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INTRODUCTION

In 1976 Alaska amended its constitution to set aside permanently a portion of the state's natural resource revenues. Article IX, section 15 of the Alaska Constitution provided that at least 25 percent of all state oil and mineral revenues would be deposited in a savings account – the “Alaska Permanent Fund” – that would generate income from investments. The drafters of the Permanent Fund amendment specified that “all income from the fund shall be deposited in the general fund *unless otherwise provided by law.*” The last five words of that clause were added to preserve the Legislature’s ability to direct the fund’s investment-generated income to specific uses, including dividend payments to Alaska residents.

In 1982 the Alaska Legislature dedicated 50 percent of the Permanent Fund’s income to annual cash payments for Alaska residents.¹ The Legislature’s intent to dedicate annual dividends from the Permanent Fund was clear and unambiguous. Alaska Statute (“AS”) 37.13.145(b) provides, “[a]t the end of each fiscal year, the corporation *shall* transfer from the earnings reserve account to the dividend fund . . . 50 percent of the income available for distribution.”² AS 43.23.055 directs the Department of Revenue to “annually pay permanent fund dividends from the dividend fund.”³

Thirty-four years after the Legislature passed – and Governor Jay Hammond signed – the law creating a formula for calculating the annual dividend payments,

¹ Ch. 81, SLA 1982.
² AS 37.13.145(b) (emphasis added).
³ AS 43.23.055.

1 Governor Bill Walker unilaterally reduced the transferred amount by more than half.⁴
2 Governor Walker purportedly used the line-item veto to halve the 2016 dividend, believing
3 that the funds transfer was an appropriation because the Legislature had included a
4 provision in the 2016 budget accounting for the dedicated funds.⁵ Consequently, the
5 Alaska Permanent Fund Corporation (“APFC”) followed the governor’s direction and
6 transferred less than 25 percent of the income from the permanent fund to the dividend
7 fund.⁶

9
10 The APFC’s failure to transfer the full 50 percent of the income from the
11 Permanent Fund to the Dividend Fund violates APFC’s duties under AS 37.13.145(b).
12 First, the constitutional and legislative history of the Permanent Fund amendment and
13 statutes demonstrate the Legislature’s intent to dedicate a calculable amount of the fund’s
14 income to annual Permanent Fund Dividend (“PFD”) payments to Alaska residents. The
15 dedication specified the purpose for which the fund’s income would be used. The Earnings
16 Reserve Account and Dividend Fund were established as accounts to accomplish the
17 dedication’s purpose.

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19
20 Second, the PFD program does not require annual appropriations from the
21 Legislature, and thus, the APFC’s duty to transfer the full 50 percent to the dividend fund
22 is unequivocal. The law dedicating 50 percent of the Permanent Fund’s income to
23 dividends contains a clear legal obligation that the APFC must follow: APFC must
24

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26
27 ⁴ See Transmittal Letter from Bill Walker, Governor, State of Alaska, to Kevin Meyer, President of
the Senate, Alaska State Legislature (June 28, 2016) [hereinafter *Line-Item Veto Transmittal Letter*].

28 ⁵ *Id.* at 2 (“\$666.4 million of the \$1.36 billion permanent fund dividend appropriation was vetoed.”).

⁶ See Letter from Angela Rodell, Executive Director, Alaska Permanent Fund Corporation, to
Senator Bill Wielechowski, Alaska State Legislature (Aug. 12, 2016) [hereinafter *Rodell Letter*].

1 automatically transfer 50 percent of the income to the Dividend Fund. As the Alaska
2 Supreme Court recognized in *Hickel v. Comper*, the statute authorizes an automatic transfer
3 and does not require an annual appropriation from the Legislature.⁷

4 Third, the line-item veto of the funds transfer was invalid because the governor
5 impermissibly struck descriptive language in Section 10. Under article II, section 15 of the
6 Alaska Constitution, the governor may “strike or reduce items in appropriations bills,” but
7 the Alaska Supreme Court has held that the governor may not use the line-item veto to
8 strike descriptive language.⁸ By striking the phrase “authorized under AS 37.13.145(b),” the
9 governor irreconcilably changed the purpose of Section 10 and unconstitutionally altered
10 the PFD framework existing since 1982.

11 A fundamental truth underlying this case is that the Legislature has the power to
12 dedicate funds pursuant to article IX, section 15 of the Alaska Constitution, and a
13 dedication of the Permanent Fund’s income was accomplished through AS 37.13.145(b)
14 and 43.23.055. To hold otherwise would eviscerate the clear intent of those statutes and
15 render the long-established formula for calculating the amount of Alaskans’ annual
16 dividend payment legislative surplusage. Upholding the line-item veto would permit every
17 future governor to decide unilaterally the annual PFD amount, undermining the
18 Legislature’s intent in enacting AS 37.13.145(b).

19 This Court should grant summary judgment to the Plaintiffs because there are no
20 genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law.
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28 ⁷ 874 P.2d 922 (Alaska 1994).

⁸ *Alaska Legislative Council v. Knowles (Knowles II)*, 21 P.3d 367, 374 (Alaska 2001).

1 Alaska Statute 37.13.145(b) is clear and the governor's purported line-item veto of Section
2 10 of the 2016 operating budget is unconstitutional. Plaintiffs are entitled to the relief
3 requested: a declaration by this Court that the APFC must follow the statutory mandate to
4 transfer the full 50 percent of the Permanent Fund's available income to the Dividend
5 Fund, and an order from this Court compelling APFC to comply with that legal mandate.
6

7 STATEMENT OF UNDISPUTED FACTS

8 I. The Statutory Framework

9
10 The PFD program consists of three primary financial accounts: 1) the principal, 2)
11 the Earnings Reserve Account, and 3) the Dividend Fund. The Permanent Fund principal
12 is the corpus of the trust fund established in 1976 by Alaska Constitution, article IX,
13 section 15.⁹ The Permanent Fund amendment requires at least 25 percent of all revenues
14 produced from oil and mineral development in the state be placed in the permanent
15 fund.¹⁰ The Permanent Fund principal is invested in "income-producing investments," and
16 cannot be withdrawn by the state except by constitutional amendment.¹¹ As of July 2016
17 the principal was approximately \$44.2 billion.¹²
18
19

20 The income produced from investing the principal is deposited into a sub-account
21 within the Permanent Fund called the Earnings Reserve Account. AS 37.13.145(a)
22 provides, "[t]he earnings reserve account is established as a separate account in the fund.
23 Income from the fund shall be deposited by the [APFC] into the account as soon as it is
24

25 ⁹ Alaska Const. art. IX, § 15.

26 ¹⁰ *Id.*

27 ¹¹ *See id.; State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 628 (Alaska 1993)
28 ("The principal of the fund must remain to produce income . . .").

¹² Alaska Permanent Fund Corporation, July 2016 Monthly Statement, available at
http://www.apfc.org/_amiReportsArchive/APFC201607.pdf.

1 received.”¹³ The funds in the Earnings Reserve Account are also invested, and each year
2 the Fund’s net income is calculated. The Fund’s net income equals the income generated
3 by returns on investments from both the principal and the Earnings Reserve Account.¹⁴
4 Twenty-one percent of the net income for the previous five fiscal years is “income
5 available for distribution.”¹⁵ As of July 2016 the Earnings Reserve Account contained
6 approximately \$8.6 billion.¹⁶ The income available for distribution in 2016 was estimated to
7 be \$2.724 billion.¹⁷

8
9
10 The Dividend Fund is a separate account in the state treasury that is administered
11 by the Commissioner of Revenue for the sole purpose of disbursing PFDs to eligible
12 Alaska residents.¹⁸ Each year, the Dividend Fund receives a transfer from the Earnings
13 Reserve Account pursuant to AS 37.13.145(b):

14
15 At the end of each fiscal year, the [APFC] shall transfer from
16 the earnings reserve account to the dividend fund established
17 under AS 43.23.045, 50 percent of the income available for
distribution under AS 37.13.140.¹⁹

18 Once the funds are transferred from the Earnings Reserve Account to the Dividend Fund,
19 the Department of Revenue automatically issues dividend payments to eligible Alaska
20 residents based on the formula in AS 43.23.025(a): The value of the PFD for each year

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22
23 ¹³ AS 37.13.145(a).

24 ¹⁴ AS 37.13.140.

25 ¹⁵ *Id.*

26 ¹⁶ Alaska Permanent Fund Corporation, July 2016 Monthly Statement, available at
http://www.apfc.org/_amiReportsArchive/APFC201607.pdf.

27 ¹⁷ CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016.

28 ¹⁸ AS 43.23.045(a) (“The dividend fund is established as a separate fund in the state treasury. The
dividend fund shall be administered by the commissioner and shall be invested by the commissioner
in the same manner as provided in AS 37.10.070.”).

¹⁹ AS 37.13.145(b).

1 “equals” the “amount of income of the Alaska permanent fund transferred to the dividend
2 fund under AS 37.13.245(b),”²⁰ less administrative and other costs, divided by the “number
3 of individuals eligible to receive a dividend payment.”²¹ AS 43.23.055 provides that the
4 Department of Revenue “shall . . . annually pay permanent fund dividends from the
5 dividend fund.”²²

7 II. The 2016 Budget and the Governor’s Line-Item Veto.

8 On December 15, 2015, Governor Walker announced his proposed budget for
9 fiscal year 2017.²³ The governor’s “New Sustainable Alaska Plan” called for state spending
10 reductions and revenue increases through a variety of new taxes and reforms to existing
11 taxes.²⁴ Chief among Governor Walker’s proposals, the “Permanent Fund Protection Act,”
12 called for reforming the PFD program and limiting the 2016 dividend amount to \$1,000
13 per Alaska resident.²⁵ Governor Walker wanted to limit the PFD amount and redirect
14 funds that would otherwise have been paid to Alaska residents in order to fill the deficit in
15 the state’s general budget.²⁶

16 On January 19, 2016, the Permanent Fund Protection Act was introduced in the
17 Legislature as Senate Bill (“SB”) 128.²⁷ According to the governor’s transmittal letter, “the
18 bill would change the manner in which permanent fund dividends are calculated” and
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20
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24 ²⁰ AS 43.23.025(a)(1)(A).

25 ²¹ AS 43.23.025(a)(2).

26 ²² AS 43.23.055.

27 ²³ Press Release, Office of the Governor, State of Alaska (Dec. 15, 2015).

28 ²⁴ Press Release, Office of the Governor, State of Alaska (Dec. 9, 2015).

²⁵ Transmittal Letter, from Bill Walker, Governor, State of Alaska, to Kevin Meyer, President of the Senate, Alaska State Legislature (Jan. 19, 2016).

²⁶ *See id.*

²⁷ S. JOURNAL, 29th Leg., 2d Sess. 1590 (Alaska 2016).

