the commissioner shall determine the value of each permanent fund dividend for that year by
(1) determining the total amount available for dividend payments, which equals
(A) the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 37.13.145(b) during the current year;
(B) plus the unexpended and unobligated balances of prior fiscal year appropriations that lapse into the dividend fund under AS 43.23.045(d);
(C) less the amount necessary to pay prior year dividends from the dividend fund in the current year under AS 43.23.005(h), 43.23.021, and 43.23.055(3) and (7);
(D) less the amount necessary to pay dividends from the dividend fund due to eligible applicants who, as determined by the department, filed for a previous year's dividend by the filing deadline but who were not included in a previous year's dividend computation;
(E) less appropriations from the dividend fund during the current year, including amounts to pay costs of administering the dividend program and the hold harmless provisions of AS 43.23.075;
(2) determining the number of individuals eligible to receive a dividend payment for the current year and the number of estates and successors eligible to receive a dividend payment for the current year under AS 43.23.005(h); and
(3) dividing the amount determined under (1) of this subsection by the amount determined under (2) of this subsection.
(b) Repealed.

AS 43.23.045. Dividend fund
(a) The dividend fund is established as a separate fund in the state treasury. The dividend fund shall be administered by the commissioner and shall be invested by the commissioner in the same manner as provided in AS 37.10.070.
(b), (c) Repealed.
(d) Unless specified otherwise in an appropriation act, the unexpended and unobligated

balance of an appropriation to implement this chapter lapses into the dividend fund on June 30 of the fiscal year for which the appropriation was made and shall be used in determining the amount of and paying the subsequent year's dividend as provided in AS 43.23.025(a)(1)(B).
(e) Repealed.

ISSUES PRESENTED

1. In 1976, voters amended the Alaska Constitution to create the Alaska Permanent Fund, a restricted savings account intended to earn spendable investment income. The amendment excluded the fund's *principal* from the dedicated funds clause—which otherwise prohibits lasting dedications of state revenue—but did not exclude the fund from appropriations and veto oversight. Does the constitution permit the fund's *income* to be dedicated and spent without appropriation or opportunity for veto?

2. The legislature created a statutory scheme that places some of the Alaska Permanent Fund income into the dividend fund within the state treasury, refers repeatedly to appropriations, and has been implemented by appropriations since its inception. Even if the constitution permits dedicating and spending the fund's income without an appropriation and opportunity for veto, does the statutory scheme authorize that?

3. A governor may use the line-item veto power to strike or reduce an item in an appropriation bill, but may not strike descriptive words to alter an expenditure's purpose. Governor Walker reduced the 2016 permanent fund dividend by replacing a reference to the statutory formula for disbursements with a lower dollar figure. Did this veto permissibly reduce the amount of the appropriation without altering its purpose?

STATEMENT OF THE CASE

Confronting what has been called the "gravest fiscal crisis in state history,"[1] in June 2016 Governor Walker reduced by veto the portion of the operating budget

[1] *Alaska Revenue and Expenditures—FY07-17*, Legislative Finance Division Informational Paper 17-1 (July 2016), *available at* http://www.legfin.akleg.gov/InformationalPapers/17-1AlaskaRevenueAndExpendituresFY07-FY17.pdf

appropriations bill that authorized the spending of state funds on 2016 permanent fund dividends. [App. 1[2]] The veto cut in half the amount to be transferred from the permanent fund earnings reserve account to the dividend fund for the payment of 2016 dividends, an expenditure that otherwise would have cost more than $1.3 billion. [*Id.*] Although the legislature had the opportunity to override this veto, it did not do so.

Instead, one state senator and two former lawmakers (collectively, Wielechowski) sued the Alaska Permanent Fund Corporation and the State (collectively, the State) to challenge the veto. [Exc. 1] Wielechowski argues that a 1982 statutory directive requires permanent fund income to be transferred to the dividend fund and spent, and that this expenditure is exempt from annual appropriation decisions made by the legislature and governor. [Exc. 182] This case thus asks whether the governor and legislature retain annual budgetary control over spending on permanent fund dividends or whether the constitution authorizes unchecked annual spending of permanent fund income. [Exc. 188]

Wielechowski's challenge to the veto fails for three reasons. First, it is inconsistent with the constitutional provisions that control the spending of state money through a system of checks and balances between the legislative and executive branches. Wielechowski argues that the 1976 permanent fund amendment allows fund income to be dedicated to particular purposes without violating the dedicated funds clause, but fails to explain why expenditures of the money are not subject to the appropriations and veto clauses. Accepting this position requires construing the 1976 amendment—which made

[2] Appendix 1, the version of HB 256, sec. 10 (2016) reflecting the veto, is also available at http://www.legis.state.ak.us/PDF/29/Vetoes/HB256.pdf .

no mention of dividends—as silently authorizing a future legislature to both dedicate permanent fund income and authorize its future expenditure outside of the normal appropriation and veto process. Nothing in the constitutional language or history indicates such a change.

Second, this challenge to the veto would fail even if the constitution permitted the legislature to exempt expenditures of permanent fund income from annual appropriation and veto control, because the dividend statutes made no such radical change to ordinary state spending. This is evident from both the legislature's consistent practice of passing an appropriation bill to authorize the transfer of permanent fund income to the dividend fund to pay dividends, and the language of the dividend statute (and a separate constitutional amendment) that plainly refers to appropriations for dividends.

Third, Wielechowski's challenge to the form of the veto is unpersuasive because the Governor struck language that described the appropriation's amount but did not alter its purpose.

For these reasons, the Court should affirm the superior court and uphold the constitutional system of checks and balances designed to give current lawmakers control over current spending.

I. Background

A. The Alaska Constitution has checks and balances that govern state spending.

The Alaska Constitution limits the spending of state money through a system of checks and balances between the legislative and executive branches. The legislature and

the governor have a "joint responsibility . . . to determine the State's spending priorities on an annual basis,"[3] and the constitution was designed with a "strong executive in mind."[4] The governor is required to submit an annual budget with proposed appropriations for the next fiscal year.[5] The legislature, in turn, annually determines how much to spend and on what, and then authorizes that spending by passing appropriations bills.[6] Under the appropriations clause, "[n]o money shall be withdrawn from the treasury except in accordance with appropriations made by law."[7]

After the legislature passes an appropriations bill, the governor has authority to strike or reduce each appropriation item[8] and the legislature may override an appropriation veto with a three-fourths vote.[9] As the Court has noted, "the appropriations clause defines how the legislature may spend state money after it has entered state coffers, and the governor's veto clause provides an executive check on the legislature's spending plan."[10] The legislature and governor maintain annual control over the budget in part because nothing mandates appropriations to satisfy all statutory promises: the

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3 *State v. Ketchikan Gateway Borough,* 366 P.3d 86, 93 (Alaska 2016) (quoting *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006)).

4 *Bradner v. Hammond*, 553 P.2d 1, 3 n.3 (Alaska 1976) (citing Proceedings of the Alaska Constitutional Convention 1984, 1102, 1741, 1986-77, 2038, 3103).

5 Alaska Const. art. IX, § 12.

6 Alaska Const. art. IX, § 13.

7 *Id.* Because of the constitution's confinement clause, bills for appropriations may contain only appropriations. *Alaska Legislative Council v. Knowles (Knowles II),* 21 P.3d 367, 377 (Alaska 2001) ("The confinement clause prevents the legislature from enacting substantive policy outside the public eye.")

8 Alaska Const. art. II, § 15.

9 Alaska Const. art. II, § 16,

10 *Ketchikan Gateway Borough,* 366 P.3d at 101-02.

existence of a statutory entitlement program does not obligate the legislative and executive branches to fund or fully fund the program.[11]

In addition to these provisions, Alaska's dedicated funds clause presents an additional and more unusual safeguard to preserve the legislature's and governor's annual powers over the purse.[12] The dedicated funds clause prohibits dedicating "the proceeds of any state tax or license" to any special purpose.[13] The constitutional convention delegates drafted this clause to avoid the dedicated funds problem that was "bedeviling" other states by depriving their legislatures of control over state finances.[14]

B. The permanent fund was created to save money for Alaska's future.

In the 1960s and 1970s, the discovery and development of Prudhoe Bay oil reserves led to dramatically increased state revenue from oil leases and the promise of substantial royalty income.[15] But Alaskans worried that the legislature would spend this new revenue as fast as it arrived.[16] Alaska had no formal mechanism to build savings, and Alaskans understood that the State's wealth was "based on nonrenewable resources

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11 *Knowles II*, 21 P.3d at 378 (recognizing that "legislatures do not have to fund or fully fund any program (except possibly constitutionally mandated programs"); *Simpson v. Murkowski*, 129 P.3d at 447 (affirming grant of summary judgment regarding the legality of governor's veto of longevity program funding).

12 Alaska Const. art. IX, § 7; *Myers v. Alaska Housing Fin. Corp.*, 68 P.3d 386, 389 n.11 (Alaska 2003) (identifying Georgia as only other state with similar provision).

13 Alaska Const. art. IX, § 7.

14 3 Alaska Statehood Commission, *Constitutional Studies* pt. IX "State Finance" at 27 (November 1955) [Exc. 323-27].

15 Jack Roderick, *Crude Dreams: A Personal History of Oil & Politics in Alaska* 281, 393 (Epicenter Press 1997) (describing $900 million raised from oil lease sale in 1969; and anticipation of revenue from Prudhoe oil during the 1970s).

