IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

EDWARD ALEXANDER, JOSH ANDREWS, SHELBY BECK ANDREWS, & CAREY CARPENTER,

Plaintiffs,

v.

ACTING COMMISSIONER HEIDI TESHNER, in her official capacity, STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT,

Defendants,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON,

Intervenors.

#8

PLAINTIFFS' REPLY IN SUPPORT OF SUMMARY JUDGMENT AND OPPOSITION TO STATE OF ALASKA'S CROSS-MOTION FOR SUMMARY JUDGMENT

#11

Case No. 3AN-23-04309CI

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TABLE OF CONTENTS

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I. INTRODUCTION

Alaska Statute 14.03.300-.310 is unconstitutional as enacted. By its plain text, the legislature has authorized purchasing educational services and materials from private organizations using public funds. Article VII, Section 1 mandates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution." The legislature broadly authorizing such purchases of educational services and materials at private organizations, and explicitly precluding DEED from imposing any restrictions on this expenditure of public funds, is facially unconstitutional because it creates more than an "occasional problem" in "specific cases," and does not have a "plainly legitimate sweep."[1]

Despite asserting that statutory text using the word private "organization" instead of "institution" somehow makes the authorized purchases fall within constitutional bounds, the State's argument collapses when it admits, as it must, that private educational institutions would be included in the term private organizations.[2] The State concedes that the plain text of these statutes authorizes the purchase of educational services, such as

[1] *Kohlhaas v. Off. of Lieutenant Governor, Div. of Elections*, 518 P.3d 1095, 1104 (Alaska 2022) ("We uphold a statute against a facial constitutional challenge if despite . . . occasional problems it might create in its application to specific cases, [it] has a plainly legitimate sweep." (quoting *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 991-92 (Alaska 2019))).

[2] State's Reply, Opposition, and Cross-Motion for Summary Judgment at 10 (dated June 2, 2023) (asserting "a 'private or religious *organization*' under AS 14.03.310" is "meaningfully different" from "a 'religious or other private *educational institution*' under Article VII, Section 1.") [hereinafter State's Opp'n & Cross-Mot.]; *cf. id.* at 10-11 ("'Educational institutions' like schools and universities are only a *subset* of possible vendors of services and materials.").

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private school classes, at private educational institutions.[3] The State further concedes that using the allotment to pay for private school tuition is possible under the statutes' plain text.[4] In a final attempt to assert these statutes are nonetheless facially constitutional, the State flips the standard of review on its head, suggesting that if the State can identify possible examples of constitutional spending under the statutes, such as purchases at public institutions, despite the plain text broadly authorizing unconstitutional expenditures at private organizations, then the statutes must have a plainly legitimate sweep.[5] This court should easily see through this gambit in ruling that the statutes are facially unconstitutional.

To avoid a decision in this case, the State falsely asserts that it has no responsibility for ensuring that the school districts use public funds for only constitutional purposes, arguing that this case can proceed only as a series of as-applied challenges against individual school districts. To address the unconstitutional expenditures authorized under the plain statutory text, the State repeatedly asserts that school districts "need not approve

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[3] State's Opp'n & Cross-Mot. at 11 ("For purchases that *do* involve religious or other private educational institutions, like private school classes . . .").

[4] *Id.* at 12 ("True, a school district *could* violate Article VII, Section 1 by allowing a parent to spent student allotment funds on full-time private school tuition . . . ."); *id.* at 13 ("Although conceivably an individual learning plan with these characteristics could be layers over a full-time private school education . . . .").

[5] *Id.* at 11 (explaining list in AS 14.03.310 includes purchases at "'public' organizations").

improper uses,"[6] although "a school district could violate Article VII, Section 1 when administering student allotments."[7] While making this argument, the State simultaneously distances itself from the 2022 AG Opinion that DEED circulated to school districts,[8] which concluded that there was both clearly unconstitutional as well as a wide range of possibly unconstitutional spending authorized by these statutes.[9] Notably, the State's briefing now abandons the flatly incorrect constitutional interpretation relied on in the 2022 AG Opinion, which was that advancing the *purpose* of public education made expenditures for the direct benefit of private institutions constitutional. But this Opinion is the *only* guidance the State has provided to districts. So, apparently, school districts will just know unconstitutional spending when they see it, despite the State failing to provide any principled way to conduct this proposed line drawing exercise.

The State placing responsibility solely on the school districts for applying the statutes in a constitutional manner ignores the fundamental question of whether the legislature has authorized expenditures that violate the direct benefit prohibition. The legislature does not have the authority to violate prohibitions in the Alaska Constitution,

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[6] *Id.* at 10 (noting "school districts need not approve improper uses."); *see also id.* at 13 (asserting "all uses of allotment funds require school district approval, and the statutes do not require districts to approve any unconstitutional uses.").

[7] *Id.* at 14.

[8] *Id.* at 9 (stating "DEED does not rely on the AG opinion as legal precedent," and "criticisms of the AG opinion and of DEED's letter about the opinion are thus mere distractions").

[9] Exhibit 14 at 13-14.

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nor can it delegate the authority to do so. The statutory authorization is facially unconstitutional, and this court must strike down these statutes that violate the direct benefit prohibition in the Alaska Constitution.

Intervenors, on the other hand, disagree that any lines need to be drawn at all; instead, they assert that expenditures of public funds to private institutions, including their use of correspondence program allotments for full-time private school tuition, are constitutional because it is a "benefit to parents," not private schools.[10] The Alaska Supreme Court, however, has already considered, and rejected, the argument that adding an intermediary has a "cleansing effect."[11] In the alternative, Intervenors argue that "[a]lthough Alaska does not have to create a student aid program,"[12] once it does, if the Alaska Constitution prohibits providing public education funds to enroll children in private schools then "it impermissibly violates Intervenors' federal constitutional rights under the First and Fourteenth Amendments."[13]

In short, the Intervenors ask this court to strike down Article VII, Section 1 of the Alaska Constitution, and to create a new fundamental parental right that the State *must*

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10 *E.g.*, Intervenors' Response in Opposition to Plaintiffs' Cross-Motion for Summary Judgment at 1 (dated June 2, 2023) (asserting "it is a direct benefit for Alaskan parents, not schools") [hereinafter Intervenors' Opp'n]; *id.* at 5 ("The text of AS 14.03.300-.310 unambiguously grants a benefit to parents of students enrolled in the program, and not to private schools.").

11 *Sheldon Jackson College v. State*, 599 P.3d 127, 132 (Alaska 1979).

12 Intervenors' Opp'n at 13-14.

13 *Id.* at 1-2.

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provide funding for private education if it provides funding for public education. The creation of such a right goes far beyond any actual holding by the United States Supreme Court. Because the Alaska Constitution prohibits direct aid to *any* private educational institution (religious or not), Intervenors' reliance on cases in which the United States Supreme Court determined states violated the Free Exercise Clause of the First Amendment in denying benefits *only* to religious private schools is entirely misplaced.

