IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN, ALASKA

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

Plaintiffs,

v.

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

Defendants.

Case No. 1KE-14-00016CI

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

The State's[1] Opposition/Cross Motion ("Opp.") recognizes that no genuine issue of fact exists as to the legal effect of the RLC, and that the case may be resolved on summary judgment. *Compare* Plaintiffs' Motion for Summary Judgment ("MSJ") at 11-12, *with* Opp. at 9-10. But it is the Plaintiffs, not the State, that are entitled to judgment as a matter of law.

[1] Defendants, State of Alaska and Commissioner Hanley, are collectively referred to as the "State."

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The positions taken by the State are unpersuasive because they are legally and factually incorrect. With respect to Plaintiffs' argument that the RLC violates the Anti-Dedication Clause, the State ignores longstanding case law which (1) adopts an extremely broad interpretation of "state tax or license" within which the RLC readily fits; (2) states that a court must consider the mandatory nature of a dedication in determining whether the Anti-Dedication Clause is violated; and (3) holds that the doctrine of constitutional avoidance does not support the State's argument that the Court should ignore the constitutional violation at issue here. The State's reliance on the Education Clause and matching grants analogy are red herrings. Its assertion that the RLC is a grandfathered dedication ignores the fact that the RLC was not enacted until after Statehood in 1962 and that the Territorial law that it claims provides for an RLC does not do so. Even if the Territorial law is considered a dedication (a position the Plaintiffs reject), it was repealed when the RLC and the other elements of the post-Statehood education funding system were enacted. In accordance with longstanding Attorney General Opinions, such repeal extinguished any claim of grandfather status.

Further, the State misapprehends longstanding case law adopting an extremely broad interpretation of the sources of public revenue that must be available to the Legislature to appropriate and to the Governor to veto. Rather, precedent compels the conclusion that the RLC violates the Legislative Appropriation Clause and the Governor's Veto Clause. It follows that Plaintiff Ketchikan Gateway Borough (the "Borough") has been forced to pay an unconstitutional dedication and is entitled to a refund of the 2014 RLC under assumpsit or restitution principles.

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The Court should grant Plaintiffs' MSJ and declare that the RLC violates three provisions of the Alaska Constitution, order a refund of the 2014 RLC, and issue an appropriate injunction.

I. Longstanding precedent holds that the RLC is a dedicated fund.

The State does not contest the essential nature of the RLC, namely that it is a "payment compelled by the State to be collected by the Borough and paid to the KGB School District." *See* MSJ at 15. While these characteristics are the essence of a dedication, the State attempts to impose additional requirements that are not found in case law. Instead, the Court should follow Anti-Dedication Clause cases that are precisely on point and apply them to the facts of this case.

A. The State misinterprets *State v. Alex* and other cases forbidding a mandatory exaction directed toward a dedicated source.

As discussed in the MSJ, the Alaska Supreme Court in *State v. Alex* invalidated a statute authorizing private aquaculture associations to collect assessments from commercial salmon fishermen because it violated the dedicated funds clause. *See* MSJ at 13-15 (citing *Alex*, 646 P.2d 203 (Alaska 1982)). Through the RLC, the State accomplishes precisely what the regional associations did in *Alex*: it imposes a State-required exaction on a third party and then requires the proceeds of that exaction to go to a dedicated source. *See Alex*, 646 P.2d at 213. In *Alex*, the State by law provided for a royalty assessment, and then required an intermediary (the commercial buyers of salmon) to collect the proceeds of that assessment and pay them to a dedicated source (the trust fund of the aquaculture associations). *Id.* at 205-07. This is precisely the scheme created by the RLC: the State establishes a formula that requires a payment by the municipality, requires the intermediary (the municipality) to collect funds to support this payment, and

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requires the municipality to annually pay the funds to a dedicated source (the school district).