16 *Id*. at 302, 310 (describing rapidly expanding state budgets); *accord.* [Exc. 6].

which will become depleted at some point in the future."[17] But when lawmakers passed legislation to divert a portion of incoming royalties to a savings account fund, Governor Hammond vetoed it because it violated the dedicated funds clause.[18] [Exc. 328]

Governor Hammond then sought a constitutional amendment to establish a permanent state savings account—the "permanent fund"—as an exception to the prohibition on dedicated funds.[19] [Exc. 192-93] In his January 15, 1976 transmittal letter to the legislature, Governor Hammond explained that the amendment was needed because "revenues from our non-renewable resources belong to future generations of Alaskans as well as ourselves." [*Id.*] The proposed permanent fund would "set aside a modest portion" of the resource proceeds "for investment in our future while leaving sufficient revenues for our present needs." [*Id.*] Governor Hammond's proposal deposited all income from investments of the fund's principal into the State's general fund. [*Id.*]

Before passing the proposed resolution, the legislature changed the Governor's version of the amendment in certain ways. For example, it increased the percentage of resource royalties to be deposited in the permanent fund from 10 to 25 percent; removed the proposal to deposit production taxes into the permanent fund; and modified the proposal to deposit income from the permanent fund into the general fund to also permit the income to be directed elsewhere if "otherwise provided by law."[20] The legislature

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17 *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55 (1982).

18 1975 House J. 1644-1645.

19 1976 House J. 39-40 [Exc. 192-93].

20 All versions of the proposed amendments are available at Exc. 194-206.

passed its version of the resolution in June 1976, and voters approved the amendment the following November with 66 percent in support.[21] The final permanent fund amendment, now article IX, section 15 of the Alaska Constitution, provides:

> At least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.[22]

The constitution's dedicated funds clause, article IX, section 7 of the constitution was simultaneously amended to add the words, "except as provided in section 15," to its prohibition on dedicating funds. It now reads in relevant part:

> The proceeds of any state tax or license shall not be dedicated to any special purpose, *except as provided in section 15 of this article* or when required by the federal government for state participation in federal programs. [23]

At the time of passage, there were still competing ideas for use of the fund principal and income.[24] Proposals included investing the principal as community development loans to diversify Alaska's economy or investing money to maintain the

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21 State of Alaska Official Returns General Election at 22 (Nov 2, 1976), *available at http://www.elections.alaska.gov/results/76GENR/76genr.pdf* .

22 Alaska Const. art. IX, § 15 (effective February 21, 1977).

23 Alaska Const. art. IX, § 7 (effective February 21, 1977) (emphasis added).

24 *See e.g., Permanent Fund Raises Use Issue,* Anchorage Daily News, 2 (Oct. 22, 1976) [Exc. 236].

safety of the principal while maximizing returns.[25] Ideas for income included using the money for bond guarantees to assist state borrowing, payment of dividends, and funding immediate government needs.[26]

In 1980, the return-maximizing approach prevailed and the legislature created the Alaska Permanent Fund Corporation to "manage and invest the assets" of the permanent fund.[27] The realized income from investment of the permanent fund is now deposited as it accrues into a separate account within the permanent fund known as the "earnings reserve account."[28] Unlike the principal of the permanent fund, which may be used only for income-producing investments, the earnings reserve account is subject to legislative appropriation.[29] Until appropriated, the money in the earnings reserve account is invested by the Corporation subject to the same statutory guidelines as the permanent fund.[30]

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[25] *Id.*; Scott Goldsmith, et al., *The Permanent Fund and the Growth of the Alaskan Economy: Selected Studies*, report for the House Special Committee on the Alaska Permanent Fund, Institute for Social and Economic Research, University of Alaska Anchorage xvii, 6-12 (Dec. 15, 1977), *available at* http://www.arlis.org/docs/vol1/Susitna/8/APA801.pdf (discussing variety of options under consideration for investment of principal and use of income);

[26] *Id.*; Morgan Guaranty Trust Co. of New York, *A Prospectus of the State of Alaska's Finances and Its Development of Economic Diversity*, 14 (Jan. 12, 1976), *available in* Special Comm. No. 9, House Special Committee on the Permanent Fund, File 29, Microfiche No. 129-30 (1977-78), (hereinafter, "Morgan Guaranty Report").

[27] AS 37.13.020 (defining fund's goal); AS 37.13.040 (establishing Corporation).

[28] AS 37.13.145(a). The earnings reserve account was established in 1986. Sec. 2, ch. 28 SLA 1986. From inception to 1982 income went to the general fund by default; between 1982 and 1986, the income of the permanent fund was placed in an account within the permanent fund known as the undistributed income account. Sec. 9, ch. 81 SLA 1982. [Exc. 269]

[29] *See Hickel v. Cowper*, 874 P.2d 922, 934 (Alaska 1994).

[30] AS 37.13.145(a) and 37.13.120.

C. The permanent fund dividend is paid annually to eligible Alaskans.

The first law to pay dividends to Alaskans from permanent fund income, enacted in 1980, set the dividend amount according to length of Alaska residency.[31] The program was immediately challenged on constitutional grounds and no dividend payments were made pending the court challenge.[32] This Court upheld the program[33] but the United States Supreme Court ruled that the law violated the federal equal protection clause.[34] The current dividend program—which pays an equal amount to each eligible Alaskan—was first established in 1982 and has been subject only to minor changes.[35]

Permanent fund dividends are not paid from the permanent fund. Instead, some of the fund income in the earnings reserve account is transferred annually to the "dividend fund"—a separate fund within the state treasury managed by the Department of Revenue.[36] Dividends are paid from this fund, subject to operational expenses and other appropriations according to statute.[37] Each year, the legislature passes an appropriation to authorize the transfer of funds and payment of dividends: annual appropriations bills have included an appropriation for dividends since before the first dividend payments in 1982

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31 Sec. 2, ch. 21 SLA 1980, *available at* Exh. M.

32 The United States Supreme Court stayed the distribution of dividends pending resolution of an appeal filed with that Court. *Zobel v. Williams*, 449 U.S. 989 (1980).

33 *Williams v. Zobel*, 619 P.2d 448 (Alaska 1980).

34 *Zobel v. Williams*, 457 U.S. 55 (1982).

35 Ch. 81 SLA 1982 [Exc. 262-71]; AS 43.23.005. Although subsequent amendments did not make any major changes to government operations or dividend recipients, they do foreclose current theories about the alleged automatic nature of the dividend payments.

36 AS 43.23.045.

37 AS 43.23.045(a), (d); AS 37.13.145(b)

and have continued without exception since then. [Exc. 337-440]

After the appropriations bill passes and funds are transferred from the earnings reserve account to the dividend fund, the Department of Revenue calculates and pays a dividend to each eligible Alaskan. The dividend amount is based on the amount of money in the dividend fund—which includes the transferred permanent fund income plus the "unexpended and unobligated balances of prior fiscal year appropriations that lapse into the dividend fund"—less sums that the legislature has appropriated for other purposes.[38] The amount of individual dividends has varied from $331.29 to $2,072.00.[39]

D. Governor Walker vetoed part of the 2016 dividend.

Consistent with historical practice, Alaska's operating budget for fiscal year 2017 included an appropriation for permanent fund dividends that authorized the transfer of money from the earnings reserve account to the dividend fund for the payment of 2016 dividends. [Exc. 296] The appropriation authorized about $1.36 billion for the dividends and related costs. [*Id.*]

On June 28, 2016, the Governor exercised his line-item veto power to reduce the appropriation to $695,650,000. [App. 1] After veto, the appropriation provides:

> The amount ~~authorized under AS 37.13.145(b)~~ for transfer by the Alaska Permanent Fund Corporation on June 30, 2016, ~~estimated~~ to be ~~$1,362,000,000~~ **$695,650,000**, is appropriated from the earnings reserve account (AS 37.13.145) to the dividend fund (AS 43.23.045(a)) for the payment of permanent fund dividends and

[38] AS 43.23.025.

[39] Summary of Dividend Applications & Payments, Alaska Department of Revenue Permanent Fund Division, http://pfd.alaska.gov/Division-Info/Summary-of-Applications-and-Payments (last visited April 3, 2017).

> for administrative and associated costs for the fiscal year ending June 30, 2017. [App. 1]

The legislature met in a special session from July 11-18, 2016 but did not vote to override the Governor's veto.

II. Procedural History

In September 2016, Wielechowski sued the State alleging that the 2016 dividend was improperly calculated because it was based on the Governor's veto reduction to the permanent fund dividend appropriation. [Exc. 1-24] Wielechowski alleged that the Corporation is statutorily required to transfer to the dividend fund a portion of permanent fund earnings calculated according to two statutes—AS 37.13.140 and AS 37.13.145(b)—rather than the sum appropriated in the operating budget after the Governor's veto. The parties filed cross-motions for summary judgment. [Exc. 25-177]

Following oral argument in November 2016, Anchorage Superior Court Judge William Morse ruled from the bench and subsequently issued a written order. [Exc. 178-89; Tr. 90-93] The court granted summary judgment to the State, concluding that "neither the legislature nor the electorate . . . intended to restructure the governor's authority in the manner that [Wielechowski] propose[s]." [Exc. 188] The court based its decision on constitutional grounds, reasoning that Wielechowski's view required interpreting the permanent fund amendment as implicitly exempting expenditures from the appropriation and veto clauses. [Exc.183-84]

The court recognized the Alaska Constitution's strong grant of spending authority to the governor and found it "unlikely that proponents of the permanent fund would

intend so drastic a change in the governor's role over the budget by such a vague vehicle." [Tr. 91, Exc. 184] The court held that the amendment "makes no mention of any exemption from the constitutional requirement of a separate, annual appropriation bill." [Exc. 183] Thus, the court concluded that while the permanent fund amendment may or may not have permitted a "second dedication" for fund income, it made the "least sense" to construe the clause as exempting the income from the threat of a gubernatorial veto "without expressly stating that intention." [Exc. 186] Indeed, because the permanent fund was established as a savings account for use when the State's natural resources ran out, the court found that the need for oversight of those savings when revenues are falling would be, if anything, greater. [Exc. 186-87] For these reasons, the court would not infer that the constitutional amendment was meant to weaken the appropriation or veto authority. [Exc. 188]

STANDARD OF REVIEW

This Court reviews a grant or denial of summary judgment de novo.[40] The Court applies its independent judgment when interpreting constitutional provisions or statutes.[41] The Court adopts the "rule of law that is most persuasive in light of precedent, reason, and policy."[42] Constitutional provisions that potentially conflict must be harmonized if possible.[43] Likewise, the Court should "if possible construe statutes so as to avoid the

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40 *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014).