II. ARGUMENT

A. Alaska Statutes 14.03.300-.310 Are Facially Unconstitutional.

1. The Plain Text of AS 14.03.300-.310 Authorizes the Expenditure of Public Funds for Private Education.

As its first fatal flaw, the State's Opposition and Cross-Motion fails to grapple with the proper interpretation of AS 14.03.300-.310. "To determine whether the challenged statute is constitutional [the Court] first interpret[s] the statute."[14] And in interpreting a statute, the Court looks to plain meaning, as well as legislative history to give effect to the legislature's intent.[15] Only "[a]fter determining the meaning of the statute," does the Court "analyze its constitutionality under Alaska's [education clause]."[16]

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[14] *Planned Parenthood of the Great Nw.*, 436 P.3d at 992.

[15] *Id.* ("When interpreting a statute, we consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others." (internal quotations omitted)).

[16] *Id.*

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Read in total, AS 14.03.300-.310 clearly authorizes the expenditure of public funds for educational purposes at private institutions, and prohibits DEED from imposing limitations on this expenditure of public funds regardless of constitutional requirements.[17] The plain text provides that "[a] parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment" so long as it is consistent with an "individual learning plan,"[18] "developed in collaboration with the student, the parent or guardian of the student, [and] a certified teacher assigned to the student."[19] By failing to offer its own interpretation of these statutes, the State apparently does not dispute Plaintiffs' reading of the plain text.[20]

The legislative history is also entirely consistent with this plain reading. But ignoring that legislative history is properly considered in the interpretation of a statute, and in a blatant attempt at misdirection, the State devotes pages of its brief to arguing that legislative history is irrelevant to determining a statute's *constitutionality*.[21] As outlined

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[17] Prior to these statutes, regulations provided student allotments that were subject to regulatory provisions to ensure the constitutionality of such expenditures. *See* Exhibit L at 1-2 & n.1.

[18] AS 14.03.310(b).

[19] AS 14.03.300(a).

[20] State's Opp'n & Cross-Mot. at 14 ("[T]he parties' dispute is not over what the statute says."), *id.* at 17 ("Although this specific provision's wording is convoluted, DEED agrees with the basic point that the statutes put school districts and parents—not DEED—in charge of student allotments."); *see also* Intervenors' Opp'n at 7 (agreeing DEED may not impose restrictions on purchases of services or materials, but asserting "sole responsibility for decisions on how to spend allotments" is "with beneficiary families").

[21] *See, e.g.*, State's Opp'n & Cross-Mot. at 14 ("Alexander cites no authority for the theory that legislative (as opposed to constitutional) history aids in assessing a statute's

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in Plaintiffs' opening brief, the legislative history confirms that the legislature fully intended to authorize public funds being used at private schools.[22] Consideration of sponsoring then-Senator Dunleavy's statements describing examples of the spending authorized under the statutes, and reasons for believing such intended spending violated the Constitution, is proper to inform the Court's statutory interpretation.[23]

Legislative history confirms that Senate Bill 100 ("SB 100") was intended to expand the public education system to specifically allow for purchases from private institutions.[24] This intention is underscored by Dunleavy's clarification of the relationship between a series of three proposals: SB 100, Senate Joint Resolution ("SJR 9"), and Senate Bill 89 ("SB 89").[25] Dunleavy emphasized that SJR 9,[26] did not implement any

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constitutionality."); *see also* Intervenors' Opp'n at 7 ("[A] legislator's concerns about a bill's constitutionality add nothing to an understanding of the statute's *purpose*—that is, what the statute is meant to *do.*").

[22] Memorandum in Support of Plaintiffs' Opposition to State of Alaska's Motion to Dismiss/Cross Motion for Summary Judgment at 6-12 (dated Apr. 28, 2023) (discussing legislative history of SB 100) [hereinafter Pls.' Mem.].

[23] *Roberge v. ASRC Constr. Holding Co.*, 503 P.3d 102, 104 (Alaska 2022) (The Court "give[s] unambiguous statutory language its ordinary and common meaning, but the 'plain meaning rule' is not an exclusionary rule; we will look to legislative history as a guide to construing a statute's words." (citation omitted)).

[24] *E.g.*, Exhibit 2 at 10, Sen. Educ. Comm., Apr. 10, 2013 at 8:29:15 AM (Statement of Senator Dunleavy providing the example of taking "a Latin course at Monroe Catholic," which "cannot be done currently under constitutional language.").

[25] Pls.' Mem. at 6-13; *see also* Exhibit 2 at 8 (Sponsoring Senator Dunleavy introducing SB 89), 9-11 (Dunleavy explaining relationship between SB 89, SJR 9, and SB 100).

[26] Exhibit 4, Sen. J. Res. No. 9, 28th Leg., 2d Sess. (introduced Feb. 13, 2013).

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new programs.[27] Instead, it amended constitutional language to allow for a series of bills, including SB 89, commonly referred to as the voucher bill, and SB 100.[28] SB 89 was to be "totally divorced from the public education concept; those are for folks that want to go to a private school, that gets private money through tax credits, and can have a religious or some other private outcome."[29] In contrast, SB 100, to be a part of the "public education system," would expand the "how" to include "public/private partnerships" with a focus on proficiency as the "outcome."[30]

2. Article VII, Section 1 of the Alaska Constitution Requires Public Funding be Spent Only in Support of Public Education.

The State also skips over the proper interpretation of the education clause in Article VII, Section 1 of the Alaska Constitution. The Alaska Constitution mandates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution."[31] Ignoring the plain language in our Constitution as well as the Constitutional Convention history, the State immediately jumps to assert that each "particular expenditure" in the "gray area" must be "evaluated on its facts" under *Sheldon*

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27 Exhibit 2 at 9-11 (Statement of Sen. Dunleavy); *see also* Exhibit K at 16 (explaining SJR 9 "does not DO ANYTHING in and by itself").

28 Exhibit 2 at 9-11.

29 *Id.* at 10.

30 *Id.* at 10-11.

31 Alaska Const. art. VII, § 1.

Jackson College v. State to avoid conceding this particular statutory scheme is facially unconstitutional.[32]

As background, in drafting Article VII, Section 1, the delegates expressed a clear intent to establish a strong system of public education open to all children.[33] The education clause of Alaska Constitution is unique, in that it expressly prohibits expenditures of public funds for the "direct benefit" of all private educational institutions, regardless of whether they are sectarian or nonsectarian.[34] As the Alaska Supreme Court explained in *Sheldon Jackson*, "a constitutional provision barring aid to all private schools serves to enforce the separation of church and state without requiring executive or judicial inquiry into the sectarian affiliation of particular schools, and furthermore disengages the state from the undesirable task of withholding benefits solely on the basis of religious

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[32] State's Opp'n & Cross-Mot. at 11-12. Here, the State further insists that Plaintiffs incorrectly argue that the *Sheldon Jackson* factors should be applied to benefits "to the individual students." *Id.* at 12 n.44. As discussed below, Plaintiffs' actual position is that the magnitude of benefits to be considered are the authorized expenditures for the direct benefit of private education across the entire correspondence program. In reality, the State is seeking to make this a case-by-case (or district-by-district) analysis, instead of looking at the scale of expenditures authorized at private institutions across more than 30 correspondence programs.