1 “establish a dividend amount of \$1,000 for each eligible individual in revenue year 2016.”²⁸
2 SB 128 would also “amend AS 37.13.145 in order to eliminate an annual inflation transfer
3 from the permanent fund earnings reserve account to the principal.”²⁹ SB 128 proposed
4 amending AS 37.13.145 to make dividend payments “subject to appropriation” from the
5 Legislature.³⁰ The bill also proposed changing the source of the PFD. Instead of paying
6 dividends from the income earned on the Permanent Fund’s principal, SB 128 called for
7 paying dividends from half of the oil and nonrenewable resource revenues paid in to the
8 state each year.³¹ Finally, SB 128 set the 2016 dividend amount at \$1,000.³²
9
10

11 On January 19 Governor Walker also introduced his proposed operating budget for
12 fiscal year 2017, House Bill (“HB”) 256.³³ The governor proposed appropriating “[t]he
13 amount necessary for the payment of a dividend to each eligible individual of \$1,000.”³⁴
14 Under HB 256, approximately \$700 million would be paid to Alaska residents as dividends,
15 and an additional \$300 million would be appropriated from the Earnings Reserve Account
16 to the general fund.³⁵
17
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19 The Legislature considered and rejected both of the governor’s bills. In March 2016
20 the House Finance Committee rejected the governor’s version of HB 256.³⁶ Instead of
21 approving the governor’s budget, the House adopted a committee substitute (“CS”) for
22

23 ²⁸ *Id.*

24 ²⁹ *Id.* at 1589.

25 ³⁰ SB 128, 29th Leg., 2d Sess., § 4 (Alaska 2016).

26 ³¹ *Id.*

27 ³² *Id.* at § 9 (“Notwithstanding any other provision in this Act or other applicable law, the permanent
28 fund dividend for each eligible individual for calendar year 2016 shall be \$1,000.”).

29 ³³ H. JOURNAL, 29th Leg., 2d Sess., at 1449 (Alaska 2016).

30 ³⁴ HB 256, 29th Leg., 2d Sess., § 8(d) (Alaska 2016).

31 ³⁵ *Id.* at § 8(e).

32 ³⁶ H. JOURNAL, 29th Leg., 2d Sess., at 1804 (Alaska 2016).

1 HB 256 that acknowledged a full 2016 PFD payment.³⁷ CSHB 256 passed the House, 24-
2 14, and a similar version passed the Senate, 16-4.³⁸ In April the House and Senate
3 convened a conference committee to work out minor differences between their respective
4 versions of HB 256.³⁹

5
6 After the regular legislative session's end, Governor Walker called a special session,
7 directing the Legislature to continue consideration of important fiscal bills, including HB
8 256 and SB 128.⁴⁰ On May 31 the HB 256 conference committee reached a consensus
9 version of the operating budget for fiscal year 2017.⁴¹ Both houses passed the conference
10 committee substitute ("CCS") for HB 256.⁴² The bill acknowledged that there would be a
11 full 2016 PFD payment under AS 37.13.145(b), and it was presented to the governor for
12 signature or veto.⁴³

13
14
15 In June 2016 the Senate passed a modified version of the governor's Permanent
16 Fund Protection Act, SB 128.⁴⁴ On June 6, the Senate's version of SB 128 was introduced
17 in the House and referred to the Finance Committee.⁴⁵ The committee took no action on
18 the bill, thus killing that PFD reform proposal.

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22 _____
23 ³⁷ CSHB 256, 29th Leg., 2d Sess., § 9(b) (Alaska 2016).

24 ³⁸ H. JOURNAL, 29th Leg., 2d Sess., at 1804 (Alaska 2016); S. JOURNAL, 29th Leg., 2d Sess., at 2130
(Alaska 2016).

25 ³⁹ H. JOURNAL, 29th Leg., 2d Sess., at 2063 (Alaska 2016).

26 ⁴⁰ H. JOURNAL, 29th Leg., 4th Spec. Sess., at 2954-55 (Alaska 2016).

27 ⁴¹ *Id.* at 3025.

28 ⁴² *Id.*; S. JOURNAL, 29th Leg., 4th Spec. Sess., at 2951 (Alaska 2016).

⁴³ CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016.

⁴⁴ CSSB 128, 29th Leg., 4th Spec. Sess. (Alaska 2016); S. JOURNAL, 29th Leg., 4th Spec. Sess., at 2980
(Alaska 2016).

⁴⁵ H. JOURNAL, 29th Leg., 4th Spec. Sess., at 3092 (Alaska 2016).

1 On June 28 Governor Walker purportedly used his line-item veto authority to
2 reduce certain appropriations in CCS HB 256, including the PFD amount.⁴⁶ The final
3 appropriations bill along with the governor's vetoed terms and inserted amount provided:

4 Sec. 10. Alaska Permanent Fund.

5
6 (a) The amount required to be deposited under AS
7 37.13.010(a)(1) and (2), estimated to be \$333,000,000, during the
8 fiscal year ending June 30, 2017, is appropriated to the principal
9 of the Alaska permanent fund in satisfaction of that
10 requirement.

11 (b) The amount ~~authorized under AS 37.13.145(b)~~ for transfer
12 by the Alaska Permanent Fund Corporation on June 30, 2016,
13 ~~estimated to be \$1,362,000,000~~ **\$695,650,000**, is appropriated
14 from the earnings reserve account (AS 37.13.145) to the
15 dividend fund (AS 43.23.045(a)) for the payment of permanent
16 fund dividends and for administrative and associated costs for
17 the fiscal year ending June 30, 2017.⁴⁷

18 According to the governor's letter explaining his PFD line-item veto,

19 [t]o assure the permanent fund earnings reserve balance remains
20 solvent enough to enact [the New Sustainable Alaska Plan],
21 \$666.4 million of the \$1.36 billion permanent fund dividend
22 appropriation was vetoed.⁴⁸

23 The governor's inserted amount for PFD payments, \$695,650,000, was calculated to
24 provide every eligible Alaska resident with a 2016 PFD totaling approximately \$1,000.⁴⁹

25 On August 10 Senator Bill Wielechowski sent a letter to Angela Rodell, Executive
26 Director of the APFC, requesting that the APFC "pay a full Permanent Fund Dividend

27 ⁴⁶ Line-Item Veto Transmittal Letter, *supra* note 4, at 2.

28 ⁴⁷ CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016.

⁴⁸ Line-Item Veto Transmittal Letter, *supra* note 4, at 2.

⁴⁹ *Id.*

1 (PFD) to every eligible Alaskan.”⁵⁰ The letter argued that the APFC had an independent
2 legal duty to transfer funds necessary to pay the full statutorily provided dividend amount,
3 regardless of the governor’s line-item veto and regardless of the Legislature’s 2016
4 appropriations bill.⁵¹ Senator Wielechowski’s letter pointed out that “the statutory law is
5 crystal clear,” referring to AS 37.13.145(b).⁵²
6

7 On August 12 the APFC sent a letter responding to Senator Wielechowski.⁵³ The
8 APFC acknowledged that it had transferred \$695,650,000 from the Earnings Reserve
9 Account to the Dividend Fund on August 1, 2016 – less than half of the \$1,362,000,000
10 required by AS 37.13.145(b). But the APFC contended that the transfer from the Earnings
11 Reserve Account required a subsequent appropriation, and consequently, the governor’s
12 line-item veto was valid.⁵⁴ The Plaintiffs filed this lawsuit on September 16, 2016.⁵⁵
13
14

15 **RULE OF DECISION**

16 Summary judgment is appropriate where “there is no genuine issue as to any
17 material fact” and “the moving party is entitled to judgment as a matter of law.”⁵⁶ “It is
18 within the special competency of this court to independently construe a statute.”⁵⁷ This
19 Court must adopt the “rule of law that is most persuasive in light of precedent, reason, and
20
21

22 ⁵⁰ Letter from Senator Bill Wielechowski, Alaska State Legislature, to Angela Rodell, Executive
23 Director, Alaska Permanent Fund Corporation (Aug. 10, 2016).

24 ⁵¹ *Id.*

25 ⁵² *Id.*

26 ⁵³ Rodell Letter, *supra* note 6.

27 ⁵⁴ *Id.*

28 ⁵⁵ Complaint at 1, *Wielechowski v. State of Alaska, Alaska Permanent Fund Corp.*, No. 3AN-16-08940 CI
(Alaska Super. Ct. Sept. 16, 2016).

⁵⁶ *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting ALASKA R. CIV. P.
56(c)).

⁵⁷ *Sanders Properties v. Anchorage*, 846 P.2d 135, 138 n.4 (Alaska 1993) (citing *O’Callaghan v. State*, 826
P.2d 1132, 1134, n.2 (Alaska 1992), *cert. denied*, 506 U.S. 860 (1992)).

1 policy,”⁵⁸ and apply its “independent judgment to questions of constitutional law” and the
2 construction of the Alaska Constitution.⁵⁹

3 ARGUMENT

4 I. The Legislature Dedicated A Percentage Of The Permanent Fund’s 5 Income To Annual PFD Payments.

6 This Court should grant summary judgment to the Plaintiffs’ because the
7
8 Legislature intended to dedicate a percentage of the Permanent Fund’s income to annual
9 PFD payments. The history of the Permanent Fund amendment demonstrates that the
10 Legislature specifically wanted the authority to dedicate the fund’s income to specific
11 purposes, including residency payments. The Legislature accomplished that goal by
12 enacting the Permanent Fund statutes.
13

14 A. The Permanent Fund’s History Demonstrates The 15 Legislature’s Intent to Dedicate The Fund’s Income To PFDs.

16 The constitutional and legislative history of the Permanent Fund demonstrates that
17 the dedication of annual dividends was intricately tied to the purpose of the fund. From
18 the adoption of the Permanent Fund amendment, to the passage and revision of the
19 Permanent Fund laws, the Legislature’s intent to dedicate a percentage of the fund’s
20 income is clear. This Court should conclude that the Legislature’s original goal was to
21 provide a percentage of the fund’s income to annual payments for Alaska residents without
22 the need for subsequent legislative action or appropriations.
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27 ⁵⁸ *Alaska Civil Liberties Union v. State*, 122 P.2d 781, 785 (Alaska 2005).

28 ⁵⁹ *State, Dep’t of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001) (quoting *Brown v. Brown*, 983 P.2d 1264, 1267 (Alaska 1999)).

1 put revenues from oil and mineral lease sales into a permanent fund – a state savings
2 account for the massive revenues pouring into the state from oil exploration and
3 development on the North Slope – had failed because of the prohibition on dedicated
4 funds. In 1975 Governor Hammond – a leading proponent of the permanent fund idea –
5 vetoed legislation that would have established a permanent fund.⁶⁷ According to Governor
6 Hammond, the bill was incompatible with the dedicated funds clause because it directed
7 state revenue to a specific purpose outside the annual appropriations process.⁶⁸
8

9
10 In response to the constitutional roadblock, Governor Hammond and others
11 supported an amendment creating an exception to the dedicated funds clause to allow
12 revenues from Alaska’s oil and mineral wealth to be saved and then directed to certain
13 purposes.⁶⁹ On January 15, 1976, the House Rules Committee introduced House Joint
14 Resolution 29, which proposed adding a new clause – section 15 – to article IX of the
15 Alaska Constitution.⁷⁰ The new clause would direct mineral lease rentals, royalties, and
16 other payments to the Alaska “permanent fund.”⁷¹ The resolution also proposed amending
17 article IX, section 7 to allow dedications to and from the permanent fund:
18
19
20
21

22 ⁶⁷ See Charles Wohlforth, *The Permanent Fund’s Defined Purpose Isn’t What You Think*, ALASKA
23 DISPATCH NEWS, Jan. 9, 2016, [http://www.adn.com/commentary/article/strange-fight-created-](http://www.adn.com/commentary/article/strange-fight-created-permanent-fund-no-defined-purpose/2016/01/10/)
24 [permanent-fund-no-defined-purpose/2016/01/10/](http://www.adn.com/commentary/article/strange-fight-created-permanent-fund-no-defined-purpose/2016/01/10/).