41 *Id.* at 655.

42 *Ketchikan Gateway Borough*, 366 P.3d at 90 (citation omitted).

43 *Schmidt*, 323 P.3d at 656.

danger of unconstitutionality."[44] When interpreting the constitution, the Court looks at "the meaning that the voters would have placed on its provisions" and gives "deference to the intent of the people."[45]

ARGUMENT

The permanent fund amendment created a savings account for current and future generations of Alaskans; it did not create an exception to the constitution's established rules for spending state money. The legislature's annual appropriation for dividends thus has not been a mere formality, but rather is a necessary step to authorize the spending of that money. And the Governor's veto prevents the expenditure of the vetoed money absent a legislative override.

I. The Alaska Constitution does not permit the legislature to dedicate permanent fund income or to spend it as dividends without annual appropriation and opportunity for veto.

A. The appropriations, veto, and dedicated funds clauses give the legislative and executive branches annual control over state spending.

When analyzing the constitutional clauses governing state spending, this Court's analysis "begins with the Alaska Constitution" not with the wording of a particular statute or the policy reasons behind the statute, as Wielechowski urges.[46] [*See, e.g.*, At. Br. 6-12] No legislative intent, no matter how clearly expressed, can exempt the dividend fund statutes from constitutionally imposed requirements. Because Wielechowski's interpretation of the dividend statutes—mandating automatic spending for the dividend

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44 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (quoting *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978)).

45 *Hickel v. Halford*, 872 P.2d 171, 177 (Alaska 1994) (citations omitted).

46 *See Knowles II*, 21 P.3d at 371; *Ketchikan Gateway Borough*, 366 P.3d at 101.

without appropriation or chance for gubernatorial veto—conflicts with the constitution, the Court should affirm the superior court's decision rejecting his claims.[47]

The appropriations and veto clauses of the Alaska Constitution should be given their plain meaning: that expenditure of money from the state treasury requires a legislative appropriation subject to gubernatorial veto. The appropriations and veto clauses, commonplace in state constitutions, generated little debate at Alaska's constitutional convention. In fact, the delegates chose to create "an especially strong form of the item veto, allowing the governor to wield great influence during the budgetary process" as compared to the President and governors in other states.[48] Delegate Rivers explained that this enhanced veto power "would allow somewhat more power to lie in the strong executive."[49] The line item veto was designed to allow the governor to limit state expenditures and to discourage "logrolling" in appropriation bills—i.e., cobbling together provisions supported by various legislators in order to create a majority.[50]

The Alaska Constitution's dedicated funds clause is also intended to maintain control over the state budget. As the Court noted recently, the delegates crafted the dedicated funds clause "to avoid the evils of earmarking, which [they] feared would 'curtail[] the exercise of budgetary controls and simply [would] amount[] to an abdication

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47 *See Andrade*, 23 P.3d at 71 (holding Court must construe statutes in way that avoids danger of unconstitutionality if possible).

48 Nicholas Passarello, *The Item Veto and the Threat of Appropriations Bundling in Alaska*, 30 Alaska L. Rev. 125, 133 (2013).

49 Proceedings of the Alaska Constitutional Convention ("PACC") Day 55 (Jan. 16, 1956).

50 *Knowles II*, 21 P.3d at 367, 371 n.33.

of legislative responsibility.' The delegates sought to protect State control over state revenue and to ensure legislative flexibility."[51]

Against this constitutional backdrop, Wielechowski's arguments about the meaning of the dividend statutes are unpersuasive. The legislature cannot circumvent the appropriations, veto, and dedicated funds clauses by enacting statutes that allow spending without appropriations. No Alaska precedent permits spending unappropriated money from the state treasury (with a possible exception to fund constitutional obligations),[52] and the dividend fund is unquestionably within the state treasury.[53] Wielechowski does not explain why the plain words of the appropriations clause do not apply to an expenditure for dividends, which are a legislative, not constitutional, entitlement.[54]

Interpreting the dividend statutes to mandate the automatic spending of state revenue on the dividend would also violate the spirit of the appropriations, veto, and dedicated funds clauses. Wielechowski argues that the dividend does not offend the purpose of the dedicated funds clause because of its "exceptionally fair and benevolent

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51 *Ketchikan Gateway Borough*, 366 P.3d at 101.

52 *See Knowles II*, 21 P.3d at 378 ("[L]egislatures do not have to fund or fully fund any program (except, possibly, constitutionally mandated programs)."); *Simpson v. Murkowski*, 129 P.3d at 447 (noting lack of a viable claim that a constitutional right was violated by the veto). *Cf. Ketchikan Gateway Borough*, 366 P.3d at 101 (holding required local contributions paid by local communities directly to local schools never enters state treasury and thus does not need to be appropriated from it); *Thomas v. Rosen* 569 P.2d 793, 795-97 (Alaska 1977) (discussing debt obligations).

53 AS 43.23.045 (establishing dividend fund "as a separate fund *in the state treasury*") (emphasis added).

54 *Ross v. State, Dept. of Revenue*, 292 P.3d 906, 910 (Alaska 2012) (holding that "PFDs are not basic necessities or a fundamental right;" they are "a matter of grace, a governmental 'benefit' indistinguishable from other forms of social welfare").

nature." [At. Br. 29] But the purpose of this clause is not to avoid spending money on unworthy causes, it is to prevent lawmakers from losing control over state revenue.[55] And stripping the government of control over dividend expenditures would have a particularly disabling impact in the current budget climate, when permanent fund net income exceeds the amount of all other incoming state revenue.[56] Depriving the legislature of annual control over the dividend would thus result in a court-mandated abdication of budgetary controls. Accordingly, Wielechowski's interpretation of the dividend statutes is inconsistent with the constitution.

B. Wielechowski cannot prevail by focusing only on the dedicated funds clause without addressing the appropriation and veto clauses.

Although the superior court's decision rested on an analysis of the veto and appropriations clauses, Wielechowski focuses on only one of the three constitutional provisions that conflict with his claims—the dedicated funds clause. [Tr. 92, At. Br. 12-29] He relies on a largely implicit assumption that *if* fund income could be dedicated without offending the dedicated funds clause, the appropriation and veto clauses would no longer apply. [*See* At. Br. 12-29] But this assumption is incorrect; Wielechowski's construction of the dividend statutes must harmonize with all three constitutional provisions. As this Court recently held in *State v. Ketchikan Gateway Borough*, "while all

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55 *State v. Alex*, 646 P.2d 203, 209 (Alaska 1982).

56 Specifically, in fiscal year 2016 unrestricted general fund revenues were $1.5 billion, while permanent fund net income under AS 37.13.149 was $2.2 billion. Alaska Department of Revenue Tax Division, Revenue Sources Book (Fall 2016) ("Fall 2016 Revenue Book", http://tax.alaska.gov/programs/documentviewer/viewer.aspx?1321r; Alaska Permanent Fund Corporation, Annual Report (2016), available at http://www.apfc.org/_amiReportsArchive/2016_09_AR.pdf.

three clauses—the dedicated funds clause, appropriations clause, and governor's veto clause—address power over the state budget, the plain meaning of each clause reveals three distinct purposes."[57] They are related but not duplicative.

Wielechowski relegates to a single footnote his explanation of why "funds that are specially dedicated by their constitutional authority and statutory character can neither be appropriated nor subject to the governor's veto." [At. Br. 31 n.131] Wielechowski supports this sweeping assertion by citing *Southeast Alaska Conservation Council v. State* (*SEACC*).[58] But far from holding that the dedicated funds and appropriations restrictions must rise and fall together, the Court held there that a dedication of future revenue from university land violated the dedicated funds clause even though the land transfer was not subject to the appropriations clause or veto.[59] Wielechowski overlooks the holding and instead cites a sentence that characterizes a particular account as "a non-dedicated account subject to legislative appropriation." [At. Br. 31 n.131] Wielechowski treats this description as a definition of "non-dedicated funds," which it was not. [*Id.*] *SEACC* does not stand for the proposition that dedicated funds need not be appropriated.

A dedicated fund is a source of money with binding restrictions on its use, not money that can be spent without appropriation subject to veto. As the Court explained in *Sonneman v. Hickel*, "[o]ne method of dedicating funds is to preclude the legislature from

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57 *See* 366 P.3d at 101.

58 202 P.3d 1162, 1173 (Alaska 2009).

59 *Id.* at 1166 (noting that the bill transferring land was held not to be an appropriation because it was not money in prior case *Alaska Legislative Council v. Knowles*, 86 P.3d 891, 893 (Alaska 2004)) and 1169 (holding that revenue from land transfer could not be dedicated to University).

appropriating designated funds for any reason other than a designated purpose. Another less direct method would be to preclude agencies from requesting monies from designated funds or revenue sources."[60] Neither of these approaches involves state expenditures without an appropriation subject to veto. And there is nothing mutually exclusive about dedicated funds and appropriations—a dedication may *restrict* the legislature's appropriation power, but it does not eliminate it.