Unable to distinguish these core features of the RLC from the royalty assessments in *Alex*, the State relies on immaterial distinctions, as well as features that actually prove the RLC is a dedication. First, the State argues that the RLC is not a source of public revenue because it "does not establish a tax or assessment on anything," because "[a] borough or municipality can finance its local contribution any way it wishes." Opp. at 12. This interpretation is a narrowed, hyper-textual interpretation of the Anti-Dedication Clause that was expressly rejected in *Alex* and the 1975 Attorney General Opinion on which *Alex* relied. Article IX, Section 1 prohibits "the dedication of any source of public revenue: tax, license, rental, sale, bonus-royalty, royalty, *or whatever . . .*" *Alex*, 646 P.2d at 210 (quoting 1975 Alaska Op. Att'y Gen. No. 9 at 24 (May 2)) (emphasis added). The 1975 Attorney General Opinion concluded that "the Convention intended to prohibit any new dedicated funds of whatever description," despite recognizing that the plain language of the Anti-Dedication Clause suggested a more narrow reading:

> Accordingly, a gentle fiction that the term 'tax or license' includes royalties does not suffice. Either the Convention prohibited the dedication of any and all additional funds or it did not. The plain language of section 7 says that it did not. *The plain language of the Convention's debates compels the conclusion that it did.*

1975 Alaska Op. Att'y Gen. No. 9 at 19-20 (emphasis added) (Ex. A).[2] Thus, it is the RLC's status as a State-compelled exaction dedicated to a particular source, not whether it meets the State's cramped definition of a "tax," that creates the infirmity present here.

[2] The 1975 Attorney General Opinion, which the Court characterized as "well researched," was expressly adopted by *Alex*. 646 P.2d at 210.

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In addition to setting forth the wrong test for whether a required payment violates the Anti-Dedication clause, the State's argument that the RLC "does not establish a tax or assessment on anything," *see* Opp. at 12, is inherently wrong: the RLC can in fact be viewed as a "tax" and "assessment" on both the Borough and its citizens even though labelling it such is expressly not required by Anti-Dedication Clause case precedent. The RLC "taxes" the Borough directly by requiring a payment to be made to a third party, and is no different than a state-compelled tax payment required of any corporation. Moreover, the RLC has historically been considered,[3] and is intended to operate as, a "tax" on the Borough's citizens with the Borough as the designated tax collector. The State concedes the RLC is calculated with reference to taxable property in the municipality, AS 14.17.410(b)(2) (cited at Opp. at 12 n.30), and that the RLC is limited to those governments who have taxing authority under Article X, Section II. Opp. at 6; *see also Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 399 (Alaska 1997) (accepting State's argument that the RLC drew a permissible distinction between REAAs and municipal districts "based on the constitutional differences between these two entities," namely the municipalities' ability to collect taxes). If the RLC was not intended to come from the tax contributions of the Borough's taxpayers, the State provides no suggestion of another source of these funds.[4]

[3] For example, the 1962 "required local effort" statute described the local contribution as a "required local ***tax*** effort," which was based on a one mill levy on all taxable property within the district. Laws of Alaska 1962, ch. 164, § 1.07(a)-(c) (emphasis added) (Ex. B). Even as recently as 2005, both the Legislature and the Attorney General's Office referred to a proposed decrease in the RLC as "***tax relief*** for 'all of organized Alaska . . .'" *See* Dep't of Law Memorandum, April 25, 2005 (Ex. C) at 3 (emphasis added) (quoting Sen. Finance Committee, Hearing on SB 174, remarks of Sen. Wilken (April 20, 2001)).

[4] The lack of specificity as to the source of funds that the Borough may use to pay the RLC does not make it any less of a "tax." *See* Opp. at 12 (arguing that the Borough can finance its local contribution in any way it wishes). No tax of any kind specifies the

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Second, the State attempts to distinguish the RLC by indicating characteristics that prove why it *is* a dedicated fund. The State argues that the RLC does not "create a pot of money that is available for the legislature to appropriate if it is not provided directly to school districts," is "not collected by the State," is "not deposited into the State treasury," and "if the local contribution is invalidated by this Court based on it being 'dedicated,' the money will not be available to the legislature for expenditure." Opp. at 11. Far from proving that the RLC is not a dedication, these attributes are all part and parcel of an impermissible dedication. A dedication is constitutionally invalid *because* it does not "create a pot of money that is available for the legislature to appropriate if it is not provided directly to [the dedicated source]." *See* Opp. at 11; *compare City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1158 (Alaska 1997) (noting that *Alex* held unconstitutional the assessment because the "allocation of revenues to the regional associations was mandatory, leaving no discretion to the legislature to spend the money in any other way").

