Craig Richards, Esq.
Alaska Bar No. 0205017

Dustin Elsberry, Esq.
Alaska Bar No. 2311124

PIONEER LAW, LLC
810 N Street, Suite 100
Anchorage, Alaska 99501
(907) 306-9878
crichards@pioneerlawllc.com
delsberry@pioneerlawllc.com

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

EDWARD ALEXANDER; JOSH ANDREWS; SHELBY BECK ANDREWS; and CAREY CARPENTER

Plaintiffs,

v.

STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT, COMMISSIONER DEENA BISHOP, in her official capacity, ANCHORAGE SCHOOL DISTRICT, MATANUSKA-SUSITNA BOROUGH SCHOOL DISTRICT, DENALI BOROUGH SCHOOL DISTRICT, and GALENA CITY SCHOOL DISTRICT,

Defendants,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON

Intervenors.

CASE NO: 3AN-23-04309CI

INTERVENORS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

INTRODUCTION

The amended complaint should be dismissed. Plaintiffs contend that using "allotment" money from the Correspondence Study Program to pay for tuition at private school is prohibited by an administrative regulation (Count II) and the Alaska Constitution (Count I). Count II alleges that, even though the Program statutes allow the use of allotment money at private schools, an administrative regulation that long predates the current iteration of the program prohibits more than minimal face-to-face instruction. Count I alleges that allotment money constitutes a "direct benefit" to private schools that violates the education clause of the Alaska Constitution. More generally, Plaintiffs portray the Program as a threat to the public school system. Plaintiffs' characterization of the program is inaccurate and, more importantly, their legal argument is wrong.

As Part I explains,[1] Count II should be dismissed because the outdated regulation simply does not apply to the use of allotment money at a private school, and, even if it did, the regulation would conflict with the Program statute, which means that the regulation is invalid. In Part II, Intervenors establish Count I should be dismissed because the use of allotment money at private schools is a direct benefit to families, not the schools. This is evident from the plain text of the statute, which conforms with the text and history of the Alaska Constitution. Further, state courts across the country consistently reject Plaintiffs' interpretation of "direct benefit" and nothing in the Alaska Supreme Court's decision in *Sheldon Jackson College v. State* says otherwise. The reality is that the Alaska Legislature has provided parents with funds to ensure that they can choose the education that fits their families' needs, regardless of each family's income. That is a fully constitutional objective and the Program is a fully constitutional way to pursue that goal.

But there are other compelling reasons to dismiss the Amended Complaint. As explained in Part III, if accepted by this Court, Plaintiffs' flawed interpretation of Article VII, section 1 would set the Alaska Constitution on a collision course with the United States

[1] Intervenors address Count II first, in accord with the Alaska Supreme Court's suggestion that this Court first determine whether the challenged use of the program is permitted by law.

Constitution. That interpretation of the Alaska Constitution, which singles out for exclusion from an otherwise available program only families choosing services from private schools, would violate those families' fundamental rights under the First and Fourteenth Amendments. Plaintiffs' Amended Complaint should be dismissed to avoid violating the federal constitutional rights of Alaskan families.

BACKGROUND

Alaska's Correspondence Study Program authorizes school districts or the Department of Education to grant "an annual student allotment to a parent or guardian of a student enrolled in the correspondence study program." AS 14.03.310(a). Families may use these allotments to pay for a student's "instructional expenses." *Id.*

To qualify to receive an allotment through the program, participating families must work with a "certificated teacher assigned to the student by the district," to develop an "individual learning plan." AS 14.03.300(a). The state does not dictate the contents of a student's individual learning plan. This is because, beyond a few basic conditions, the Department of Education may not impose "additional requirements . . . on a student who is proficient or advanced on statewide assessments." AS 14.03.300(b). In practice, this means that participating families may choose to use their allotments to pay for educational "services and materials" provided by a wide variety of approved vendors. *See* AS 14.03.310(b). Among these approved vendors are private schools.

Intervenors Andrea Moceri, Brandy Pennington, and Theresa Brooks ("Parents") are beneficiaries of the Program. Their children are enrolled in the Program, and they use their allotment towards private school tuition. Mot. to Intervene 5. Without the Program, Parents would be unable to send their students to these private schools, or would be able to do so only by incurring great financial hardship. *Id.* at 5–7.

Plaintiffs first filed a lawsuit challenging the Program's constitutionality on January 24, 2023. Compl. In the initial Complaint, Plaintiffs sued the Department of Education and Early Development ("the Department"), alleging that the Program, on its face, violated Article VII, section 1 of the Alaska Constitution, which prohibits the payment of public funds "for the direct benefit of any religious or other private educational institution."

Compl. ¶¶ 56–72. Parents moved to intervene as Defendants to defend their interest as beneficiaries of the program, and the Superior Court granted Parents' motion.

After considering cross motions for summary judgment and the Department's motion to dismiss, the Superior Court granted summary judgment for Plaintiffs, declaring AS 14.03.300–.310 facially unconstitutional under the Alaska Constitution. Parents and the Department separately appealed the Superior Court's judgment to the Alaska Supreme Court. The Alaska Supreme Court expedited the appeal and issued a summary ruling reversing the judgment of the Superior Court. A full opinion followed on March 28, 2025, setting out in more detail the Court's reasons for reversal.