[33] *Sheldon Jackson*, 599 P.2d at 129 (explaining in rejecting a proposal to delete the direct benefit prohibition, "the convention made it clear that it wished the constitution to support and protect a strong system of public schools.").

[34] *Id.*

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affiliation."[35] Instead, for purposes of public funding, the Alaska Constitution establishes just two categories: public and non-public institutions.[36]

To ensure adequate funding for this public education system, delegates wrote the Constitution to prohibit public funds from being diverted: Article VII, Section 1 mandates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution."[37] The Alaska Supreme Court concluded this language was "designed to commit Alaska to the pursuit of public, not private education."[38]

There can be no question that a prohibited "direct benefit" includes the payment of public funds to a private school for private education. Consistent with this intention to devote public funds to public education, the delegates understood a "direct benefit" as spending "public funds"[39] in support of the provision of private education, whereas

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[35] *Id.* (internal footnote omitted); *see also id.* at 132 (relying on cases addressing distinction between sectarian and nonsectarian institutions, "obviously has no application with respect to Article VII's direct benefit prohibition, which bans aid to all private educational institutions, including those with no religious affiliation.").

[36] The delegates defined "private educational institutions" as "any educational institution that is not supported and run by the state." 2 Proceedings of the Alaska Constitutional Convention at 1511 [hereinafter Proceedings].

[37] The Court's "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [The Court is] not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result." *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

[38] *Sheldon Jackson*, 599 P.2d at 129.

[39] "[B]ecause we felt that state funds may at times go through many hands before reaching the point of their work for the public, and so the term 'public funds' was then used as a guide to every portion of our state financing, borough, city or other entity for the disbursement of these

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indirect benefits, like supporting student health or welfare generally, would be permissible.[40]

Recognizing that the "distinction may at times appear more 'metaphysical' than precise,"[41] the *Sheldon Jackson* Court concluded that "the core of the concern expressed in the direct benefit prohibition" was "government aid to *Education* conducted outside the public schools."[42] For example, while "fire protection" could be said to afford a private school direct benefits "when a campus fire is extinguished," such benefits are provided to all and therefore are "indirect" within the meaning of the Constitution.[43] But in contrast, the Court held that benefits such as tuition reimbursements for private school students are a "direct benefit" to "private institutions, *or to those served by them.*"[44]

Although purchasing educational services at private institutions strikes at the core of the direct benefit prohibition—paying for education conducted outside of public

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monies." Proceedings at 1514. This definition of public funds further underscores the delegates' intention that the ultimate end destination of funds was the relevant factor—passing funds through additional hands was foreseen as a potential problem and deliberately foreclosed. *Contra* Intervenors' Opp'n at 4-5 (arguing allotments are "indirect benefits" because they "benefit *individuals*, not *institutions*").

40 *See, e.g.*, Proceedings at 1511 (defining "other private educational institutions"), 1514-17 (comparing a "direct benefit" to "indirect" spending for "health and matters of welfare"), 1525-28 (debating striking the direct benefit prohibition in the education clause), 1531-32 (discussing meaning of "system of public schools"); *see also Sheldon Jackson*, 599 P.3d at 129-32 (interpreting the direct benefit prohibition).

41 *Sheldon Jackson*, 599 P.2d at 129-30 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 840 (1978)).

42 *Id.* at 130 (emphasis in original).

43 *Id.*

44 *Id.* at 130 & nn.26-27 (emphasis added).

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schools—and clearly implicates three of the four *Sheldon Jackson* factors,[45] the State attempts to argue that a single factor, the "magnitude" of the benefit, is dispositive such that only an as-applied challenge can proceed. Under the State's approach, this in turn would involve parsing each individual learning plan's ("ILP") expenditure of funds for the direct benefit of private institutions.[46] Reviewing each ILP "in isolation," however, is the wrong scale to use when examining the "magnitude" of the benefit.[47]

Contrary to the implicit arguments of the State, even assuming there was a *de minimus* exception,[48] it would not apply here; these statutes authorize the purchase of private educational services and materials across more than 30 correspondence programs.[49] The appropriate way to consider the "magnitude" of the benefit is by looking at authorized expenditures across the entire program.[50] Here, the statutory authorization contains no limits on the number of students who may enroll in the correspondence

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45 Pls.' Mem. at 30-33 (detailing *Sheldon Jackson* factors).

46 State's Opp'n & Cross-Mot. at 11 (suggesting "purchases" at "private educational institutions, like private school classes . . . would need to be evaluated on its facts").

47 *Sheldon Jackson*, 599 P.2d at 130.

48 For example, the *Sheldon Jackson* Court cited an Arkansas case upholding a program involving just 8 scholarships. 599 P.3d at 130 n.22 (citing *Lendall v. Cook*, 432 F. Supp. 971 (E.D. Ark. 1977)).

49 State's Opp'n & Cross-Mot. at 6-7 & nn.33-35 (explaining "more than 30 district-operated school programs" across Alaska may each enroll "hundreds or even thousands" of students); *see also* Exhibit K at 14 (Dunleavy 2013 PowerPoint providing "there are 11,153 students in 27 correspondence schools in 26 communities in Alaska").

50 Exhibit L at 2 (explaining in reviewing the magnitude of expenditures under the correspondence program allotments, a court would not "be limited to individual expenditures [under an ILP] or even district-wide expenditures" under the test established in *Sheldon Jackson*).

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program, nor the amount of expenditures at private institutions that may be authorized under an ILP, throughout a district, or collectively across the entire program.

Of note, unlike its opening Motion to Dismiss, the State in this most recently filed brief walks away from the 2022 AG Opinion—and its interpretation that the Alaska Constitution allows for expenditures of public funds for the direct benefit of private educational institutions where such expenditures further the public purpose of education.[51] Plaintiffs' briefing extensively detailed how the plain text of the Alaska Constitution, as well as the minutes of the Constitutional Convention, flatly contradict such interpretation: the delegates specifically added in the direct benefit prohibition in the education clause despite the overall constitutional requirement that public funds be spent for a public purpose.[52] In response, the State now claims that the 2022 AG Opinion has no relevance to this case, despite it being the Department of Law's formal interpretation of the constitutionality of the challenged statutes.[53]

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[51] Nor does the State refute any of Plaintiffs' arguments regarding the AG Opinion on the merits.

[52] Pls.' Mem. at 34-39 (discussing 2022 AG Opinion).

[53] State's Opp'n & Cross-Mot. at 9-10. Given the State's insistence that this case is not about grading the Opinion, it apparently believes this court should give it little weight. *Basey v. State*, 408 P.3d 1173, 1178 n.36 (Alaska 2017) ("We 'exercise[] [our] independent judgment on matters of statutory interpretation,' and the weight we accord an attorney general's 'opinion[] is largely' a matter of 'discretion.'" (quoting *Grimes v. Kinney Shoe Corp.*, 938 P.2d 997, 1000 n.7 (Alaska 1997))); *cf. Carney v. Bd. of Fisheries*, 785 P.2d 544, 548 (Alaska 1990) ("Opinions of the attorney general, while not controlling on matters of statutory interpretation, are entitled to some deference."). If the State now believes the Opinion reached an erroneous conclusion, the appropriate response is to formally withdraw the opinion and issue a new opinion.

