

IN THE SUPREME COURT OF 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.

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Supreme Court No.: S-15811/15841

Trial Court Case No: 1KE-14-00016 CI

APPEAL FROM THE SUPERIOR COURT FIRST JUDICIAL DISTRICT AT KETCHIKAN THE HONORABLE WILLIAM B. CAREY, JUDGE

ANSWERING BRIEF OF APPELLANTS/CROSS-APPELLEES STATE OF ALASKA and MICHAEL HANLEY

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CONSTITUTIONAL PROVISIONS

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. VII, § 1. Public Education.

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

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No money shall be withdrawn from the treasury except in accordance with appropriations made by law.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, § 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. X, § 2. Local Government Powers.

All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

STATUTES

AS 14.12.010. Districts of state public school system.

The districts of the state public school system are as follows:

- (1) each home rule and first class city in the unorganized borough is a city school district;
- (2) each organized borough is a borough school district;
- (3) the area outside organized boroughs and outside home rule and first class cities is divided into regional educational attendance areas.

AS 14.12.020. Support, management, and control in general; military reservation schools.

- (a) Each regional educational attendance area shall be operated on an areawide basis under the management and control of a regional school board. The regional school board manages and controls schools on military reservations within its regional educational attendance area until the military mission is terminated or so long as management and control by the regional educational attendance area is approved by the department. However, operation of the military reservation schools by a city or borough school district may be required by the department under AS 14.14.110. If the military mission of a military reservation terminates or continued management and control by the regional educational attendance area is disapproved by the department, operation, management, and control of schools on the military reservation transfers to the city or borough school district in which the military reservation is located.
- (b) Each borough or city school district shall be operated on a district-wide basis under the management and control of a school board.
- (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 14.17.400. State aid for districts.

- (a) The state aid for which a school district is eligible in a fiscal year is equal to the amount for which a district qualifies under AS 14.17.410.
- (b) If the amount appropriated to the public education fund for purposes of this chapter is insufficient to meet the amounts authorized under (a) of this section for a fiscal year, the department shall reduce pro rata each district's basic need by the necessary percentage as determined by the department. If the basic need of each district is reduced under this subsection, the department shall also reduce state funding for centralized correspondence study and the state boarding school by the same percentage.

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) and the secondary school vocational and technical instruction funding factor set out in AS 14.17.420(a)(3);

(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;

(E) notwithstanding (A)--(C) of this paragraph, if a school district's ADM adjusted for school size under (A) of this paragraph decreases by five percent or more from one fiscal year to the next fiscal year, the school district may use the last fiscal year before the decrease as a base fiscal year to offset the decrease, according to the following method:

(i) for the first fiscal year after the base fiscal year determined under this subparagraph, the school district's ADM adjusted for school size determined under (A) of this paragraph is calculated as the district's ADM adjusted for school size, plus 75 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the first fiscal year after the base fiscal year;

(ii) for the second fiscal year after the base fiscal year determined under this subparagraph, the school district's ADM adjusted for school size determined under (A) of this paragraph is calculated as the district's ADM adjusted for school size, plus 50 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the second fiscal year after the base fiscal year;

(iii) for the third fiscal year after the base fiscal year determined under this subparagraph, the school district's ADM adjusted for school size determined under (A) of this paragraph is calculated as the district's ADM adjusted for school size, plus 25 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the third fiscal year after the base fiscal year;

(F) the method established in (E) of this paragraph is available to a school district for the three fiscal years following the base fiscal year determined under (E) of this paragraph only if the district's ADM adjusted for school size determined under (A) of this paragraph for each fiscal year is less than the district's ADM adjusted for school size in the base fiscal year;

(G) the method established in (E) of this paragraph does not apply to a decrease in the district's ADM adjusted for school size resulting from a loss of enrollment that occurs as a result of a boundary change under AS 29;

(2) the required local contribution of a city or borough school district is the equivalent of a 2.65 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 total of the district's basic need for the fiscal year under (b)(1) of this section and any additional funding distributed to the district in a fiscal year according to (b) 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 one 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 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.

(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.

KETCHIKAN GATEWAY BOROUGH MUNICIPAL CODE

2.35.020 Corporate status of School District.

The Ketchikan Gateway Borough, as a municipal corporation, is the Ketchikan Gateway Borough School District. Said School District is not a distinct entity independent of the borough.

2.35.040 Centralized treasury.

All public money of the borough School District shall be deposited in the centralized treasury with all other borough money.

2.35.050 School budget.

The borough school board shall submit the school budget for the following school year to the borough assembly by May 1 for approval of the total amount. Within 30 days after the receipt of the budget, the assembly shall determine the total amount of money to be made available from local sources for school purposes and shall furnish the school board with a statement of the sum to be made available. If the assembly does not, within 30 days, furnish the school board with a statement of the sum to be made available, the amount requested in the budget is automatically approved. By June 30, the assembly shall appropriate the amount to be made available from local sources from money available for the purpose.

JURISDICTION

This is a cross-appeal from the November 21, 2014 Order on Motion and Cross Motion for Summary Judgment, the January 21, 2015 Order on Motion to Reconsider, and the January 23, 2015 Final Judgment of the superior court, the Honorable William B. Carey. This Court has jurisdiction under AS 22.05.010 and Appellate Rule 202(a).