The Alaska Supreme Court reversed the superior court's grant of summary judgment for Plaintiffs because Plaintiffs had not demonstrated that the statute was facially unconstitutional. *State of Alaska, Dep't of Educ. & Early Dev. v. Alexander*, 2025 WL 941767 (Alaska Mar. 28, 2025). The Court held that the superior court had erred by "[s]triking down the statutes entirely" where it was "clear that there are a substantial number of constitutionally valid uses of allotment funds." *Id.* at *1. The Court noted among those constitutional uses was "using public funds to purchase a homeschool curriculum from a private organization." *Id.* at *14. Because of those many constitutionally valid uses, the Court held, the superior court's "remedy went too far." *Id.* at *1. The Court also held that, to answer "the important question whether it is constitutional to use allotment funds to pay for private school tuition," the school districts that administer the Program must be made parties to the lawsuit. The Court further held that, before it could reach that constitutional question, the parties must address "whether the statutes actually permit this use of allotment funds." *Id.*

Plaintiffs filed a Motion to Amend Complaint and Join Parties, which this Court granted on March 2, 2025. Plaintiffs filed their Amended Complaint later that day, this time alleging an as-applied, rather than facial, constitutional challenge to the Program. Am. Compl. The as-applied challenge asks the Court to declare unconstitutional use of the benefit awarded through the Program (1) "towards full-time tuition at a private educational institution," (2) "for classes and/or part-time enrollment at a private educational

institution," and (3) "for educational materials purchased at a private educational institution, including textbooks, curriculum, lesson plans, and other instructional materials." Am. Compl. at 41. It further alleges that such uses of the Program are not authorized by Alaska law because the Program "is limited to homeschooling." *Id.* ¶ 149. In their Amended Complaint, the Plaintiffs also joined as Defendants four school districts: Anchorage School District, Matanuska-Susitna Borough School District, Denali Borough School District, and Galena City School District (together, "the School Districts").

Parents now move to dismiss the Amended Complaint for failure to state a claim pursuant to Alaska Civil Rule 12(b)(6).

LEGAL STANDARD

A complaint should be dismissed under Alaska Civil Rule 12(b)(6) where it fails to "allege a set of facts consistent with and appropriate to some enforceable cause of action." *Larson v. State of Alaska, Dep't of Corrections*, 284 P.3d 1, 6–7 (Alaska 2012). A motion under Rule 12(b)(6) tests the legal sufficiency of a complaint. A court considering such a motion assumes all factual allegations can be proven as true, but it need not credit as true any "unwarranted factual inferences" or "conclusions of law." *Dworkin v. First Nat'l Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968).

ARGUMENT

On remand, the Alaska Supreme Court outlined the task at hand: "the superior court must interpret the statutes to determine if they allow allotment funds to be used for private school tuition before addressing the statutes' constitutionality." *Alexander*, 2025 WL 941767 at *2. These questions of law are ripe for conclusion and require Plaintiffs' claims to be dismissed. The statutes authorize parents to spend their allotments on private school tuition, the statutes are consistent with the Alaska Constitution, and Plaintiffs' contrary interpretations are inconsistent with the U.S. Constitution. Each point is addressed in turn.

I. Expenditure of student allotments towards materials and services from private schools is authorized under Alaska law.

In Count II of the Amended Complaint, Plaintiffs allege that "spending allotments on private school courses and tuition violates Alaska law." Am. Compl. ¶ 149. Plaintiffs set

forth a few key facts in support of this claim. First, Plaintiffs contend that "[a] number of school districts, including those named as defendants here, allow allotments to be used to reimburse full-time private school tuition and to reimburse some number of private school courses." *Id.* at ¶ 145. They further claim that "[i]n practice, many correspondence programs offered by the School Districts currently offer face-to-face interaction as part of the program." *Id.* at ¶ 147. Finally, they assert that this permitted use of allotment dollars for face-to-face interaction at private schools is "inconsistent with the definition of 'correspondence study program,'" as described by the Alaska Administrative Code because that definition sets limits on hours of "'scheduled face-to face interaction' for secondary and elementary students.'" *See id.* at ¶¶ 149, 146. Count II fails as a matter of law for two reasons, even accepting as true Plaintiffs' claims that correspondence programs, including those offered by the School Districts, currently permit the expenditure of allotment dollars at private schools where total face-to-face interaction exceeds the alleged regulatory limits. First, the use of allotment dollars that Plaintiffs describe does not violate the cited regulations.[2] Second, to the extent such use can be read to conflict with the cited regulatory definition, that regulation must cede to the commands of the statute, which Plaintiffs acknowledge permits the challenged use of allotment dollars.

Plaintiffs do not allege that the allotment spending they challenge is prohibited by *statute*. *See id.* at ¶ 144 ("Alaska Statutes 14.03.300–.310 then expanded the correspondence allotment program to expressly allow for the purchase of services and materials from private institutions."). Rather, their argument in Count II is based on a regulation—in fact, an outdated regulation. Specifically, Plaintiffs allege that the Alaska Administrative Code limits the hours of "scheduled face-to-face interaction" permissible for students participating in a "correspondence study program." *Id.* ¶ 146. They further allege that the enrollment of students in the Program who exceed those alleged limits "would be inconsistent with the regulatory definition of 'correspondence study program.'"

[2] Plaintiffs' allegation that the use of allotment dollars they describe violates the regulations is a legal conclusion that need not be credited on this motion to dismiss.

Id. ¶ 148. But Plaintiffs' citation of these regulations is incomplete. The regulations on which Plaintiffs rely do not refer to "face-to-face" interaction broadly. Rather, they limit only "face-to-face interaction, in the same location, **between a teacher certificated under AS 14.20.020 and each class**." 4 AAC 09.990(a)(3) (emphasis added).

Plaintiffs do not allege that the "face-to-face interaction" of students using allotment dollars towards tuition at private schools is with a "teacher certificated under AS 14.20.020," as would be necessary for this Court to consider even whether the cited regulations are implicated at all. Their claim in Count II should fail on that ground alone. Further, the cited regulations predate the 2014 legislative expansion of the program by almost 15 years. *See* 4 AAC 09 and 33, Definition of Correspondence Study (June 19, 2000), https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=118436. For that reason, it is doubtful that it continues to offer a valid definition of a "correspondence study program." But the claim also fails for two other reasons. First, the regulation does not restrict in-person instruction at private schools by its own terms. Second, to the extent the regulation can be read to apply to teachers at private schools, it would impermissibly violate the statutory command that DEED not "impose additional requirements [beyond those included in the statute] on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f)." AS 14.03.300(b).