And Alaska's experience with dedicated funds demonstrates that dedicated funds are not automatically exempt from appropriations and veto. For example, one of the few dedicated funds in Alaska is the territorial-era dedication of cigarette taxes and tobacco license fees under AS 43.50.010–.180,[61] which is allowed under the exception in the dedicated funds clause for pre-existing dedications.[62] This tobacco revenue is dedicated to Alaska's schools; but the legislature nevertheless appropriates it annually for that purpose.[63] Likewise, Alaska's Fish and Game Fund, although a dedicated fund, nonetheless requires annual appropriation. [Exc. 64-65] Accordingly, Wielechowski

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60 *Sonneman v. Hickel*, 836 P.2d 936, 940 (Alaska 1992).

61 AS 43.50.140 provides that "[t]he proceeds derived from the payment of taxes, fees, and penalties under AS 43.50.010—43.50.180, and the license fees received by the department shall be paid into a state fund entitled 'School Fund,' and shall be used exclusively to rehabilitate, construct, and repair the state's school facilities, and for the costs of insurance on buildings comprising school facilities during the rehabilitation, construction, and repair, and for the life of buildings."

62 *See Ketchikan Gateway Borough*, 366 P.3d at 93 (discussing grandfather provision); 4A Proceedings at 2370, 2408, 2415 (Jan. 17, 1956) (identifying fuel and tobacco taxes as largest existing earmarks); ch. 187 SLA 1955 (enacting what later became AS 43.50.010–43.50.180).

63 *See e.g.*, HB 256, sec. 24(k)(1) (2016) (appropriating "$18,300,000 from the School Fund (AS 43.50.140)").

cannot prevail just by convincing the Court that his view of the dividend statutory scheme is permitted by the dedicated funds clause—he must also explain why dividend expenditures are exempt from the appropriations and veto clauses.

C. The permanent fund amendment did not create an exception to constitutional spending rules for fund income.

Wielechowski argues that the permanent fund amendment enabled a "special dedication" of fund income exempt from the appropriations and veto process. But because the plain language of the amendment does not reflect this, the legislative history does not support it, and the voters were not told about it, the Court should not interpret the permanent fund amendment in that manner. Although the meaning of the last phrase of the amendment—"unless otherwise provided by law"—was the subject of some debate shortly after passage, the longstanding executive and legislative interpretation is that this language does not exempt fund income from spending rules.

1. The plain language of the amendment does not support an exception to constitutional spending rules for fund income.

The permanent fund amendment effected two related changes to the Alaska Constitution. First, it added section 15 to Article IX, creating the permanent fund and providing that at least 25 percent of specified natural resource revenues would be dedicated to the fund and used only for authorized investments.[64] Second, to avoid contradiction in the constitution, the amendment altered section 7 of Article IX—the dedicated fund prohibition—to create an exception for the permanent fund. After amendment, it read in relevant part: "The proceeds of any state tax or license shall not be

[64] Alaska Const. art. IX, § 15.

dedicated to any special purpose, except as provided in section 15 of this article…"[65]

The plain language of section 15 creates only one dedication, that of the permanent fund principal. The proceeds of a specific source of state revenue are dedicated—i.e., pledged in a way that limits use—to a special purpose (the permanent fund). This is the dedication that required an exception to the dedicated funds clause. Unlike the principal, the income from the fund is available for spending as demonstrated by its default deposit in the general fund. Section 15 thus makes no dedication of the fund's income. It does however, indicate that deposit of the income in the general fund is not mandatory—it occurs "unless otherwise provided by law."

According to Wielechowski, the final clause of section 15—"unless otherwise provided by law"—means that the exception to the dedicated funds clause applies to permanent fund income as well as to the principal. He reads the phrase expansively to permit the legislature to enact statutes to spend fund income however it wishes, including to create additional dedicated funds unspecified in section 15. But as explained above, even if this were true, a dedicated funds exception for fund income would not exempt expenditures of fund income from the appropriations and veto process.

And in any event, the plain language does not support Wielechowski's view that the exception to the dedicated funds clause applies to permanent fund income. The exception exempts only dedications "as provided in" section 15, and section 15 only dedicates certain oil royalty money to the fund principal. Because section 15 does not dedicate the fund's income, it did not "provide" for a dedication of fund income; instead,

[65] Alaska Const. art. IX, § 7.

it set as a default the deposit of the income into the general fund for appropriation. And whatever else the legislature might do with the income besides spend it via the general fund—e.g., depositing it in a different fund like the earnings reserve account, reinvesting it in the permanent fund, or using it for debt service—it must act "by law," meaning authorized by legislative enactment, consistent with the constitution. As this Court has explained, the phrase "provided by law" in the constitution "empowers the legislature to construct any *otherwise constitutional* scheme" pertaining to the subject at hand.[66] Wielechowski turns the meaning of "by law" on its head by construing it to authorize a future legislature to disregard other constitutional provisions that govern state spending.

Further, shoehorning future unmentioned dedications into the dedicated fund's exception would be contrary to "precedent, reason, and policy."[67] Had the legislature wanted to exempt permanent fund income from the clause, it could have done so clearly and easily by substituting the resolution's final sentence with: "Income from the permanent fund shall be deposited in the general fund or may be dedicated to a particular purpose." But as is, the dedicated funds exception extends only to the permanent fund itself, and the legislature may only deposit the income into the general fund or elsewhere in accordance with the law.

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66 *City of Douglas v. City and Borough of Juneau*, 484 P.2d 1040, 1044 (Alaska 1971) (emphasis added) (holding that where cities may be "dissolved in the manner provided by law," the legislature was allowed to delegate through statute the power to perform the dissolution); *see also* Alaska Const. art. 12, § 11 (clarifying that "by law and by the legislature . . . are used interchangeably when related to law-making powers.").

67 *Ketchikan Gateway Borough*, 366 P.3d at 90.

2. The legislative history of the amendment does not support an exception to the constitutional spending rules for fund income.

Wielechowski asserts that the legislature intended to permit the dedication of permanent fund income, "including for dividends," when it added the phrase "unless otherwise provided by law" to section 15. [At. Br. 23-28] But the legislative history does not support this view and provides no indication that the legislature intended an exception from the appropriation and veto clauses. Instead, the legislative history reveals that the dedicated funds exception was drafted for the permanent fund principal, that lawmakers rejected language dedicating fund income, and that the phrase "unless otherwise provided by law" was recognized to be unnecessary for dividend spending.

Wielechowski's legislative history encompasses only the beginning of the amendment's bicameral evolution, but even that history does not support his conclusion that the "legislature specifically designed [the amendments] to permit dedication of funds, including for dividends." [At. Br. 23] The first version of HJR 39, introduced in June 1975, amended only article IX, section 7, adding a new exception to the dedicated funds prohibition for "the dedication of the proceeds of mineral lease bonuses." [Exc. 194] This version did not yet create a savings account, much less provide for the dedication of income from such an account. The second version of HJR 39, introduced in January 1976, simply excepted section 15 from the prohibition against dedicated funds, and at that time section 15 provided that fund income would be deposited in the general

fund. [Exc. 195] Thus, this version also showed no intent to dedicate fund income, let alone to avoid appropriations and veto for the income, and the language "as provided in Section 15" referenced only the creation of the permanent fund itself.

Wielechowski's primary support for his claim that the legislature intended to permit a dedication of income is (1) a brief exchange between Representative Hugh Malone and Commissioner of Revenue Sterling Gallagher about whether fund income could be dedicated to debt service; and (2) a statement by one of Malone's aides that the phrase "unless otherwise provided by law" was considered to be "a sufficient legal peg so that income from the permanent fund could be pledged in the bond covenants for the security of state agencies or … it could also permit the legislature to make a dividend payment to citizens of Alaska from the income of the fund." [At Br. 25-26] But as Wielechowski acknowledges, the legislators knew they could pay a dividend from the income via the general fund without adding "unless otherwise provided by law," and immediately recognized this within the debate. [At. Br. 26, 27]

In fact, the discussion reveals that the "unless otherwise provided by law" clause in the House version was meant to allow use of permanent fund income for debt servicing.[68] This demonstrates that even at this stage, "unless otherwise provided by law" was not intended to enable automatic spending on dividends, but rather to enable the use of income for borrowing as well as for saving or spending. And far from recommending that the legislature create exceptions to constitutional provisions, the suggestion

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[68] *See* At. Br. 26 (quoting Jim Rhode); Morgan Guaranty Report, *supra* n.26, at 14.

originated with financial consultants, who "admit[ted] to an ignorance of the provisions of the Constitution of Alaska."[69]

Likewise, the March 24, 1976 House Journal notes that Wielechowski cites mention nothing about dedicating the fund income or avoiding the appropriation and veto clauses, stating instead that "[t]he purpose of the language in the last sentence of the resolution is to give future legislatures the maximum flexibility in using the Fund's earnings—ranging from adding to fund principal to paying out a dividend to resident Alaskans." [Exc. 330]

And Wielechowski's rendition of the legislative history largely ends with the House Journal notes in March 1976, thus ignoring significant subsequent developments in the other body. [*See* At. Br. 23-27, 28 n.118] The Senate State Affairs Committee substantially revised the House version and expressly provided for dedication of some of the fund income to the permanent fund, and allowed further dedications:

> Fifty per cent of all the proceeds from mineral lease rentals, royalties, royalty sales, revenue sharing payments and bonuses received by the state and *ten per cent of the income from the permanent fund shall be placed in a permanent fund*, the principal of which shall be used only for those income producing investments specifically designated by law as eligible for permanent fund investments. *The legislature may dedicate additional proceeds both as to source and percentage* which shall become a part of the principal of the fund. Any additional dedication may be revoked by the legislature, but revocation may not make the principal amount in the permanent fund subject to appropriation. Other income from the permanent fund shall be deposited in the general fund. [Exc. 201-02 (compare with Exc. 199-200)]

This version shows that legislators knew how to expressly dedicate permanent fund

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69 Morgan Guaranty Report Page, *supra* n.26, 14.

income and how to expressly permit other dedications. It also deleted the phrase "unless otherwise provided by law," undermining Wielechowski's suggestion that the earlier brief exchange in the House Finance Committee settled the issue of including the phrase and established its meaning. Instead, the draft progression demonstrates a less monolithic intent with respect to the use of permanent fund income.