That the money is "not collected by the State" is not relevant to an analysis under the Anti-Dedication Clause, as the assessments also were not collected by the State or its agencies in *Alex*. Instead, the "qualified regional associations" to whom the assessments inured were a coalition of "associations representative of commercial fishermen in the region," and "representatives of other user groups interested in fisheries," run by an independent board. *See Alex*, 646 P.2d at 205-06. The Commissioner of the Department of Commerce and Economic Development certified and "assist[ed] in and encourage[d]"

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source of the payment, because money is fungible. While the IRS bases income tax on the taxpayer's income, for example, it imposes no requirement on how the money financing the tax payment is generated. Similarly, the RLC is based on the taxable property in the Borough, but it contains no technical requirement that the RLC actually be paid by tax revenues.

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their formation," but as the Court recognized, the associations were "completely independent of government control." *See id.* at 206, 213. Instead, as is true of the RLC, the compelled payment was orchestrated by the State, but never directly collected by the State.

The fact that the money "is not deposited into the State treasury" also shows why the RLC is a dedicated fund. *See* Opp. at 11; *see also Fairbanks Convention & Visitors Bureau*, 818 P.2d at 1158. The Anti-Dedication Clause prohibits funds from being directly dedicated to a source and bypassing the State treasury, as were the royalty assessments collected in *Alex* by the commercial buyers of salmon.

The fact that the money "will not be available to the legislature for expenditure" if the RLC is invalidated is also irrelevant to an Anti-Dedication analysis. The State asserts that this is the "most important[]" factor, but it provides no authority for this position or for its extrajudicial statement of the Anti-Dedication Clause's supposed requirement. *See* Opp. at 10 (suggesting that a public source of revenue is dedicated for a special purpose only if it "remove[s] those 'proceeds' from the revenue available to the legislature for appropriation on an annual basis."). No Anti-Dedication Clause cases have inquired into whether, if invalidated, funding would be available to the legislature for expenditure. In *Alex*, for example, the Supreme Court suggested that the unconstitutionally collected royalty assessments could be refunded to the commercial fishermen on whom the assessments were imposed, just as Plaintiffs propose in the instant case. *See* 246 P.2d at 204, 215 (noting that complaint in the court below sought a refund of all assessments that had been paid by fishermen, and discussing assumpsit cause of action).[5] Moreover,

[5] The Superior Court in *Alex* had indeed ordered a refund of the unconstitutional royalty assessments, ordered that the funds be placed in escrow pending appeal, and after the Supreme Court ruled, ordered that the escrowed funds be returned to the plaintiff

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rather than compel the legislature to place the royalty assessments in the general fund, the Court issued a permanent injunction to restrain future collection of the assessments (as the Plaintiffs request here) and provided guidance to the legislature to remedy the unconstitutional dedication. *See id.* at 205.

Third, the State implicitly requests a *per se* rule that assessments collected by local governments cannot constitute dedications because they are not State revenues. *See* Opp. at 13. But as stated above, the Alaska Supreme Court has held the opposite: a payment compelled by the State and collected by a non-State actor under that compulsion is still a dedication. *See supra* p. 6-7 (discussion of regional aquaculture associations being funded under State compulsion, but with no State collection action).

The State cannot distinguish clear authority under the Anti-Dedication Clause, therefore compelling a conclusion that the RLC violates that clause. Indeed, if the State's position is adopted, then the State could require payments from local governments or their residents, in an amount based on some measure of ad valorem or sales taxation, and further require that those funds be expended *for any* specific purpose which is a State responsibility. For example, if the RLC is held not to violate the Anti-Dedication Clause, what if the State were then to enact a mandatory contribution from any borough which houses a State courthouse in order to offset the cost of maintaining the court within that borough? What if the State required boroughs to contribute two mills to defray the costs of the State district attorney, troopers and jails? How about if the legislature then required each city to contribute a one-mill levy to support its local elected representatives

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fishermen. *See* Orders, Ex. D, at 2 CL 2. The Supreme Court affirmed the judgment of the Superior Court "in all respects." 646 P.2d at 215. The Superior Court entered judgment following the Supreme Court's mandate in an amount that included $3,992,368.09 in favor of the plaintiff class against the State and a regional aquaculture association. Orders, Ex. D, at 8.

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to the legislature, and required each borough to pay the equivalent of an additional one-mill levy to pay for fuel to heat State facilities located within their boundaries? This slippery slope is exactly what the Framers of Alaska's Constitution expressly and emphatically sought to avoid. Moreover, their reasoning was embraced by the Alaska Supreme Court in *Alex* and its progeny.