Alaska law states that "[a] person may not be employed as a teacher in the public schools of the state unless that person possesses a valid teacher certificate . . . ." AS 14.20.010. It does not, however, set the same requirement for teachers in private schools. Under AS 14.45.100, "a religious or other private school that complies with AS 14.45.100–14.45.130 is exempt from other provisions of law and regulations relating to education." AS 14.45.100. This means that, if a private school meets the minimal requirements of AS 14.45.100–.130 (which include keeping attendance records, implementing standardized testing, and certain recordkeeping requirements), it is exempt from—among other things—the statutory requirement that its teachers be certificated. The most natural reading of the face-to-face instruction limitation in 4 AAC 09.990(a)(3), then, is that it refers ***only*** to face-to-face instruction with public school teachers. And such a

restriction makes sense. It highlights the mutual exclusivity of the state's various educational options. In other words, it ensures that a student cannot be both a full-time public-school student and qualify for allotment dollars through the Program for additional educational expenses outside the school day.

To the extent that the regulations cited by Plaintiffs could be read to impose broader limitations on "face-to-face interaction" outside the context of public schools, they conflict with the statutes governing the Program and are therefore invalid. Agencies may enact regulations "consistent with and reasonably necessary to implement the statutes authorizing their adoption," but they may not "use [their] rule-making authority to 'contradict a clear legislative policy.'" *Sagoonick v. State*, 503 P.3d 777, 804 (Alaska 2022). For this reason, "[a] regulation is invalid if it 'conflicts with other statutes.'" *Id.* If Plaintiffs' interpretation of the regulatory "face-to-face interaction" limits is correct, the regulations imposing those limits would directly conflict with the Program's governing statute. Specifically, they would run afoul of the statutory command that DEED not "impose additional requirements [beyond those included in the statute] on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f)." AS 14.03.300(b). Plaintiffs have previously emphasized the breadth of this bar on DEED's ability to add any restrictions to the Program, arguing that it "explicitly preclude[s] [the Department] from imposing any restrictions to keep expenditures within constitutional bounds." *See Alexander*, 2025 WL 94176732, at *16. Because Alaska law prohibits DEED from imposing extra-statutory requirements on students enrolled in the Program, Plaintiffs' interpretation of the cited regulations as containing a general "face-to-face interaction" limit (and not a limited one, as to only public-school teachers) renders those regulations invalid and should be rejected.

II. Plaintiffs fail to state a claim that expenditure of allotment dollars at private schools violates Article VII, section 1 of the Alaska Constitution.

In Count I of the Amended Complaint, Plaintiffs allege that the use of allotment dollars towards "private school tuition," "some number of classes at private schools," or "educational materials and curriculum from private schools" violates Article VII, section 1

of the Alaska Constitution. *See* Am. Compl. ¶ 124. In support of this claim, Plaintiffs contend throughout the Amended Complaint that correspondence study programs, including those offered by the School Districts, currently permit program participants to use allotment dollars to pay for tuition and materials from private schools. *See, e.g.,* Am. Compl. ¶¶ 90, 97,102-103, 106, 110, 111, 118-119. Accepting these allegations as true, the claim in Count I fails as a matter of law because none of the uses of allotment dollars described in the Amended Complaint violates Article VII, section 1.[3]

Article VII, section 1 of the Alaska Constitution prohibits the legislature from "pay[ing] from public funds for the direct benefit of any religious or other private educational institution." The plain text of the statutes governing the Program, and the effect of those statutes, demonstrate that they provide a direct benefit for individuals, not private educational institutions. That is true even if private schools derive some incidental benefit from a portion of Program participants' choices. This commonsense understanding is further bolstered by evidence from the Alaska Constitutional Convention that the framers of Article VII, section 1 intentionally rejected a proposed prohibition on "indirect" benefits to private educational institutions. That historical evidence further reveals that the framers expressly contemplated—and viewed as constitutional—at least one program that permitted individuals to purchase educational services from a private school. In addition to fitting comfortably within the constitutional history, use of the Program to purchase—among other options—services and materials from private schools is also consistent with case law.

A. The direct benefit that the Program provides to families does not become unconstitutional if those families choose services from a private school.

The statute governing the Program authorizes school districts or the Department of Education to "provide an annual student allotment *to a parent or guardian* of a student enrolled in the correspondence study program." AS 14.03.310 (emphasis added). This

[3] On a motion to dismiss, this Court of course need not credit the conclusions of law in Plaintiffs' Amended Complaint. *See, e.g.,* Am. Compl. ¶ 21 ("Reimbursing parents for private school courses, tuition, and educational materials with public funds is exactly the channeling of funds the Alaska Supreme Court has held is prohibited.")

statutory text unambiguously grants the Program's benefit to parents of enrolled students, and not to *any* institution or institutions. The statute further states that beneficiaries may use the allotment to "purchase nonsectarian services and materials from a public, private, or religious organization." *Id.* Under the statute's plain language, *parents*, not the government, decide where to spend the money. That is direct aid to families, not direct aid to private schools. State and federal cases across the country treat true parental choice, as Alaska parents have here, as the key to a constitutional educational choice program. *See, e.g., Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Because it is families—not the state—who decide where to spend their allotments, the statute can no more be construed as the state sending public funds "for the direct benefit of any religious or other private educational institution" than a public assistance program for low-income families be described as the state providing direct benefits to Safeway or Walmart. Alaska Const. art. VII, § 1. This is true whether families ultimately use that benefit towards "martial arts classes at a private gym," "classes at the University of Alaska," or (as relevant in the present challenge) tuition at a private school. *See Alexander*, 2025 WL 94176732, at *14. Because they exercise exclusive control over which of those options—or the myriad other options covered by the Program—is the best fit for their children, parents and guardians receiving the allotment are the only "direct" beneficiaries of the Program, even on the facts alleged by Plaintiffs in their Amended Complaint.