25 ⁶⁸ See Charles Bingham, *PFD – Fund is Jay Hammond’s Legacy to the State*, JUNEAU EMPIRE, Oct. 9,
26 2005, http://juneauempire.com/stories/100905/sta_20051009029.shtml#.V_f0zrVlyuQ
27 (“Legislation passed in 1975 that would have allocated 50 percent of the mineral leases to the
28 permanent fund, but Hammond (who became governor in 1974) vetoed the plan because he felt it
‘was an unconstitutional dedication of revenues.’ Hammond said the state’s constitution didn’t allow
money to be dedicated in that way, and he thought the courts would overturn the legislation.”).

⁶⁹ *Id.*

⁷⁰ SSHJR 39, 9th Leg., 2d Sess. (Alaska 1976).

⁷¹ *Id.*

1 The proceeds of any state tax or license shall not be dedicated
2 to any special purpose, *except as provided in section 15* and except
when required for state participation in federal programs⁷²

3 The initial draft of article IX, section 15 provided that “[a]ll income from the
4 permanent fund shall be deposited in the general fund.”⁷³ In Governor Hammond’s
5 January 15, 1976, transmittal letter to the Legislature supporting the resolution, the
6 governor noted, “[t]he income of the fund would be deposited into the general fund
7 without any permanent fund restrictions.”⁷⁴

8
9 But the idea that *all* income from the permanent fund would be deposited into the
10 general fund raised concerns. The Legislature wanted the constitution to authorize
11 dedications of the Permanent Fund’s income for specific purposes. On February 21, 1976,
12 the House Finance Committee held the first hearing on the proposed amendment.⁷⁵ The
13 Committee discussed whether the language of proposed article IX, section 15 should be
14 changed to allow explicitly the Legislature to direct income from the Permanent Fund to
15 specific purposes. Testimony from the hearing demonstrates the Committee’s intent to
16 draft language that would let the Legislature dedicate the Permanent Fund’s income to
17 certain uses, in particular, securities or debt service:
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19
20

21 HOUSE FINANCE CHAIR MALONE: What about the
22 question of fund income for securities of the state? Would that
23 be allowable under the language of the resolution as drawn?

24 REVENUE COMMISSIONER GALLAGHER: The
25 dedication of income?

26
27 ⁷² *Id.*

⁷³ *Id.*

28 ⁷⁴ H. JOURNAL, 9th Leg., 2d Sess. 38–40 (Alaska 1976).

⁷⁵ Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976).

1 MALONE: Not the way it's drawn right now. It wouldn't be I
2 guess.

3 GALLAGHER: As you have seen the Morgan report, they feel
4 it would be, could be, a great enhancement to be able to
5 dedicate that income to whatever purpose the legislature so
6 feels. And I also, personally, feel it would be a great
7 enhancement. It's one of the things I've gotta talk to the
8 governor about. I would hope also a week or so to get back to
9 you on that one.

10 REPRESENTATIVE COWPER: You mean like a dedication
11 of debt service?

12 GALLAGHER: To debt service or whatever purpose the
13 legislature sees fit.⁷⁶

14 The Legislature amended proposed article IX, section 15 to include the phrase

15 "unless otherwise provided by law."⁷⁷ As the House Joint Committee's Report explained,

16 The purpose of the language in the last sentence of the
17 resolution is to give future legislatures the maximum flexibility
18 in using the Fund's earnings – ranging from adding to the Fund
19 principal to paying out a dividend to resident Alaskans.⁷⁸

20 The phrase was deemed a "sufficient legal peg so that income from the permanent fund
21 could be pledged in the bond covenants for the security of state agencies or general
22 obligation bonds, or . . . it could also permit the legislature to make a dividend payment to
23 citizens of Alaska from the income of the fund."⁷⁹

24 The proposed amendment was adopted by the Legislature and placed on the
25 November 1976 election ballot. During the campaign for voter approval, proponents of

26 ⁷⁶ *Id.*

27 ⁷⁷ CS SSHJR 39 (JUD), 9th Leg., 2d Sess. (Alaska Mar. 24, 1976).

28 ⁷⁸ H. JOURNAL, 9th Leg., 2d Sess. 685 (Alaska 1976) (joint report of the House Finance and Judiciary
Committees).

⁷⁹ Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976)
(quoting Jim Rhodes, staff to Chair Malone).

1 the amendment made it clear that the Permanent Fund's income could be set aside for
2 PFD payments. "There have been many proposals for possible fund uses. They range from
3 paying direct dividends to Alaskans to using the money to underwrite such vast projects as
4 hydroelectric dams."⁸⁰ According to one of the resolution's main sponsors, Representative
5 Hugh Malone, the amendment was "a chance to let average Alaskans have a stake in
6 managing some of the oil wealth."⁸¹ Alaskan voters knew that the Permanent Fund could
7 be dedicated to cash payments, and in November 1976, approved the proposed
8 constitutional amendment.
9

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11 2. *The 1980 and 1982 Permanent Fund Acts Dedicated Income to*
12 *Annual PFD Payments.*

13 In 1980 the Legislature accomplished the amendment's goal by establishing the
14 Alaska Permanent Fund and dedicating a portion of the fund's income to cash payments
15 for Alaska residents. First, the Legislature created the APFC as a government corporation
16 to manage and invest the Permanent Fund's assets. The Legislature provided that "the
17 corporation should be used as a savings device managed to allow the maximum use of
18 disposable income from the corporation for purposes designated by law."⁸²
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21 Second, the Legislature dedicated a percentage of the Permanent Fund's income to
22 annual cash payments for Alaska residents. The Legislature listed three purposes for the
23 dedication:
24

25 (1) to provide a mechanism for equitable distribution to the
26 people of Alaska of at least a portion of the state's energy

27 ⁸⁰ Editorial, *Permanent Fund Raises Use Issue*, ANCHORAGE DAILY NEWS, Oct. 22, 1976, at 2.

28 ⁸¹ *Id.*

⁸² Ch. 18, SLA 1980 (codified at AS 37.13.020(3)).

1 wealth derived from the development and production of the
2 natural resources belonging to them as Alaskans;

3 (2) to encourage persons to maintain their residence in Alaska
4 and to reduce population turnover in the state; and

5 (3) to encourage increased awareness and involvement by the
6 residents of the state in the management and expenditure of
7 state revenues derived from natural resource development and
8 production.⁸³

9 According to the 1980 law, the amount of each Alaskan's dividend payment was based on
10 the individual's length of state residency. Thus, each Alaska resident would receive one
11 dividend share "for each full year that the individual is a state resident after January 1,
12 1959."⁸⁴

13 The Legislature also established the Dividend Fund as a separate account in the
14 state treasury to facilitate the annual payments.⁸⁵ The Legislature mandated that "[e]ach
15 year the commissioner shall transfer to the dividend fund 50 percent of the income of the
16 Alaska permanent fund."⁸⁶ The law provided that "the Legislature may annually
17 appropriate money from the general to the dividend fund if there is not enough money in
18 the dividend fund to pay each eligible individual an annual permanent fund dividend
19 valued at \$50."⁸⁷ But if the Permanent Fund's income was sufficient to pay at least \$50
20 dividends, the law contemplated that the payments would be made automatically. There
21 was no provision conditioning either the transfer from the Permanent Fund to the
22 Dividend Fund, or from the Dividend Fund to Alaska residents, on annual appropriations.
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26 ⁸³ Ch. 21, SLA 1980.

27 ⁸⁴ *Id.* (codified at AS 43.23.010).

28 ⁸⁵ *Id.* (codified at AS 43.23.050).

⁸⁶ *Id.* (codified at AS 43.23.050(b)).

⁸⁷ *Id.* (codified at AS 43.23.050(c)).

1 The opinion of the attorney general at the time the law was passed supports the
2 conclusion that dividend payments were automatic and did not require subsequent
3 appropriations. In early 1980, Senate President Clem Tillion solicited the attorney general's
4 advice on "whether the payments of dividends can be prescribed by law to be made
5 directly from the income of the Alaska Permanent Fund."⁸⁸ Attorney General Avrum
6 Gross' March 19, 1980 opinion confirmed that article IX, section 15 of the Alaska
7 Constitution did indeed grant the Legislature the power to dedicate the Permanent Fund's
8 income to dividend payments:
9

10
11 Our reading of the decisional law on constitutional amendments
12 leads us to the conclusion here that the legislature probably can
13 provide by law for income from the fund to be *automatically*
14 deposited back into the fund or distributed as dividends. Both
15 are part of the amendment's history and both are closely related
16 to the fund itself. . . . The legislature's discretionary power over
17 permanent fund income may be limited, but *it is probably broad*
18 *enough for it to prescribe for the distribution of a portion of the income to*
19 *the people without annual appropriation.*⁸⁹

20 Thus, at the time the first PFD law was passed, legal experts and legislators understood
21 that a percentage of the Permanent Fund's income could be dedicated to dividend
22 payments without requiring annual appropriations.
23

24 Almost immediately after the 1980 law passed, it was challenged in court on the
25 grounds that it violated the U.S. Constitution's equal protection clause. Dividend payments
26 were stalled for two years while the challenge worked its way through the court system.
27

28 ⁸⁸ 1980 Op. Att'y Gen. (No. 3; Mar. 19).

⁸⁹ *Id.* (emphasis added).

1 Ultimately, the U.S. Supreme Court concluded that the law unconstitutionally
2 discriminated against newer state residents.⁹⁰

3 In 1982 the Legislature anticipated that the residency classification would not
4 withstand federal constitutional scrutiny and revised the dedication of the Permanent
5 Fund's income. First, the Legislature amended the Permanent Fund's structure by
6 specifying that the Permanent Fund's income would be put in a separate account called the
7 undistributed income account.⁹¹

8
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10 The balance of the net income as defined in AS 37.13.140 shall
11 be transferred to the undistributed income account in the
12 Alaska permanent fund. Money in the undistributed income
13 account shall be invested in investments authorized under AS
14 37.13.120. Income from the investment of the undistributed
15 income account shall be treated as an addition to that account.⁹²

16 The "average net income of the corporation for the last five fiscal years" in the
17 undistributed income account was "income available for distribution."⁹³

18 Second, the Legislature eliminated the unconstitutional residency classification for
19 dividend payments. Instead, the Legislature provided simply that all eligible Alaska
20 residents would "receive one permanent fund dividend each year."⁹⁴ The amount of the
21 annual dividend would be determined by dividing the amount available for distribution by
22 the total number of Alaska residents receiving dividends.⁹⁵ The formula for calculating the
23 amount of the PFD payment has remained substantially unchanged to the present day.

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26 ⁹⁰ *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

27 ⁹¹ Ch. 81, SLA 1982 (codified at AS 37.13.145).

28 ⁹² *Id.* (codified at AS 37.13.145).

⁹³ *Id.* (codified at AS 37.13.140).

⁹⁴ Ch. 102, SLA 1982 (codified at AS 43.23.005).

