

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA; MICHAEL HANLEY,
COMMISSIONER OF ALASKA
DEPARTMENT OF EDUCATION AND
EARLY DEVELOPMENT, in his official
capacity,

Appellants/Cross-Appellees,

v.

KETCHIKAN GATEWAY BOROUGH;
AGNES MORAN, an individual, on her own
behalf and on behalf of her son; JOHN COSS,
a minor; JOHN HARRINGTON, an
individual; and DAVID SPOKELY, an
individual,

Appellees/Cross-Appellants.

Supreme Court No. S-15811/15841

Trial Court No. 1KE-14-00016 CI

CROSS-APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT KETCHIKAN
HONORABLE WILLIAM B. CAREY

CROSS-APPELLANTS' OPENING BRIEF

Dated: May 12, 2015

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Filed in the Supreme Court
for the State of Alaska,
this 12th day of May, 2015

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AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitution, Article IX, Section 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No money shall be withdrawn from the treasury except in accordance with appropriations made by law.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 Constitution, Article II, Section 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.

AS 14.12.020. Support, Management, and Control in General; Military Reservation Schools.

. . . (c) The legislature shall provide the state money necessary to maintain and operate the regional educational attendance areas. The borough assembly for a borough school district, and the city council for a city school district, shall provide the money that must be raised from local sources to maintain and operate the district.

AS 14.17.410. Public School Funding.

(a) A district is eligible for public school funding in an amount equal to the sum calculated under (b) and (c) of this section.

(b) Public school funding consists of state aid, a required local contribution, and eligible federal impact aid determined as follows:

(1) state aid equals basic need minus a required local contribution and 90 percent of eligible federal impact aid for that fiscal year; basic need equals the sum obtained under (D) of this paragraph, multiplied by the base student allocation set out in AS 14.17.470; district adjusted ADM is calculated as follows:

(A) the ADM of each school in the district is calculated by applying the school size factor to the student count as set out in AS 14.17.450;

(B) the number obtained under (A) of this paragraph is multiplied by the district cost factor described in AS 14.17.460;

(C) the ADMs of each school in a district, as adjusted according to (A) and (B) of this paragraph, are added; the sum is then multiplied by the special needs factor set out in AS 14.17.420 (a)(1);

(D) the number obtained for intensive services under AS 14.17.420(a)(2) and the number obtained for correspondence study under AS 14.17.430 are added to the number obtained under (C) of this paragraph;

(2) the required local contribution of a city or borough school district is the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110, not to exceed 45 percent of a district's basic need for the preceding fiscal year as determined under (1) of this subsection.

(c) In addition to the local contribution required under (b)(2) of this section, a city or borough school district in a fiscal year may make a local contribution of not more than the greater of

(1) the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110; or

(2) 23 percent of the district's basic need for the fiscal year under (b)(1) of this section.

(d) State aid may not be provided to a city or borough school district if the local contributions required under (b)(2) of this section have not been made.

(e) If a city or borough school district is established after July 1, 1998, for the first three fiscal years in which the city or borough school district operates schools, local contributions may be less than the amount that would otherwise be required under (b)(2) of this section, except that

(1) in the second fiscal year of operations, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the city or borough school district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110; and

(2) in the third year of operation, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a three mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110.

(f) A school district is eligible for additional state aid in the amount by which the local contributions that would otherwise have been required under (b)(2) of this section exceed the district's actual local contributions under (e) of this section. . . .

AS 14.17.490. Public School Funding Adjustments.

(a) Except as provided in (b) - (e) of this section, if, in fiscal year 1999, a city or borough school district or a regional educational attendance area would

receive less public school funding under AS 14.17.410 than the district or area would have received as state aid, the district or area is, in each fiscal year, eligible to receive additional public school funding equal to the difference between the public school funding the district or area was eligible to receive under AS 14.17.410 in fiscal year 1999 and the state aid the district or area would have received in fiscal year 1999.

- (b) A city or borough school district is not eligible for additional funding authorized under (a) of this section unless, during the fiscal year in which the district receives funding under (a) of this section, the district received a local contribution equal to at least the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110.
- (c) For the purposes of the reduction required under AS 14.17.400 (b), funding authorized under (a) of this section is treated the same as the state share of public school funding under AS 14.17.410.
- (d) Beginning in fiscal year 2000, if a district receives more public school funding under AS 14.17.410 than the district received in the preceding fiscal year, any amount received by the district under this section shall be reduced. The amount of the reduction required under this subsection is equal to the amount of increase from the preceding fiscal year in public school funding multiplied by 40 percent. In this subsection, "public school funding" does not include funding under this section.
- (e) Beginning in fiscal year 2000, in each fiscal year, the department shall compare each district's ADM with the district's ADM in fiscal year 1999. If the current fiscal year ADM is less than 95 percent of the district's ADM in fiscal year 1999, the department shall reduce the district's public school funding calculated under (a) of this section by a percentage equal to the percentage of decrease in the district's ADM.
- (f) For purposes of this section, "state aid" means state aid distributed under the provisions of AS 14.17, as those provisions read on January 1, 1998, and additional district support appropriated by the legislature for fiscal year 1998.