B. The history of Article VII, section 1 shows that it was not intended to limit the educational choices of families.

The constitutional history of Article VII, section 1 reveals that "[t]he delegates clearly did not intend to adopt a maximalist prohibition," like that advanced by Plaintiffs in their Amended Complaint.[4] *See Alexander*, 2025 WL 941767, at *12. This is particularly

[4] This Court is free to consider Alaska constitutional history on the present motion to dismiss because "issues of constitutional and statutory interpretation are decidedly questions of law, for which resort to drafting history to clarify the meaning of language is common practice." *Forrer v. State*, 471 P.3d 569, 584 (Alaska 2020) (explaining why a

evident from the convention minutes in which the delegates discussed the proposed insertion of the words "or indirect" into Article VII, section 1. After carefully considering whether to include both words, the drafting committee ultimately rejected the phrase "or indirect." One member of the drafting committee, Delegate Awes, explained that the committee "felt that the words 'or indirect' would . . . reach out into infinity practically, and probably it is not even known what the results of that might be." 2 Proceedings of the Alaska Constitutional Convention ("PACC") 1517 (Jan. 9, 1956). Delegate Buckalew later voiced a similar concern, objecting that a prohibition on "indirect" aid would eliminate "free lunch," "bus transportation," and "any support to the child." *Id.* at 1524. He worried that the "word 'indirect' cuts out everything, just eliminates all kinds of support." *Id.* The statements of the framers at the Constitutional Convention confirm that the constitutional prohibition on direct benefits to private schools was intended to be narrow, still allowing for "support to the child" such as the Program here. *Id.*

In its opinion rejecting Plaintiffs' facial constitutional challenge to the Program, the Alaska Supreme Court flagged one part of the debate on the inclusion of the words "or indirect" that is "[p]erhaps most relevant to this case." *Alexander*, 2025 WL 941767, at *13. The Court highlighted a statement by Delegate Yule Kilcher expressing his concern that inclusion of "or indirect" would compel the State to end an important existing educational program. *See id.* At the time, five of Delegate Kilcher's seven children were enrolled in "the Calvert course," a correspondence program offered by a private school in Baltimore that was subsidized by the Territory. *Id.* Delegate Kilcher expressly described the Calvert course as "a private school," and emphasized that his children "go to a private school." *Id.* (quoting 2 PACC 1524 (Jan. 9, 1956)). He worried that the inclusion of the words "or indirect" could bring the Calvert course within the ambit of the prohibition, which would be "a great problem in Alaska." *Id.* In its opinion, the Alaska Supreme Court noted that "[t]his exchange suggests the delegates did not intend to prohibit using state

---

court's reliance on legislative or constitutional history does not convert a motion to dismiss into a motion for summary judgment).

funds to purchase a homeschool curriculum from a private organization—perhaps even from a private school." *Id.* The Court later reiterated that "the constitutional convention delegates appeared to be in agreement that using public funds to purchase a homeschool curriculum from a private organization should be permitted." *Id.* at *14.

Parents, and other beneficiary families who choose to purchase educational services from private schools, are just like the families who enrolled their children in the private Calvert course. Through the Program's allotment, the State has offered them a benefit to serve as an alternative to the traditional public school system. And, like Delegate Kilcher's family, they choose to use that benefit to purchase educational services from a private school. That Parents' payments here take the form of tuition expenses, rather than enrollment in a private mail-order course, makes no difference to the constitutional analysis. The text of Article VII, section 1 inquires only whether the state has provided "a direct benefit" to a "private educational institution." It does not list categories of educational services which it is permissible or impermissible for private educational institutions to provide. The type of educational service purchased by a beneficiary family should not, therefore, be determinative of the benefit's constitutionality. Consider, for example, two families who use allotment dollars to enroll their children in courses from the same private school. One family chooses an in-person enrollment option, and the other chooses a mail-order enrollment option (identical to the Calvert course model endorsed by the delegates). It makes no sense to say that the school has received a "direct benefit" as to the first family's allotment dollars, but not as to the second's. Rather, the only "direct" beneficiaries in both instances were the families who received the allotments.

C. Expenditures of allotment funds at private schools do not violate the rule in Sheldon Jackson.

The correspondence study program also passes constitutional muster under the test established by the Alaska Supreme Court in *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979). There, the Alaska Supreme Court struck down as unconstitutional a program that exclusively awarded tuition grants to students attending private colleges and universities. *Id.* Determining that the program violated Alaska's no-aid provision, the Court

set out a four-factor test to determine when a benefit to a private educational institution is impermissibly "direct" for purposes of Article VII, section 1: (1) "the breadth of the class to which statutory benefits are directed," (2) "the nature of the use to which the public funds are to be put," (3) "the magnitude of the benefit conferred," and (4) the form of the benefit because "the superficial form of a benefit will not suffice to define its substantive character." *Id.* at 130–31. Those factors weigh in favor of upholding the correspondence study program as it is currently constituted.

First, the breadth of the beneficiary class here is extremely wide. Unlike the program in *Sheldon Jackson*, which was available only to students at Alaska's private colleges, *see id.* at 128, any school-age Alaskan is eligible to enroll in the correspondence study program. And these enrollees have a wide array of options of how to design their educational experience under the program. They can buy educational services through public institutions, private institutions, or a combination of the two. Plaintiffs do not, and could not allege, that families' eligibility for allotments hinges in any way on their educational choices. This is precisely the kind of state "neutrality" at the heart of the first *Sheldon Jackson* factor. *Sheldon Jackson*, 599 P.2d at 130. Accordingly, the first *Sheldon Jackson* factor points to the program's constitutionality.