The resolution was then referred to the Senate Resources Committee, which did not support its altered language.[70] This committee made changes after hearing administration comments opposing the new language because it provided too much undefined dedication power:

> it brings before the people of the State, next November, a very odd situation where they're asked to consider several specific dedications and then empowering the legislature to make essentially omnibus dedication thereafter. And we think that's perhaps just a typographical or conceptual mistake on the part of the drafter. Not something that was fully intended. In any case we do not support that as it's simply not an appropriate issue to bring before the people.[71]

Although this commentary addressed the committee substitute's authorization for the legislature to "dedicate additional proceeds both as to source and percentage," its hesitation is instructive and weighs against Wielechowski's claim that "unless otherwise provided by law" was intended to "empower the legislature to make essentially omnibus dedication[s]" of fund income. And at least the grant of authority to make omnibus dedications was plain on the face of the Senate State Affairs Committee Substitute. Despite this history, Wielechowski asks the Court to read a dramatic expansion of

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[70] Audio Exc. (Senate Resources Comm. 1, May 15, 1976 at 9:15—9:50); 1976 Senate J. 735 [Exc. 331].

[71] Audio Exc. (Senate Resources Comm. 2, May 15, 1976 at 11:20—11:50).

legislative power into the vague phrase "unless otherwise provided by law." Yet Wielechowski has not identified a single statement by any legislator indicating that this language was meant to allow the legislature to dedicate fund income.[72]

If the legislature wanted to be able to dedicate fund income, its lack of discussion about it is remarkable, particularly when the Senate State Affairs Committee stripped out the language allegedly authorizing such dedications. When the Senate Resources Committee heard the bill on May 15, 1976, Senator Orsini specifically asked Representatives Malone and Gruening which aspects of the House version were particularly important to House members. Neither identified the provision on the use of fund income as a central component of the resolution.[73] Indeed, although the Resources Committee readopted the House version, including the "unless otherwise provided by law" language, it hardly discussed the income, focusing instead on which sources of revenue to place in the fund and what percentage to designate.[74] [*See* Exc. 203-04]

Thus, the legislative history does not support Wielechowski's claim that the legislature intended to amend the permanent fund resolution to exempt fund income from the dedicated funds prohibition, let alone the appropriation or veto clauses. And even if

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[72] For example, when the bill was presented to the Senate Resources Committee, the purpose of the phrase "unless otherwise provided by law" was described as "broadening" the use of the fund income, not as an authorization to dedicate the income. Audio Exc. (Senate Resources Comm. 1, May 15, 1976 at 6:40—7:10).

[73] Audio Exc. (Senate Resources Comm. 2, May 15, 1976 at 25:50—26:50; at 1:14:00—1:15:12).

[74] *See* Audio Exc. (Senate Resources Comm., May 15, 1976 and May 20, 1976).

such a legislative intent existed, it would not be meaningful unless reflected in the information provided to voters about the meaning of the amendment.[75]

3. Voters were not informed that the phrase "unless otherwise provided by law" would create an exception to constitutional spending rules for fund income.

The parties agree that voters' understanding is crucial to the Court's task of interpreting a constitutional amendment. [*See* At. Br. 16] The Court "must 'look to the meaning that the voters would have placed on its provisions,'"[76] focusing on the "plain ordinary meaning" that the voters would have given the terms of the amendment rather than construing it "abstrusely."[77] This plain ordinary meaning is discussed above,[78] but the Court will also "look to any published arguments made in support or opposition to determine what meaning voters may have attached to the initiative."[79] Here, neither the language of the amendment nor the public debate informed Alaskans that permanent fund income could be dedicated or spent without appropriation and opportunity for veto.

While Wielechowski asserts that "the people would have anticipated that any dedicated funds restrictions would be rendered ineffective against the entirety of section 15," he identifies nothing concrete that informed voters that "unless otherwise provided by law" would allow the legislature to avoid constitutional spending rules for the income.

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75 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007) (The court should "look to any published arguments made in support or opposition to determine what meaning voters may have attached to the initiative.")

76 *Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994) (quoting *Division of Elections v. Johnstone*, 669 P.2d 537, 539 (Alaska 1983)).

77 *Id.* at 177.

78 *See supra* subsection I(C)(1).

79 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007).

[At. Br. 18] In fact, very little of the public debate focused on fund income and nothing informed voters that the amendment would allow the legislature to dedicate fund income to any purpose it favored.

For example, Wielechowski characterizes the ballot summary language as "definitively demonstrat[ing] that permanent fund income could be dedicated." [At. Br. 17] The ballot summary provided to voters stated as follows:

> This proposal would amend Article IX, Section 7 (Dedicated Funds) and add a new Section to Article IX, (Alaska Permanent Fund) of the Alaska Constitution. It would establish a constitutional permanent fund into which at least 25 percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payment and bonuses received by the State would be paid. The principal of the fund would be used only for income-producing investments permitted by law. *The income from the fund would be deposited in the State's General Fund and be available for appropriation for the State unless law provided otherwise.* [314A]

Wielechowski's discussion emphasizes part of the summary's sentence pertaining to income: "The income from the fund would be deposited in the State's General Fund and *be available for appropriation for the State unless law provided otherwise*." [At. Br. 17-18 (emphasis in brief)] By deemphasizing "[t]he income from the fund *would be deposited in the State's General Fund*" Wielechowski ignores the true dichotomy presented: the income could either be deposited in the general fund *or* the legislature could use it in some other manner by passing a law. The amendment asked voters to put a category of money into a locked savings account for the future, informed them that the income would be available for general fund spending, and implicitly also informed them that such spending was not mandatory—the income could be saved or deposited outside the general fund or used in some other lawful manner. The options outside the general

fund were not explained, but the amendment specified that the legislature must determine any other use in accordance with the law.

While Wielechowski speculates that voters would construe "available for appropriation unless law provided otherwise" to mean that money could be legislatively dedicated and annually spent without appropriation or gubernatorial oversight, he identifies no contemporaneous source articulating that strained interpretation to voters.[80]

Nor do the official statements supporting and opposing the amendment support Wielechowski's view. Neither statement addressed how the fund income would be used, but the supporting statement emphasized saving for the future when the State's nonrenewable resources would be less plentiful—a focus inconsistent with the notion that the fund's income could be tied up through dedication:

> Today, as the result of anticipated oil and gas revenues, Alaska stands on the brink of unprecedented prosperity. No one, but no one, argues that these non-renewable resources will last but for a few decades. Similarly, no one should fail to recognize that in those years ahead the cost of state government will continue to spiral upwards. Now is the time to ask ourselves the question: "When the oil and gas is depleted, where will the funds to feed our giant government come from?" The answer is: the "Permanent Fund."[81] [Exc. 241]

The supporting statement also said that locking up some incoming revenue in the

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[80] Wielechowski also cites *State v. A.L.I.V.E. Voluntary*, to support his argument that voters might have supported the amendment because it would allow the legislature to use the income through "particularized laws" "unlike" the "usual appropriations and government spending." [At. Br. 20 (citing 606 P.2d 769, 772 (Alaska 1980)).] But *A.L.I.V.E. Voluntary* held just the opposite—that the legislature cannot effect lawmaking in a manner that bypasses the ordinary legislative process. 606 P.2d at 772. The Court held that the ordinary and mandatory constitutional mechanics of lawmaking—not extraordinary process as Wielechowski advocates—"engender a responsible legislative process worthy of the public trust." *Id.*

[81] Statement In Favor of Proposition No. 2.

permanent fund might contribute to "cutting costs or at least holding even" while also requiring "elected officials to pause, reflect and research any proposal before blindly authorizing expenditure of taxpayers' monies." [Exc. 241] Wielechowski argues that this language "would have given voters an understanding that approval would lead to different, more thoughtful legislative choices than spending-as-usual." [At. Br. 21 n.85] But nothing about a prediction of more restrained legislative spending suggests that the amendment grants the legislature authority to dedicate fund income and spend it without annual appropriation or opportunity for veto.

Similarly, Governor Hammond gave no indication that the fund income could be earmarked by one legislature for spending outside of the appropriation process. To the contrary, he explained that "[t]he income from the Permanent Fund will be available for general appropriation by the legislature, but the principal of the fund may not be touched. It could only be removed from the fund by another constitutional amendment."[82] [Exc. 237] Thus, Governor Hammond expressly contrasted the amendment's treatment of fund income with its treatment of fund principal, noting that the former, but not the latter, would be subject to appropriation. Likewise, his statement that "it is for the people, not the governor, nor the legislature singly to determine how your savings are invested and the interest used," directly contradicts Wielechowski's theory that the people knew the legislature would have authority to dedicate and automatically spend the money without the usual checks and balances. [*See* At. Br. 21; Exc. 237]

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[82] Gov. Jay Hammond, *The Governor's Point of View,* Anchorage Times, October 27, 1976, at 6 [Exc. 237-38].