JURISDICTIONAL STATEMENT

A final judgment that disposed of all issues other than attorneys' fees and costs was entered on January 23, 2015. Cross-Appellants timely filed a Notice of Appeal on February 23, 2015, within thirty days of the date shown in the clerk's certificate of distribution on the judgment. The Supreme Court therefore has authority to decide this appeal pursuant to Alaska R. App. P. 204(a)(2).

STATEMENT OF ISSUES

1. Did the Superior Court err by holding that the required local contribution provided for in AS 14.12.020(c) and AS 14.17.410(b) ("RLC") does not violate Article IX, Section 13 of the Alaska Constitution ("Appropriations Clause")?
2. Did the Superior Court err by holding that the RLC does not violate Article II, Section 15 of the Alaska Constitution ("Veto Clause")?
3. Did the Superior Court err by holding that the Ketchikan Gateway Borough ("Borough") is not entitled to a refund of the RLC payment it paid under protest?

STANDARD OF REVIEW

The Supreme Court reviews grants of summary judgment motions on a de novo basis.¹

SUMMARY OF ARGUMENT

The RLC payment violates the Appropriations Clause of the Alaska Constitution because it is not a source of revenue that is available to the Legislature to appropriate for *any* State purpose as required by the Framers and as acknowledged by Alaska Supreme Court (“Court”) precedent. Further, the RLC payment violates the Veto Clause because it deprives the Governor of the power to veto appropriations in order to meaningfully participate in the budget process as required by the Framers and as acknowledged by Court precedent.

Cross-Appellants’ claim for a refund should be honored because the RLC payment is unconstitutional and because it was paid under protest. Contrary to the superior court’s conclusion, the State received a tangible benefit from payment of the RLC because such payment facilitated the State’s ability to maintain public schools, an exclusive duty and responsibility of the State under the Alaska Constitution and this Court’s precedent.

¹ *Christensen v. Alaska Sales & Service, Inc.*, 335 P.3d 514, 516 (Alaska 2014).

STATEMENT OF THE CASE

A. Relevant Statutes

For purposes of the Cross-Appeal, the following brief description of the statutory scheme under which Alaska schools are funded is provided.

State funding for operation of school districts depends on whether school district schools are located within: (1) an organized borough, (2) a home-rule or first-class city that is outside an organized borough, or (3) a regional educational attendance area.² The current State scheme for providing operating funds to a school district utilizes the Public Education Fund which consists of funds appropriated by the Alaska State Legislature (“Legislature”) for distribution to school districts, the State boarding school, centralized correspondence study and pupil transportation.³ A school district is entitled to be funded adequately according to its “Basic Need.”⁴ Basic Need is the level of educational funding at which “all districts are considered equal” and that “provides all districts with needed resources.”⁵

² AS 14.12.010(1) - (3).

³ AS 14.17.300.

⁴ See AS 14.17.410(b).

⁵ *Alaska’s Public School Funding Formula: A Report to the Alaska State Legislature*, Tab 2 -- Comparison of Old to New Funding Formula, DEED, p. 8, January 15, 2001, Ex. A to Affidavit of Scott Brandt-Erichsen (“Brandt-Erichsen Aff.”); Exc. 059.

Under the existing statutory scheme, there are three sources of funding for Basic Need: “state aid, a required local contribution, and eligible federal impact aid.”⁶ Each school district is eligible for state aid under AS 14.17.410 (“State Aid”) in an amount determined by a formula, but if the appropriations in a given year are insufficient to pay the amounts authorized, then the amount provided by the State to each district is reduced on a pro-rata basis.⁷ State Aid is provided from the funds appropriated to the Public Education Fund by the Legislature.⁸ These funds are subject to veto by the Governor of the State of Alaska (“Governor”) in accordance with Article II, Section 15 of the Alaska Constitution.⁹

The RLC is an amount that only a borough or a home rule or first class city outside of an organized borough (“Municipality”) must pay to its school district each year.¹⁰ The penalties for not providing an RLC are: (1) the State will not offer *any* State Aid to that Municipality’s school district¹¹ and (2) the school district will be disqualified from receiving any supplemental State funding.¹² The RLC payments reduce (by a 1:1 ratio) – or offset – the amount of State Aid provided from the Public Education Fund to

⁶ AS 14.17.410(b).

⁷ AS 14.17.400.

⁸ See AS 14.17.300(a)(1).

⁹ See Alaska Const. Art. II, § 15.

¹⁰ AS 14.17.410(b); AS 14.12.020(c).

¹¹ AS 14.17.410(d).