⁹⁵ *Id.* (codified at AS 43.23.025).

1 The 1982 law left intact the Legislature's command for automatic transfers from the
2 undistributed income account in the Permanent Fund to the Dividend Fund.

3 "Notwithstanding any contrary provision of law, each year the commissioner shall transfer
4 to the dividend fund 50 percent of the income of the Alaska permanent fund earned
5 during the fiscal year ending on June 30 of the current year and available for
6 distribution."⁹⁶ The Legislature did not condition the transfer from the undistributed
7 income account to the Dividend Fund on annual appropriations. And the Legislature made
8 it clear that "[m]oney in the dividend shall be used to pay permanent fund dividends
9 annually."⁹⁷ As a subsequent opinion by the Attorney General in 1981 noted, "the payment
10 of dividends from the dividend fund . . . does not require an appropriation."⁹⁸
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14 *3. Minor Amendments Since 1982 Have Not Altered The Intent For An
Automatic Dividend Payment.*

15 Since 1982, the Legislature has twice amended the Permanent Fund laws, but
16 neither revision substantially altered the original dedication. In 1986 the Legislature
17 renamed the undistributed income account the "earnings reserve account" and changed
18 the formula for calculating the fund's income available for distribution.⁹⁹ But using the
19 term "earnings reserve account" did not alter the substance of the law in any way.
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22 Finally, in 1992 the Legislature reorganized the APFC's governing laws codified at
23 AS 37.13, but left undisturbed the underlying dedication of the fund's income to annual
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27 ⁹⁶ *Id.* (codified at AS 43.23.050(b)).

28 ⁹⁷ *Id.* (codified at AS 43.23.050(a)) (emphasis added).

⁹⁸ 1981 Inf. Op. Att'y Gen. (66-260-82; Dec. 22).

⁹⁹ Ch. 28, SLA 1986 (codified at AS 37.13.140, 37.13.145).

1 dividends. The 1992 law restructured how the statutes described the “disposition of
2 income” by clarifying the specific purposes of the fund’s income:

3 (a) The earnings reserve account is established as a separate
4 account in the fund. Income from the fund shall be deposited
5 by the corporation into the account as soon as it is received.
6 Money in the account shall be invested in investments
7 authorized under AS 37.13.120.¹⁰⁰

8 (b) At the end of each fiscal year, the corporation *shall* transfer
9 from the earnings reserve account to the dividend fund
10 established under AS 43.23.045 50 percent of the income
11 available for distribution under AS 37.13.140.¹⁰¹

12 The 1992 law did not fundamentally change the original dedication or the specific duties of
13 the corporation to transfer a percentage of the fund’s income to the dividend fund for
14 distribution as annual dividends.

15 Thus, this Court should conclude that the Permanent Fund’s constitutional and
16 legislative history demonstrates the Legislature’s intent to dedicate the fund’s income to
17 annual payments for Alaska residents. The Legislature accomplished that goal by enacting
18 the Permanent Fund laws, which provided an automatic transfer of the fund’s income to
19 the Dividend Fund, and an automatic payment from the Dividend Fund to Alaska
20 residents. The dedication was not predicated on subsequent annual appropriations from
21 the Legislature.
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28 ¹⁰⁰ Ch. 134, SLA 1992 (codified at AS 37.13.145(a)).

¹⁰¹ *Id.* (codified at AS 37.13.145(b)).

1 **B. The State’s Interpretation Of The Dedication Would Render**
2 **The Constitution’s Phrase “Unless Otherwise Provided By**
3 **Law” Meaningless.**

4 This Court should conclude that the State’s previous interpretations of the
5 dedication of the Permanent Fund’s income misunderstand the nature of dedicated funds.
6 The State has argued that the dedication of the Permanent Fund’s income was limited to
7 only directing the fund’s income into the Earnings Reserve Account, and that the
8 constitution forbids any dedication of the fund’s income to specific uses. For example, in
9 the APFC’s August 2016 letter to Bill Wielechowski, the State erroneously contended that
10 article IX, section 15’s phrase “unless otherwise provided by law” means that the
11 Legislature is only authorized to “re-direct the deposit of permanent fund income into an
12 account other than the general fund, which the Legislature did in 1982 by directing
13 permanent fund earnings in to the Earnings Reserve Account.”¹⁰² Consequently, the State
14 narrowly concluded that the Legislature may not automatically direct funds from the
15 Earnings Reserve Account to any specific purpose, such as annual PFD payments, without
16 violating the dedicated funds prohibition in article IX, section 7.¹⁰³

17 The State’s logic contorts the constitution’s meaning because the phrase “unless
18 otherwise provided by law” was specifically added to article IX, section 15 to allow the
19 Legislature to dedicate the fund’s income to specific purposes, such as annual PFD
20 payments or loan guarantees. The State’s overly narrow interpretation of the PFD program
21 – in which any use of the fund’s income requires an annual appropriation – would

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27 ¹⁰² Rodel Letter, *supra* note 6.

28 ¹⁰³ *Id.* (“We do not, however, interpret this constitutional language as exempting the net income of
the permanent fund from the dedicated fund prohibition contained in Article IX, Section 7 of the
Alaska Constitution.”).

1 erroneously treat the fund's income "as automatically becoming part of the general fund
2 despite any attempted dedication by law."¹⁰⁴ The State's interpretation of the PFD
3 program would contradict the clear intent of the constitutional amendment and the express
4 terms of the dedication accomplished in AS 37.13.145(b).¹⁰⁵

5
6 First, the State has acknowledged that there was a dedication of the Permanent
7 Fund's income,¹⁰⁶ but averred that the dedication was limited to directing the Permanent
8 Fund's income to a specific account – the Earnings Reserve Account.¹⁰⁷ The State's
9 conclusion is unsupported by the history of the PFD statutes. When the Legislature
10 originally dedicated the Permanent Fund's income to annual dividends, there was no such
11 thing as the Earnings Reserve Account. In 1982 the Legislature provided that "net income
12 [from the permanent fund] shall be transferred to the undistributed income account in the
13 Alaska permanent fund."¹⁰⁸ The "undistributed income account" was simply a sub-account
14 within the permanent fund to segregate the fund's earnings. In 1986 the Legislature
15 renamed the "undistributed income account" the Earnings Reserve Account, but the
16 Legislature did not change any substantive provision related to the dedication of income
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21 ¹⁰⁴ 1983 Inf. Op. Att'y Gen. (366-484-83; Mar. 10).

22 ¹⁰⁵ *Id.*

23 ¹⁰⁶ No one disputes that the Permanent Fund income is state revenue and that without article IX,
24 section 15's exemption, the fund's income would be subject to the dedicated funds prohibition in
25 article IX, section 7. *See* 2009 Inf. Op. Att'y Gen. (JU2009-200-509; June 16) ("In our opinion, the
26 doubts recently expressed by the Alaska Supreme Court in SEACC regarding the statutory
27 dedication of income from an investment fund are addressed by the constitutional language
28 permitting the legislature to otherwise provide for the income from the permanent fund."); *Southeast
Alaska Conservation Council v. State*, 202 P.3d 1162, 1170 (Alaska 2009) ("[T]he amendment to article
IX, section 7 creating an exception for the Permanent Fund indicates that the prohibition is meant
to apply broadly.").

¹⁰⁷ Rodel Letter, *supra* note 6; 2009 Inf. Op. Att'y Gen. (JU2009-200-509; June 16); 1983 Inf. Op.
Att'y Gen. (366-484-83; Mar. 10).

¹⁰⁸ CSSSSB 684, 12 Leg., 2d Sess., § 9, Ch. 81, § 9, SLA 1982.

1 for PFD payments.¹⁰⁹ Because the original dedication of the Permanent Fund's income
2 occurred before the Legislature created the Earnings Reserve Account, the State's position
3 is untenable.

4 Second, the State's argument that the Legislature intended to dedicate the
5 Permanent Fund's income to the Earnings Reserve Account without any specific purpose
6 in mind strains logic and misunderstands the meaning of the dedicated funds clause. The
7 State has contended that the Permanent Fund's income was dedicated to the Earnings
8 Reserve Account, and consequently, any further dedications by the Legislature – such as to
9 annual PFD payments – would violate the dedicated funds clause.¹¹⁰ But the State has
10 concluded that the Earnings Reserve Account is an unrestricted fund.¹¹¹ Thus, according
11 to the State's theory, the Permanent Fund's income was directed to an account without any
12 limitations on how those funds could be spent.
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16 The State justified its position by noting that “[a]s a practical matter, any deposit of
17 funds into the earnings reserve account arguably decreases the legislature's flexibility and
18 control over such funds because of the public and political pressure to use such funds only
19 for permanent fund dividends or inflation-proofing.”¹¹² The State's conclusion was that
20 “the deposit of investment into the earnings reserve account is for all practical purposes a
21 dedication.”¹¹³ But the State was wrong.
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26 ¹⁰⁹ Ch. 28, SLA 1986.

27 ¹¹⁰ Rodel Letter, *supra* note 6; 2009 Inf. Op. Att'y Gen. (JU2009-200-509; June 16).

28 ¹¹¹ *See Hickel*, 874 P.2d at 934; 2009 Inf. Op. Att'y Gen. (JU2009-200-509; June 16) (“Nothing in law restricts the earnings reserve account from appropriation.”).

¹¹² 2009 Inf. Op. Att'y Gen. (JU2009-200-509; June 16).

¹¹³ *Id.*

1 The State's interpretation of the dedication would render the constitution's phrase
2 "unless otherwise provided by law" meaningless because directing the fund's income to the
3 Earnings Reserve Account would have been constitutionally permissible even without that
4 provision. In *Sonneman v. Hickel*, the Alaska Supreme Court concluded that the Legislature
5 may direct state revenues to a fund or account without violating the dedicated funds clause
6 so long as there is no "legal restraint on the appropriation power of the legislature."¹¹⁴ The
7 Court's decision was premised on the purpose of the dedicated funds clause, which was
8 designed to prevent the Legislature from losing control over the state's finances.¹¹⁵ When
9 the Legislature segregated the Permanent Fund's income in the "undistributed income
10 account," and subsequently, the Earnings Reserve Account, the designation did not
11 deprive either the governor or the Legislature of any real control over the finances of the
12 state because at the time the full amounts of those funds were available for appropriation.
13 Consequently, even without the exemption for dedications of the Permanent Fund's
14 income, there would have been no constitutional prohibition on the Legislature simply
15 directing the Permanent Fund's income to a designated account, such as the Earnings
16 Reserve Account.
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21 The Earnings Reserve Account is more accurately characterized as a "special
22 account."¹¹⁶ Since 1959 the Legislature has created numerous "special accounts" to
23 "identify the amount of revenue collected from the source."¹¹⁷ Special accounts differ from
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26 ¹¹⁴ *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992).

27 ¹¹⁵ *Id.* at 938-40.

28 ¹¹⁶ See Staff Report of Alaska Legislative Council, Dedicated and Special Funds, 3d Leg., 1st Sess. (January 1963).