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3. The Statutes Are Facially Unconstitutional Because They Authorize the Expenditure of Public Funds for the Direct Benefit of Private Education in Violation of the Alaska Constitution.

After interpreting both the statute and the Constitution, the final step in the Court's constitutional analysis is to determine whether the statute is unconstitutional. "A facial challenge to a law's constitutionality alleges that the law is unconstitutional 'as enacted.'"[54] In other words, "a 'facial challenge' is nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution."[55] In enacting AS 14.03.300-.310, the legislature authorized school districts to expend public funds for the direct benefit of private organizations. The plain statutory text does not provide any limits on these expenditures. And so long as educational outcomes are achieved, the legislation deliberately removed DEED's ability to impose restrictions. In fact, the challenged statutes actually nullified pre-existing regulations that were developed in response to a DEED audit of the correspondence program identifying unconstitutional expenditures.[56]

"Under Alaska's constitutional structure of government, 'the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the

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[54] *Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 981 n.64 (Alaska 2022) (quoting *Planned Parenthood of the Great Nw.*, 439 P.3d at 1000).

[55] Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1238 (2010)), cited in *Planned Parenthood of the Great Nw.*, 436 P.3d at 991 n.29.

[56] Exhibit L at 2 ("Indeed, a departmental audit in the past decade resulted in the additional controls over expenditures of public funds by parents and districts in regulations that the bill seeks to overturn.").

Alaska Constitution, including compliance by the legislature.'"[57] The Court will uphold a statute against a facial challenge, "if it might occasionally create constitutional problems in its application, as long as it has a plainly legitimate sweep."[58] If statutes or regulations violate "minimum requirements" of the Alaska Constitution, including "a [constitutionalized] prohibition," the Court is "compelled to strike down any statutes or regulations that violate" the prohibition.[59] Alaska Statutes 14.03.300-.310 expressly authorize paying for private education with public funds, and clearly violate the direct benefit prohibition of the Alaska Constitution.

Because the plain text of AS 14.03.310 is so clear, the State must concede that it authorizes purchasing educational services and materials from private organizations with public funds.[60] The State's current arguments[61] that the statutes are nonetheless facially constitutional fall into two main categories, which are really just two sides of the same

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[57] *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) (quoting *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982)).

[58] *Planned Parenthood of the Great Nw.*, 436 P.3d at 1000 (cleaned-up)); *see also State v. Planned Parenthood*, 171 P.3d 577, 581 (Alaska 2007) ("We uphold a statute against a facial constitutional challenge if 'despite any occasional problems it might create in its application to specific cases, [the statute] has a plainly legitimate sweep.'").

[59] *Owsichek v. Guide Licensing & Control Bd.*, 763 P.2d 488, 496 (Alaska 1988).

[60] State's Opp'n & Cross-Mot. at 10-13.

[61] Unlike in its Motion to Dismiss, the State's Opposition and Cross-Motion now disowns the 2022 AG Opinion, which concluded that the purpose of spending is the touchstone that could make otherwise unconstitutional spending constitutional. *Compare* Defs.' Mot. to Dismiss at 4-7 (discussing AG Opinion in background), 12-14 (discussing unconstitutional and possibility unconstitutional applications from the AG Opinion in argument) (dated Mar. 8, 2023), *with* State's Opp'n & Cross-Mot. at 9-10 (insisting "DEED discussed the opinion only in the 'background' section of its motion.").

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coin: (1) splitting hairs over whether a private education provider is referred to as "organization" or "institution," and (2) flipping the "plainly legitimate sweep" standard on its head. Neither argument holds water.

In an attempt to construe the plain text as constitutional, the State argues that Article VII, Section 1 prohibits only uses of funds "for the direct benefit of" a "religious or other private educational institution," and that the statutory term "private or religious *organization*" in the statute is "meaningfully different" from a "religious or other private *educational institution*."[62] In other words, the State's statutory interpretation assigns great significance to the use of the word "organization" as opposed to "institution."[63] But, the State then concedes, as it must, that private "schools and universities" are at a minimum a "*subset*" of such "organizations."[64] Thus, even as interpreted by the State, AS 14.03.310 specifically authorizes unconstitutional spending.

To the extent the State is requesting this court uphold the statutes as facially valid based on the word "organization" instead of "institution," such reading is unreasonable

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62 State's Opp'n & Cross-Mot. at 10.

63 The State does not define these terms, apparently assuming the difference is apparent. However, an "institution" is defined as "[a]n established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons. — Also termed *public institution*." *Institution*, BLACK'S LAW DICTIONARY (11th ed. 2019). Similarly, an "organization" is defined as "[a] group formed for a particular purpose <the World Trade Organization>." In defining an "organization," Black's Law Dictionary further discusses the writing of Friedrich A. Hayek, noting "Kant once observed that 'in a recently undertaken reconstruction of a great people into a great state, the word *organization* has been frequently and appropriately used for the institution of the magistracies and even the whole state.'" The legislative history and dictionary both indicate that these terms can be used interchangeably.

64 State's Opp'n & Cross-Mot. at 10-11.

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and finds no support in the legislative history: "[t]here is no indication in the legislative record that ["organization"] was meant to play the attenuating role the State has proposed."[65] "If the legislature had [so] intended . . . [the Court] would expect to see some discussion of that phrasing and its effect somewhere in the legislative history. But the legislative record contains no such discussion."[66] Instead, Dunleavy's PowerPoint presentation proposing amending the Alaska Constitution via SJR 9 candidly explained that the "Alaska State Constitution prohibits public funds going to private or religious *educational service providers*."[67] Moreover, when asked to prepare a memorandum by Senator Gardner, even legislative counsel could not identify any limitation on direct expenditures between using the word "organization" or "institution."[68]

The State also invents limits on spending at private institutions that appear nowhere in the statutory text, asserting that while "conceivably" a "full-time private school education" could be "layered" over an ILP, this is "contrary to the statute."[69] As the State admits, nothing in the plain text would prevent full-time enrollment in a private

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65 *Planned Parenthood of the Great Nw.*, 436 P.3d at 997.

66 *Id.*

67 Exhibit K at 2 (emphasis added) (noting further that, "these partnerships and associated practices could be construed to be unconstitutional."); *see also* Exhibit K at 19 (identifying the "[i]ssue" as "[d]o existing and potential public/private partnerships using public education funding violate the constitution?").

68 Legislative counsel explained when considering this exact language, "[i]n my opinion, the use of 'organization' rather than 'institution' provides no meaningful limitation on using public money for the direct benefit of a private or religious school." Exhibit L at 2.