¹² AS 14.17.490(b).

all school districts.¹³ RLC payments are not available to the Legislature for appropriation to the Public Education Fund or any other purpose because they are made directly from a Municipality to its school district. Correspondingly, the Governor is not given the opportunity to veto appropriations of RLC payments by the Legislature.¹⁴

B. Factual Basis of Refund Claim

On October 9, 2013, in light of the statutory consequences of not making what the Borough believed was an unconstitutional RLC payment, the Borough made the \$4,198,727 RLC payment for FY 14.¹⁵ The Borough informed Defendant Hanley that the RLC payment was being “made under protest,” and that the Borough would seek a refund of the RLC payment in this lawsuit.¹⁶

C. The Proceedings Below

On January 13, 2014, the Borough and individual plaintiffs Agnes Moran, John Coss, John Harrington and David Spokely (collectively “Cross-Appellants”) filed suit against the State of Alaska and Commissioner Michael Hanley in his official capacity as

¹³ See AS 14.17.410(b).

¹⁴ See generally AS 14.17.410(b) (requiring local contribution to come directly from Borough or City); see also Brandt-Erichsen Aff., ¶ 10 (Exc. 044) and Ex. G (showing payment directly from Borough to KGB School District), Exc. 089.

¹⁵ Brandt-Erichsen Aff., ¶ 10, Exc. 044.

¹⁶ Brandt-Erichsen Aff., Ex. H, Exc. 090; Complaint at ¶ 27, Exc. 008.

Commissioner of the Department of Education and Early Development (collectively “the State”).¹⁷

Cross-Appellants filed a Motion for Summary Judgment on February 6, 2014, seeking a declaration that the RLC is unconstitutional because it violates Article IX, Section 7 of the Alaska Constitution (the “Anti-Dedication Clause”), the Appropriations Clause, and the Veto Clause of the Alaska Constitution.¹⁸ Cross-Appellants also sought a refund of the 2014 RLC that had been paid under protest.¹⁹ The State opposed that motion and cross-moved for summary judgment seeking dismissal of all of Cross-Appellants’ claims.²⁰ All parties were in agreement that there were no genuine issues of material fact, and that the case would turn on legal principles that could be appropriately determined at summary judgment.²¹

In its November 21, 2014 decision, the superior court held that the RLC violated the Anti-Dedication Clause.²² This aspect of the superior court’s decision is the subject of the State’s Appeal No. S-15811. However, the superior court held that the RLC

¹⁷ Complaint, Exc. 001-014.

¹⁸ Plaintiffs’ February 6, 2014 Motion and Memorandum in Support of Motion for Summary Judgment (“Cross-Appellants’ Motion”), Exc. 015-093.

¹⁹ *Id.*

²⁰ State of Alaska’s Opposition to Ketchikan Gateway Borough’s Motion for Summary Judgment and Cross Motion for Summary Judgment, Exc. 094-128 (“State’s Cross Motion”).

²¹ Cross-Appellants’ Motion, Exc. 024, 038; State’s Cross Motion, Exc. 115.

²² Order on Cross Motions for Summary Judgment (“SJ Order”) at 22, Exc. 268.

payments did not violate the Appropriations Clause and the Veto Clause because the RLC payments never entered the State treasury, and therefore, in the superior court's view, are not subject to the Legislature's appropriations power or the Governor's veto power.²³ The superior court also denied Cross-Appellants' claim for a refund principally because: (1) the State is not required to fully fund all public schools in Alaska and (2) the State had therefore not been enriched or benefitted by the payment of the RLC to the Ketchikan Gateway Borough School District ("KGB School District").²⁴

ARGUMENT

I. As a Matter of Law, the RLC violates the Appropriations and Veto Clauses of the Alaska Constitution.

The Alaska Constitution "defines with specificity the mechanics of legislation. Each provision has a purpose "designed to engender a responsible legislative process worthy of the public trust."²⁵ The Legislature cannot exercise its legislative power without following the enactment provisions of the Alaska Constitution; otherwise, these provisions "would serve no purpose."²⁶ Contrary to these important public purposes, the RLC payments evade the Legislature's appropriations power as well as the Governor's veto power, and are therefore unconstitutional.

²³ SJ Order at 22, Exc. 265.

²⁴ SJ Order at 24-5, Exc. 267-68; Order on Motion to Reconsider ("Reconsideration Order"), Exc. 281-284.

²⁵ *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (quoting *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979)).

²⁶ *Id.* at 772.

A. The RLC Payments Violate the Appropriations and Veto Clauses Because they are not Deposited into the State Treasury and made Available for Appropriation by the Legislature for any Purpose or Subject to Veto by the Governor.

The Appropriations Clause, Article IX, Section 13 of the Alaska Constitution, provides:

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.

The Veto Clause, Article II, Section 15 of the Alaska Constitution, provides that the Governor “may, by veto, strike or reduce individual items in appropriation bills.” The item veto ““gives the Governor the power to influence the State’s budget by requiring him or her to submit a proposed budget and general appropriation bill to the Legislature and by striking or reducing items appropriated by the Legislature.””²⁷

Funding governmental activities is considered a vital function of the Legislature, and advance long-term earmarking of taxes or fees for specific interests has long been considered an “abdication of legislative responsibility” and a “fiscal evil.”²⁸ In other words, the Constitution is designed to ensure that ““it is the joint responsibility of the Governor and the Legislature to determine the State's spending priorities on an annual

²⁷ *Simpson v. Murkowski*, 129 P.3d 435, 446 (Alaska 2006) (quoting *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001)).