ISSUES PRESENTED ON CROSS-APPEAL

1. The appropriations and line-item veto clauses of the Alaska Constitution apply only to expenditures of state money from within the state treasury. Does a law requiring that a municipality pay a local contribution directly to its local school district violate either of these constitutional provisions?

2. In the superior court, Ketchikan Gateway Borough expressly declined to argue that the State has an obligation to fully fund public schools, rejecting the State's contention that such an argument was a necessary predicate for the borough's claims. Does this waiver preclude the borough from arguing on appeal that it is entitled to a refund based on the State's obligation to fully fund schools?

3. Ketchikan Gateway Borough paid money for its local schools directly to the Ketchikan Gateway Borough School District, which is not a distinct entity independent of the borough. If the law requiring the borough to make this payment is invalidated as unconstitutional, may the borough recover from the State, which never received the money?

STATEMENT OF THE CASE

I. Introduction

In challenging the requirement that municipalities partially fund their local schools, the borough relies on three constitutional provisions ill-suited to the task. The borough does not confront what the Alaska Constitution says about funding public schools in the education clause (art. VII, § 1) or about delegating responsibilities to municipalities in the article on local government (art. 10). Instead, the borough seeks to upend decades of established state-local cooperation on education using three inapposite constitutional provisions governing the spending of state money—the dedicated funds (art. IX, § 7), appropriations (art. IX, § 13), and veto clauses (art. II, §15).

The local contribution requirement is consistent with the appropriations and veto clauses of the Alaska Constitution for the same reason that the requirement does not violate the dedicated funds clause: the local contribution is not state public revenue and therefore is not subject to constitutional restrictions that apply to the spending of state public revenue.¹ The superior court granted partial summary judgment to each party, and its holding that the local contribution violates the dedicated funds clause is the basis of the State’s related appeal and should be reversed. But this Court should affirm the superior court’s other conclusions, including that the local contribution is “clearly not an appropriation” and thus does not violate the appropriations or veto clauses, and that the

¹ The State’s briefing employs the term “state public revenue” although the Constitution and caselaw generally speak of public revenue of the State without adding in the additional, ordinarily superfluous, adjective. The question of whether these constitutional provisions discussing state finances also apply to local public revenue is an issue of first impression.

borough is not entitled to a refund of its contributions paid under protest. [Exc. 261-67]

Before the superior court, both parties treated the borough's three constitutional challenges to the local contribution as a set of claims that would likely rise or fall together, depending on whether or not the local contribution is characterized as state money. [Exc. 109, 143] Following the mixed superior court ruling, these arguments are being briefed separately, at the potential cost of some clarity. The borough's cross-appeal conflates the appropriations and veto clauses with the dedicated funds clause as if all three carry an anti-dedication purpose, but the clauses serve distinct purposes that are part of larger constitutional guidance on state finance. The appropriations and veto clauses are designed to control the withdrawal of money from the state treasury subject to a balance of legislative and executive powers; they are not mechanisms for determining when non-state revenue must be deposited into the treasury. Nor are they mechanisms for determining how much money is available for a program in total—rather, they concern only how much is available from the state purse, subject to whatever conditions (including matching local funding) the State places on the money.

The Court should reject the borough's implicit attempt to support its claims with the waived argument that the State is responsible for fully funding education at the basic need level. The borough references the education clause only obliquely—avoiding any analysis of what the constitutional convention delegates and this Court's precedent have said about delegation of education funding responsibilities. Because interpretation of important constitutional provisions should not happen by implication, and because the borough explicitly waived the argument below, the Court should reject any argument by

the borough that depends on holding the State responsible for fully funding public schools.

Finally, the superior court correctly concluded that the borough is not entitled to a refund even if this Court holds the required local contribution unconstitutional because the requirement has not unjustly enriched the State at the borough's expense.

The borough's contribution went directly from the borough assembly to its school district—which is not a separate entity—and therefore only the school district and the borough's students were enriched by the payment. Because the State never received the money, and the borough has waived any argument that the State would otherwise be obligated to give the borough that money from state coffers, the borough's contention that the State is enriched on a dollar-for-dollar basis by the required local contribution fails. Indeed, the plain text of the local contribution statute shows that the State was not enriched because the borough's payment of its local contribution triggered the State's obligation to *spend* the state aid portion of the funding formula and therefore cost the State money, rather than the other way around.²

II. Additional background relevant to the cross-appeal³

The borough's arguments on cross-appeal involve the mechanics of local contribution payments. The borough complains that the local contribution goes directly from the Borough Assembly to the Ketchikan Gateway Borough School District, without

² AS 14.17.410(d).

³ The State provided a detailed factual background in its opening brief in the appeal, which it does not duplicate here.

being (1) deposited in the state treasury, (2) spent from the state treasury through an appropriation bill, or (3) subject to veto by the governor. [Borough Op. Br. 8]

Because the mechanics are at issue, this section explains how the political process and money from various sources converge to fund public schools on an annual basis.

The statute that defines the public school funding formula, AS 14.17.410, is not itself an appropriation bill. Thus, it does not appropriate any of the money discussed within the formula—neither the local, federal, nor state aid portions. Instead, every year, the relevant local, federal, and state governments appropriate their own portions of the funding identified in the formula, as described below.

A. The legislature exercises annual appropriation power over the state aid portion of school funding, subject to gubernatorial veto.