And Alaska's largest newspapers emphasized the flexibility that the proposed amendment would give the legislature with respect to the fund:

> Nobody knows exactly how the fund will be used; that decision will be made by legislative action in the future. Although the fund is protected against certain kinds of usage, its precise organization and management have been left flexible by designers… [t]he flexibility of allowing future legislatures to decide on precise uses will prevent the "locked up" circumstance…There have been many proposals for possible fund uses. They range from paying direct dividends to Alaskans to using the money to underwrite such vast projects as hydroelectric dams. [83]

The notion that future legislatures would have flexibility in how to spend the money could not have alerted voters that the amendment would allow dedication of the fund's *income* as well as the fund itself. To the contrary, a dedicated fund is by definition "locked up" and thus voters were, in effect, promised the opposite of what Wielechowski suggests. Another editorial similarly emphasized future legislative flexibility:

> Exactly how the permanent fund is set up would be the job of future legislatures. Our elected representatives, by law, would prescribe how the money is to be invested. That may demand a different application of the fund from one year to the next, but flexibility to meet changing demands is guaranteed by current legislation. Likewise, future legislators would be able to decide what to do with the considerable earnings of the fund. [84]

No reasonable voter informed that "future legislators would be able to decide what to do with" fund income would have supposed that this meant income could be dedicated and spent without any appropriation, contrary to existing constitutional requirements.

Wielechowski quotes an editorial noting that the payment of "direct dividends to Alaskans" was a "possible fund use," but does not explain how this informed voters that

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[83] *Permanent Fund Raises Use Issue,* Anchorage Daily News, 2 (Oct. 22, 1976). [Exc. 235-36]

[84] Editorial, *2 Plans, 1 Fund,* Anchorage Daily News, 6 (April 21, 1976). [Exc. 332]

dividends would be paid outside of the appropriations process. [At. Br. 22; Exc. 317A] Indeed, he concedes elsewhere that dividends would not require even a dedication. [At Br. 27] The mere use of the word "dividend" does not convey that income can be spent outside of traditional constitutional restraints and irrespective of economic conditions. Wielechowski's other quotation—from the same editorial—characterizes the amendment as "a chance to let average Alaskans have a stake in managing some of the oil wealth," but this comment is not even about a possible dividend and thus offers no support to his claims.[85] [At. Br. 22]

Without even a single clear public statement that the proposed amendment would permit fund income to be dedicated and spent without appropriation or opportunity for veto, voters had no reason to believe this would occur.

4. The Court can give meaning to the phrase "unless otherwise provided by law" without adopting Wielechowski's view.

Wielechowski argues that interpreting "unless otherwise provided by law" to mean anything short of an expansive exemption from the dedicated funds, appropriations, and veto clauses "risks rendering [the term] nugatory." [At. Br. 16 n.64] He explains that "if the only option for providing 'by law' was to create accounts or funding mechanisms that would still be subject to appropriation, those accounts and funding mechanisms could simply draw from the general fund under the section 15 default term" rendering it unnecessary to have permitted anything to be "provided by law." [At. Br. 16 n.16]

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[85] The article Wielechowski quotes continues, "Malone says that if the fund is used, for example, to make business loans available to Alaskans, that will be, in effect, letting them personally manage part of the state revenue." Thus, the quoted comment was not a reference to possible dividend payments. [Exc. 317A]

But this is not so. As a variety of legal opinions from the late 1970s and early 1980s demonstrates, this language is subject to a number of plausible interpretations that do not suffer the same constitutional infirmities as Wielechowski's interpretation. For example, the language could authorize deposit of fund income back into the principal,[86] or appropriation directly into a reserve fund to serve as security against repayment of debt.[87] Although Wielechowski suggested below that a reserve fund that relies on appropriation would be worthless as a guarantee for loan repayment, in fact, a well-established market exists for bonds backed by appropriations.[88]

And while dividends could be paid from the general fund, the "unless otherwise provided by law" language authorizes the legislature to pay them directly from the permanent fund income by passing an appropriation bill. The legislature could also deposit fund income in a fund other than the general fund, which it has done by creating the earnings reserve account within the permanent fund. It can and has exercised its authority to appropriate money from this fund to pay dividends. Far from being meaningless, as Wielechowski suggests, [At. Br. 16] the ability to retain the money in a separate fund within the permanent fund—rather than the general fund—has kept the money invested while it awaits appropriation and has created an expectation of continued

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86 *See e.g.*, Avrum Gross to Jay Hammond, (June 28, 1976) [Exc. 334] (suggesting this was only other place income could be deposited); 1983 Inf. Op. Att'y Gen. (Jan 5; 366-328-83); 1983 Inf. Op. Att'y Gen. (Mar. 10; 366-484-83).

87 *See e.g.*, 1979 Inf. Op. Att'y Gen. (Apr. 11; J-66-614-79).

88 *See e.g., generally Lonegan v. State*, 176 N.J. 2 (2003) (reviewing wide variety of debt issued by New Jersey agencies that is supported by security pledges that are subject to annual appropriation); Alaska Public Debt Report 2015-16 at 3, 5.

annual dividend payments. The history of the dividend program makes clear that it is possible to have such a program without also abandoning Alaska's constitutional framework for annual spending by appropriation subject to veto.

In fact, allowing deposit in another account is precisely how the Court interpreted "unless otherwise provided by law" in *Hickel v. Cowper*, when it described the permanent fund earnings reserve account:

> This fund is established as a separate account within the permanent fund under the authority of the last sentence of Article IX, § 15 of the Alaska Constitution: "All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law." *AS 37.13.145(a) provides otherwise*: "The earnings reserve account is established as a separate account in the fund. Income from the fund shall be deposited by the corporation into the account as soon as it is received."[89]

Thus, in *Hickel* the Court recognized that the final clause of section 15 authorized the deposit of fund income into a separate earnings account rather than the general fund.

Of course, this Court need not determine the precise contours of the authority created by the phrase "unless otherwise provided by law" to decide this case. It need only decide whether that language permits the dedication of fund income to pay dividends outside of the constitutional appropriations process. And that question is answered conclusively by the lack of any reference to such power in the plain language of the amendment or in its presentation to Alaska voters in 1976.

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[89] 874 P.2d 922, 934 (Alaska 1994) (emphasis added).

D. The Court's decision in *Hickel v. Cowper* does not alter the appropriations or veto clause analysis.

Wielechowski cites *Hickel v. Cowper*[90] as support for the proposition that permanent fund income can be spent without appropriation. [At. Br. 54-67] But *Hickel* did not discuss what money may be spent without *any* appropriation; it looked at various pots of money to examine whether the legislature had already "validly appropriated" the funds so that they could be spent, or whether the funds were still "available for appropriation."[91] The Court considered the meaning of this term in the context of the constitutional amendment that created the budget reserve fund.[92] As a result, its analysis does not control the issue here: whether permanent fund income may be dedicated and spent by the legislature without *any* appropriation or opportunity for veto.

More specifically, the Court's task in *Hickel* was to determine what voters meant when they approved the constitutional budget reserve amendment, which called for a comparison between the "amount available for appropriation" in one fiscal year with the "amount appropriated for the previous fiscal year."[93] The answer to that question determined ease of access to the constitutional budget reserve fund, and the legislature had attempted to statutorily define "available for appropriation" as including only certain unrestricted revenues received in a particular year, general fund program receipts and

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90 874 P.2d 922 (Alaska 1994).

91 *Id.* at 933.

92 *See* Alaska Const. art. IX, sec. 17; *Hickel v. Cowper*, 874 P.2d at 923.

93 874 P.2d at 928.

balances, and the balance in the statutory budget reserve fund.[94] The governor sued to make access to the budget reserve fund harder, and wanted to define "amount available for appropriation" as "the total funds accessible by the legislature for appropriation."[95] Had the Court adopted the governor's approach, the *Hickel* decision might have served to define the contours of the appropriation clause, but the Court specifically declined to do so.[96] Instead it decided to define "available for appropriation" as excluding money already appropriated and certain other illiquid or committed assets, but including more than the revenue received in a particular year.[97] Because of this middle ground approach, the Court's holding does not address whether permanent fund income must be appropriated before it can be spent.

Wielechowski nevertheless relies heavily on *Hickel* because within the budget reserve context, the Court characterized money as being "automatically" transferred from the earnings reserve account to the dividend fund each year and automatically transferred from the earnings reserve account to the principal for inflation-proofing,[98] apparently unaware that such money is and was annually included in appropriations bills. This mistaken factual description of state spending practice does not determine what the permanent fund amendment means, because the Court was not asked that question. Indeed, the Court spoke more directly about the power involved in paying dividends in

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94 *Id.* at 926-27 (citing AS 37.10.420(a)(1) (1994)).

95 *Id.* at 928.

96 *Id.* at 930.

97 *Id.* at 930-31.

98 *Id.* at 934.