²⁸ *See State v. Alex*, 646 P.2d 203, 209 (1982).

basis.”²⁹ The Constitution “indicates a desire by the delegates to create a strong executive branch with a strong control on the purse strings of the state.”³⁰ The RLC violates these constitutional requirements because the money raised by the RLC must be paid directly to school districts and is not available for: (1) appropriation for any purpose by the Legislature, or (2) veto by the Governor.

1. This Court’s Precedent Demonstrates that the Requirements of the Appropriations and Veto Clauses are Violated by the RLC Payment Statutes.

The superior court found that the Appropriations Clause was not violated by relying on the 2014 Black’s Law Dictionary (10th Edition) definition of “appropriation:” “A legislative body’s act of setting aside a sum of money for a public purpose . . . The sum of money so voted.”³¹ Based on this definition, the superior court found that the RLC “is clearly not an appropriation” because it is “not a sum of money so voted.”³² Further, the superior court rejected as “too tenuous” Cross-Appellants’ argument that the Legislature and Governor were deprived of opportunities (or responsibilities) to appropriate for any purpose or to veto these amounts because the

²⁹ *Id.* (quoting with approval the superior court’s reasoning in opinion below).

³⁰ *Id.* (quoting *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (internal quotation marks omitted)).

³¹ SJ Order at 19, Exc. 262.

³² SJ Order at 22, Exc. 265.

payments were not made to the treasury.³³ Cross-Appellants respectfully submit that the superior court erred as a matter of law in reaching these conclusions.

First, to interpret “appropriation” in the Constitution, the Court should look to the definition of “appropriation” in the Black’s Law Dictionary contemporaneous with the drafting of the Constitution, not the 2014 version.³⁴ The 2014 Black’s Law Dictionary definition of “appropriation” is more truncated than the definition included in the 1951 Black’s Law Dictionary that was contemporaneous with the drafting of the Constitution. The older definition states:

The act by which the legislative department of government *designates a particular fund, or sets apart a specified portion of the public revenue* or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense.³⁵

The RLC payment scheme ensures that a “specified portion of the public revenue” is set aside and provided directly to school districts. It is therefore an appropriation and should be directed to the State Treasury for appropriation by the Legislature to schools, or for some other purpose to be determined by the Legislature, on an annual basis.

³³ *Id.*

³⁴ *Beck v. Prupis*, 529 U.S. 494, 504 (2000) (using dictionary definitions from 1968 and 1969 to establish an understanding of “civil conspiracy” under RICO, which was enacted in 1970); *Amoco Production Co. v. Southern UTE Tribe*, 526 U.S. 865, 873-874 (1999) (using late 19th century dictionary definitions to conclude that “coal” in the Coal Lands Acts of 1909 and 1910 did not include coalbed methane gas).

³⁵ Black’s Law Dictionary 131 (4th ed. 1951) (emphasis added).

The Court has previously relied upon this version of the definition of “appropriation” in Black’s Law Dictionary and in doing so, taken a very broad view of “appropriation” for purposes of enforcing the Framers’ goal of ensuring that the Legislature and Governor retain close control of finances. In *McAlpine v. University of Alaska*, 762 P.2d 81, 87 (Alaska 1988), an initiative established a separate community college system requiring the University of Alaska to transfer such real and personal property to the community college system as was necessary for its operation. The Court held that the requirement that property be transferred to the new community college system violated Article IX, Section 7 of the Alaska Constitution, which prohibited using an initiative to “make or repeal appropriations.”³⁶

In *McAlpine*, the Court relied on the definition of “appropriation” in the 5th edition of Black’s Law Dictionary, which was the same as the one in use when the Constitution was drafted. The Court described an appropriation as “[t]he act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense.”³⁷ It also held that “[t]he reason for prohibiting appropriations by initiative is to ensure that the legislature, and *only* the legislature, retains control over the allocation of State assets

³⁶ *Id.* at 87.

³⁷ *Id.*

among competing needs,” and applied this rationale to allocations of property as well as allocations of money.³⁸

Thus, in *McAlpine*, the Court held that a direct transfer of property was an appropriation within the meaning of the Constitution, and struck down an initiative that attempted to bypass the Legislature and allocate these assets directly to the new community college system. If a direct transfer of property was unconstitutional under the Appropriations Clause, a direct transfer of money in the form of the RLC payment directly to a Municipality’s school district is similarly unconstitutional.

The RLC payment is also unconstitutional under the definition of appropriation adopted by the Court in *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 373 (Alaska 2001) (“*Knowles IP*”) and *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895-6 (2004) (*Knowles IIP*”). *Knowles II* and *Knowles III* dealt directly with the meaning of “appropriations” under the Veto Clause. In these cases, this Court held that appropriations of money are subject to the Governor’s veto power.³⁹ In *Knowles III*, this Court cited to Constitutional Convention minutes for the proposition that “any bill affecting payments of money under existing statutes” would be an appropriation against which an item veto could be made.⁴⁰ Similarly, the RLC is a

³⁸ *Id.* at 88 (emphasis in the original).