As this year’s legislative session timely demonstrates, public officials remain involved in public school financing annually.⁴ Even while AS 14.17.410 remains on the books setting out the public school funding formula, the Legislature appropriates the money to pay the state aid portion of public school funding every year.⁵ The statutory structure recognizes that the state aid portion of the formula in AS 14.17.410 is subject to

⁴ See, e.g., Alex DeMarban, *Conference committee takes step to restore education funding in budget bill*, Alaska Dispatch News (June 9, 2015), available at <http://www.adn.com/article/20150609/conference-committee-takes-step-restore-education-funding-budget-bill> (last viewed June 30, 2015).

⁵ See, e.g., sec. 28(c), ch. 16, SLA 2014 (appropriating \$1,202,568,100 from general fund to public education fund for distribution to school districts); see also AS 14.17.300(b) (providing that money appropriated to public education fund may be expended without further appropriation).

appropriation.⁶ “If the amount appropriated to the education fund . . . is insufficient to meet the amounts authorized under [the public school funding formula] for a fiscal year” AS 14.17.400(b) provides for a pro rata reduction of each district’s basic need funding. The Legislature may also choose to appropriate more money for public schools than the funding formula requires, as it did in 2014.⁷

B. The federal government appropriates federal dollars to some Alaska school districts.

Likewise, the federal impact aid portion of school funding is both provided for in federal statute and annually appropriated by the federal government, subject to presidential veto.⁸ Once federally appropriated, federal impact aid is generally supplied directly from the federal government to qualifying local school districts, based on applications submitted by the school districts.⁹ The federal impact aid the federal

⁶ For example, AS 14.17.300 establishes a public education fund to receive appropriations.

⁷ See sec. 32, ch. 18, SLA 2014 (appropriating additional public school funding outside the state aid formula).

⁸ 20 U.S.C. § 7703(a) (providing formula for computing impact aid payments); 20 U.S.C. § 7703(b) (acknowledging that amounts are subject to appropriation); 20 U.S.C. § 7714(b) (authorizing appropriations); see e.g. P.L. 113-164, the Continuing Appropriations Resolution, 2015 § 101 (a)(5) (Sept. 19, 2014) (appropriating money including impact aid for fiscal year 2015).

⁹ See 20 U.S.C. § 7705(a) (applications for impact aid to be made by local educational agency); 20 U.S.C. § 7713(9) (defining local educational agency as local school board); Exc. 92 (Letter from U.S. Department of Education responding to Ketchikan Gateway Borough School District’s impact aid application).

government sends to local school districts does not enter the state treasury and is not appropriated by the State.

C. Local municipalities appropriate local dollars to their school districts.

The local portion of school funding goes through a corresponding local political process. The municipality determines how much aid to provide within the floor and cap set by the State, and appropriates that money.¹⁰ Many municipalities wait to determine the amount of local aid to allocate within the floor and cap set by statute until the legislature has appropriated the state aid portion of school funding.¹¹ For Ketchikan Gateway Borough, the school budget is subject to annual appropriation from the Borough Assembly.¹² The school board submits a school budget on May 1 for the following school year, and the Borough Assembly is given thirty days to determine the total amount of money to be made available from local sources for school purposes.¹³ By June 30, the borough assembly appropriates the money to the Ketchikan Gateway Borough School District, which is defined in municipal code as “not a distinct entity independent of the borough.”¹⁴ Per municipal code, the money does not leave the borough’s coffers: “[a]ll

¹⁰ The floor for the local contribution, which is the subject of this lawsuit, is the required local contribution found at AS 14.17.410(b)(2). The cap for the additional voluntary local contribution is found at AS 14.17.410(c). The borough has not challenged the voluntary local contribution.

¹¹ See AS 14.14.060(c) (providing that, except as otherwise provided by municipal ordinance, borough school boards must submit a school budget by May 1 and the borough assembly must appropriate the money by June 30—dates that occur after the scheduled end of the legislative session).

¹² Ketchikan Gateway Borough Municipal Code § 2.35.050.

¹³ *Id.*

public money of the borough School District shall be deposited in the centralized treasury with all other borough money.”¹⁵

III. In the proceedings below, the superior court ruled for the State on the issues of appropriation, veto, and refund.

The superior court ruled for the State on the three claims that are the subject of the borough’s cross-appeal, concluding that the local contribution does not violate the appropriations or veto clauses and that the borough would not be entitled to a refund of past contributions even if the local contribution requirement were unconstitutional.

The court held the local contribution does not violate the appropriations or veto clauses because the local contribution is “clearly not an appropriation as defined by the Alaska Supreme Court or by Black’s Law Dictionary.” [Exc. 265] The court noted that the borough’s argument would require holding that any outlay of local funds at the direction of a state statute violates the appropriations and veto clauses. [Exc. 265] The court described the purpose of both the appropriations and veto clauses as “striv[ing] to ensure that public funds are not spent without legislative approval or without a final check on an errant legislature.” [Exc. 265] The court noted that this purpose was satisfied because the statute providing for the local contribution was enacted with legislative oversight and the opportunity for veto. [Exc. 266]

Despite having held that the local contribution violated the dedicated funds clause (the subject of the State’s appeal), the court held that the borough was not entitled to a

¹⁴ Ketchikan Gateway Borough Municipal Code § 2.35.020.