B. The State's analogy to the matching grant program is inapposite.

The State's argument that the RLC is comparable to the Municipal Capital Project Matching Grant Program ("matching grant program"), or indeed any discretionary matching fund program, ignores the mandatory, annual nature of the RLC. Unlike the discretionary matching grant program, the RLC is infirm because "allocation of revenues to the [KGB School District] [i]s mandatory, leaving no discretion to the legislature to spend the money in any other way." *Fairbanks Convention & Visitors Bureau*, 818 P.2d at 1158. The mandatory nature of the RLC also explains why the State's analogy to a voluntary State-local cooperative program, Opp. at 15 n. 35, is inapposite.

The matching grant program may be attractive to municipalities, but participation in the program is not required. After money is appropriated to a municipality's individual grant account, the municipality "*may* draw amounts from its individual grant account for a capital project . . ." AS 37.06.010 (emphasis added). Only if the municipality elects to do so does it incur the local share requirement under AS 37.06.030. A municipality can elect not to identify a capital project and request that the legislature appropriate, and the governor approve, the draw for that particular project. But a municipality cannot elect to forego providing the RLC to a school district, making this comparison of little value.

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C. The Education Clause (Article VII, section 1) is irrelevant to the Borough's constitutional arguments.

The State suggests that the Borough "assumes that the State is constitutionally required to provide full funding for public schools," or that it implicitly seeks judicial interpretation of the Education Clause of the Alaska Constitution.[6] *See* Opp. at 17-21. But the State also recognizes, correctly, that the Borough has not sought to invalidate the RLC under the Education Clause. *See id.* at 18. The Borough will not address the extent to which the State must provide school funding, and it will not speculate in a case in which it has not presented the issue. Most importantly, the State does not argue, and cannot argue, that the RLC's compliance with the Education Clause would excuse a violation of separate provisions of the Alaska Constitution. *Cf. Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1171 (Alaska 2009) (declining to read "implied exception" to dedicated funds provision based on separate constitutional provision relating to university ownership of land). The State may not establish a method of school funding that is unconstitutional in any manner, and its references to the Education Clause obscure the other plain constitutional violations present in the RLC.

D. Constitutional avoidance does not apply.

The State's brief misapprehends the doctrine of constitutional avoidance in asking the Court to apply the doctrine to resolve the case in the State's favor. *See* Opp. at 8-9. The Alaska Supreme Court has held numerous times that the doctrine of constitutional avoidance applies only where the statutory scheme that a plaintiff claims is unconstitutional is ambiguous and capable of more than one interpretation. *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 384 (Alaska 2013) (constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text. Under

[6] Alaska Const. Art. VII, § 1.

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this tool, as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [this Court's] plain duty is to adopt that which will save the Act."); *see also Alex*, 646 P.2d at 207-08 (declining to interpret statute in a manner contrary to legislative intent in order to avoid constitutional questions). Nowhere in the State's brief does the State propose a "competing plausible interpretation" of the language of the RLC provisions; rather, it seeks to misapply the doctrine to avoid altogether a *legal determination* of the statute's constitutionality.

E. The RLC does not qualify for the pre-Statehood dedication exemption in the Anti-Dedication Clause.

The State's alternate argument that the RLC is "grandfathered" as a pre-existing dedication should be rejected because (1) the RLC was established *after* Statehood, and (2) the pre-existing statute was repealed. Both facts are fatal to the State's argument because, while the Anti-Dedication Clause permits "the continuance of any dedication for special purposes *existing on the date of ratification* ...," Art. IX, Section 7 (emphasis added), it is well established by the Attorney General's own opinions that a dedication is only grandfathered if it existed before April 1956 and has not thereafter been repealed. No RLC was required by the legislature until 1962, long after the Constitution was ratified. Moreover, even if the pre-Statehood statutory scheme is considered a dedication – a position the Plaintiffs reject as set forth below – it was expressly repealed when the RLC and the other elements of the post-Statehood education funding statutes were enacted. Thus, the RLC is not a grandfathered pre-existing dedication.