Second, looking to the "nature of the use to which the public funds are to be put," the correspondence study program again differs from the tuition grant program in *Sheldon Jackson*. That program created public funds available *only* for use at private colleges. Here, not only can funds be used at a variety of public and private vendors, but they can also be used for various materials and services. This includes courses at private schools, but it also includes courses at public institutions. And it includes many other options not comparable to the education provided in a traditional public-school environment. Among other things, for example, approved vendors offer tutoring, piano lessons, social/emotional learning skills development, vocational learning courses (including in welding, electrical, and woodworking), and lessons in horseback riding and equine care. *See* Family Partnership Correspondence School, Approved Service Vendors, https://www.asdk12.org/Page/15846. And, again, the state in no manner "directs" which, if any, of these myriad options families

select. The varied nature of the use of the allotment funds further affirms the program's constitutionality.

Third, the *Sheldon Jackson* factor inquiring about the "magnitude of the benefit conferred" is in Parents' favor because no benefits at all are conferred to private schools. Rather, they are conferred on the beneficiary families, many of whom (it is unclear from Plaintiffs' Amended Complaint how many, but that is not determinative to the analysis) do not make any expenditures at all from private schools. It is only through the free choice of some of those families that any allotment dollars may be used to pay for services from private schools. For that reason, the third *Sheldon Jackson* factor does not suggest that the program violates Article VII, section 1.

Additionally, though it does not support Plaintiffs' claim even on the allegations in the Amended Complaint, the third *Sheldon Jackson* factor is likely no longer applicable. That factor derives from two cases that are no longer good law: *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), and *Meek v. Pittenger*, 421 U.S. 349 (1975). In those cases, the United States Supreme Court evaluated alleged "excessive entanglement" between government and religion in the context of First Amendment challenges to benefits and subsidies provided to religious schools. *See, e.g.*, *Roemer*, 426 U.S. at 762. The Alaska Supreme Court cited *Roemer* and *Meek* as supporting the proposition that "[a] trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may." *Sheldon Jackson*, 599 P.2d at 130. But those cases have since been abrogated or overruled. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1251–52 (10th Cir. 2008) (acknowledging abrogation of *Roemer* and similar cases); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion) (declaring that *Meek* is "no longer good law").[5]

---

[5] The United States Supreme Court summarized the evolution of its case law on this question as follows in *Zelman v. Simmons-Harris*:

> While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, . . . our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government

In *Mitchell v. Helms*, the Court explained that its departure from its prior line of Establishment Clause cases was based on "the principle of private choice." 530 U.S. at 816. The Court reasoned that "[i]f aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally and figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion[.]'" *Id.* Similarly, where—as here—government funds are provided directly to families who may direct those funds as they please, the Alaska government cannot be using public funds "for the direct benefit of any religious or other private educational institution." Alaska Const. art. VII, § 1. Abandoning the third *Sheldon Jackson* factor also brings the standard in line with the text of the Alaska Constitution. Because, as discussed, the framers of the Alaska Constitution directly rejected the inclusion of "indirect" in Article VII, section 1, courts should not read that word back into the clause, regardless of a challenged benefit's "magnitude." *See Sheldon Jackson*, 599 P.2d at 130. Accordingly, even if this Court decides that it remains bound to consider all four factors set out in *Sheldon Jackson*, the third factor does not support a ruling that the program is unconstitutional.

Fourth, the form of the benefit conferred by the program is not a "superficial" difference from direct payments from the state to private schools. *See id.* at 131. Parents participating in the Program need not—and often do not—use the allotment towards tuition, or for any materials or services from private institutions. The legislature has not, then, "merely channel[ed] the funds through an intermediary." *Id.* at 130. In *Sheldon Jackson*, the legislature knew—and intended—upon enactment of the tuition grant program that every dollar awarded would flow exclusively to private colleges. That money could pass through beneficiaries, but those beneficiaries had no capacity to divert it to another purpose. Here, by contrast, the legislature has not directed the funds at all—it is

---

> programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

536 U.S. 639, 649 (2002).

families who do the directing based on their—not the state's—desires. That decision rests with the families in the program. Application of the four factors laid out in *Sheldon Jackson* confirms that the Program does not violate Article VII, section 1, even where families choose to use it towards educational services from private schools.

D. Persuasive Arizona precedent supports a distinction between this Program and the one struck down in Sheldon Jackson.

Persuasive precedent from the Arizona Court of Appeals supports the interpretation of *Sheldon Jackson* offered above. That court considered a very similar challenge to the one in this case and upheld the challenged program under Arizona constitutional text materially like that of the Alaska Constitution. That reasoning is a model for this Court. In 2013, the Arizona Court of Appeals considered a state constitutional challenge to the Arizona Empowerment Scholarship Accounts ("ESA") program, which made educational savings accounts available to Arizona students with disabilities. *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013). Like the program beneficiaries here, the families of those students were then permitted to choose the best use of the funds allotted to them through the ESA program. Among other claims, the plaintiffs in that case argued that the ESA program violated Article 9, Section 10 of the Arizona Constitution, which states that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." Ariz. Const. art. IX, § 10 ("no-aid clause"). Like plaintiffs here, the Arizona plaintiffs argued that—because families could choose to use ESA funds at private schools—the program was unconstitutional under the no-aid clause.