¹⁵ Ketchikan Gateway Borough Municipal Code § 2.35.040.

refund. The court noted that the borough's local contribution "never passed through state coffers." [Exc. 267] It found that the payment did not enrich the State—on the contrary, it caused the State to release state funding to the school district. [Exc. 267] Finally, the court concluded that the borough's refund argument relied upon the implied assumption that the borough's payment lessened the State's obligation. [Exc. 267] The court found that the borough had never argued that the State has an obligation to fully fund public schools in Alaska, and concluded that "without this showing one cannot conclude the state received any benefit from KGB's payment." [Exc. 267-68]

The borough sought partial reconsideration on the refund issue, [Exc. 270] which the State opposed. [Exc. 275] The superior court denied the motion for reconsideration, holding that the State is not enriched by the borough's local contribution payment because the statute does not obligate the State to fully fund schools, the Legislature provided a back-up plan to reduce basic need if money was not appropriated, the statutory scheme contemplates a variety of school funding sources, and "the KGB School District is the only party enriched by an RLC payment." [Exc. 281] The court held that "the KGB School District is the sole party against whom the Borough may bring a claim in restitution." [Exc. 284] The court also held that the borough "specifically waived" any argument that the basic need calculation is an expression of the State's constitutional obligation under the education clause. [Exc. 285] Finally, the court held that the local contribution does not spare the State an otherwise necessary expense because the State had never conceded that it was otherwise obligated to spend the money and there is no measurable amount the State profits from the local contribution. [Exc. 286-87]

STANDARD OF REVIEW

This Court reviews a grant or denial of summary judgment de novo.¹⁶ And the Court applies its independent judgment when interpreting constitutional provisions or statutes.¹⁷ “[A] party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality.”¹⁸ This presumption “recognizes that the legislature, like the courts, is pledged to support the state and federal constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits.”¹⁹ The Court’s power to strike down a provision of law as unconstitutional is “not a power that should be exercised unnecessarily, for doing so can undermine the public trust and confidence in the courts and be interpreted as an indication of lack of respect for the legislative and executive branches of government.”²⁰

ARGUMENT

The appropriations and veto clauses of the Alaska Constitution place procedural requirements and safeguards on the spending of money from the state treasury. The superior court correctly recognized that the appropriations and veto clauses do not apply to required local contribution payments because the payments do not enter the state

¹⁶ *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014).

¹⁷ *Id.* at 655.

¹⁸ *Harrod v. State, Dep’t of Revenue*, 255 P.3d 991, 1000-01 (Alaska 2011) (quoting *State, Dep’t of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001)).

¹⁹ *Andrade*, 23 P.3d at 71 (citation omitted).

²⁰ *Brause v. State, Dept. of Health & Social Services*, 21 P.3d 357, 360 (Alaska 2001).

treasury. [Exc. 262] Moreover, because the local contribution is not state public revenue, it is not money that conceivably should be deposited in the state treasury.

The appropriations and veto clauses have never been stretched to cover the non-state resource portion of statutes that share financial burdens between the State and other entities. Recognizing that appropriations apply only to money in the state treasury, the borough urges the Court to interpret the appropriations and veto clauses to require the legislature to gain control over non-state funds, deposit them into the treasury, appropriate them freely, and subject them to line-item veto. This proposed exercise would clutter appropriation bills with non-state money, creating hurdles of delay and possible financial diversion for all jointly funded projects and programs without serving the purposes of the clauses. This interpretation of the constitution is untenable.

Finally, because the borough expressly waived in superior court any claim that the education clause requires full funding of public schools, it cannot now claim that the duty to maintain schools under the education clause means the State must fully fund public schools. Thus, even if the local contribution is ruled unconstitutional, the borough is not entitled to a refund of its local contribution from the State because the State did not receive the money and only the borough's school district was enriched.

I. Local contribution payments do not violate the appropriations or veto clauses.

A. The language and history of the appropriations and line-item veto clauses show they apply only to appropriations of money in the state treasury.

The appropriations clause and corresponding line-item veto clause of the Alaska

Constitution are limited in scope to money in the state treasury by their language and context. The plain language of the appropriations clause, article IX, § 13 (actually titled “Expenditures”), applies only to money in the treasury:

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 appropriated by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

(emphasis added). And the relevant portion of the veto clause, article II, § 15, has the same limitation, as it refers back to “appropriation bills”:

The Governor . . . may, by veto, strike or reduce items in appropriation bills.

The discussion of these clauses at the Alaska Constitutional Convention confirms that they contain no hidden meaning. The commentary on the committee proposal for the appropriations clause explained that “[t]he requirement of appropriation before expenditure” is “standard.”²¹ And the minutes confirm that the delegates intended to reference money in the state treasury. The last line of the appropriations clause was originally worded “All appropriated funds unexpended at the end of a period of time specified by law shall be returned to the state treasury.”²² This language was amended by the committee to omit the concept of “return” to the state treasury in order to reflect the fact that “[unexpended] funds hadn’t actually ever *left* the state treasury.”²³

Likewise, as the borough acknowledges, the delegates crafted the corresponding

²¹ 6 Proceedings of the Alaska Constitutional Convention App. V at 112.

²² *Id.* at 108-09.