The Territorial Law that the State claims establishes an RLC in fact does no such thing. Under that law, municipalities exercised independent judgment and discretion as to what they could afford to pay for schools, and were reimbursed by the Territory for a

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portion of the support provided "from the moneys of the Territory appropriated for such purposes." Ex. E at § 37-3-62.[7] Each year, the city councils determined "the amount of money to be made available for school purposes, [furnished] the school board of the city a statement of such sum, and [required] the treasurer to pay the sum available for school purposes to the treasurer of the school board." *Id.* at § 37-3-35. Thus, no dedication was created because, unlike the current mandatory RLC provided for in AS 14.17.410(b)(2), the cities were not required to provide any particular amount to the school districts. Additionally, no dedication was created because the amount of State reimbursement depended on how much was appropriated by the legislature for such purpose.

Furthermore, even if this voluntary local payment and appropriation based State reimbursement scheme is construed as a dedication, the Attorney General Opinions hold that as soon as it was repealed, its grandfather status was extinguished. Repeal of the Territorial education funding scheme began in 1962. Laws of Alaska 1962, ch. 164 §§ 5.01-5.05 (Ex. B).[8] The 1962 legislation included a transition period. *See id.* at § 5.04. Thus, not all sections of the territorial education funding statute were repealed in 1962. For example, § 37-3-62 (State funding) was repealed in 1962, *id.* at § 5.04, but § 37-3-35 (city determination of funds available for schools) was not repealed until 1966. *See* Laws of Alaska 1966, ch. 98, § 59 (repealing all of AS 14.15 including § 37-3-35 which was codified as AS 14.15.330 and AS 14.15.380 in 1962).[9] The 1962 legislation implemented

[7] The State did not provide the Court with a complete copy of the Territorial Law it claims created the pre-existing dedication in Ex. 2 to its Opp. Therefore, Plaintiffs provide a complete copy in this Ex. E.

[8] The State's Exhibit 3 is not a complete copy of the 1962 statute, so Plaintiffs have provided a complete copy in Ex. B.

[9] The recodified sections as well as the 1966 version of the Alaska statutes stating that they were repealed in SLA 1966, ch. 98, § 59, are provided in Ex. F.

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the foundation formula with its basic need approach and mandatory RLC. Ex. B at §§ 1.01-4.02.

In March 1959, the Attorney General first addressed the grandfather clause after "diligently" researching the written transcript of the Constitutional Convention "minutes" and after reviewing audio recordings that were not transcribed at the time. 1959 Alaska Op. Att'y Gen. No. 7 at 1-2 (March 11) (Ex. G).[10] He concluded that "as a matter of compromise, a grandfather clause had been included in section 7 [the Anti-Dedication Clause] to permit all dedications existing on the date of ratification of the Constitution (April 24, 1956) to continue." *Id.* at 2. He then concluded that repeal of pre-existing dedications removed them from protection under the grandfather clause because "the purpose of the prohibition would be defeated" by "denying the financial flexibility sought by the constitutional framers." *Id.* at 3. He summarized:

> [T]he intent of the drafters ... was to permit the continuance of existing dedications at the then existing rates until the Legislature saw fit to exercise the only power retained in relation to them: that is, the power to repeal.
> ...
> Also note that *any repeal or repeal and re-enactment* of a dedication during that session takes the dedication from under the protection of the grandfather clause and a re-enactment either in 1957 or later is a nullity unless the dedication is required by the Federal Government for participation in Federal programs.

Id. at 5, 6 (emphasis supplied).[11]

[10] Excerpts from the audiotapes that were not transcribed are included in the Opinion at 4.

[11] The 1959 Opinion also concluded that it would be proper to dedicate "any revenues that are proceeds of neither taxes or licenses." *Id.* at 3. However, the narrow view was rejected in the 1975 Attorney General's Opinion (Ex. A) at 2 n.1. The 1975 Opinion stated that earlier opinions "erred in relying principally on legal lexicons and prior decisions to define 'proceeds', 'taxes', and 'licenses' and in relying too little on the files and minutes of the Constitutional Convention." *Id.*

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The Attorney General has consistently held that (1) for a dedicated fund to be grandfathered, it must have existed before April 1956; and (2) pre-existing dedications are no longer grandfathered if they are repealed, or they are repealed and re-enacted. It has "never wavered" from this belief. 1992 Alaska Op. Att'y Gen. (Inf.) 33 (Jan. 12, 1990, re-dated Jan. 1, 1992) (Ex. H); *see also* 1992 Alaska Op. Atty. Gen. (Inf.) 31 (Sept. 11, 1989, re-dated Jan. 1, 1992) ("In our opinion, it is likely a court would find that a repealed dedication cannot be revived.") (Ex. I).