¹¹⁷ *Id.*

1 dedicated funds because the Legislature may appropriate from special accounts at will –
2 “there is no prohibition against appropriating the resources of the ‘special accounts’ for
3 other purposes should the need arise.”¹¹⁸ In contrast, dedicated funds may be used only for
4 a particular, specific purpose “set forth in the statute establishing it.”¹¹⁹ Thus, the State’s
5 argument that the Earnings Reserve Account is a dedicated fund is incorrect. The Earnings
6 Reserve Account is a special account designed to facilitate the dedication of the Permanent
7 Fund’s income to PFD payments.
8

9
10 The State’s position on the dedication of funds is also inconsistent. On the one
11 hand, the State has argued that the Permanent Fund’s income is dedicated to the Earnings
12 Reserve Account.¹²⁰ At the same time, the State has contended that the Earnings Reserve
13 Account may be appropriated for any purpose the Legislature desires.¹²¹ Those two
14 propositions are irreconcilable because the two hallmarks of a dedication of funds are (1)
15 the identification of a specific purpose by the Legislature and (2) a restriction on the
16 Legislature’s ability to use the dedicated funds for anything else. Because there is no legal
17 difference between how the Earnings Reserve Account and general fund may be
18 appropriated, directing money to the Earnings Reserve Account instead of the general
19 fund is not a dedication of funds for a specific purpose¹²² and there is no restriction on the
20 Legislature’s ability to use the funds for other purposes. The State’s reliance on “public and
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25 ¹¹⁸ *Id.*

26 ¹¹⁹ *Id.*

27 ¹²⁰ Rodel Letter, *supra* note 6; 2009 Inf. Op. Att’y Gen. (JU2009-200-509; June 16).

28 ¹²¹ 2009 Inf. Op. Att’y Gen. (JU2009-200-509; June 16).

¹²² *See id.* (“Generally speaking, a dedication of funds occurs when the legislature sets aside the proceeds of certain state revenue *for a special purpose.*” (emphasis added)).

1 political pressure” to use the funds only for specific purposes does not justify calling a
2 simple direction of income to a special account a dedication of funds.

3 Contrary to the State’s arguments, the Legislature dedicated the Permanent Fund’s
4 income for the specific purpose of paying annual PFDs. The Legislature explained that the
5 phrase “unless otherwise provided by law” was meant to “give future legislatures the
6 maximum flexibility in using the Fund’s earnings,” including as a potential loan security for
7 the state.¹²³ If the State’s position is accepted – that the phrase means only that the
8 Legislature may direct the Permanent Fund’s income to a designated account – then there
9 would be no way for the Legislature to dedicate the income to a loan guarantee, security, or
10 any other purpose. Each year the Legislature would have to re-appropriate money from the
11 designated account to accomplish the fund’s designated purpose, but there would be no
12 obligation for the Legislature to do so, and any annual appropriation would be subject to
13 line-item veto. No lender would think such a proposition constituted a loan guarantee or
14 security. Thus, the State interprets the phrase “unless otherwise provided by law” too
15 narrowly and is clearly inconsistent with the constitutional amendment’s intent

16 Finally, the State’s current position is the opposite of its previous interpretations of
17 the constitution and Permanent Fund statutes. In 1983 a third Attorney General opinion
18 on the Permanent Fund’s dedication acknowledged that paying annual PFDs from the
19 Permanent Fund’s income “was so intimately connected to the establishment of the
20 permanent fund that an exception from the dedicated fund prohibition for that purpose
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¹²³ H. JOURNAL, 9th Leg., 2d Sess. 685 (Alaska 1976).

1 was implied in the permanent fund constitutional amendment.”¹²⁴ And a fourth Attorney
2 General opinion in March 1983 recognized that “[a]rticle IX, section 15 clearly
3 contemplates that the legislature may by law provide for some use of the fund other than
4 deposit in the general fund.”¹²⁵ The State claimed that it would defend the dedication of
5 the Permanent Fund’s income to PFD payments on the grounds that the statute and
6 practice was consistent with the constitution’s and Legislature’s intent.¹²⁶

8 Thus, this Court should conclude that dedication of the Permanent Fund’s income
9 occurred when the Legislature specified the *use* of the permanent fund’s income, which was
10 to annual PFD payments. AS 37.13.145(b) does not require an annual appropriation, and
11 the full funds transfer from the Earnings Reserve Account to Dividend Fund must be
12 carried out automatically.
13

14
15 **II. The Constitutionally Authorized Dedication Of Permanent Fund**
16 **Income In AS 37.13.145(b) Requires the APFC To Transfer 50 Percent**
17 **Of The Income From The Earnings Reserve Account To The Dividend**
18 **Fund.**

19 This Court should conclude that AS 37.13.145(b) requires the APFC to transfer the
20 full 50 percent of the income available for distribution from the Earnings Reserve Account
21 to the Dividend Fund. AS 37.13.145(b) is unambiguous and unconditional – nothing in the
22 statute’s text indicates that the funds transfer is subject to annual appropriations. By
23 enacting AS 37.13.145 and 43.23.045 the Legislature and Governor dedicated a certain
24 percentage of the fund’s income to annual dividend payments. Consequently, the funds
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¹²⁴ 1983 Inf. Op. Att’y Gen. (366-328-83; Jan. 5).

28 ¹²⁵ 1983 Inf. Op. Att’y Gen. (366-484-83; Mar. 10).

¹²⁶ 1983 Inf. Op. Att’y Gen. (366-328-83; Jan. 5).

1 transfer is automatic and not dependent on an annual appropriations. This Court must
2 order the APFC to comply with AS 37.13.145(b) and transfer the full 50 percent of the
3 income available for distribution.

4 **A. AS 37.13.145(b) Is Clear And Unambiguous.**

5 AS 37.13.145(b) provides that the APFC “shall” transfer 50 percent of the income
6 available for distribution.¹²⁷ The Legislature’s command was mandatory and left no room
7 for the APFC to deviate from the full transfer.¹²⁸ “[T]he use of ‘shall’ indicates” that the
8 legislature intended to make the funds transfer mandatory.¹²⁹ Courts have commonly held
9 that “the word ‘shall’ generally indicates a command that admits no discretion on the part
10 of the person instructed to carry out the directive.”¹³⁰ The language in AS 37.13.145(b) is
11 clear and unambiguous: The Legislature created a specific statutory structure requiring an
12 automatic funds transfer.
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16 The Alaska Supreme Court’s analysis in *Hickel v. Cowper* supports the conclusion
17 that AS 37.13.145(b) created an automatic transfer that does not require an annual
18 appropriation.¹³¹ *Hickel* concerned a dispute over the Legislature’s attempt to define
19 “amount available for appropriation” as that phrase was used in Alaska Constitution,
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23 ¹²⁷ AS 37.13.145(b) (“At the end of each fiscal year, the corporation *shall* transfer from the earnings
24 reserve account to the dividend fund established under AS 43.23.045, 50 percent of the income
available for distribution under AS 37.13.140.” (emphasis added)).

25 ¹²⁸ See BLACK’S LAW DICTIONARY 1375 (6th ed. 1990) (“As used in statutes . . . [shall] is generally
imperative or mandatory.”).

26 ¹²⁹ *State v. Alex*, 646 P.2d 203, 208 (Alaska 1982).

27 ¹³⁰ *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). See
28 also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory
‘shall’ . . . normally creates an obligation impervious to judicial discretion.”).

¹³¹ *Hickel*, 874 P.2d. at 934.

1 article IX, section 17.¹³² The Legislature passed a law defining “amount available for
2 appropriation” as all of the funds and assets referred to in various state funds and
3 accounts.¹³³ Governor Hickel challenged the Legislature’s definition, arguing that the law
4 was unconstitutional because “the amount available for appropriation” must include all
5 state funds, i.e., “the total amount accessible by the legislature, including all of the funds
6 and assets” so long as a simple legislative majority can make the funds available.¹³⁴ The
7 Court rejected both interpretations, defining “the amount available for appropriation” as
8 “all funds over which the legislature has retained the power to appropriate which require
9 further appropriation before expenditure.”¹³⁵
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12 The Court then turned its attention to whether particular funds and assets created
13 by various statutes were available for appropriation.¹³⁶ The Court stressed that whether the
14 money in the funds was “available” depended on whether there had already been a valid
15 appropriation “such that the funds involved are no longer” free to be used.¹³⁷ In answering
16 that question, the Court considered the meaning of appropriation, citing several definitions
17 from dictionaries and case law.¹³⁸ Ultimately, the Court concluded that a valid
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24 ¹³² *Id.* at 923; Alaska Const. art. IX, § 17 (“(b) If the amount available for appropriation for a fiscal
25 year is less than the amount appropriated for the previous fiscal year, an appropriation may be made
26 from the budget reserve fund.”).

27 ¹³³ *Hickel*, 874 P.2d at 923–24.

28 ¹³⁴ *Id.* at 927.

¹³⁵ *Id.*

¹³⁶ *Id.* at 933.

¹³⁷ *Id.* at 932.

¹³⁸ *Id.* (citing *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87–88 (Alaska 1988)).

1 appropriation occurred when no further legislative action was required before the money
2 can be spent.¹³⁹

3 In *Hickel*, the State argued that the Earnings Reserve Account should not be
4 considered available for appropriation because the Legislature had set those funds aside
5 specifically for PFD payments.¹⁴⁰ Under the State's interpretation of AS 37.13.145 offered
6 in *Hickel*, the purpose of the Earnings Reserve Account was to accumulate the Permanent
7 Fund's income and allow for a PFD payment each year.¹⁴¹ The State correctly
8 acknowledged that that purpose continues "indefinitely"¹⁴² and that the "money has been
9 set aside by a decision of the legislature."¹⁴³ The State's logic in arguing that the Earnings
10 Reserve Account was unavailable for appropriation was premised on the fact that the
11 dividend and inflation-proofing transfers provided in AS 37.13.145 occurred without the
12 need for an appropriation each year.¹⁴⁴ According to the State, at some point there would
13 be no balance in the Earnings Reserve Account that was "liquid," or not dedicated to those
14 specific uses.¹⁴⁵ The State correctly argued that funds in the Earnings Reserve Account
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21 ¹³⁹ *Id.*

22 ¹⁴⁰ *Id.* at 934 n.29 ("In oral argument before the superior court, the State argued that the earnings
23 reserve account should not be considered available because, under current projections of the Alaska
24 Permanent Fund Corporation, the entire balance will be used for dividend payments and inflation
25 proofing by the year 2010."); Oral Argument at 18:05, *Hickel v. Cowper*, 874 P.d 922 (Alaska 1994)
(S-6294, 6304) ("The Legislature in [the PFD's case] has made a determination that the money
should be set aside for a particular use.").

26 ¹⁴¹ *Hickel*, 874 P.2d at 934.

27 ¹⁴² Reply Brief for Petitioner, *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994) (No. S-6294) (April 19,
1994).

28 ¹⁴³ Oral Argument at 18:23, *Hickel v. Cowper*, 874 P.d 922 (Alaska 1994) (S-6294, 6304).

¹⁴⁴ *Id.*

¹⁴⁵ *Hickel*, 874 P.2d at 934.