²³ 3B Proceedings at 2298 (Jan.16, 1956) (emphasis added).

line item veto provision with the intent to create “a strong executive branch with strong control on the purse strings of the state.”²⁴ [Borough Op. Br. 9] The emphasis of these clauses was on controlling expenditures of state public revenue.²⁵

The statute implementing the appropriations clause—AS 37.05.170—also supports reading the clause as applying to state, not local, money. The statute prevents payment from any fund “unless the Department of Administration certifies that its records disclose that there is a sufficient unencumbered balance available in the fund,” among other requirements.²⁶ The reference to Department of Administration records makes plain that the appropriations clause is concerned with money held in state coffers rather than local or private money. Because Alaska’s appropriations clause is “standard,”²⁷ it serves the same practical purpose as such clauses generally serve in other jurisdictions. An appropriations clause gives a “straightforward and explicit command” that money cannot be released from a treasury without an official act of the legislative branch.²⁸ Such a clause serves the purpose of preventing the discretionary release of money from the treasury by executive officers: “However much money may be in the Treasury at any one time, not a dollar of it can be used in payment of any thing not thus

²⁴ *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977).

²⁵ *See id.* at 796 (describing term “public revenue” as critical to the definition of an appropriation.).

²⁶ AS 37.05.170; *see also Zerbetz v. Alaska Energy Center*, 708 P.3d 1270, 1277 (Alaska 1985) (identifying AS 37.05.170 as statute implementing the Appropriations Clause).

²⁷ 6 Proceedings App. V at 112.

²⁸ *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (describing Appropriations Clause of U.S. Constitution, Art. 1, § 9, cl 7).

previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.”²⁹ And, as this Court has held, the corresponding veto clause is likewise an executive check on legislative appropriations.³⁰

The borough’s focus on differing definitions of “appropriation” to support its argument that the appropriations clause was intended to extend to non-state money is not persuasive. [Borough Op. Br. 9-13] The borough has identified portions of definitions that referenced the terms “particular fund” and “specified portion of the public revenue” without additional identifying adjectives. [*Id.* at 10-11] But the lack of specificity in those definitions does not mean that Alaska’s appropriations clause extends to funds outside the treasury, particularly given the reference to the treasury in the clause itself. Indeed, the dissent in *Myers v. Alaska Housing Finance Corporation* that the borough cites expressed concern about the one-time appropriation of future tobacco settlement revenue precisely because the money was to be routed through a state account in future years.³¹ [Borough Op. Br. 16] The borough has not cited a use of appropriation that requires a government to “appropriate” money it does not itself possess. [*See id.*]

Nor does the borough explain why the State’s imposition of a financial obligation on the borough should be subject to appropriation and line-item veto while other financial impositions, be they minimum wage laws, mandatory insurance requirements, or even statutes imposing taxes, are outside the annual “appropriation” requirement. As these

²⁹ *Id.* at 425 (quoting *Reeside v. Walker*, 52 U.S. 272, 291 (1850)).

³⁰ *Rosen*, 569 P.2d at 797.

³¹ *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386, 399 (Alaska 2003) (Bryner, J., dissenting).

examples illustrate, there is a clear difference between spending state money and imposing financial obligations on non-state entities; the appropriations and corresponding veto clauses draw that line at the state treasury. Because the local contribution does not spend state money, it is not subject to the limits on expenditures of state money. The borough's use of the initiative context to define "appropriation" is likewise inapposite as well as unpersuasive. [See Borough Op. Br. 11-12] The Court employs a narrower interpretation of appropriation to the appropriations and veto clauses than it does in other contexts. A broad definition applies to the constitutional prohibition on appropriation by initiative, article XI, § 7, under which allocating assets like land and fish may count as an "appropriation."³² By contrast, the appropriations and veto clauses apply only to money.³³ The Court has held that "article II's definition [of appropriation] is not governed by the overriding goal of preventing initiatives from wasting public assets or encroaching on protected legislative powers."³⁴ Instead, the Court explained, the veto clauses "govern the balance of power between the legislative and executive branches of Alaska's government."³⁵ Thus, the "the governor's appropriations veto applies only to

³² *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988) (applying initiative appropriation prohibition to designation of state lands); *Thomas v. Bailey*, 595 P.2d 1, 2 (Alaska 1979) (Alaska Homestead Act initiative violated article IX, § 7 prohibition on making appropriation in initiative because it gave away state land); *Pullen v. Ulmer*, 923 P.2d 54, 64 (Alaska 1996) (applying initiative appropriation prohibition to allocation of salmon harvesting rights).

³³ *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles* ("Knowles III"), 86 P.3d 891, 895 (Alaska 2004).

³⁴ *Id.*

³⁵ *Id.*

monetary appropriations.”³⁶ The Court held that a strictly monetary approach to appropriations is also suggested by various provisions of article IX, which contains the appropriations clause.³⁷

Of course, the money that the appropriations and veto clauses discuss is not just any money. The Court held in *Thomas v. Rosen* that appropriation bills concern “public revenue.”³⁸ The Court cited with approval a definition of “appropriation” that describes appropriation as the process through which a government authorizes use of money by executive officers of that government: “An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.”³⁹ Requiring state appropriation of the local contribution does not fit that model because state officials are not authorized to use the money—by statute it goes directly to school districts.

In sum, the appropriations and line item veto clauses are inapplicable to AS 14.17.410(b) and AS 14.12.020(c) because the clauses apply to the removal of money from the state treasury. The local contribution statutory provisions do not take money from the state treasury. And they are not appropriation bills—they are enactments of law

³⁶ *Id.*

³⁷ *Id.* at 897.