69 State's Opp'n & Cross-Mot. at 12-13.

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school (or place any other limit on purchases at private organizations), so the State instead relies on a single statement in the legislative history from Sponsor Dunleavy.[70] The Alaska Supreme Court addressed a similarly "unreasonable" statutory interpretation advanced by the State while considering a facial challenge in *State v. Planned Parenthood of the Great Northwest*.[71] In *Planned Parenthood*, the plain text of the statute provided that "an abortion must be necessary to avoid the risk of harm to the life or physical health of a pregnant woman," but the text did not address "fatal fetal abnormalities."[72] The State relied on a statement from the sponsor that he believed fatal fetal abnormalities would be included under a catch-all provision to argue that they would be covered under the statute.[73] There, the Court noted that a single statement by the sponsor, "unsupported by other evidence from the legislative history, is not sufficient to overcome the plain meaning of the statute."[74] The same conclusion that a single statement cannot overcome the plain statutory text, as well as all other legislative history, holds true here.

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70 *Id.* at 13 ("Nor, contrary to Alexander's contention, was this the intent of the statute's sponsor, then-Senator Michael Dunleavy, who expressly disavowed the idea that correspondence school allotments could be used to "send[] kids to private school.") (citing Sen. Educ. Comm., 28th Leg., Mar. 3, 2014, Statement of Sen. Dunleavy at 8:29:05-10 AM). Regardless, considered in context, even Dunleavy's statement does not indicate that allotments *cannot* be used to pay for private school tuition; instead, Dunleavy discussed SB 100 as a "public school issue," that takes the "next step" of an "independent approach under the guidance of a public school teacher governed by an ILP." Exhibit 1 at 10, Sen. Educ. Comm., 28th Leg., Mar. 3, 2014, Statement of Sen. Dunleavy at 8:26:55 AM.

71 436 P.3d 984 (Alaska 2019).

72 *Id.* at 998.

73 *Id.*

74 *Id.*

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Finally, although the State may be able to provide several examples of a potentially constitutional use,[75] the plain import of these statutes is to expressly authorize the use of public funds at private schools, which is the exact opposite of having a "plainly legitimate sweep." The State's arguments flip the "plainly legitimate sweep" standard on its head, relying on an occasional constitutional use to save plainly unconstitutional statutes. For example, the affidavit provided by the State specifies that in the case of Mat-Su Central Correspondence School, of more than 300 approved vendors, only 16 are public vendors.[76] And of 200 district-approved curricula sources, only "five are public entities while the rest are private businesses and organizations."[77] Although the State's briefing superficially acknowledges that hundreds of private organizations actually *are* on the approved vendors list of a single program, it avoids addressing the ramifications of these statutes authorizing every correspondence program to approve unlimited private vendors. The fact that a parent and teacher could spend money constitutionally under the correspondence program allotment with a handful of approved public institutions among hundreds of private organizations, does not make the broad sweep allowing purchases at

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[75] The State provides examples of "taking a baking class" or "working with a tutor." State's Opp'n & Cross-Mot. at 12. The State asserts "AS 14.03.310 also authorizes purchases from 'public' organizations." *Id.* at 11. Again, this says nothing about the broad authorization for expenditures at private organizations, as distinct from public organizations.

[76] State's Opp'n & Cross-Mot., Emili Aff. ¶ 7.

[77] Of these five public entities, four are public entities in other states. Emili Aff. ¶¶ 2-3.

"private, or religious organization[s]" as distinct from "public" organizations, plainly legitimate.

The State's argument slicing and dicing hypothetical expenditures misses the fundamental point that the Alaska Constitution prohibits paying public funds for the provision of private education, which is expressly authorized on the face of AS 14.03.300-.310. The plain sweep of these statutes creates more than the "occasional problem." These statutes are facially unconstitutional as enacted by the legislature. The State is simply incorrect that the statutes are facially constitutional, leaving Plaintiffs with only an as-applied challenge that would require this court to parse through thousands of individual learning plans to examine every possible private expenditure in more than 30 correspondence programs to determine the constitutionality of each expenditure.[78]

4. Alternatively, Even Assuming AS 14.03.300-.310 Could Somehow Be Narrowly Interpreted to Disallow Unconstitutional Spending, This Too Would Entitle Plaintiffs to the Relief Sought in Their Complaint.

The State insists that it is not arguing for a narrowing construction or severance of unconstitutional language.[79] But that is the practical import of its argument that AS 14.03.300-.310 authorizes both constitutional and unconstitutional spending on its face, and should be allowed to stand to the extent they authorize constitutional spending. If the

[78] *See* State's Opp'n & Cross-Mot. at 6 & n.31 (explaining "[t]here are currently more than 30 district-operated correspondence school programs in Alaska, 18 of which are statewide.").

[79] *Id.* at 18-21.

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statutes are not struck down in their entirety, then the statutes must be narrowly construed to avoid constitutional infirmity.

The Alaska Supreme Court has directed that "when constitutional issues are raised, this court has a duty to construe a statute, where reasonable, to avoid dangers of unconstitutionality. Rather than strike a statute down, [the court] will employ a narrowing construction, if one is reasonably possible."[80] But the State offers no narrowing construction that would allow only the constitutional provisions to stand. Indeed, it has also now disavowed the 2022 AG Opinion, the only prior guidance given to districts in approving expenditures.[81] Because the statutes expressly authorize public funds to be paid to private institutions for education, and deliberately removed DEED's ability to narrow this authorization,[82] the statutes cannot reasonably be construed to allow only constitutional spending.

B. The State Is The Proper Party In This Challenge To The Constitutionality Of The Statutes.

The State concedes it is the proper party to a facial challenge, but argues that this case must proceed as an as-applied challenge that can be maintained only against the

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[80] *State v. ACLU of Alaska*, 204 P.3d 364, 373 (Alaska 2009) (internal footnotes omitted).

[81] State's Opp'n & Cross-Mot. at 9-10 (asserting "[t]his case is not a referendum on the 2022 AG opinion," "DEED does not rely on the AG opinion as legal precedent," and Plaintiffs' "criticisms of the AG opinion and DEED's letter about the opinion are thus mere distractions").

[82] Pls.' Mem. at 9-12 (discussing legislative history addressing removing DEED's authority and the existing regulations restricting expenditures); Exhibit L at 2 (explaining a "departmental audit in the past decade resulted in the additional controls over expenditures of public funds by parents and districts in regulations that the bill seeks to overturn.").

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school districts.[83] This pass-the-buck argument ignores the role of the executive branch in ensuring that public funds are lawfully spent. The State's argument relies on the flawed premise that it is constitutional for the legislature to enact statutes that authorize unconstitutional spending, but then assumes the school districts will independently interpret and comply with the direct benefit prohibition, such that school districts will "reject parent proposals . . . that cross[] constitutional lines."[84] The State places the sole responsibility for complying with the direct benefit prohibition in the hands of school districts, although the State itself has failed to articulate an interpretation of the statutory scheme as enacted by the legislature that would be facially constitutional.