1 may be “expended without further legislative action,”¹⁴⁶ indicating that AS 37.13.145(b)
2 authorized an automatic funds transfer.¹⁴⁷

3 The *Hickel* Court’s analysis of the Earnings Reserve Account confirmed the State’s
4 view that the dividend transfer was automatic. The Court observed that “money in the
5 earnings reserve account never passes through the general fund, and is never appropriated
6 as such by the legislature.”¹⁴⁸ According to the Court, AS 37.13.145 mandates that 50
7 percent of the income available for distribution is “automatically transferred to the
8 dividend fund at the end of each fiscal year.”¹⁴⁹ The money remaining in the Earnings
9 Reserve Account after the dividend and inflation-proofing transfers is “liquid” and subject
10 to appropriation. The Court called that remaining amount the “earnings reserve account
11 balance.”¹⁵⁰ Plaintiffs do not contest that the balance remaining after the automatic
12 transfers “are therefore available for appropriation.” But the funds directed to the dividend
13 payment by AS 37.13.14.5(b) had already been dedicated by the Legislature through an
14 “automatic transfer.”¹⁵¹ The *Hickel* decision means that AS 37.13.145(b) requires the APFC
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24 ¹⁴⁶ *Id.* at 934 n.29.

25 ¹⁴⁷ The State’s position in *Hickel* should carry great weight. *Cf. Chase Bank USA, N.A. v. McCoy*, 562
26 U.S. 195, 208 (2011) (“[W]e defer to an agency’s interpretation of its own regulation, advanced in a
27 legal brief, unless that interpretation is plainly erroneous or inconsistent with the
28 regulation.” (internal quotation marks omitted)).

¹⁴⁸ *Hickel*, 874 P.2d at 934.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

1 to transfer the full 50 percent without an annual appropriation. Respectfully, it is not for
2 this Court to second-guess the Supreme Court's interpretation of statutes.¹⁵²

3 Moreover, if this Court were to interpret AS 37.13.145(b) to require an annual
4 appropriation, it would violate the basic principal of statutory interpretation that "[a]
5 statute should be construed so that effect is given to all its provisions, so that no part will
6 be inoperative or superfluous, void or insignificant."¹⁵³ This Court must strive to "give
7 effect, if possible, to every clause and word of a statute, avoiding, if it may be, any
8 construction which implies that the legislature was ignorant of the meaning of the language
9 it employed."¹⁵⁴ "A construction making some words surplusage is to be avoided."¹⁵⁵

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12 But requiring an annual appropriation prior to the transfer from the Earnings
13 Reserve Account to the Dividend Fund would make the statutory formula for calculating
14 PFD payments meaningless.¹⁵⁶ Requiring an annual appropriation would render
15 inoperative AS 37.13.145(b)'s command for the APFC to transfer "50 percent" of the
16 income available for distribution. For what purpose would the Legislature have included
17 the "50 percent" amount if each year the Legislature must determine how much to transfer
18 (e.g., 25, 35, 40, or 75 percent)? Clearly, when the Legislature enacted AS 37.13.145(b), it
19 intended for an annual transfer of 50 percent. This Court must give effect to that legislative
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23 ¹⁵² *But see* 2009 Inf. Op. Att'y Gen. (JU2009-200-509; June 16) ("While the Alaska Supreme Court
24 has apparently assumed that the permanent fund dividend transfer is made automatically without an
25 appropriation, this is incorrect.").

26 ¹⁵³ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

27 ¹⁵⁴ *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

28 ¹⁵⁵ *Dyna-Med, Inc. v. Fair Emp't & Housing Comm'n*, 743 P.2d 1323, 1387 (Cal. 1987).

¹⁵⁶ *See Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978) ("[W]e recognized the well-established rule of
statutory construction that courts should if possible construe statutes so as to avoid the danger of
unconstitutionality . . . courts, therefore, should presume that the legislature sought to act within
constitutional limits.").

1 determination and should not render superfluous the statutory language. When the
2 Legislature passed AS 37.13.145(b), it meant what it said, and said what it meant – the
3 transfer amount must be 50 percent.¹⁵⁷ The Legislature did not condition the transfer on
4 annual appropriations or make the PFD program contingent on annual legislation. The
5 transfer from the Earnings Reserve Account to the Dividend Fund was intended to be
6 automatic and based on an amount calculable by the APFC without further legislative
7 approval. Thus, this Court should conclude that AS 37.13.145(b) is clear and unambiguous,
8 and requires the APFC to transfer the full 50 percent from the Earnings Reserve Account
9 to the Dividend Fund.
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12 **B. The Dedication Of Funds For PFD Payments Was Not**
13 **Contingent On Annual Appropriations.**

14 This Court should conclude that the Legislature’s dedication of Permanent Fund
15 income for dividend payments means that the transfer does not require subsequent
16 legislative action or appropriations. The Alaska Supreme Court construes strictly the
17 meaning of “appropriation.”¹⁵⁸ The Legislature makes an appropriation when it sets aside a
18 certain amount of money “for a specific purpose or object in such a manner that it is
19 executable, mandatory, and reasonably definite with no further legislative action.”¹⁵⁹ “One
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23 ¹⁵⁷ *Burlington Electric Dep’t v. Vermont Dep’t of Taxes*, 576 A.2d, 450, 453 (Vt. 1990) (“Where the
24 Legislature meant what it said and said what it meant, we must be true to the statute’s intent.”
(quoting DR. SEUSS, HORTON HATCHES THE EGG (1940) (internal quotation marks omitted))).

25 ¹⁵⁸ *See State v. Ketchikan Gateway Borough*, 366 P.3d 86, 101 (Alaska 2016) (“The appropriations clause,
26 per its plain language, applies to withdrawals from the state treasury, and the governor’s veto applies
27 to appropriations bills.”); *Alaska Legislative Council v. Knowles (Knowles III)*, 86 P.3d 891, 895 (Alaska
2004) (rejecting the argument that non-monetary transfer of land were appropriations subject to the
governor’s line-item veto).

28 ¹⁵⁹ *Hickel*, 874 P.2d at 933 (quoting *City of Fairbanks v. Fairbanks Convention & Visitors Bur.*, 818 P.2d
1153, 1157 (Alaska 1991)).

1 of the fundamental characteristics of an appropriation, in the public law context, is that it
2 authorizes governmental expenditure without further legislative action.”¹⁶⁰ Money
3 appropriated by the Legislature has been set aside “for a specific purpose or object in such
4 a manner that is executable, mandatory, and reasonably definite with no further legislative
5 action.”¹⁶¹

7 1. *The Dedication For Annual Dividend Payments Was A Statutory*
8 *Appropriation.*

9 Under the Alaska Supreme Court’s definition of appropriation, dedications of
10 funding, such as the Permanent Fund’s income to PFD payments, are appropriated when
11 the Legislature enacts the law providing the money for a specific use.¹⁶² Here, the
12 Legislature appropriated funds for annual PFD payments when it dedicated a calculable
13 percentage from the Permanent Fund’s income. Subsequent annual appropriations for
14 PFD payments are unnecessary.
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16 Alaska’s constitutional prohibition on dedicated funds means that there are few
17 examples of how dedicated funds typically work in this state.¹⁶³ Consequently, this Court
18 should look to other jurisdictions for guidance. Many states have dedicated funds in their
19 budgetary frameworks. For example, the Minnesota legislature uses dedicated funds to
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25 ¹⁶⁰ *Hickel*, 874 P.2 at 933.

26 ¹⁶¹ *Id.* (quoting *City of Fairbanks v. Fairbanks Convention & Visitors Bur.*, 818 P.2d 1153, 1157 (Alaska
1991)).

27 ¹⁶² *See id.*

28 ¹⁶³ *See* Alaska Const. art. IX, § 7; GORDON HARRISON, ALASKA’S CONSTITUTION, A CITIZEN’S
GUIDE 160 (5th ed.) (“Dedicated funds normally specify the source of the revenue and the purpose
for which it is to be expended.”).

1 appropriate state money outside of the ordinary appropriations process.¹⁶⁴ According to a
2 Minnesota Senate fiscal report, “[a] dedicated appropriation is an authorization, usually in
3 statute, that makes a stream of revenue available for spending for a particular activity.”¹⁶⁵
4 Such a dedication that continues indefinitely is called a “statutory appropriation” and “is an
5 authorization to expend money from the state treasury that is codified in state statute and
6 continues automatically unless an act of law is passed to change or repeal the
7 authorization.”¹⁶⁶ In Minnesota, the annual expenditures for the dedicated purpose are
8 reported to the legislature as “estimates” and expended without subsequent “legislative
9 action.”¹⁶⁷
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12 On the other hand, some dedications explicitly require two forms of appropriations:
13 an initial authorization dedicating the funds and subsequent annual appropriations for
14 spending the funds. For example, Congress created the federal Highway Trust Fund with
15 an initial automatic appropriation of all revenues from the federal gasoline tax.¹⁶⁸ The
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18 ¹⁶⁴ MINNESOTA LEGISLATIVE COMMISSION ON PLANNING AND FISCAL POLICY, STATUTORY
19 APPROPRIATIONS GUIDELINES (Dec. 5, 2002), available at [http://www.house.leg.state.mn.us/fiscal/
20 files/1202stat.pdf](http://www.house.leg.state.mn.us/fiscal/files/1202stat.pdf) (“ ‘Statutory Appropriation’ refers to the authority to spend resources that is
21 codified in state statute, rather than session laws. This means the expenditure authority is ongoing
and not dependent on the passage of an appropriations bill each biennium.”).

22 ¹⁶⁵ MINNESOTA SENATE, STATE OF MINNESOTA BUDGET BASICS 4 (Oct. 2004), available at
<http://www.senate.mn/departments/fiscalpol/reports/2005/budgetbasics.pdf>.

23 ¹⁶⁶ *Id.* at 7; MINNESOTA LEGISLATIVE COMMISSION, *supra* note 164, at 2 (“While the initial act
24 establishing a statutory appropriation (usually every two years) requires affirmative action, the
25 appropriation remains in effect until the legislature either decides to change the original law or until
a sunset takes effect . . . Statutory appropriations are often assumed as given. . . . [T]he program is
26 considered so important that the legislature treats its funding as nearly automatic. . . . A reduction in
a statutory appropriation requires an enactment of legislation. On the other hand, direct
27 appropriations require enactment of legislation for the appropriation to occur.”); *see, e.g.*, Minn. Stat.
§16A.661 (2016) (authorizing statutory appropriations for general obligation special tax bonds).

28 ¹⁶⁷ MINNESOTA LEGISLATIVE COMMISSION, *supra* note 164, at 1.

¹⁶⁸ 26 U.S.C. § 9503 (2012) (“(a) There is established in the Treasury of the United States a trust fund
to be known as the ‘Highway Trust Fund’, consisting of such amounts as may be appropriated or

1 legislation dedicating funds to the Highway Trust Fund specified that it may only be used
2 for the purpose of building highways.¹⁶⁹ But in order for money to be withdrawn from the
3 Highway Trust Fund, Congress must pass an annual appropriation, spending the funds on
4 a particular highway project.¹⁷⁰

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6 The Highway Trust Fund, however, demonstrates the shortcomings of the two-
7 tiered appropriation model. Because spending from the Highway Trust Fund was not
8 limited to very specific uses and expendable without annual appropriations, Congress was
9 able to redirect and divert some of the dedicated funds to other purposes, including mass
10 transportation projects.¹⁷¹ As a result, in 2009, the Highway Trust Fund had a \$3.2 billion
11 deficit.¹⁷²

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13 One of Alaska's few dedicated funds, the Fish and Game Fund, was designed by
14 the Legislature to require a two-tiered appropriation, similar to the federal Highway Trust
15 Fund.¹⁷³ The Fish and Game Fund is a constitutionally permitted dedicated fund that
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19 credited to the Highway Trust Fund . . . (b) There are hereby appropriated to the Highway Trust
20 Fund amounts equivalent to the taxes received in the Treasury before October 1, 2016, under the
21 following provisions . . .”);

22 ¹⁶⁹ *Id.*; see *New York v. United States*, 505 U.S. 144, 172–73 (1992) (“A great deal of federal spending
23 comes from segregated trust funds collected and spent for a particular purpose. See, e.g., 23 U.S.C. §
24 118 (Highway Trust Fund) . . .”).