³⁸ 569 P.2d 793, 796 (Alaska 1977) (holding sale of general obligation bonds was not appropriation because sale did not spend particular public revenue but was instead “the commitment of the state to a debtor relationship with those who purchase bonds”).

³⁹ *Id.* (quoting *State ex rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936)).

rather than authorizations for expenditure of money that expire.⁴⁰ Therefore, although the local contribution statutes went through the legislative process and were subject to veto upon passage, the statutes are not subject to annual appropriation and veto requirements that apply to state appropriations.

B. The local contribution is not state public revenue such that it should be deposited in the state treasury and subjected to appropriation.

Perhaps acknowledging that the appropriations and veto clauses only apply to money within the state treasury, the borough argues that the required local contribution “should be directed to the State Treasury.” [Borough Op. Br. 10] But rather than demonstrating that these funds must be deposited in the state treasury by analyzing the criteria governing such deposits, the borough offers the circular argument that the local contribution should be deposited in the treasury because it is an appropriation.

[Borough Op. Br. 10]

The local contribution does not belong in the state treasury because it is not state public revenue. To determine whether money needs to be deposited into the state treasury and made subject to appropriation, the Court has looked at whether the money is an “unrestricted program receipt.”⁴¹ Alaska Statute 37.05.146 defines program receipts as

⁴⁰ Indeed, these statutes would violate the confinement clause if they were deemed to be appropriations. *See Alaska Legislative Council v. Knowles (Knowles II)*, 21 P.3d 367, 377 (Alaska 2001) (adopting five requirements for appropriations bills to satisfy the confinement clause: (1) language qualifying appropriation must be minimum necessary to explain legislature’s intent regarding how money is to be spent; (2) must not administer the program of expenditures; (3) must not enact law or amend existing law; (4) must not extend beyond the life of the appropriation; (5) language must be germane to an appropriations bill).

⁴¹ *Carr-Gottstein Properties v. State*, 899 P.3d 136, 145 (Alaska 1995).

“fees, charges, income earned on assets, and other state money received by a state agency in connection with the performance of its functions.” From within this broad category of program receipts the statute then defines categories of receipts that are not “unrestricted.”⁴² Using this statutory definition, the Court has held that private funds placed in trust for renovation of a building subject to a lease-purchase agreement with the State did not need to be deposited in the treasury or subject to appropriation.⁴³ Even though that money was available to the state court system to spend on building renovations, the creation of a separate renovation fund outside the treasury did not violate the appropriations clause of the Constitution.⁴⁴

The local contribution presents an even more straightforward case for exclusion from the treasury because it is not “state money” and is not “received by a state agency.”⁴⁵ The local and non-state nature of the local contribution was argued in the State’s opening brief on appeal. [State’s Op. Br. 29-34] That argument is incorporated by reference here. Because the local contribution does not enter the state treasury and does not belong in the state treasury, it is not an appropriation subject to the appropriations and veto clauses.

C. Requiring local contributions to be deposited in the state treasury and appropriated would not increase control over state expenditures.

If, as the borough suggests, the appropriation provisions required the State to

⁴² AS 37.05.146(b) and (c).

⁴³ *Carr-Gottstein Properties*, 899 P.2d at 145-46.

⁴⁴ *Id.*

⁴⁵ *See* AS 37.05.146.

collect and appropriate all private, local, and outside money identified in statute, a major bureaucratic hurdle would be created for no gain. [Borough Op. Br. 12-13] For the local contribution alone, an appropriation requirement would add meaningless delay and confusion without furthering the appropriation clause's goal of providing control on expenditures of *state* money.

Under the current system, the legislature appropriates money for public schools each year, which influences the amount of money local governments choose to spend.⁴⁶ Local governments next proceed with their own budgeting and decision-making process, then locally appropriate the local portion of money.⁴⁷ Under the status quo, the conditions for release of state aid are met at that point, and schools can be funded.⁴⁸ But under the borough's theory, local governments (and presumably the federal government) should be forced to send their locally appropriated share of the money to the State for deposit in the treasury, subject to the legislature's passage of an appropriation bill and the governor's line-item veto to keep track of (and potentially divert) money that is not state money. This third round of appropriation would meaninglessly clutter appropriations bills with money that may be restricted to particular programs as a condition of its receipt. It would serve to inject delay and uncertainty into jointly funded endeavors, and—by making it harder for the State to partner financially with other government and private entities—it

⁴⁶ See generally AS 14.14.060(c) (providing deadlines for borough budgeting on schools after legislative session is scheduled to end); AS 14.14.065 (extending borough requirements to city school districts).

⁴⁷ *Id.*

⁴⁸ AS 14.17.410(d) (conditioning payment of state aid on payment of local contribution).

would fail to serve the appropriations and veto clauses goal of “controlling the state purse strings.”⁴⁹

The borough argues without citation that “[t]he 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.” [Borough Op. Br. 14] But the borough provides no support for its claim that the legislature is constitutionally required to annually reassess how much money local governments spend on anything. And the appropriations clause is not meant to require the legislature to run its fingers over every dollar of funding that goes to “State programs” regardless of the source—by its terms the clause concerns withdrawal of money from the *treasury* and the incurring of obligations on the *treasury*, not the imposing of obligations on others or spending of money by others.