Williams v. Zobel, when it described the first dividend statute as an effort by the legislature to exercise "its appropriations power" over permanent fund income.[99]

The *Hickel* court acknowledged that "[t]here are no statutory or constitutional prohibitions against direct appropriations from [the earnings reserve] account."[100] And Wielechowski does not deny that the legislature can appropriate from the earnings reserve account. [At. Br. 62] Because permanent fund income cannot simultaneously be dedicated to a particular purpose and also be free to be appropriated for any public purpose, this holding establishes that the earnings reserve account is not a dedicated fund. Thus, the only relevant holding of *Hickel*—that the earnings reserve account is "available for appropriation"—is inconsistent with Wielechowski's claim that permanent fund income has been dedicated to pay dividends.[101] And although *Hickel* inaccurately called the transfer of funds between the earnings reserve account and the dividend fund "automatic," it never suggested that the money could leave the dividend fund to pay for dividends without an appropriation.[102] Indeed, it did not discuss the dividend fund at all. Wielechowski's sweeping conclusion—that spending for dividends may occur without appropriation—is simply not found in *Hickel.*

Wielechowski argues that "[t]he term 'appropriation' carries the same meaning for the CBR as elsewhere in the constitutional provisions relevant here." [At. Br. 67] But *Hickel* defines some funds as unavailable for appropriation precisely because the funds

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99 *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), *rev'd*, 457 U.S. 55 (1982).

100 *Hickel v. Cowper*, 874 P.2d at 934.

101 *Id.* at 935.

102 *See id.* at 934.

have already been validly appropriated.[103] Wielechowski addresses this problem in a footnote, where he argues that the Court should disregard *Hickel's* repeated use of "'appropriated,' a 'valid appropriation,' or 'validly appropriated'" when defining a fund as unavailable for appropriation. [At. Br. 67 n.281] He argues that "as those terms are used in *Hickel*, their expressions are perfunctory, referencing forms of the word 'appropriation' but meaning only to describe the general occurrence of a legislative act of devoting funds to a particular purpose and not the technical legislative act of appropriation." [*Id.*] But this footnote fatally undermines his textual point that preceded it—*Hickel* cannot both define the contours of the appropriation power in other constitutional provisions and not actually signify the act of official appropriation.

Wielechowski's argument is also undercut by *Hickel*'s holding that "all amounts actually appropriated, whether or not they would have been considered available prior to appropriation, are available" in the budget reserve context.[104] This holding does two things: first, it again clarifies that "available for appropriation" in this context does not mean "susceptible to appropriation," because the Court clearly contemplates that some funds or assets it had not considered "available" might nonetheless be "actually appropriated" by the legislature. Second, it clarifies that even in the budget reserve context, dividend expenditures are indeed "available for appropriation" because they have been "actually appropriated."

Wielechowski again recognizes this problem only in a footnote, and tries to

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103 *Id.* at 930.

104 *Id.* at 935.

minimize it with the assertion that "[t]his aspect of the holding is incidental to legislative appropriation practice and specific to CBR interpretation only; it does not undermine the Appellants' argument because the legislature cannot actually appropriate the dividend funds." [At. Br. 59 n.237] But the legislature can and does appropriate dividend funds. [Exc. 337-440] And Wielechowski's response begs the very question it purports to answer: Wielechowski wants to use *Hickel* to establish what the legislature cannot appropriate, but argues that its holding that all funds actually appropriated are "available for appropriation" does not apply.

One part of Wielechowski's argument is correct though: the *Hickel* discussion overall is "specific to CBR interpretation only" and not dispositive of the questions before the Court. [At. Br. 59 n.237] *Hickel* does not analyze the appropriations clause to determine what state money falls within it. *Hickel* does not analyze the veto clause. And while *Hickel* touches upon the meaning of "otherwise provided by law" within the permanent fund amendment and observes that it allows deposit of income into the earnings reserve account, it does not analyze the meaning of that amendment in any depth. Nothing in *Hickel* provides that permanent fund income is exempted from the ordinary constitutional rules governing state spending.

In sum, Wielechowski's claims fail because his view of the dividend scheme is inconsistent with the constitutional checks and balances controlling state spending—the dedicated funds, appropriations, and veto clauses. The permanent fund amendment simply did not create an enormous, implicit exception to these requirements.

II. Even if it were constitutionally permissible to do so, the existing dividend statutes do not dedicate permanent fund income for dividends without the need for appropriation or opportunity for veto.

If the Court agrees with the State and superior court that the constitution precludes Wielechowski's statutory interpretation, it need not interpret the legislature's subsequent enactments. But even if the constitution authorizes the legislature to bypass its spending protections for permanent fund income, the legislature has not, in fact, done so. When the current statutory scheme is construed as a whole, it is clear that the legislature intended dividends to be paid via appropriation. This interpretation does not deprive the dividend statutes of meaning, and is supported by the policy underlying them.

A. Read as a whole, including more recent amendments, the dividend statutes demonstrate an expectation of appropriations.

Statutes must be read as a whole, and, when part of a larger framework, must be interpreted in light of the other portions of the regulatory whole.[105] The key statutory provisions pertaining to permanent fund income and dividend spending span four statutes: AS 37.13.140, defining permanent fund income; AS 37.13.145, establishing the earnings reserve account to receive permanent fund earnings and providing for transfers to the dividend fund and for inflation proofing; AS 43.23.025 discussing the amount of the dividend; and AS 43.23.045, establishing the dividend fund.

The statute creating the dividend fund—AS 43.23.045—explicitly references appropriations, referring to "an appropriation to implement this chapter" and "the fiscal

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[105] *Federal Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344, 351 (Alaska 2001).

year in which the appropriation was made."[106] When subsection (d) was added to this statute in 1987, Governor Cowper's transmittal letter noted that "[a]n appropriation has been the vehicle for the 'transfer' of permanent fund income to the dividend fund."[107] In other words, from the 1987 amendments onward the statutory scheme is expressly designed around a concept of appropriations. Wielechowski does not explain how the statutory scheme could mean that dividends are paid without appropriations given the language of AS 43.23.025(a)(1)(B), which provides that the amount available to pay dividends includes "the unexpended and unobligated balances of prior fiscal year appropriations that lapsed into the dividend fund under AS 43.23.045(d)."[108]

A standard rule of statutory construction instructs that "[w]hen interpreting statutes and regulations, seemingly conflicting provisions must be harmonized unless such an interpretation would be at odds with statutory purpose."[109] Alaska Statute 37.13.145(b) says that the corporation "shall transfer" a portion of fund income from the earnings reserve account to the dividend fund, but any internal conflict can be avoided by reading "transfer" to include transfer authorized by appropriation. Such an interpretation is not at odds with the purpose of the dividend program, nor does it create any potential

106 AS 43.23.045(d).

107 1987 House J. 103-104 [Exc. 336].

108 AS 43.23.025(a)(1)(B).

109 *Davis Wright Tremaine LLP v. State, Dep't of Administration*, 324 P.3d 293, 299 (Alaska 2014).

172 pconstitutional problem.[110] To the contrary, it avoids one. Moreover, it accounts for the legislature's consistent practice of appropriating permanent fund income for the payment of dividends from the earliest days of the dividend program. [Exc. 337-440] To harmonize the different provisions of the dividend program, the Court should simply read the language as directory rather than mandatory.[111]

Wielechowski focuses on AS 37.13.145—the earnings reserve account provision—and legislative history from the 1980 and 1982 session laws. [At. Br. 32-54] But his theory that the legislature intended to avoid appropriations does not hold up in light of the consistent historical practice of appropriations for dividends and the subsequent amendments that reference appropriations. Wielechowski argues that subsequent legislative choices cannot alter the meaning of the language that remains from 1982. [At. Br. 54 n.219] But he elsewhere acknowledges that the legislature is free to amend the law to change what happens with permanent fund income. [At. Br. 47-48] This is contradictory. Even if he were correct that some legislators in 1982 thought they were passing a law that did not require appropriation, such intent would not control current statutory language demonstrating an appropriation requirement.

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[110] The dividend program was intended to provide "for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth;" to encourage people to remain in Alaska and "reduce population turnover;" and "to encourage increased awareness and involvement by [Alaskans] in the management and expenditure of the Alaska permanent fund." *See* sec. 1, ch. 21 SLA 1980. None of these purposes is undermined by the constitutional requirement for an appropriation to pay the dividend.

[111] *See, e.g.*, *S. Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768 (Alaska 2007) (holding statutory provision to be directory rather than mandatory despite use of "shall").

And Wielechowski's argument that the original legislation mandated appropriation-free distribution is unconvincing in any event. It requires believing that the legislature took the unusual step of deciding to order the automatic payment of money without the need for normal appropriation—without ever mentioning it—and then proceeded to appropriate the money every single year anyway. Wielechowski does not claim that appropriation-free government spending is a common practice in Alaska—indeed, he provides no other examples of such spending and theorized below that such "automatic" spending of money is only allowed for some fraction of Alaska's few dedicated funds. [Exc. 65] Given the novelty of the alleged plan, why did the legislature not mention that (1) the dividend fund was a dedicated fund and (2) permanent fund income would be transferred into it and spent without the need for annual appropriation? Presumably, the legislature did not say this because it was not doing this.

Wielechowski suggests that the word "transfer" in AS 37.13.145(b) must mean "automatically transfer without annual appropriation" because the 1980 legislature considered using the word appropriation differently in prior forms of the bill, and referred to appropriations from the general fund to supplement the dividends. [At. Br. 39] But the final 1980 version of the dividend statute called for appropriation power over both the transfer and the end expenditure. In 1980, AS 43.25.050(b) provided that 50% of permanent fund income would be "transferred" into the fund each year, and subsection (c) provided for "appropriation" from the general fund to ensure a dividend of at least $50. The next statute, AS 43.23.060, provided that "by the 10th day of each regular session, [the department shall] present a request to the legislature for an appropriation

from the general fund to the dividend fund to satisfy the requirements of AS 43.23.050." [Exc. 257] Alaska Statute 43.23.060 thus called for an appropriation request governing the transfer. A 1983 attorney general opinion sowed confusion by suggesting that money had been transferred to the dividend fund in the past without appropriation—and recommending ceasing that practice immediately [Exc. 293]—but in fact, as discussed above, the legislature consistently made appropriations for dividends. Although the language changed in 1982 (presumably due to a change in the timing of when the appropriation amount would be known under the new legislation), the 1980 language is significant because Wielechowski relies heavily on the alleged meaning that the 1980 lawmakers put on the word "transfer" to argue for its intended meaning in 1982.