As addressed in opposition to the State's Motion to Dismiss, the school districts are not indispensable parties under Civil Rule 19.[85] The State, nonetheless, takes a second bite at the apple, now moving for summary judgment on the basis that DEED is not the proper defendant for an as-applied challenge. In advancing this argument, the State (again) ignores that Plaintiffs are seeking declaratory and injunctive relief, and instead suggests Plaintiffs are seeking damages. Under this inaccurate reframing, the State asserts Plaintiffs are seeking to hold DEED "liable for the school districts' actions,"[86] and cites

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[83] State's Opp'n & Cross-Mot. at 21-28.

[84] *Id.* at 18.

[85] Pls.' Mem. at 43-49. And the State essentially concedes that the second prong of Civil Rule 19(a) does not apply, because school districts have not claimed an interest in this litigation. State's Opp'n & Cross-Mot. at 23.

[86] State's Opp'n & Cross-Mot. at 24.

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to tort cases.[87] In reality, Plaintiffs are seeking to hold the legislature accountable for passing unconstitutional statutes and DEED accountable for its responsibility to provide oversight to the correspondence program and oversight of public education funding.[88] While AS 14.03.300(b) prevents DEED from imposing requirements on expenditures under an ILP, DEED (and its legal counsel, the Attorney General) still has an obligation to ensure that a school district's expenditure of public funds complies with state law, including the Alaska Constitution. The as-applied challenge is appropriately brought against the State.

The State's briefing insists that because only school districts currently *operate* correspondence programs, that school districts have sole responsibility for ensuring expenditures are constitutional. This argument, however, ignores the roles of DEED and the Attorney General, let alone the legislature. Although the "legislature has pervasive control over public education," this does not mean that the legislature can make unconstitutional appropriations of public funds, nor can it authorize the school districts to

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[87] *Id.* at 25-27, citing *Kenai Peninsula Borough v. State*, 532 P.2d 1019, 1027 (Alaska 1975) ("holding that the borough was not acting as an agent of the state in furnishing school transportation" and so the state was not liable to indemnify the borough for settlement and costs of resolving a case involving a bus crash with a private vehicle); *Alaska State-Operated Sch. Sys. v. Mueller*, 536 P.2d 99, 100 (Alaska 1975) (in a case where an ASOS teacher received a default judgment for travel expenses incurred in reaching her teaching station, "the question presented for review on [] appeal [wa]s whether ASOS is a state agency within the meaning of Civil Rules 4(d)(7) and (8) relating to service of process upon the state.").

[88] *E.g.*, AS 14.07.020(a)(9) (DEED "shall" "exercise general supervision over . . . correspondence study programs"); AS 14.17.610 (DEED "shall determine the state aid for each school district").

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do so.[89] In executing the laws and the appropriations passed by the legislature, DEED and the Attorney General both have roles in ensuring public funds are spent in compliance with the laws of this state, including the Alaska Constitution.

The Alaska Constitution mandates that the legislature establish and maintain a system of public schools.[90] To satisfy its obligation to provide a system of public education, "the legislature has established numerous interrelated statutory policies and delegated implementation authority to the executive branch."[91] As the State acknowledges, "the legislature, through DEED, monitors and approves district correspondence programs."[92] "DEED is tasked with the general supervision of the [correspondence] programs."[93] "To ensure that districts operating a correspondence study program comply with state law, they must provide DEED with a statement of assurances."[94] DEED has "the regulatory mandate to approve the program."[95] "DEED may, in its discretion, monitor the programs for compliance."[96] DEED may also

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89 State's Opp'n & Cross-Mot. at 17 (quoting *Jefferson v. State*, 527 P.2d 37, 44 (Alaska 1974)).

90 *State v. Alaska Legis. Council & Coal. for Educ. Equity*, 515 P.3d 117, 127 (Alaska 2022) (explaining "the establishment and maintenance of the public school system [is] specifically a legislative responsibility.").

91 *Sagoonick v. State*, 503 P.3d 777, 785 (Alaska 2022) (discussing political branches' roles in carrying out obligations under the Alaska Constitution).

92 State's Opp'n & Cross-Mot. at 6.

93 *Id.* at 5 (citing AS 14.07.020(a)(9)).

94 *Id.* (citing 4 AAC 33.420).

95 *Id.* (citing 4 AAC 33.420).

96 *Id.* (citing 4 AAC 33.460(a)).

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"withdraw approval for the district to operate the program."[97] When executive agencies, like DEED, have questions regarding the interpretation of laws passed by the legislature, the Attorney General is "the officer charged by law with advising" executive agencies who enforce the law "as to the meaning of it."[98]

As the executive branch department overseeing education, DEED has long been responsible for ensuring public funds are spent appropriately. But by enacting these statutory changes, the legislature struck down DEED's regulations creating side-bars for the district's use of the state's public funds. And with the statutory changes, all parties agree that the legislature has now prohibited DEED from regulating future expenditures under this program.[99] In addition, the State in its briefing implicitly concedes that the Attorney General has also given incorrect advice in its AG Opinion and fails to otherwise articulate how school districts are supposed to know whether the myriad possible private expenditures would pass constitutional muster. Contrary to the State's assertions, Plaintiffs are not asking the Court "to grade the AG opinion."[100] Instead, this 2022 AG Opinion is relevant both as the Department of Law's interpretation of the challenged

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97 *Id.* at 6 (citing 4 AAC 33.460(c)).

98 *Allison v. State*, 583 P.2d 813, 816 (Alaska 1978) (quoting *Smith v. Mun. Court of Glendale Judicial Dist.*, 334 P.2d 931, 935 (Cal. Dist. App. 1959)).

99 State's Opp'n & Cross-Mot. at 17 ("Although this specific provision's wording is convoluted, DEED agrees with the basic point that the statutes put school districts and parents—not DEED—in charge of student allotments."); *see also* Intervenors' Opp'n at 7 (asserting AS 14.03.300-.310 "prohibits the Department from meddling in" spending of allotments).

100 State's Opp'n & Cross-Mot. at 10.

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statutes, as well as the only current legal guidance provided by DEED to all school districts in operating the correspondence program.[101] Given the executive branch's role in ensuring public funds are spent legally—in other words, consistent with Alaska's Constitution, statutes, and regulations—the as-applied challenge (in addition to the facial challenge) can proceed against the State directly, and the districts are not indispensable parties.

Fundamentally, this court has a "constitutionally mandated duty to ensure [executive and legislative branch] compliance with the provisions of the Alaska Constitution."[102] The Alaska Supreme Court has consistently recognized that although "the need for flexibility in providing public education" is "entitled to respect," courts must "reject[] the argument that this directive authorize[s] an otherwise impermissible dedication of funds."[103] Legislative appropriations of public funds for education must meet constitutional requirements.[104]

Where the legislature has written a statute explicitly authorizing unconstitutional expenditures of public funds, and precluded DEED from imposing any regulations that could potentially address the constitutional infirmity, this court should not be asked to

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101 *See* Exhibits 13-15 (containing press release of 2022 AG Opinion providing guidance on uses of public funds at private schools with correspondence allotments, 2022 AG Opinion, and Letter to Superintendents circulating 2022 AG Opinion).