The borough appears to believe that the current system deprives the legislature and governor of sufficient control because it does not place each dollar that goes to public schools into an appropriation bill. This argument is belied by the reality of the vigorous education funding debates that occur annually.⁵⁰ Moreover, the State is better able to deal with the big picture of program funding when it appropriates in one bill state funding subject to matching grant and offset provisions, as it does under the current system, rather

⁴⁹ See *Rosen*, 569 P.2d at 795.

⁵⁰ See, e.g., sec. 32(e), ch. 18, SLA 2014 (discussing intent of legislature in providing supplemental education funding as allowing continued operations and time for “all stakeholders to work with the legislature to identify innovative approaches . . . that will . . . lower costs while maintaining a quality education system”).

than having to disjointedly debate and appropriate education funding from different sources. In sum, declining to appropriate the mandatory portion of local aid does not impede the State's control over its purse strings.

D. Even if local contribution payments must be appropriated and subject to veto, the Court should not strike down the local contribution statutes.

The Court should not strike down the State's local contribution statutes even if it agrees with the borough's appropriations and veto clause arguments. Although in practice local contributions go directly from the borough to its school district, nothing in state statute mandates that the payments be delivered directly to school districts.⁵¹ The payments could be routed through the state treasury if necessary. Thus, if this Court holds that the constitution requires the legislature to appropriate the local contribution payments and subject them to veto, it should not invalidate the local contribution statutes. Instead, under principals of constitutional avoidance, the Court should uphold the statutes, by construing them to allow the local contributions to flow through the state treasury and be subject to appropriation and veto.⁵² The only laws that might be invalid would be local ordinances that specify the mechanics of payment—such as the borough's Municipal Code § 2.35.040 ordinance specifying that public money of the school district

⁵¹ See AS 14.17.410(b)(2) (setting amount of local contribution without specifying mechanics of payment); AS 14.12.020(c) (stating requirement that municipality “provide the money that must be raised from local sources” without specifying mechanics of payment).

⁵² *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (recognizing “well-established rule of statutory construction that courts should if possible construe statutes so as to avoid the danger of unconstitutionality” (internal citation omitted)).

be deposited in the borough's centralized treasury.

II. The borough waived any argument dependent on a holding that the State is responsible for fully funding public schools.

The borough acknowledges that it (1) did not argue in superior court that the State is responsible for fully funding education and (2) explicitly disclaimed such an argument in the superior court. [Borough Op. Br. 19, 21] But then the borough implicitly relies on the equivalent of a full-funding argument by referring to the State's "sole" obligation to "maintain" schools. [Borough Op. Br. 21-25] Constitutional provisions should not be interpreted by implication or indirectly,⁵³ and "[i]t is especially important to properly raise and brief constitutional issues."⁵⁴ The Court should decline to take the drastic step of ruling that the State is responsible for fully funding education on such an insubstantial foundation.

The superior court correctly found that the borough explicitly waived any argument about the State's obligation to fully fund public schools. [Exc. 267-68] The borough filed a complaint seeking declaratory relief and damages from the State's "underfund[ing]" of its schools. [Exc. 8] The State noted early in briefing before the superior court that the borough was attempting to indirectly argue that the State is constitutionally required to provide full funding for public schools. [Exc. 110-14]

⁵³ *Brause v. State, Dep't of Health and Soc. Servs.*, 21 P.3d 357, 360 (Alaska 2001) (cautioning that Court should refrain from ruling statute unconstitutional "when the issues are not concretely framed" because that "increases the risk of erroneous decisions.").

⁵⁴ *Alyeska Pipeline Serv. Co. v. State*, 288 P.3d 736, 743 (Alaska 2012) (deeming waived constitutional argument raised for the first time in superior court reply brief).

The borough responded by explicitly disclaiming any attempt to argue the extent of the State's responsibility for funding public schools. [Exc. 138] In a subsection of its brief headed "The Education Clause (Article VII, section 1) is irrelevant to the Borough's constitutional arguments" the borough stated: "The Borough will 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." [Exc. 138]

When the borough later raised a full funding argument to support its motion for reconsideration of its refund claim, the superior court correctly recognized the effort as too little, too late. [Exc. 285] The borough contended that the State is enriched on a dollar-for-dollar basis by the borough's payment of its local contribution. [Exc. 271, Borough Op. Br. 19-26] Similarly, the borough now argues, "Since maintaining the public schools is solely the State's responsibility, it follows that any expenditures by the State on education are necessary." [Borough Op. Br. at 25] The borough asserts that "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" and that "[t]he State's burden in fulfilling the obligation was correspondingly lessened." [Borough Op. Br. 23] Each of these arguments depends on the assumption that the State is constitutionally required to fully fund education at the basic need level, and are thus waived by the borough's disclaimer of such a position before the superior court.

The borough's arguments would have failed even if the borough had not waived them. As the State noted in its appeal, and incorporates by reference here, the constitutional delegates intended that local governments would help fund their public

schools. [State’s Op. Br. 13-14, 38-40] And the borough’s assumption that basic need— an amount that fluctuates based on available revenue and legislative priorities— represents a constitutional minimum for the amount of school funding required by the education clause is unfounded and unbriefed. Moreover, it is illogical: the basic need statute allows pro rata reductions of basic need, which would be unconstitutional if basic need represented a constitutional floor for education spending.⁵⁵ These flaws and others would have been fully addressed by the State in briefing if the borough had timely raised the constitutional challenge. The Court should decline to reach this waived issue.

III. The borough is not entitled to a refund from the State even if the local contribution requirement is unconstitutional.