The Arizona plaintiffs' argument relied heavily on a case previously decided by the Arizona Supreme Court, *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), that is similar to *Sheldon Jackson*. *See Niehaus*, 310 P.3d at 988. In *Cain*, the Arizona Supreme Court invalidated a pair of private-school voucher programs as unconstitutional under the no-aid clause. The court held that the program was an impermissible "direct appropriation of public funds" to private schools. *Cain*, 202 P.3d at 1184. It made no difference, the court wrote, that "the checks or warrants first pass[ed] through the hands of parents." *Id.*

Ultimately, "once a pupil ha[d] been accepted into a qualified school under either program, the parents or guardians ha[d] no choice; they must endorse the check or warrant to the qualified school." *Id.*

The court in *Niehaus*, however, distinguished *Cain*, just as Parents distinguish *Sheldon Jackson* here. Unlike the voucher programs struck down in *Cain*, the ESA program in *Niehaus* was not exclusively for tuition at private schools. On the contrary, parents were permitted to "customize an education that meets their child's unique educational needs." *Niehaus*, 310 P.3d at 987. They could do this by paying tuition at a private school, but they could also choose, as here, from a wide variety of other educational goods and services. *See id.* Ultimately, the families had "discretion as to how to spend the ESA funds without having to spend any of the aid at private or sectarian schools." *Id.* at 988. Because of this discretion, and because "[n]o funds in the ESA [were] earmarked for private schools," the Arizona Court of Appeals held that the ESA program was constitutional. *Id.* at 989. In so doing, the court "reject[ed] Niehaus's notion that if any state funds end up at private schools the program is automatically unconstitutional." *Id.* at 988.

The reasoning of the Arizona Court of Appeals in *Niehaus* applies perfectly here and explains why *Sheldon Jackson* does not require invaliding the allotment program. In Arizona, the fact that vouchers for exclusive use for private school tuition had previously been held unconstitutional did not mean that an ESA program with a variety of permissible public and nonpublic uses was similarly unconstitutional. Just the same, *Sheldon Jackson*'s invalidation of the tuition grant program for students exclusively at private colleges does not mean that the program here is unconstitutional. The discretion the program offers to families—discretion to choose between and among private and public options—ensures that it does not violate Alaska's constitutional prohibition on direct benefits to private schools.

III. If adopted, Plaintiffs' misinterpretation of the Alaska Constitution would violate Parents' federal constitutional rights.

In asking this Court to hold that Article VII, section 1 bars parents who choose private school education for their children—and only those parents—from participating in

the Program, Plaintiffs would set the Alaska Constitution on a collision course with the United States Constitution. For the reasons already explained in Part II, such a collision is wholly necessary because use of allotment dollars at private schools fits comfortably within the demands of the Alaska Constitution. But Plaintiffs' claims in Count I must also be rejected because they advance an interpretation of the Alaska Constitution that the Court is "obligated by the Federal Constitution to reject." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 488 (2020). Specifically, Plaintiffs' preferred interpretation (1) unconstitutionally conditions the availability of public benefits on parents' surrender of their fundamental, federal constitutional right to direct the education of their children, which includes the right to choose a private school for them, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); (2) violates equal protection by discriminating against parents based on their exercise of that fundamental constitutional right; and (3) violates religious parents' hybrid rights under the First and Fourteenth Amendments. In a conflict between the Alaska and U.S. constitutions, the latter must prevail. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (Courts are bound by the Supremacy Clause to "not give effect to state laws that conflict with federal law[].").

A. Plaintiffs' misinterpretation and misapplication of the Alaska Constitution would unconstitutionally bar Parents from accessing a benefit because they choose to exercise a fundamental federal constitutional right.

"[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 545 (1983)). This is true even if such a result is arguably commanded by a state's constitution. *See Espinoza*, 591 U.S. at 478–79 (striking down the Montana Supreme Court's interpretation of the state constitutional no-aid provision because it "inevitably deters or discourages the exercise of First Amendment rights."). The right to send one's child to a private school is a fundamental federal constitutional right and therefore cannot be the basis of exclusion from state benefits. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Pierce*, 268 U.S. at 535.

This is, of course, not to say that Alaska was under any constitutional obligation to create a program, like the one here, providing aid to families who choose a private education for their children. After all, "[a] State need not subsidize private education." *Espinoza*, 591 U.S. at 487. But once the legislature, in its discretion, provides a neutral and generally available educational aid program, the state constitution cannot be used to bar from it only families who may use it to exercise their fundamental constitutional right to send their children to private school. If Plaintiffs' claim in Count I of their Amended Complaint is legally sufficient, it would mean that Alaska may not ever provide financial aid to a parent exercising her right to provide her child with a private school education. Such a result clashes with numerous U.S. Supreme Court holdings "that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz*, 570 U.S. at 604.

For over a century, the United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects a parent's fundamental liberty interest in directing the education and upbringing of her children. First, in *Meyer v. Nebraska*, the Court held that the right to "bring up children" and "acquire useful knowledge" is among the liberties protected by the Due Process Clause. 262 U.S. 390, 399 (1923). That right encompasses the right of parents "to control the education" of their children, including "the right of parents to engage [a private teacher] so to instruct their children." *Id.* at 400–01. Two years later, in *Pierce v. Society of Sisters*, the Court reaffirmed "the liberty of parents and guardians to direct the upbringing and education of children under their control," including by sending them to a private school. 268 U.S. at 534–35. This right exists because "[t]he child is not the mere creature of the state"; rather, "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

The U.S. Supreme Court has again and again reiterated the fundamental right explained in *Meyer* and *Pierce*. *E.g.*, *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972); *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022). In

fact, the Court has described that right as "perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also id.* at 80 (Thomas, J., concurring in judgment) ("I agree with the [four-justice] plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."); *Glucksberg*, 521 U.S. at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children.").