Like the Court in *Alex*, this Court should adopt the consistent reasoning of these Attorney General Opinions and reject the inconsistent position taken by the State in this case.[12] In accordance with the holdings of "diligently researched" longstanding Attorney General Opinions, the RLC was never grandfathered because the reimbursement scheme that existed pre-Statehood did not require any dedication or an RLC. Furthermore, even if the pre-existing reimbursement scheme is viewed as a dedication, it was fully repealed forty-eight years earlier.

II. The RLC also violates the Legislative Appropriation Clause and the Governor's Veto Clause.

The State defends the RLC against both the Legislative Appropriation Clause and Governor's Veto Clause on the basis that the RLC does not enter the general fund or become subject to appropriation. But this simply points out the infirmity with the RLC – it is a State-compelled exaction on the Borough that can only be properly assessed, if at all, by becoming subject to appropriation (rather than dedication). That the legislature

[12] *See Alex*, 646 P.2d at 210 (adopting "well reasoned" Attorney General Opinion on construction of Anti-Dedication Clause); *see also Myers*, 68 P.3d at 401 (quoting *Allison v. State*, 583 P.2d 813, 816–17 n.15 (Alaska 1978)) (noting that the attorney general's opinion is entitled to "great weight," because the attorney general is "the officer charged by law with advising the officers charged with the enforcement of the law as to the meaning of it.").

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has set up the RLC in this manner is a feature of its unconstitutionality, not a defense to its constitutionality. If the Court holds, as it should, that the RLC violates the Anti-Dedication Clause, it should also hold as a necessary corollary that the RLC bypasses the legislative process that the Anti-Dedication Clause is intended to preserve.

The State misapprehends the compelled nature of the RLC by stating at footnote 39 of page 17:

> If borough taxes, locally collected and locally spent, could be appropriated by the state Legislature, as the borough suggests, it is not clear why such appropriation power would be limited to just the local contribution as opposed to the entire borough budget.

To the contrary, there are clear answers that distinguish the entire Borough budget from the RLC. The Borough's collection of taxes is generally a matter of Borough policy, but unlike taxes that form the basis for general Borough services, the RLC is assessed under color of State law and is a mandatory payment for the Borough. The "entire [B]orough budget" does not impermissibly bypass the legislative process in the manner that the RLC does.

The Alaska Supreme Court has addressed the Legislative Appropriations Clause only in the context of funds directly flowing from the state general fund, and has not had occasion to address the effect of a self-executing payment for a state function such as the RLC. However, in *Myers*, the dissenting justices suggested that an automatic payment flowing to a private entity upon receipt by the State was vulnerable to an attack under the Legislative Appropriation Clause because it operated without requiring an appropriation. *Myers*, 68 P.3d 386, 399 & 399 n.9 (Bryner, J., dissenting) (citing with approval memorandum opinion of Director of Legislative Services for the Legislative Affairs Agency; the majority did not address Appropriation Clause issues). Because the RLC

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threatens the power of appropriation and gubernatorial veto right by bypassing the process entirely by its own terms, it presents an even stronger case for invalidation under these clauses.

III. The Borough is entitled to a refund under the principles of assumpsit and restitution.

The State relies solely on its arguments as to the constitutionality of the RLC in arguing that the Borough is not entitled to a refund of the 2014 RLC. The Borough recognizes that its assumpsit and restitution arguments depend on the success of its constitutional challenges to the RLC as a whole. The State has not set forth legal authority separate from the RLC's constitutionality, and the Borough's request for a refund in assumpsit or restitution should be deemed unopposed if its constitutional challenges are well taken. The State concedes that it has been enriched by asserting that the RLC "leaves more money in state coffers because schools received part of their funding from local sources." Opp. at 15. Because the State's obligations have been lessened by the Borough's payment under protest of an unconstitutional assessment, the Borough is entitled to a refund.

CONCLUSION

For the reasons stated herein and in Plaintiffs' motion and memorandum, Plaintiffs respectfully request summary judgment, a declaratory judgment and injunction in their

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favor, and an order to refund the 2014 RLC.

Dated this 28th day of April, 2014.

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