³⁹ *Knowles III*, 86 P.3d are 895 (citing *Knowles II*, 21 P.3d at 373).

⁴⁰ *Knowles III*, 86 P.3d at 896.

“payment[] of money under existing statutes” and therefore, is an appropriation that the Governor may veto.

Additionally, in a case largely involving the Anti-Dedication Clause,⁴¹ the Court held:

The principle on which the act is based, that the administrators of the Alaska Marine Highway System and the legislature will treat the fund as if the Marine Highway System had a right to its proceeds, is inconsistent with the model contemplated by the anti-dedication clause, under which the disposition of all revenues will be decided anew on an annual basis. Nevertheless, the expectations created by the act are merely a "talking point" because they impose no legal restraint on the appropriation power of the legislature.

In contrast, the RLC payments are *never* available for appropriation as the Legislature sees fit each year. The statutory scheme ensures that the RLC is directly transferred to the school district without the possibility of being reassigned to any other priority. This arrangement therefore violates the Appropriations (and Veto) Clauses.

Additionally, the Court in *Sonneman* held that the portion of a statute that restricted executive authority to seek appropriations from the fund for other purposes also violated the Anti-Dedication Clause because it not only bound the Legislature but also restricted the executive branch from asking for appropriations from all funding sources.⁴²

⁴¹ *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992).

⁴² *Id.* at 940.

The RLC suffers from the same flaw and therefore is also unconstitutional under the Appropriations and Veto Clauses.

Moreover, the superior court's finding that the original statutory enactment of the RLC satisfied the need for legislative and gubernatorial oversight of public funds⁴³ is also erroneous as a matter of law since this Court has long held that all statutory enactments are subject to: (1) the Legislature's constitutional power to appropriate on an annual basis, and (2) the Governor's power to veto annual appropriations.⁴⁴ Indeed, the constitutional reality imposed by the Appropriations and Veto Clauses is recognized elsewhere in Title 14. If appropriations to the Public Education Fund in a given year are insufficient, payments to school districts are reduced on a pro rata basis.⁴⁵ The same constitutional requirements for annual appropriation and the possibility of a veto also apply to the RLC.

The purpose of the Appropriations Clause is to make sure that the Legislature annually considers funding requests for all State programs and exercises its responsibility to appropriate funds as it sees fit in any given year. Similarly, the purpose of the Veto

⁴³ SJ Order at 22-23, Exc. 265-66.

⁴⁴ *Simpson v. Murkowski*, 129 P.3d 435, 446-447 (Alaska 2006) (holding the Governor could veto an appropriation for the longevity bonus program even though the statutory authority for the longevity bonus had not been repealed); *Knowles II*, 21 P.3d at 378 (holding that legislatures "do not have to fund or fully fund any program"). *See also Zerbetz v. Alaska Energy Ctr.*, 708 P.2d 1270, 1277 (Alaska 1985) (holding private party could not force State to pay a contractual obligation without an appropriation from the Legislature).

⁴⁵ AS 14.17.400(b).

Clause is to give the Governor the power to submit requests for appropriations and to veto appropriations on an annual basis. Yet the RLC imposes a *perpetual obligation* to send a specific amount of public revenue to school districts without ever being subject to appropriation by the Legislature for education or for any other purpose, and without ever being subject to veto by the Governor. The superior court's decision that this arrangement does not violate either the Appropriations or Veto Clauses is incompatible with this Court's precedents regarding the Constitution's requirements.

2. Because The RLC Payments are not made to the State for Appropriation by the Legislature for Education or for any other Purpose, they Violate the Appropriations and Veto Clauses.

The superior court held that the RLC payments do not have to comply with either the Appropriations or Veto Clauses because the money generated by the RLC never enters the general fund to become subject to appropriation.⁴⁶ These facts underscore the constitutional infirmity with the RLC payment: it is a State-compelled annual exaction that requires the automatic transfer of a specific amount on the basis of statutory authority in contravention of the case law summarized above. As this Court has acknowledged, the Framers intentionally provided for *annual* consideration by the Legislature and the Governor of the appropriate level of funding for all State programs in light of competing priorities for the limited dollars available to support State services. The RLC payment statutes cannot be reconciled with these clear constitutional requirements.

⁴⁶ SJ Order at 22, Exc. 265.