Plaintiffs read the Alaska Constitution as flatly prohibiting aid to families who purchase services from private schools, even though the legislature, in its discretion, saw fit to include such families in a neutral and generally available educational aid program. In this way, Plaintiffs' interpretation of the Alaska Constitution conditions availability of educational benefits on a parent's surrender of this fundamental constitutional right to send her child to a private school. But, as noted above, such conditions are prohibited by the federal Constitution.

Though targeted at the exercise of a different constitutional right, Plaintiffs' interpretation and application of the Alaska Constitution would be unconstitutional for reasons nearly identical to those set out by the U.S. Supreme Court in two recent cases. First, in *Espinoza*, the Court held that a state cannot condition an educational benefit on the recipient not exercising her free exercise right to use the benefit at a religious school. 591 U.S. at 487–88. In that case, Montana had established a scholarship program that enabled recipients to direct aid to schools, including religious ones. Invoking the state constitution's no-aid provision, the Montana Supreme Court struck down the program because it "provided 'no mechanism' for preventing aid from flowing to religious schools" and thus could not "be construed as consistent with the no-aid provision." *Id.* at 472.

In reversing, the U.S. Supreme Court held that the Montana Supreme Court "was obligated by the Federal Constitution to reject the invitation" to strike down the program based on the no-aid provision. *Id.* at 488. When that court instead accepted that invitation, Montana "penalize[d]" the free exercise rights of families by "cutting [them] off from

otherwise available benefits if they choose a religious private school." *Id.* at 486. Montana was not required to "subsidize private education," the Court explained, but once it did, it could not "disqualify some private schools solely because they are religious." *Id.* at 487. Thus, although the state constitution arguably commanded the decision, the state supreme court had a duty to "'disregard[]' the no-aid provision and decide[] this case 'conformably to the [C]onstitution' of the United States." *Id.* at 488.

Second, in *Carson v. Makin*, the Court held that Maine could not condition an educational benefit on the recipient not exercising her free exercise right to use the benefit for a religious education. 596 U.S. 767, 789 (2022). In that case, Maine operated a tuition assistance program for parents who lived in school districts without secondary schools. Under the program, parents could choose a school—public or private—so long as it was not "sectarian." Maine had justified the exclusion of parents seeking a "sectarian" education, in part, on the state's interest in "stricter separation of church and state than the Federal Constitution requires." *Id.* at 781.

As in *Espinoza*, the Court rejected the state's attempt to justify the exclusion of certain people exercising a constitutional right from a public benefit based on a state's purported interest. A state's "interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise." *Id.* (quoting *Espinoza*, 591 U.S. at 484–85 (internal quotation marks omitted)). The exclusion thus failed strict scrutiny because a "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* When the state "condition[s] the availability of benefits" based solely on religion, the Court held, it "effectively penalizes the free exercise" of religion. *Id.* at 780.

The same logic from *Espinoza* and *Carson* applies here. In each instance, the state created a program that provided financial benefits for parents to exercise their fundamental constitutional right to direct the upbringing of their children. And, in each case, a state invoked a supposed state interest in restricting benefits to people exercising a federal constitutional right. In *Espinoza* and *Carson*, the state did so through scholarships and

tuition assistance payments that parents could use at private schools; here, the state does so through allotments that parents may spend on a variety of educational services, including those provided by private institutions. Also in each circumstance, the availability of a benefit is conditioned on the non-exercise of a fundamental constitutional right. In *Espinoza* and *Carson*, the availability of an otherwise generally available benefit was conditioned on parents not using it for religious education; here, Plaintiffs' interpretation of the Alaska Constitution conditions the benefit on parents not using it for private education.

Although the object of the would-be exclusion here—parents who exercise their right to enroll their children in private schools—is different from those in *Espinoza* and *Carson*, the exclusion of "some members of the community from an otherwise generally available public benefit because of their" exercise of a right is not. *Carson*, 596 U.S. at 781. Since conditioning aid in this way "penalizes" parental rights by "cutting families off from otherwise available benefits" and "inevitably deters or discourages the exercise of" those rights, it fails strict scrutiny. *Espinoza*, 591 U.S. at 478, 486.

Alaska was not required to enact the correspondence study program. Indeed, its legislature may have chosen not to create such a program for any number of reasons. But it did create such a program, one that is neutral and generally available to all families, for use on a wide array of educational goods and services, both public and private, school and non-school. The Alaska Constitution cannot, as Plaintiffs would urge, bar some parents from that Program simply because they might choose to use the benefit to provide their children a private school education. Such an interpretation of the Alaska Constitution would "apply a state law no-aid provision to exclude" parents who exercise their right to send their children to private school programs, placing the Alaska Constitution at odds with fundamental rights protected by the United States Constitution. *Espinoza*, 591 U.S. at 487–88. This Court is "obligated by the Federal Constitution to reject [that] invitation." *Id.*

B. Plaintiffs' misinterpretation of the Alaska Constitution would violate Parents' rights under the Equal Protection Clause.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). Plaintiffs' interpretation of Article VII, section 1 would impose a structural barrier preventing a discrete class of people from obtaining an otherwise generally available public benefit. Because that class of people is determined by their exercise of a fundamental right, the exclusion violates the Equal Protection Clause unless it can satisfy strict scrutiny. *Id.* at 217. And even if a fundamental right were not involved, it would still violate the Equal Protection Clause because imposing a "special disability" on a class of people by restricting the legislature's power to provide them—and them alone—with benefits and protections cannot even satisfy rational basis review. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). Exclusion from the Program of families who choose private school education for their children—and only those families—cannot satisfy either strict scrutiny or rational basis.