102 *Sagoonick*, 503 P.3d at 799 (alteration in original) (quoting *Malone*, 650 P.2d at 356).

103 *Alaska Legis. Council & Coal. for Educ. Equity*, 515 P.3d at 127-28.

104 *Id.* at 128.

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rewrite the statute or create new limitations made up from whole cloth on a case-by-case basis. Members of the judicial branch are not "legislators, policy makers, or pundits charged with making law."[105] The Court is "concerned only with upholding the Alaska Constitution"[106] Because the plain text of AS 14.03.300-.310 authorizes unconstitutional expenditures of public funds in violation of the direct benefit prohibition, the declaratory and injunctive relief sought by Plaintiffs is warranted, and is relief that may be granted against DEED as the executive agency charged by the legislature with overseeing public schools, including correspondence programs, and the distribution of public funds to public schools.

C. Deciding Factual Issues in Favor of the State on the As-Applied Challenge is Premature.

In response to Plaintiffs' cross-motion for summary judgment on the facial challenge—a purely legal issue also raised in the State's Motion to Dismiss—the State now cross-moves for summary judgment on the as-applied challenge.[107] Its argument that it is not the proper party to an as-applied challenge is addressed above and should be rejected outright as a matter of law. In addition, the State does not appear to seriously contend that there are no genuine issues of material fact. For an as-applied challenge, the State insists this court would have to look at each specific expenditure authorized under

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105 *Planned Parenthood of Alaska 2007*, 171 P.3d at 579.

106 *Wielechowski*, 403 P.3d at 1143 n.2.

107 State's Opp'n & Cross-Mot. at 8.

each student's ILP and draw constitutional lines distinguishing various private educational expenditures.[108] Because Plaintiffs must be allowed to conduct factual discovery on their as-applied claims if the statutes are not struck down as facially unconstitutional, Plaintiffs therefore request a continuance pursuant to Rule 56(f) in the event this court denies Plaintiffs' Cross-Motion for Summary Judgment.[109] In no event is summary judgment in favor of the State warranted on this claim.

D. Intervenors' Arguments Are Not Legally Sound.

Having fully addressed the State's arguments, Plaintiffs now address Intervenors' briefing. Intervenors' interest in this litigation is as parents who use the correspondence program allotment to pay for private school tuition and who do not want the statutory authorization to do so to end.[110] Because Intervenors concede that under the federal

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[108] State's Opp'n & Cross-Mot. at 11 ("For purchases that *do* involve religious or other private educational institutions, like private school classes . . . spending of student allotments would need to be evaluated on its facts . . . .").

[109] Plaintiffs' Civil Rule 56(f) affidavit is attached to this filing. *E.g.*, *Punches v. McCarrey Glen Apts., LLC*, 480 P.3d 612, 623 (Alaska 2021) ("We have explained that the purpose of Rule 56(f) is to 'safeguard against premature grants of summary judgment.'" (quoting *Gamble v. Northstore P'ship*, 907 P.2d 477, 485 (Alaska 1995))); *Gamble*, 907 P.2d at 484-85 (Alaska 1995) ("Alaska Civil Rule 56(f) allows a party opposing summary judgment to seek additional time to gather and submit evidence to justify the party's opposition. . . Rule 56(f) may be invoked simply by submitting an affidavit requesting additional time to oppose the motion"); *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188, 193 (Alaska 1989) (explaining once a non-movant has "made clear to the trial court and the opposing party that he is requesting a Rule 56(f) continuance, the request should be freely granted." (internal quotations omitted)).

[110] Intervenors' Opp'n at 2 ("Intervenors ("Parents") are beneficiaries of the program. Their children are enrolled in the program, and they use their allotment to pay tuition to private schools."). Intervenors have employed the very approach Jodi Taylor described in her Opinion Piece, *see* Exhibit 10.

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constitution states may prohibit the use of public funds for private schooling, and because the delegates to our Constitutional Convention chose to enact such a prohibition in our Constitution, the Intervenors' arguments fail as a matter of law.

Plaintiffs first address Intervenors' argument that using public correspondence program allotments to pay for private school tuition is not a "direct benefit" that violates the Alaska Constitution because it benefits parents, not private educational institutions.[111] Plaintiffs then respond to Intervenors' arguments that Alaska's direct benefit prohibition "impermissibly violates Intervenors' federal constitutional rights."[112] In sum, Intervenors want this court to create a new federal constitutional parental right that does not currently exist, and they then ask this court to conclude that Article VII, Section 1 of the Alaska Constitution is void for violating this newly-created right.

E. Intervenors Ask This Court to Rewrite the Meaning of a "Direct Benefit" in Article VII, Section 1, Which Would Require Overruling *Sheldon Jackson*.

The direct benefit prohibition in the Alaska Constitution prohibits the use of public funds for private education.[113] Intervenors argue that, as a matter of statutory

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111 *E.g.*, Intervenors' Opp'n at 2, 4-7.

112 *Id.* at 13-17.

113 Pls.' Mem. at 24-27; *Sheldon Jackson*, 599 P.3d at 130; *see also* Exhibit M at 2 (discussing *Sheldon Jackson* test, and explaining "the Court looked at how the public money is to be used; i.e., whether the benefit to the private school is incidental to education (as with fire and police protection) or whether it amounts to direct aid to education (as with tuition and books).").

interpretation, the correspondence program allotment is "a benefit for families" not a benefit "for schools," and is therefore constitutional.[114]

But the Alaska Supreme Court has already rejected this very argument—that adding intermediaries makes such expenditures constitutional—in *Sheldon Jackson*. The Court's interpretation was grounded in the delegates' primary concern that public funds be used for public, not private education, regardless of how many hands the funds passed through on the way to their final destination.[115] Intervenors' interpretation that paying for private school tuition with public funds is a benefit "to individual students," and therefore an "indirect benefit" only to private schools, would create a loophole that would render the "direct benefit" prohibition meaningless. It flies directly in the face of the central holding of the *Sheldon Jackson* decision.

To buttress their arguments, Intervenors assert that legislative history indicates the program is "a benefit for parents," and the legislature did not state its intention in passing these statutes was to benefit private schools.[116] Although the legislative history does not

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114 Intervenors' Opp'n at 6-7.

115 *Sheldon Jackson*, 599 P.2d at 132 ("Simply interposing an intermediary does not have a cleansing effect and somehow cause the funds to lose their identity as public funds." (internal quotations omitted)); Proceedings at 1514 ("[B]ecause we felt that state funds may at times go through many hands before reaching their work for the public, and so the term 'public funds' was then used as a guide to every portion . . . for the disbursement of these monies.").