In addition to the case law described in the previous section, the dissent in *Myers v. Alaska Housing Finance Corporation*, 68 P.3d 386 (Alaska 2003) is also instructive. The case concerned tobacco settlement payments that were routed through the Alaska Housing Finance Corporation (“AHFC”) to the State and to a private nonprofit without being appropriated by the Legislature. The dissenting justices found a Legislative Legal Services opinion persuasive which pointed out that the arrangement operated to transfer funds to AHFC without an appropriation violating the Appropriations Clause.⁴⁷

The requirement imposed on Municipalities to make payments directly to school districts is similarly unconstitutional because it bypasses the appropriations (and veto) process(es). The lack of an appropriation is not a theoretical or “tenuous” concern.⁴⁸ Rather, the RLC payment scheme directly violates the Appropriations and Veto Clauses precisely because the payments are not made to the State for annual consideration of funding priorities by the Legislature and the Governor. The purposes of the Appropriations and Veto Clauses are nullified when revenues are diverted in this fashion because neither the Legislature nor the Governor has to wrestle annually with the difficult decisions that the Framers wanted them to consider. Moreover, if the RLC payment scheme stands, policy makers will be incentivized to fund other State programs this way, evading the very responsibilities that the Framers consciously imposed on them.

⁴⁷ *Id.* at 399 and n.9 (Bryner, J., and Fabe, J., dissenting).

⁴⁸ SJ Order at 22, Exc. 265.

For all of the above stated reasons, the Appropriations and Veto Clauses are violated by forcing Municipalities to make RLC payments directly to their school districts.

II. A Refund of Unconstitutional RLC Payments Paid Under Protest is Required.

Although the superior court found that the RLC was unconstitutional, the superior court rejected Cross-Appellants' claim for a refund of the unconstitutional RLC under both the assumpsit and restitution theories.⁴⁹ The superior court found that the State obtains no benefit and is not enriched by the RLC payment because the RLC payment is made to the school district.⁵⁰ Further, the superior court held that the Borough was not entitled to a refund because the State had no obligation to fully fund education.⁵¹ Finally, the superior court found that any refund claim should be brought against the KGB School District, not the State.⁵² Cross-Appellants respectfully submit that the superior court erred as a matter of law in reaching these conclusions.

⁴⁹ SJ Order at 24-25, Exc. 267-68. The Borough is the party that made the RLC payment to the school district. Complaint at Paragraphs 43, 44; Exc. 012.

⁵⁰ SJ Order at 24-25, Exc. 267-68.

⁵¹ *Id.*

⁵² Reconsideration Order at 5, Exc. 284.

A. The State’s Claim that it is Irreparably Harmed by the Superior Court’s Final Judgment Demonstrates that the State Receives a Tangible Benefit from the RLC Payments.

The superior court held that unjust enrichment was a necessary prerequisite to both the assumpsit and restitution claims.⁵³ The three elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation of such benefit, and (3) acceptance and retention by the defendant of such benefit under circumstances where retention would be inequitable without paying the value thereof.⁵⁴ The factual obstacle the superior court perceived to the restitution and assumpsit claims was the absence of a “tangible benefit” to the State in order to establish the first unjust enrichment element. The superior court reasoned the RLC did not save the State any money if the State was not obligated to fully fund the cost of education; therefore conferring no benefit on the State.⁵⁵ Yet the State’s own pleadings, particularly those submitted in connection with its Emergency Motion For a Stay Pending Appeal, demonstrate that the State does benefit from the Borough’s payment of the unconstitutional RLC.

Despite a finding that the RLC was unconstitutional, the State strenuously argued that it would be irreparably harmed if the Borough was not required to pay the RLC while

⁵³ SJ Order at 24, Exc. 267.

⁵⁴ SJ Order at 24 (citing *Alaska Sales and Service, Inc. v. Millet*, 735 P.2d 743, 746 (Alaska 1987), Exc. 267.

⁵⁵ SJ Order at 25, Exc. 268; Reconsideration Order at 2-5, Exc. 281-284.

this appeal was pending.⁵⁶ Commissioner Michael Hanley stated in his Affidavit supporting the State’s Emergency Motion for Stay that the RLC payments are “a vital source of funding to our municipal schools.”⁵⁷ If the State is irreparably harmed by the lack of “a vital source of funding” for schools, it follows that the State receives a tangible benefit from payment of the RLC.

B. The State Receives a Tangible Benefit from the Unconstitutional Mandatory RLC Payments Because Municipalities Contribute Funding to Education in Support of the State’s Requirement to Maintain a Public School System.

As noted above, our Constitution was consciously written to ensure that the Legislature would have no obligation to fully fund *any* State program and that all programs would compete annually for the Legislature’s and Governor’s attention. Therefore, whether the State has to fully fund education is not controlling. Instead, the issue is whether the State has been unjustly enriched by the unconstitutional extraction of RLC payments through the direct statutory requirement to make such payments in AS 14.12.020(c), and the direct statutory threat of losing all State Aid for education if the RLC payments are not made in accordance with AS 14.17.410(d) and AS 14.17.490(b).

Although the State has no obligation to fully fund education, as the superior court recognized, the State has the sole responsibility to “establish and maintain a system of

⁵⁶ See State’s Emergency Motion For Stay Pending Appeal, filed February 3, 2015 with the Court.