The Plaintiffs want to advance a rule of law that violates equal protection—one that provides benefits to all similarly situated parents except those who exercise a constitutional right in a manner they disfavor. As Plaintiffs would have it, if a parent wants to use the program for the tuition and fees needed to enroll her child in an out-of-district public school, she can. If she wants to use the program to educate her child with tutors, she can. If she wants to use the program for textbooks and curricula so she can homeschool her child, she can. If she wants to use the program for a mixture of public and private educational expenses, she can. It is only when a parent wants to use the scholarship for private school tuition and fees and so facilitate the exercise of her right to send her child to private school that Plaintiffs say she cannot. But the Constitution plainly does not permit a rule of law in which "in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 633.

C. Plaintiffs' misinterpretation of the Alaska Constitution would violate Parents' hybrid rights.

In addition to violating the Fourteenth Amendment rights and Equal Protection rights of tens of thousands of parents, an interpretation of the Alaska Constitution

prohibiting inclusion in the Program for parents who choose private schools violates the "hybrid" rights—rights also guaranteed by the federal Constitution—of the subcategory of parents who choose religious private schools.

A hybrid right, as defined in *Employment Division v. Smith*, involves the First Amendment right to freely exercise one's religion connected with some communicative activity or parental right, including the right of parents "to direct the education of their children." 494 U.S. 872, 881 (1990) (citing *Yoder*, 406 U.S. 205). "[U]nder this Court's precedents, even neutral and generally applicable laws are subject to strict scrutiny where . . . a plaintiff presents a 'hybrid' claim—meaning a claim involving the violation of the right to free exercise *and* another right, such as the right of parents 'to direct the education of their children.'" *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay). By way of illustration, the U.S. Supreme Court has cited *Yoder*, 406 U.S. 205—in which the Court voided "compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school"—as a case involving hybrid rights. *Id.* The law in *Yoder* was "neutral" and "generally applicable" in the sense that it burdened the rights of all parents to direct the education of their children, but as applied to Amish parents, the law burdened their parental and free exercise rights—and was therefore unconstitutional.

In weighing challenges to laws burdening hybrid rights, both the U.S. and Alaska Supreme Court apply some form of "strict" or "heightened" scrutiny. For its part, the Alaska Supreme Court has stated that it "require[s] proof of a compelling state interest in 'a hybrid situation' where the facts indicated a possible violation of the Free Exercise Clause and some other constitutionally protected right." *Thomas v. Anchorage Equal Rts. Comm'n*, 102 P.3d 937, 940 (Alaska 2004).

Those facts are present here. Plaintiffs' interpretation of the Alaska Constitution would bar all private school parents from ever receiving any educational benefits for their children (and the legislature from ever providing them). Although facially neutral, such a bar would fall unevenly on parents like Intervenor Andrea Moceri, whose hybrid rights—to direct her son's education by enrolling him in a parochial school—would be infringed

by a bar on her receiving aid for her son's education. *See* Aff. of Andrea Moceri in Supp. Of Mot. to Intervene (explaining her decision to provide her children with a religious education); *see also Espinoza*, 591 U.S. at 486 ("[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children . . . . Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution." (quoting *Yoder*, 406 U.S. at 213–14)). This bar would not only prevent her from obtaining aid when she exercises her Fourteenth Amendment right to enroll her son in a private school, but it would prevent her from receiving aid when she exercises her free exercise right to enroll her son in a parochial school.

Alaska does not have a "compelling interest" in prohibiting aid to parents like Andrea. But even if it did, strict scrutiny demands that any prohibition be narrowly tailored when it implicates a hybrid right. The alleged constitutional prohibition described in Plaintiffs' Amended Complaint would fail this standard twice over: first, by stretching a bar on aid to institutions into one on aid to individuals; second, through a facially neutral prohibition that falls unequally on parents like Andrea, who "direct 'the religious upbringing' of their children . . . by sending [them] to religious schools." *Espinoza*, 591 U.S. at 486 (citing *Yoder*, 406 U.S. at 213–14, and *Pierce*, 268 U.S. at 534–35). Extending a constitutional bar on aiding private institutions into a bar on aiding private school parents is not narrowly tailored to achieve a compelling governmental interest and fails strict scrutiny.

CONCLUSION

For the foregoing reasons, Parents respectfully request that the Court dismiss Plaintiffs' Amended Complaint pursuant to Alaska Civil Rule 12(b)(6).

Dated this 14th day of April, 2025.

PIONEER LAW, LLC
Attorneys for Intervenors

By: /s/ Craig Richards
Craig Richards (AK Bar No. 0205017)
Dustin Elsberry (AK Bar No. 2311124)

David Hodges* (D.C. Bar No. 1025319)
Kirby Thomas West* (PA Bar No. 321371)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
dhodges@ij.org
kwest@ij.org

Jeff Rowes* (TX Bar No. 24104956)
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 970
Austin, TX 78701
(512) 480-5936
jrowes@ij.org

*Admitted *pro hac vice*

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I certify that on this 14th day of April, 2025, a true and correct copy of the foregoing was served upon the following by e-mail:

Scott M. Kendall
Lauren L. Sherman
CASHION GILMORE & LINDEMUTH
Attorneys for Plaintiffs
scott@cashiongilmore.com
lauren@cashiongilmore.com

Clint Campion
John Sedor
John Ptacin
SEDOR, WENDLANDT, EVANS & FILIPPI
campion@alaskalaw.pro
sedor@alaskalaw.pro
ptacin@alaskalaw.pro
support@alaskalaw.pro

Lee Baxter
Matt Singer
SCHWABE, WILLIAMSON & WYATT
lbaxter@schwabe.com
msinger@schwabe.com

Margaret Paton-Walsh, AAG
Cassidy White
Jamie Dodd
Rachael Richardson
Alaska Attorney General's Office
margaret.paton-walsh@alaska.gov
cassidy.white@alaska.gov
jamie.dodd@alaska.gov
rachael.richardson@alaska.gov

By: /s/ Craig Richards