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MEMORANDUM March 27, 2025

SUBJECT: Unallocated reduction
(CSHB 53(FIN); Work Order No. 34-GH1462\I)

TO: Representative Jubilee Underwood
Attn: Buddy Whitt

FROM: Marie Marx
Legislative Counsel

On March 26, 2025, the House Finance Committee adopted amendment #14 to CSHB 53(FIN) (HB 53) (Work Order No. 34-GH1462\I),[1] as amended by amendment #1 to amendment #14,[2] which makes an unallocated reduction to the executive branch. You asked whether this unallocated reduction raises any constitutional issues. You also asked whether there may be consequences if the legislature passes HB 53 with the unallocated reduction language included, and whether an unconstitutional item is conferenceable.

Constitutionality of unallocated reduction. Courts would likely find an unallocated reduction as set out in amendment #14, as amended, to be an unconstitutional delegation of the legislative power.[3] In *State v. Fairbanks North Star Borough*,[4] the Alaska Supreme Court examined Governor Sheffield's implementation of a statute that permitted the governor to reduce appropriations if the estimated receipts for the state were insufficient to provide for amounts appropriated for that year. The court stated:

> The legislature has articulated no principles, intelligible or otherwise, to guide the executive. Under AS 37.07.080(g)(2), the governor decides when projected revenues are inadequate to meet appropriations. Once he makes that determination, he may or may not assume authority under the

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[1] Amendment # 14 is available at: https://www.akleg.gov/basis/get_documents.asp?session=34&docid=4190.

[2] Amendment #1 to amendment #14 is available at: https://www.akleg.gov/basis/get_documents.asp?session=34&docid=4204.

[3] The power to appropriate state funds is conferred solely upon the legislature by art. IX, sec. 13, Constitution of the State of Alaska.

[4] 736 P.2d 1140 (Alaska 1987).

> statute. If he decides to act, he has total discretion as to which appropriations to cut and to what extent . . . .
>
> Most importantly, the executive is provided with no policy guidance as to how the cuts should be distributed. The State conceded at oral argument that the statute would permit the governor to cut the entire budget for a particular department or project. Indeed, nothing in the statute would prevent him from effectively vetoing a project where his veto had previously been overridden.[5]

In short, an unallocated reduction delegates power over appropriations to the governor that can only be exercised by the legislature and therefore probably violates the constitutional separation of powers doctrine.

In a 1983 superior court decision, an appropriation which made an unallocated reduction of $5,267,248 in personal services that was to be equitably allocated among state agencies by the office of management and budget was struck down. The superior court found this appropriation to be invalid because it was either a delegation of the legislature's nondelegable spending power or, in the alternative, if the power was delegable to the governor, it was a standardless delegation of the appropriation power to the governor.[6]

The attorney general has also expressed concerns regarding unallocated reductions in the past.[7] In a 1999 opinion, the attorney general stated:

> The unallocated reductions this year are generally included in the appropriation for each department that includes the allocation for the department's commissioner's office. But the legislature has made it clear that its intent, in placing these reductions where they are, is to allow the departments to take the reductions anywhere in the departmental budget. See the language at the beginning of sec. 43, CCS HB 50 (the main part of the budget), which refers (at page 17, line 5) to "department-wide unallocated reductions."
>
> The serious new legal questions arise because each department's budget, as well as the court system's and the legislature's, consist of more than one appropriation. However, we are not recommending any vetoes based on these questions, since it is not entirely clear to us that the legislature's new

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[5] *Id.* at 1143.

[6] *Alaska State Legislature v. Hammond*, Case No. 1JU-80-1163 CI, Memorandum of Decision (Alaska Super., May 25, 1983), pages 66 - 69.

[7] *See* 1999 Inf. Op. Att'y Gen. (June 28; 883-99-0070) (internal citations omitted).

approach violates the Alaska Constitution or would require you, in administering the budget, to violate any such provision or any statute. Moreover, the consequences of such vetoes would be highly problematic.

The first question raised by the legislature's new approach is whether it has given you unconstitutionally broad discretion in making these reductions. The Alaska Supreme Court has ruled that the legislature cannot legally give the executive unfettered discretion to reduce appropriations after the bill making those appropriations has been enacted into law. *See State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987) (holding unconstitutional AS 37.07.080(g)(2), which allowed the governor to withhold or reduce appropriations if the governor determined that estimated revenue would be insufficient to provide for all appropriations, because the governor is provided no policy guidance as to how to distribute cuts). This bill may present similar problems, because CCS HB 50 on its face provides no policy guidance to the agencies as to how to cut their budgets, and the legislative history of the bill with regard to this question is sparse. We cannot, however give you a definitive answer as to whether the legislature's new approach is constitutional.

The second question raised is whether the legislature's approach would require you to violate AS 37.07.080(e). That statute prohibits transfers between appropriations. But it is the legislature's intent, as noted above, that you do precisely that: that you take the unallocated reductions that appear in the appropriations for each commissioner's office and spread those reductions across the entire budget for each department. The budget for every executive branch department, the court system, and the legislature consist of multiple appropriations. Only the budget for the University of Alaska (Sec. 43, CCS HB 50, page 48, line 21 - page 49, line 32) consists of just one appropriation. It can be argued that you would not be violating AS 37.07.080(e) in following the legislative intent to spread these unallocated reductions over the whole department. One possible argument is that this bill, with its clear expression of legislative intent, is the equivalent of an "act making transfers between appropriations" within the meaning of that statute. Another possible argument is that a negative appropriation is not an appropriation within the meaning of the statute. As noted above, we do not know whether the courts would accept these arguments. But, as also noted above, we believe that the answer to the question is sufficiently unclear that we are not recommending vetoes of these allocations for unallocated reductions.[8]

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[8] *Id.* at 2 - 3; *see also* 2002 Inf. Op. Att'y Gen. (June 28; 883-02-0028).

In light of these cases and opinions, it is likely that if challenged, a court would find the unallocated reductions in amendment #14, as amended by amendment #1 to amendment #14, to be unconstitutional.

Potential consequences. If HB 53 is passed by the legislature with the language in amendment #14, as amended, one possible consequence is that the governor might veto the appropriation because of the significant legal questions the amendment raises. Another possible consequence is that the unallocated reduction language may result in litigation due to these serious legal issues. If challenged, it is likely that a court would find the unallocated reduction language to be unconstitutional and therefore unenforceable. It is important to note, however, that if the unallocated reduction language is passed by the legislature and not vetoed by the governor, it would be legally valid unless challenged and found unconstitutional. This is because an act of the legislature is presumed to be constitutional, and the burden of showing unconstitutionality is on the party challenging the enactment.[9]

Conferenceability of unallocated reduction language. If the House passes out a version of HB 53 with the unallocated reduction language included and the Senate passes out a version of HB 53 without it, the language would be conferenceable under Uniform Rule 42.

Please let me know if I may be of further assistance.

MYM:mjt
25-133.mjt

[9] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 379 (Alaska 2001).