⁵⁷ Hanley Aff., ¶8, Exc. 292.

public schools” under Article VII, Section 1 of the Alaska Constitution.⁵⁸ The amount of education funding that the State ultimately provides each year to fulfill this constitutional obligation is reduced as a result of the RLC payments.⁵⁹ As the superior court also recognized, “when a municipal district pays the RLC, the district’s Basic Need is partially fulfilled, which in turn reduces the State’s Basic Need obligation.”⁶⁰ Furthermore, the superior court acknowledged the State’s argument that “without the RLC, the State would have to contribute more to the funding of State education programs.”⁶¹ Similarly, when requesting a stay of the superior court’s decision, the State argued that continued payment of the RLC while the case was pending was necessary for the State to fulfill its constitutional duties:

. . . [T]he State has a Constitutional mandate to ‘establish and maintain a system of public schools open to all children of the State,’ which it has historically fulfilled through laws that set up a system of joint state and local cooperation. By invalidating a key statutory source of funding necessary to the maintenance of public schools, the judgment harms the State’s ability to fulfill its duty under the education clause. The State has vested interests in the solvency of Alaska’s schools and the adequacy of Alaska’s educational

⁵⁸ Reconsideration Order at 3, Exc. 282.

⁵⁹ AS 14.17.410(b).

⁶⁰ SJ Order at 4, Exc. 247.

⁶¹ SJ Order at 12, Exc. 255.

opportunities, and these interests should be weighed when considering the merits of a stay.⁶²

The State does receive a benefit from the RLC because, as a result of the RLC, the State pays a diminished amount to fund education to the level it believes is appropriate.

Yet, with respect to the refund claim, the superior court found that Cross-Appellants waived the right to argue that the State receives a tangible benefit from the RLC payments since such payments contribute to the State's responsibility to maintain public schools.⁶³ The superior court reached this conclusion on the basis of a statement in Cross-Appellants' summary judgment reply that the Borough would not "address the extent to which the State must provide school funding, and it will not speculate in a case in which it has not presented the issue."⁶⁴ However, a statement that the Borough would not address the precise amount that the State must provide for school funding does not waive the Borough's ability to argue that whatever funding the Borough provides towards education funding constitutes a tangible benefit to the State. The existence of the benefit is not diminished or negated as a result of the actual amount of the benefit. Regardless of the total amount that the State spends on education each year, it clearly benefits in a

⁶² Appendix to State's March 3, 2015 Notice That Emergency Motion For Stay Is Ripe For Decision and Request For Full Court Consideration at 0149 (State's Reply in Further Support of Motion for Stay at 6).

⁶³ Reconsideration Order at 6; Exc. 285.

⁶⁴ *Id.*

tangible way from RLC payments, federal impact aid, and any other funding sources it utilizes to meet its school maintenance obligation.

As the State pointed out in its Opposition to Cross-Appellants' Motion for Summary Judgment, the RLC "leaves more money in state coffers because schools received part of their funding from local sources."⁶⁵ In other words, the State "received a benefit" from the RLC, regardless of whether the Alaska Constitution requires the State to fully fund education. The State is enriched because it has "more money in state coffers" absent the RLC payments. And such enrichment is unjust because the mechanism used to achieve it is unconstitutional and therefore illegal. As noted in the *Restatement (Third) of Restitution and Unjust Enrichment* §19 comment (c) :

A legal regime that imposes statutory or constitutional limits to a particular exercise of the taxing power can only be understood as forbidding the taxing authority to raise revenues in violation of those limits. Payment of an unlawful tax, therefore, results not only in a transfer lacking an adequate legal basis—the usual and sufficient condition of a claim in restitution—but in a transfer that the law implicitly forbids.

This Court has held that the State's duty to maintain the public education system is not shared with any other unit of government, and that the State's authority over education is "pervasive" and "unqualified."⁶⁶ "That the legislature has seen fit to delegate certain education functions to local school boards in order that Alaska schools

⁶⁵ State's Cross Motion at 15; Exc. 108.

⁶⁶ *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

might be adapted to meet the varying conditions of different localities does not diminish this constitutionally mandated state control over education.”⁶⁷ It follows that the Borough’s payment of the RLC helped to fulfill a State function and achieved a result desired by the State, thus conferring a benefit upon the State. The State determined what level of funding was adequate to fulfill its constitutional duty, and demanded that the Borough provide a portion of that amount through an unconstitutional mechanism. The Borough involuntarily assisted in fulfilling a State obligation by making the mandatory RLC payment, and by making that payment directly to the KGB School District. The State’s burden in fulfilling the obligation was correspondingly lessened. Clearly, the State received a tangible benefit.

The other two elements of an unjust enrichment claim were not challenged below.⁶⁸ This is likely because the State undisputedly “appreciated” the benefit of RLC payments because it created the RLC statutory scheme, was made aware that the RLC was paid under protest on constitutional grounds, and did not decline to assess the RLC.⁶⁹ Indeed, even after the superior court ruled that the RLC payment was unconstitutional,

⁶⁷ *Id.*

⁶⁸ *See Millet*, 735 P.2d at 746 (holding elements of an unjust enrichment claim are: (1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation of such benefit, and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof.)