The borough is not entitled to a refund from the State because even if the required local contribution is unconstitutional, the requirement has not unjustly enriched the State at the borough’s expense. To prevail on its refund claim the borough must prove that (1) it “conferred a benefit upon [the State]”; (2) the State “appreciated the benefit”; and (3) the State “accepted and retained the benefit under circumstances making it inequitable for [it] to retain the benefit without paying [the borough] the value thereof.”⁵⁶ The borough satisfies none of the elements.

The local contribution went directly from the borough assembly to its school

⁵⁵ AS 14.17.400(b) (permitting pro rata reduction in basic need).

⁵⁶ *Bennett v. Artus*, 20 P.3d 560, 563 (Alaska 2001) (plaintiff seeking credit under unjust enrichment theory has burden to show that it (1) conferred a benefit upon defendant; (2) defendant appreciated the benefit; and (3) defendant accepted and retained the benefit under circumstances making it inequitable to retain the benefit without paying plaintiff the value thereof).

district—which is not a separate entity from the borough—and only the school district was enriched by the payment. The money never even left borough coffers.⁵⁷ The borough instead paid part of the costs of educating its children. Although a well-educated borough intangibly benefits the State, it more directly benefits the borough itself. Because the State never received the money, and the borough has waived any argument that the State would have otherwise been obligated to provide the money from state coffers, the borough has failed to show that the State was enriched on a dollar-for-dollar basis.⁵⁸

Indeed, the borough’s own actions in paying above and beyond the required local contribution demonstrate that the required local contribution did not result in unjust enrichment. Absent proof that the borough paid an obligation the State owed, the only other possible loss to it (at a gain to its schools) would be if the funding requirement resulted in the borough giving its school district more money than the borough determined the school district needed. But the borough in fact chose to give above and beyond the local contribution floor of \$4.2 million by over \$3.8 million additional dollars. [Exc. 22]

The borough’s reliance on the *Restatement (Third) of Restitution and Unjust Enrichment* § 19 is unavailing because it presumes the existence of an unlawful tax that transferred money away from the taxpayer and toward the taxing authority. [Borough Op. Br. 22-26] In contrast, the local contribution imposed a financial obligation on the

⁵⁷ Ketchikan Gateway Borough Municipal Code § 2.35.040.

⁵⁸ The borough bears “the burden of proving the value of the benefits [it] conferred upon [the State].” *Bennett*, 20 P.3d at 563.

borough to pay a certain amount to itself for its schools. And even if the borough prevails on its constitutional claims, the borough's constitutional complaint finds error not in the collection of borough money but with the requirement that the money go directly to the borough's school district without possible diversion by the legislature—this alleges a harm to the legislature's ability to spend money another way but not a harm to the borough, which received every penny of its local contribution. Even assuming the borough is right that the money should not have remained in borough coffers, equity does not support requiring the State to pay the borough for the "error" of allowing the borough to spend its money.

A finding of enrichment to the State is also contradicted by the plain text of the statute, which provides that the State's obligation to *spend* money is triggered by the borough's payment of its local contribution, meaning that the payment of the local contribution cost the State money to the benefit of the borough and its schools rather than the other way around.⁵⁹

Contrary to the borough's assertions, the State has never conceded that it is enriched by the borough's payment of its local contribution. [Borough Op. Br. 18] As the superior court correctly determined, the State never conceded this in its briefing below. [Exc. 286-87] Rather, in response to a different argument about the purpose of the dedicated funds provision, the State argued that allowing local funds to be called upon enhances rather than limits the legislature's budgetary control over the State's purse

⁵⁹ AS 14.17.410(d).

strings, and the ability to use local funds on education may result in a system with less State spending. [Exc. 108, 277-287] This was not a concession about how much the legislature would spend from State coffers on public schools if it did not have a statutory formula that included direct local spending on schools. And under the current system, a local contribution costs the State money.⁶⁰

Nor did the State concede enrichment in its motion for a stay. As the State argued in that motion, it is unknown what the legislature will do if the local contribution is struck down. [State Em. Mot. for Stay 11-13] The State has a vested interest in preserving the current system because it is the one chosen by the elected representatives of the people.⁶¹ But in its absence, the legislature might provide a formula that results in less funding to schools at the same cost to the State, or might impose a tax to raise state revenue generally and increase state aid, or might do something else entirely. Whether the borough would benefit or suffer from such changes is unknown, and is further evidence that the current system does not unjustly enrich the State at the borough's expense. The State's observation, in its motion for a stay, that it would be harmed by immediate enforcement of a ruling invalidating its democratically enacted method of providing for education was not a concession that the borough is harmed by the current system in which its schools receive funding from both state and local sources. As the numerous amici curiae supportive of the local contribution demonstrate, many of those most

⁶⁰ *Id.*

⁶¹ *See Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J. in chambers) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”)

intimately involved in public education believe the current system works to the benefit of students, educators, and communities alike. [See CEAAC Br. 6, 12-13, 37-40; NEA Br. 1-3; AASB Br. 17-18]

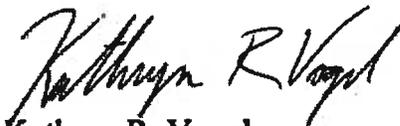
CONCLUSION

Based on the foregoing, this Court should affirm the superior court's award of partial summary judgment to the State on the issues of appropriation, veto and refund.

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