Adopting Wielechowski's interpretation is not necessary to give meaning to the formula within the dividend statute. The formula specifies a "calculable percentage" of the permanent fund to be spent on dividends to provide a starting point and soft (non-binding) pledge of money. Longstanding Alaska practice in a number of arenas, including state funding for public schools, retirement payments, and power cost equalization payments include non-binding formulas.[112] These formulas carry weight even though the legislature is bound by its constitutional obligations to appropriate the money before it can be spent. They help frame the debate and enable consistency from year to year. The formulas are also effective: until last year's fiscal crisis, appropriations to the dividend fund have been sufficient to fully cover the formula spending.

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[112] *See* AS 14.17.410(a) (school funding formula); AS 14.25.085 and AS 39.35.280 (contributions to pension plans based on formula); AS 42.45.085(a) (power cost equalization formula).

Moreover, the legislature's contemporaneous action in proposing the 1982 constitutional amendment limiting appropriations—article IX, section 16—strongly undercuts any contention that it had charted a bold new appropriation-free course for permanent fund dividends. That constitutional amendment contained the proviso that its new limit did not apply to "appropriations for Alaska permanent fund dividends."[113] Wielechowski argues that these words were placed in the constitution to address a one-time appropriation, or even past appropriations. [At. Br. 56 n.224] But this explanation does not work: the 1982 Amendment included a stipulation that the limit applied to fiscal year 1984 and later.[114]

Finally, the dividend statutes demonstrate that money in the dividend fund may be appropriated for purposes other than the payment of dividends or the administration of the dividend program fatally undermining Wielechowski's claim that the legislature has dedicated that money for dividends. [At. Br. 66] For example, AS 43.23.025 provides the formula for calculating dividends and requires the subtraction of "*appropriations from the dividend fund* during the current year, including amounts to pay costs of administering the dividend program and the hold harmless provisions of AS 43.23.075."[115] This language indicates that these appropriations may also include sums appropriated for things other than administrative costs and the hold harmless statute. Similarly, AS 43.23.028 requires that the "stub attached to each individual dividend

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113 Alaska Const., art. IX, § 16.

114 Alaska Const. art. XV, § 28.

115 AS 43.23.025(a)(1)(E) (emphasis added).

disbursement advice" provide notice to recipients of "the amount by which each dividend has been reduced due to each appropriation from the dividend fund."[116] Because the statutory language permits appropriation from the dividend fund for purposes other than paying dividends and the legislature's consistent practice has been to make such appropriations, it is clear that the dividend fund is not dedicated to the payment of dividends and is generally available for appropriation by the legislature.

In sum, neither the language of the statutes nor the legislative history supports Wielechowski's view that the legislature intended to create a dividend plan that would operate outside of the traditional appropriations process.

B. The policy rationale behind the dividend program does not support exemption from constitutional spending provisions.

Wielechowski argues that the policy rationale underlying the dividend program justifies its "protection." [At. Br. 6] But contemporaneous sources indicate that the policy behind the dividend does not conflict with annual control over fund income or responsiveness to the economic conditions of the time. For example, one of the earliest analyses of the rationales underpinning both the permanent fund and the subsequent dividend program can be found in *Williams v. Zobel*, which evaluated the constitutionality of the 1980 dividend.[117] The Court noted that the permanent fund served two purposes. First, fund income could help in lean economic times: "the earnings from

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[116] AS 43.23.030(a)(3). Department of Revenue records indicate that a variety of appropriations have been made from the dividend fund for purposes other than dividends. [Exc. 443-49]

[117] 619 P.2d 448, 453 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55 (1982).

[the permanent fund] will help to defray costs of government at that future time when the non-renewable resources run out."[118] Second, creating the permanent fund kept government smaller by "plac[ing] the principal of the fund beyond the legislature's appropriation power, which can be exercised only over earnings derived from the fund."[119] Normally, a government's tendency toward "costly, wasteful, and unnecessary government projects" is limited because the money for such programs must come from the taxpayers, but with Alaska's mineral wealth flowing in, "this damper [was] removed" and the people of Alaska "recognized the need for some other form of restraint."[120] Rather than contradicting the goal of using permanent fund earnings for government, then, the dividend program was designed to act as a counterbalance to the legislature's desire to spend, because it gave a tax-like feeling to any attempt by the legislature to "'take back' some of the fund's income distributed to Alaskans."[121]

Wielechowski lists several policy reasons supporting continued dividend payments, including giving Alaskans a portion of the State's oil wealth, equitably distributing benefits, increasing the incomes of Alaskans, and reducing poverty. [At. Br. 6-12] These arguments indisputably have a place in the political decisions governing the continued use of permanent fund income. But these arguments failed to persuade enough lawmakers to overcome the governor's veto in 2016. And consistent with normal state spending rules, the judgment of lawmakers in 1982 should have *less* sway over

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.* at 454.

currentstate spending than the judgment of Alaska's current elected officials.[122]

Unsurprisingly, the dividend program has proven to be immensely popular among Alaskans. But while that popularity will properly influence political decisions, it does not lessen the Court's obligation to interpret the law consistent with the checks and balances the constitutional delegates provided. Indeed, far from treating programs that give directly to Alaskans with less scrutiny, the Court has historically looked more critically at state programs conferring benefits, construing the term "appropriations" broadly when resources are given away and narrowly when such programs are repealed.[123] This presumably reflects the reality that far from being "easy," [At. Br. 10] reducing expenditures on a popular program is an act that requires political courage.

Finally, Wielechowski's position represents bad public policy because it upsets the normal constitutional balance of power. Although Wielechowski argued below that "[t]he constitution does not permit the governor to 'save' the state through fiat in cases of perceived fiscal emergency," [Exc. 72] this is actually precisely what the constitution permits by giving the governor veto power. Indeed, as the Court has explained "Alaska's constitutional convention delegates intended to 'create a strong executive branch with a

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[122] The parties presumably agree that the legislature remains free to amend or repeal the dividend statute entirely. But this lawsuit asks about the default situation: Wielechowski interprets the dividend statute as mandating spending until a majority of lawmakers in each chamber opt to repeal it, while the State argues that no dividend spending can occur unless a majority of lawmakers appropriates for it each year, and a sufficient number overcomes any gubernatorial veto.

[123] *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles* (*Knowles III*), 86 P.3d 891, 894 n.17 (Alaska 2004) (discussing how term appropriation has different meaning in different parts of constitution and even within the context of a single article depending on whether an initiative seeks to make or repeal the appropriation).

strong control on the purse strings of the state.'"[124] Thus, the Governor's use of the veto to limit spending in a fiscal emergency is entirely consistent with the constitutional intent.

III. Governor Walker did not unconstitutionally delete descriptive language from the operating budget when he reduced dividend spending with his veto.

Finally, Wielechowski claims that the Governor unconstitutionally exceeded his line-item veto power by deleting certain language in the budget that Wielechowski calls "descriptive." [At. Br. 68] This claim fails because the Governor only struck language necessary to identify the amount of the appropriation and did not alter its purpose.

In *Alaska Legislative Council v. Knowles* (*Knowles II),*[125] the Court held that the governor's item veto power allows him to "strike" or "reduce" "a sum of money dedicated to a particular purpose" in an appropriation bill. [126] But the governor cannot alter the purpose of an appropriation by striking descriptive language.[127] In *Knowles II*, the Court held that the governor exceeded his veto power when he struck a condition that pertained to an appropriation, thereby altering the purpose of the appropriation.[128]

Here, unlike in *Knowles II*, the Governor did not alter the purpose of the dividend appropriation. The appropriation's plain language provides for an expenditure of public revenues for the payment of permanent fund dividends. [App. 1] The Governor exercised his line-item veto authority to reduce the amount of the appropriation, but the underlying purpose—paying dividends to eligible Alaskans—was unchanged.

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124 *Id*. at 372 (quoting *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977)).

125 21 P.3d 367 (Alaska 2001).

126 *Id.* at 372-73.

127 *Id.*

128 *Id.* at 374.

The Governor altered some language in the appropriation bill, but only as necessary to accomplish this constitutionally permissible line-item reduction. The amount of the expenditure authorized was stated by reference to the statutory formula in AS 37.13.145(b). [App. 1] To reduce this item by veto, the Governor had to strike the language identifying the appropriation as the amount calculated by the statute's formula and insert a lesser sum for the appropriation. But the purpose of the appropriation—"for the payment of permanent fund dividends and for administrative and associated costs for the fiscal year ending June 30, 2017"—was never changed.[129] [App. 1]

Wielechowski's argument that the veto altered the purpose of the appropriation implies that its purpose was not to pay dividends, but rather to comply with a statutory formula. He also reincorporates his argument that the transfer was mandated by law. [At. Br. 71] But this argument would impermissibly allow the legislature to circumvent the governor's veto power any time it uses a statutory formula to calculate an appropriation amount. Because the Governor only struck language that referenced the amount of the appropriation and did not alter its purpose, the Court should reject this challenge.

CONCLUSION

For these reasons, this Court should affirm the superior court's decision awarding summary judgment to the State.

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[129] *See Knowles II*, 21 P.3d at 372.