⁶⁹ *See also Hill v. Cross-Country Settlements, LLC*, 936 A.2d 343, 354 (Md. App. 2007) (holding the essence of appreciation/knowledge requirement is that the defendant had the opportunity to decline benefit).

the State has continued to insist on its collection and filed emergency stay motions to ensure that its continued receipt of the RLC payment would not be affected by the superior court's decision that the RLC payment was unconstitutional. Finally, as the superior court has already concluded, the RLC payment is the result of an unconstitutional dedication, and it is unjust that the State benefit from it.⁷⁰

C. The Restatement (Third) of Restitution and Unjust Enrichment §19 Provides Additional Authority for a Refund when Illegal Payments have been made to Governmental Authorities.

Restatement (Third) of Restitution and Unjust Enrichment §19 (2011)

(“*Restatement* §19”) provides:

- (1) Except to the extent that a different rule is imposed by statute, the payment of a tax by mistake, or the payment of a tax that is erroneously or illegally assessed or collected, gives the taxpayer a claim in restitution against the taxing authority as necessary to prevent unjust enrichment. “Tax” within the meaning of this section includes every form of imposition or assessment collected under color of public authority.⁷¹

The Borough had to pay the RLC under protest because: (1) the RLC is required;⁷² (2) if it is not paid, the State will not provide *any* State aid to the Borough's school district;⁷³

⁷⁰ See SJ Order at 7-18, Exc. 250-261.

⁷¹ See also *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 511 (Iowa 2012) (holding refund of excessive franchise fees required; Iowa Supreme Court affirmed lower court's conclusion that “there must be financial consequences from” illegal taxation even if the taxes “were used wisely, legally, and with the best intentions for the residents.”).

⁷² AS 14.17.410(b); AS 14.12.020(c).

⁷³ AS 14.17.410(d).

and (3) the school district will be disqualified from receiving *any* supplemental funding from the State.⁷⁴

The superior court found *Restatement* §19 inapplicable because the State had not been spared “an otherwise necessary expense” since “the State need not fill the gap left by an RLC payment ...”⁷⁵ Since maintaining the public schools is solely the State’s responsibility, it follows that any expenditures by the State on education are necessary. Therefore, the payment of the RLC does in fact spare the State “an otherwise necessary expense.”

The superior court also found that illustration 16 in *Restatement* §19 provided an additional reason for denying the Borough’s refund claim.⁷⁶ Illustration 16 states:

A municipal zoning board has the statutory duty to approve new residential subdivisions on such terms as will serve the best interests of the community. The board adopts the practice of requiring developers to make a cash contribution to the local school district as a condition of obtaining development approval. Upon a judicial determination that the board has no statutory authority to require such contributions, the developers who have made them have a claim in restitution to recover their payments from the school district.

Because the RLC payments were made directly to the school district, the superior court reasoned on the basis of illustration 16 that the Borough should seek a refund from the school district rather than the State.⁷⁷

⁷⁴ AS 14.17.490(b).

⁷⁵ Reconsideration Order at 7; Exc. 286.

⁷⁶ *Id.* at 5, Exc. 284.

However, *Restatement* §19 comment e indicates that illustration 16 is based on *Rosen v. Village of Downers Grove*, 167 N.E. 2d 320 (Ill. 1960).⁷⁸ In that case, a developer agreed to make payments to a school district escrow account that would be refunded if the ordinance allowing the zoning board to require the payments was subsequently invalidated by the court.⁷⁹ It is therefore entirely unsurprising that the school district's escrow account was the source for payment to the developers in accordance with the agreement after the Illinois Supreme Court invalidated the ordinance authorizing the zoning board to require the payments.⁸⁰ Thus, neither *Rosen* nor illustration 16 stand for the proposition that the State can require its proxy (the Borough) to make an unconstitutional payment in order to: (1) partially fulfill the State's sole obligation to maintain Alaska's education system, and (2) avoid making a refund to the proxy when the payment is made under protest and ultimately found unconstitutional.

In sum, because the RLC payment is unconstitutional and the State has been unjustly enriched as a result of the Borough's RLC payment, Cross-Appellants' refund claim should not have been denied by the superior court.

⁷⁷ *Id.*

⁷⁸ See Reporter's Note to §19 at subsection e (last paragraph).

⁷⁹ *Rosen*, 167 N.E. 2d at 450-451.

⁸⁰ Indeed, nothing in *Rosen* indicates that any party argued that a source other than the district's escrow account would be the source of the refund. *Id.*

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Cross-Appellants respectfully request that this Court hold that the statutorily required RLC payment paid by the Borough is a violation of the Appropriations Clause and/or the Veto Clause.

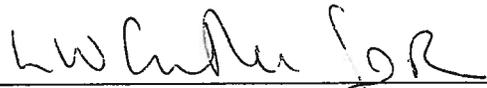
Cross-Appellants also request that the Court grant the refund claim and remand the case to the superior court for issuance of an amended judgment consistent with the Court's opinion.

DATED this 12th day of May, 2015.

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