25 ¹⁷⁰ 26 U.S.C. § 9503(c)(1) (2012) (“[A]mounts in the Highway Trust Fund shall be available, as
26 provided by appropriation Acts, for making expenditures before October 1, 2020, to meet those
27 obligations of the United States heretofore or hereafter incurred which are authorized to be paid out
28 of the Highway Trust Fund . . .”).

29 ¹⁷¹ See David Z. Morris, *Highway Funding Is Running Out of Road—Again*, Fortune, Jul. 10, 2015,
30 <http://fortune.com/2015/07/10/highway-funding-running-out/> (“[S]tarting in the early 1990s,
31 funds were partly diverted to deficit reduction. There has also been opposition to the portion of the
32 gas tax—still around 20%—that goes to mass transit and other non-highway projects.”).

33 ¹⁷² See, e.g., Letter from National Governors Association to Congress, June 19, 2008,
34 [http://www.nga.org/cms/home/federal-relations/nga-letters/archived-letters--2008/col2-
35 content/main-content-list/title_june-19-2008-1.html](http://www.nga.org/cms/home/federal-relations/nga-letters/archived-letters--2008/col2-content/main-content-list/title_june-19-2008-1.html).

36 ¹⁷³ See generally AS 16.05.100 (“There is created a revolving ‘fish and game fund’ . . .”).

1 receives money earmarked from receipts of hunting and fishing licenses.¹⁷⁴ Under the first
2 appropriation, the Legislature dedicated hunting and fishing license revenues to the Fish
3 and Game Fund, and restricted the funds' use to projects directly connected with the
4 Department of Fish and Game.¹⁷⁵ But a second appropriation is required by statute each
5 year before the state can spend money in the Fish and Game Fund.¹⁷⁶ The Legislature
6 must make appropriations to specific purposes, such as game or fish management, or
7 capital projects.¹⁷⁷ The Fish and Game Fund is not designed to be an automatic, recurring
8 expenditure.
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11 Unlike the Highway Trust Fund and the Fish and Game Fund, the dedication of
12 income from the Permanent Fund in AS 37.13.145 and 43.23.055 to PFD payments is a
13 statutory appropriation because the Legislature did not require subsequent annual
14 appropriations before money is transferred from the Permanent Fund to Alaska residents.
15 The Permanent Fund Act of 1982 dedicated a fixed percentage of the Permanent Fund's
16 income to PFD payments each year. AS 37.13.145(b) mandates that payment "shall" be
17 made, and clearly indicates the Legislature's intent that the program continue until the law
18 is changed or repealed.
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21 The Legislature's intent to avoid annual appropriations for the PFD is evidenced by
22 its decision to eliminate conditional language from the PFD statutes. The Legislature knew
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25 ¹⁷⁴ See *id.* The Fish and Game Fund is constitutionally permitted because it is required for
26 participation in a federal funds-matching program. See 1982 Op. Att'y Gen. (No. 13; Nov. 13) at 21.

27 ¹⁷⁵ *Id.* ("(a) The fish and game fund shall be made up of the following money and other money the
28 legislature appropriates").

¹⁷⁶ *Id.* ("[M]oney the legislature appropriates . . . shall be deposited and retained in the fund until
expended").

¹⁷⁷ *Id.*

1 how to condition funds transfers on annual appropriations but chose not to. In 1980 the
2 Legislature considered multiple drafts of bills providing payments from the Permanent
3 Fund conditioned on annual appropriations. The first version of the PFD law would have
4 created an annual income tax refund from the Permanent Fund's income, providing that
5 "[p]ayment of refunds under this section is subject to annual appropriation."¹⁷⁸ When the
6 Legislature designed the first dividend payment program, the bill drafts explicitly provided
7 that "[t]he legislature shall appropriate at least 50 percent of the annual income of the
8 Alaska permanent fund for residency payments."¹⁷⁹ And the 1980 PFD law implied that
9 the income transfers to the Dividend Fund were automatic by providing that the
10 Legislature may make an "additional *appropriation* from the general fund if necessary to
11 cover the distribution of dividends" up to \$50 per resident.¹⁸⁰ Ultimately, the statutory
12 language conditioning PFD payments on appropriations was eliminated. Instead, the
13 Legislature simply dedicated a calculable amount of the Permanent Fund's income each
14 year to PFDs and made that distribution automatic.¹⁸¹

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19 2. *Section 10 Of The 2016 Operating Budget Was An Accounting
20 Notation And Was Not An Appropriation.*

21 This Court should conclude that Section 10 of HB 256 was not an appropriation.
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25 ¹⁷⁸ CSSB 122, 11th Leg., 2d Sess. (Alaska 1980).

26 ¹⁷⁹ HCS CSSB 122, 11th Leg., 2d Sess. (Alaska 1980).

27 ¹⁸⁰ 1981 Inf. Op. Att'y Gen. (66-260-82; Dec. 22) (emphasis in original).

28 ¹⁸¹ Compare HCS CSSB 122 (March 18, 1980) ("The legislature shall appropriate at least 50 percent of the annual income of the Alaska permanent fund for residency payments . . ."), with FCCSB 122, 11th Leg., 2d Sess. (Alaska 1980), Ch. 21, SLA 1980 ("Each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund . . ."), and Ch. 102, SLA 1982 (same).

1 Section 10 did not, by itself, authorize any “governmental expenditure” or mandate the
2 expenditure funds. Section 10 merely recognized the statutory appropriation in
3 AS 37.13.145(b) that the Legislature had already authorized and appropriated. This Court
4 must look to Section 10’s purpose and refrain from “giving undue meaning to the terms
5 used in the act.”¹⁸² Section 10 referred to the underlying statute, AS 37.13.145(b), which
6 contained the legal obligation for the APFC to transfer the funds, but Section 10 did not
7 alter the APFC’s pre-existing duties under AS 37.13.145(b).
8

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10 The first PFD payment was made almost immediately after the law’s passage in
11 1982. There was no intervening legislative action or appropriation; the transfer and
12 dividend payment simply occurred automatically. Since then, each year the Legislature has
13 included a provision in the state’s budget acknowledging the transfer of funds from the
14 Permanent Fund to the Dividend Fund. Although an annual appropriation was never
15 legally necessary, the Legislature included the provisions out of an abundance of caution.
16

17 In 1983 a new Attorney General issued an opinion on the PFD laws, changing the
18 previous position that the transfers and dividend payments occurred automatically. The
19 1983 opinion recommended that the Legislature “may not transfer income to another fund
20 or authorize it to be spent without an appropriation.”¹⁸³ Yet, the 1983 opinion noted that
21 requiring an annual appropriation “for any use of the [fund’s] income . . . would render the
22 phrase ‘unless otherwise provided by law’ meaningless.”¹⁸⁴ Nevertheless, the 1983 opinion
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26 ¹⁸² See *Thomas v. Rosen*, 569 P.2d 793, 797 (Alaska 1977) (concluding that the Legislature did not make
27 an appropriation in an act that provided, “[t]here is appropriated from the Regional Fire Fighting
28 Training Centers Bond Fund . . . \$7,100,000.”).

¹⁸³ 1983 Inf. Op. Att’y Gen. (366-484-83: Mar. 10).

¹⁸⁴ *Id.*

1 concluded that the Legislature's authority was limited to providing that some of the fund's
2 income may remain in the fund instead of being deposited in the general fund.

3 But the obvious problem with the 1983 Attorney General opinion's conclusion is
4 that it cast doubt on the constitutionality of the law requiring the APFC to transfer funds
5 from the Earnings Reserve Account to the Dividend Fund. Under the 1983 opinion's
6 reasoning, AS 37.13.145(b) would be null and void because each year the Legislature would
7 be required to determine how much of the Permanent Fund's income to transfer for PFD
8 payments.¹⁸⁵ And the opinion discounted the constitutional and legislative history of article
9 IX, section 15 and the PFD statutes, ignoring the purpose of the phrase "unless otherwise
10 provided by law" and the importance of the Legislature's authority to dedicate the fund's
11 income to specific uses.
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15 Because the 1983 opinion sowed doubt on the authority to dedicate the Permanent
16 Fund's income to automatic, annual dividend payments, the Legislature began recognizing
17 the transfer in annual appropriations bills. But taking a fair look at the purpose and
18 language of Section 10, it is clear that the Legislature's intent was not to appropriate.
19 Section 10 noted that the transfer from Earnings Reserve Account to Dividend Fund
20 would take place pursuant to AS 37.13.145(b) and estimated the total amount that would
21 be disbursed as PFD payments.¹⁸⁶ Thus, Section 10 served as a way of taking legislative
22 notice that over \$1 billion was leaving the state's hands as authorized by existing law, but it
23 was not an appropriation.
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27 ¹⁸⁵ See *Isakson v. Rickey*, 550 P.2d 359, 364 (Alaska 1976) ("[E]ach section of a statute is presumed to
28 serve some useful purpose.").

¹⁸⁶ CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016.

1 C. *Simpson v. Murkowski* Is Inapposite Because The Dedication Of
2 Funds Under AS 37.13.145(b) Is Automatic And Does Not
3 Require An Annual Appropriation.

4 The Alaska Supreme Court has previously concluded that the governor's line-item
5 veto authority can be used to reduce annual entitlement payments to individual
6 Alaskans.¹⁸⁷ But the Court's reasoning in *Simpson v. Murkowski* was premised on the fact
7 that the statute in that case, which created the entitlement payments at issue, specifically
8 required an annual legislative appropriation.¹⁸⁸ The same reasoning cannot apply to this
9 case because AS 37.13.145(b) is an automatic dedication of funds and does not require an
10 annual appropriation.
11

12 In *Simpson*, the Court addressed Governor Murkowski's line-item veto of annual
13 longevity bonus payments to senior Alaskans pursuant to AS 47.45.¹⁸⁹ The Court described
14 succinctly the relevant facts of that case:
15

16 In 2003 Governor Murkowski submitted a proposed operating
17 budget to the legislature for fiscal year 2004 that did not include
18 an appropriation for the longevity bonus. The 2003 legislature
19 amended the proposed budget to include an appropriation for
20 the longevity program for 2004. Governor Murkowski then
21 exercised his line item veto power to eliminate the
22 appropriation. The legislature did not use its constitutional
23 power to override in accordance with the appropriations
24 process set forth in the Alaska Constitution¹⁹⁰
25

26 The Court's analysis focused on whether Murkowski's line-item veto violated the
27 appropriations and line-item veto clauses of the Alaska Constitution.¹⁹¹ The Court noted
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26 ¹⁸⁷ *Simpson v. Murkowski*, 129 P.3d 435, 446 (Alaska 2006).

27 ¹⁸⁸ *Id.* at 438 (Alaska 2006).

28 ¹⁸⁹ *Id.* at 446.

¹⁹⁰ *Id.* at 446–47.

¹⁹¹ *Id.*

1 that “entitlement programs can be modified by subsequent enactments,” and then
2 determined that the line-item veto was constitutional because the entitlement payment was
3 an appropriation.¹⁹² The Court rejected the seniors’ argument that because “AS 47.45 has
4 not been repealed” the entitlement funding must be paid regardless of the line-item veto.¹⁹³
5 AS 47.45 provided that payments to seniors would be made from “money made available
6 by *appropriations* of the . . . legislature from the general fund.”¹⁹⁴ The Court concluded that
7 there was no identifiable legal basis for divergence from the constitutionally prescribed
8 appropriations procedure because the longevity bonus statute specifically required an
9 annual appropriation.¹⁹⁵

12 At first glance, the facts of *Simpson* are superficially similar to the facts of this case:
13 Both involved a long-standing payment to Alaskan residents that was reduced by the
14 governor. But *Simpson* is inapposite because nothing in the PFD statutes, including
15 AS 37.13.145(b), requires – explicitly or implicitly – an annual appropriation. The PFD
16 program is a dedication of funds that recurs on a yearly basis. AS 37.13.145(b) provides
17 that the APFC “shall” transfer 50 percent of the income available for distribution to the
18 dividend fund for PFD payments. Unlike in *Simpson*, the Legislature did not condition the
19 transfer, or the PFD payments, on an appropriation.
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22 Thus, this Court should conclude that the language of AS 37.13.145(b) is a
23 dedication of funds from the Permanent Fund and there is no requirement for an annual
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27 ¹⁹² *Id.* at 446.

¹⁹³ *Id.* at 446–47.

28 ¹⁹⁴ *Id.* at 538 (quoting Ch. 38, SLA 1984) (emphasis added).

¹⁹⁵ *Id.* at 447.

1 appropriation. *Simpson* is inapposite because the Legislature chose not to condition PFD
2 payments on annual appropriations.

3 **D. Public Policy Confirms That The Governor Does Not Have The**
4 **Constitutional Authority To Reduce the 2016 PFD Payment.**

5 This Court should consider the important public policy implications of the
6 Governor's line-item veto of Section 10. The Permanent Fund Act of 1982 dedicated a
7 percentage of the Permanent Fund's income to annual PFD payments based on a statutory
8 formula intended to link Alaskan's financial interest with the management of the
9 Permanent Fund principal. That legislation accomplished both an appropriation of funds
10 and the enactment of substantive law establishing a comprehensive program for disbursing
11 annual PFD payments.
12
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14 If this Court were to uphold the governor's line-item veto in this case it would
15 subject Alaskans to the ephemeral whims of the governor, who would possess the
16 unilateral power to set the PFD each year, subject only to a legislative override requiring
17 three-fourths of the state's elected representatives. Giving the governor that power is
18 incompatible with the Legislature's intent when it enacted AS 37.13.145(b), and
19 incongruous with the limits on executive power contemplated by the separation of powers
20 principle embedded in the Alaska Constitution.¹⁹⁶ The Legislature has the power to change
21 the amount appropriated from the Permanent Fund's income to dividend payments. But
22 the Legislature must do so through the constitutionally prescribed law-making process.
23
24 The Governor cannot circumvent the Legislature by unilaterally setting the PFD amount.
25
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27 ¹⁹⁶ See *Public Defender Agency v. Super. Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975) ("Since
28 Article III concerns the executive branch, it can fairly be implied that this state does recognize the
separation of powers doctrine.")

1 This Court should also take note that ordering the APFC to make a supplemental
2 transfer from the Earnings Reserve Account to the Dividend Fund would not significantly
3 change the State's fiscal position. The governor has stressed that his line-item veto was
4 necessary to avert an imminent economic crisis in Alaska. But the vetoed funds have
5 remained in the Earnings Reserve Account, inaccessible to the governor or state agencies
6 until appropriated by the Legislature. The Earnings Reserve Account currently contains
7 approximately \$8.6 billion, and the fund's income is expected to yield approximately \$3.5
8 billion per year in the future. Thus, if this Court were to order the APFC to transfer the
9 legally required additional \$666.4 million, the State's financial position would not be
10 significantly affected. Although Governor Walker is correct that the state's fiscal future
11 requires solutions, Alaska's constitution gives the Legislature a role in setting budgetary
12 priorities and the Legislature has already contemplated that the \$666.4 million in funds
13 would be distributed as dividend payments. The constitution does not permit the governor
14 to "save" the state through fiat in cases of perceived fiscal emergency.

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19 **III. The Line-item Veto Was Unconstitutional Because The Governor**
20 **Impermissibly Struck Descriptive Language From Section 10.**

21 This Court should conclude that even if Section 10 was an appropriation, the line-
22 item veto was unconstitutional because Governor Walker impermissibly altered the bill's
23 meaning by striking descriptive language. The Alaska Supreme Court has made it clear that
24 the line-item veto clause does not give the governor power to strike descriptive language in
25 appropriations bills.¹⁹⁷ In *Alaska Legislative Council v. Knowles (Knowles II)*, the Court
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¹⁹⁷ *Alaska Legislative Council v. Knowles (Knowles II)*, 21 P.3d 367, 369 (Alaska 2001).

1 examined several purported line-item vetoes of appropriations to a variety of state
2 projects.¹⁹⁸ The Legislature had included descriptive language in the appropriations bills,
3 making the funding “[c]ontingent” on certain requirements. Governor Knowles used the
4 line-item veto to strike the words “contingent” and other limiting language thus,
5 unfettering the appropriated funds.¹⁹⁹
6

7 But the Court concluded that the line-item vetoes were unconstitutional because
8 the governor could not constitutionally strike descriptive language and conditions in the
9 appropriations.²⁰⁰ After analyzing the purpose and history of the line-item veto power in
10 Article II, section 15, and the Court rejected the notion that the governor could strike the
11 proposed text.²⁰¹ The Court made it clear that the line-item veto power “does not give the
12 governor the power to rewrite appropriation bills except by striking or reducing items.”²⁰²
13 An “item” subject to the line-item veto must be narrowly construed and limited to
14 monetary amounts: “[P]ublic policy disfavors a reading of ‘item’ that would permit the
15 executive branch to substantively alter the legislature’s appropriation bills, effectively
16 resulting in appropriations passed without the protections our constitution
17 contemplates.”²⁰³ Thus, under *Knowles II*, the governor’s line-item veto authority is strictly
18 limited to striking or reducing monetary amounts.
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22 Here, Governor Walker substantively altered Section 10 by deleting important non-
23 monetary text. The governor struck the phrase “authorized under AS 37.13.145(b)” and
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25 ¹⁹⁸ *Id.* at Appendix A.

26 ¹⁹⁹ *Id.*

27 ²⁰⁰ *Id.* at 371–75.

28 ²⁰¹ *Id.* at 371, 374–75.

²⁰² *Id.* at 372.

²⁰³ *Id.* at 373.

1 the word “estimated” from the appropriations bill.²⁰⁴ This Court must reinsert those words
2 in Section 10, which would then read as follows:

3 (b) The amount authorized under AS 37.13.145(b) for transfer
4 by the Alaska Permanent Fund Corporation on June 30, 2016,
5 estimated to be ~~\$1,362,000,000~~ **\$695,650,000**, is appropriated
6 from the earnings reserve account (AS 37.13.145) to the
7 dividend fund (AS 43.23.045(a)) for the payment of permanent
8 fund dividends and for administrative and associated costs for
9 the fiscal year ending June 30, 2017.

10 After reinserting the invalidly vetoed language, Section 10 provides for a funds
11 transfer as authorized by AS 37.13.145(b) from the earnings reserve account to the
12 dividend fund. The amount the Legislature appropriated is the “amount authorized under
13 AS 37.13.145(b)” – which equals “50 percent of the income available for distribution under
14 AS 37.13.140.” The constitution does not allow the governor to change the substance of
15 what the Legislature was attempting to accomplish.

16 Furthermore, the governor’s reduction of the “estimated” amount – from
17 \$1,362,000,000 to \$695,650,000 – did not alter the appropriated amount. That phrase in
18 Section 10 provided an estimated amount of the funds authorized under AS 37.13.145(b).
19 The governor’s reduction of that amount changed the estimate, but did not change the
20 underlying amount of the appropriation which was “the amount authorized under AS
21 37.13.145(b).” The governor’s reduction of the estimated amount simply made the
22 estimate less accurate.
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25 The fact that Section 10 was not an appropriation is evidenced by the process in
26 which the estimate – \$1.362 billion – was determined. The Legislature did not reach that
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²⁰⁴ Line-Item Veto Transmittal Letter, *supra* note 4, at 2.

1 amount deliberatively. The Legislature adopted the amount that was reported by the APFC
2 as being 50 percent of the income available for distribution. Both houses initially passed
3 versions of HB 256 that provided an estimate of \$1.405 billion. On May 30 the Conference
4 Committee changed the amount to \$1.362 billion. As Legislative Finance Division Director
5 David Teal explained, “[a]s part of our technical and conforming powers, we intend to
6 modify the following estimated amounts in the operating bill: . . . \$1.362 billion (replacing
7 \$1.405 billion).”²⁰⁵ Teal further explained, “the amount was necessary to fulfill the
8 statutory formula, and was a conforming or technical change to reflect the current
9 estimates.”²⁰⁶ The conference committee did not vote on the changes, instead accepting
10 the “technical” change as simply a revised estimate. The Legislature clearly did not intend
11 to appropriate an amount separately and independently from the statutory formula.
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15 Thus, this Court should conclude that the governor’s line-item veto of non-
16 monetary, descriptive text in Section 10 was unconstitutional. The deletions of substantive
17 phrases impermissibly altered Section 10’s meaning. This Court must reinsert the phrase
18 “authorized under AS 37.13.145(b)” and the word “estimated.” With those key phrases
19 reinserted, it is abundantly clear that the Legislature did not intend to alter the automatic
20 transfer pursuant to AS 37.13.145(b), and the governor’s reduction in an “estimated”
21 amount does not mean that the APFC can deviate from the full funds transfer.
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27 ²⁰⁵ Hearing on CCS HB 256 Before the Conference Committee, 29th Leg., 4th Spec. Sess. (Alaska
28 May 30, 2016).
²⁰⁶ *Id.*

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CONCLUSION

For the foregoing reasons, this Court should grant summary judgment to Plaintiffs and order the Defendants to comply with AS 37.13.145(b) by transferring the full 50 percent of the income available for distribution from the Earnings Reserve Account to the Dividend Fund for disbursement as a supplemental 2016 PFD.

Respectfully submitted this 28th day of October, 2016.

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1 FONT CERTIFICATION

2 I hereby certify that the font used in this filing is Garamond, size 13, and conforms to
3 Alaska Rule of Civil Procedure 76.

4
5 s/ Bill Wielechowski

6 Bill Wielechowski
7

8 CERTIFICATE OF SERVICE

9 This is to certify that on this date a true and correct copy of the foregoing document is being
10 served electronically and by ~~U.S. Mail~~ to the following:

hand

11 Bill Milks
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10/20/16

Date