116 Intervenors' Opp'n at 7.

actually support this argument,[117] there is no requirement that the legislative history provide a "smoking gun" statement indicating that the purpose of the program is really to benefit private schools nor is intent to benefit private schools required;[118] it is sufficient that the plain text authorizes the approval of unlimited expenditures at private schools with public funds, period. Stated differently, intent, even a good intent, is irrelevant to the Court's analysis.[119]

As further support for the contention that this court should adopt this new definition of an "indirect benefit," Intervenors suggest that this court should "doubt the continued applicability" of the third *Sheldon Jackson* factor.[120] Intervenors argue the third factor should be jettisoned because *Sheldon Jackson* discussed the reasoning in then-current Establishment Clause cases (which have since been overruled or abrogated) for guidance in delineating between the meaning of "direct" and "indirect."[121] *Sheldon Jackson's* holding, however, was not based on concerns about "entanglement" between government and religion, as the direct benefit prohibition bars aid to *all* private educational institutions; rather the Court analogized to these cases in explaining the

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[117] Sponsor Dunleavy specifically stated he intended to create "a public/private partnership concept" as "an expansion of the public education system." *E.g.*, Exhibit 2 at 10 (Statement of Sen. Dunleavy at 8:29:15 AM); *see also* Pls.' Mem. at 6-12, 22-23 (discussing legislative intent).

[118] Intervenors' Opp'n at 7 ("Nor did Plaintiffs discover any evidence that the legislature intended to encourage families to spend their allotments with private providers.").

[119] *Sheldon Jackson*, 599 P.2d at 131 (concluding even a "laudable purpose" will not save a program that, in substance, provides a direct benefit to private colleges).

[120] Intervenors' Opp'n at 10.

[121] *Id.* at 10-11.

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meaning of a direct versus indirect benefit.[122] *Sheldon Jackson* is controlling precedent, and cannot be disregarded.[123]

Finally, Intervenors' participation in this litigation is proof that this program is a "direct benefit" that violates the Alaska Constitution. Intervenors' stated interest in this litigation is ensuring that the statutory authorization for the use of public funds for private schooling continues because the named parents would face financial hardship, such that they might not send their children to private schools, without this allotment subsidizing their private education.[124] Intervenors' affidavits and briefing establish that the allotment

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[122] The 2022 AG Opinion also considered, and rejected, the argument that the U.S. Supreme Court's departure from prior Establishment Clause cases would change the interpretation of the Alaska Constitution:

> *Zelman* is unlikely to move the needle on the Alaska Supreme Court's interpretation of the state constitution. For one, the Alaska Supreme Court's ruling in *Sheldon Jackson* turned on the interpretation and application of the Alaska Constitution's public education clause; it was not a federal Establishment Clause case. And while the Alaska Supreme Court discussed then-current Establishment Clause cases, it did so by way of analogy and to draw "generalizations." Ultimately, the court's analysis centered on Alaska's "apparently unique" constitutional prohibition on using public funds for the direct benefit of any private school, religious or not.

Exhibit 14 at 16.

[123] Intervenors' Opp'n at 11 ("Even if this Court decides that it remains bound to consider all four factors set out in *Sheldon Jackson*, however, the third factor does not support a ruling that the program is unconstitutional.").

[124] "1. To aid or promote (an undertaking) through financial support. 2. To grant a regular allowance or monetary assistance to." *Subsidize*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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is providing a substantial portion of Intervenors' private school tuition.[125] These parents, like many others, have followed Jodi Taylor's recommended approach to receive an allotment of public funds to be applied towards private school tuition or classes.[126] Intervenors themselves provide the smoking gun proving that the legislature unconstitutionally authorized public funds being used to pay for private education.

F. Intervenors' Federal Claims Lack Merit Because There is No Fundamental Parental Right to State-Subsidized Private Education.

As Intervenors concede,[127] the United States Supreme Court has repeatedly held that a "State need not subsidize private education."[128] Federal law simply requires that "once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[129] The delegates to our Constitutional Convention made the choice to bar the use of public funds for private education in our Constitution. Because Alaska's direct benefit clause prohibits subsidizing *all* private education, it does not violate the

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[125] Intervenors' Opp'n at 2 (asserting parents "use their allotment to pay for tuition to private schools. 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."); *see also* Affidavits of Andrea Moceri, Brandy Pennington, and Theresa Brooks, attached to Motion to Intervene as Defendants (dated Jan. 26, 2023).

[126] Exhibit 10 (outlining steps for parents to enroll students in a public correspondence program and then receive reimbursements for private school tuition).

[127] *E.g.*, Intervenors' Opp'n at 13-14 ("Although Alaska does not have to create a student aid program like the one here, once it does, it cannot exclude families from that general educational benefit simply because they exercise their fundamental federal right to send their children to private school.").

[128] *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

[129] *Carson*, 142 S. Ct. at 1997 (discussing *Espinoza*).

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federal constitution. Instead, Intervenors' federal claims all hinge on the unsupportable assertion that there is a fundamental parental right that requires a state to subsidize private education, an argument that is refuted by the very cases they cite. This court should not accept Intervenors' invitation to create a new federal constitutional right, especially one that would abrogate the direct benefit clause in our state constitution.

1. Strict Scrutiny is Not Implicated Because the Direct Benefit Prohibition Addresses All Private Educational Institutions.

In advancing their arguments, Intervenors make several unsupported leaps. First, they rely on cases in which the United States Supreme Court has ruled that programs that provide benefits to private schools, but exclude a subset of schools solely based on being *religious* private schools, violate the Free Exercise Clause of the First Amendment.[130] They suggest that this is just like Alaska prohibiting public funding being spent for the direct benefit of *all* private educational institutions. However, there is not a fundamental parental right requiring the state to subsidize private education. The direct benefit prohibition in Alaska's Constitution distinguishes only between public and non-public institutions, and thus is not subject to strict scrutiny. "Swap[ping] out religious schools for private schools," as Intervenors suggest, results in an entirely different analysis, as the Establishment Clause and Free Exercise Clause of the First Amendment are no longer

130 *Id.*; *Espinoza*, 140 S. Ct. at 2261.

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implicated.[131] Instead, as the Supreme Court held in *Carson* and *Espinoza*—cases relied upon by Intervenors—the "State need not subsidize private education."[132] In short, Intervenors' own cases require rejection of their arguments.[133]

2. The State Has a Legitimate Interest in Ensuring Public Funds Are Used for Public Education, and the Direct Benefit Prohibition Is Rationally Related to that Interest.

Second, Intervenors argue that even if their claim that strict scrutiny applies fails (which it does), denying "generally available public benefits to a class of people" does not satisfy even rational basis review.[134] The State, however, undeniably has a legitimate

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[131] Intervenors' Opp'n at 15; *see also id.* at 17 (admitting "the object of the would-be exclusion here—parents who exercise their right to enroll their children in private schools—is different from *Espinoza* and *Carson*").

[132] *Carson*, 142 S. Ct. at 1997; *Espinoza*, 140 S. Ct. at 2261.

[133] Intervenors' "hybrid" rights theory therefore fails too. Intervenors' Opp'n at 23-25. Intervenors insist "even if this court rejects the argument that a ruling in favor of Plaintiffs would violate . . . the Fourteenth Amendment, it should credit the argument that it could violate the 'hybrid' rights of religious parents." *Id.* at 23. However, for "hybrid" rights caselaw to even apply there must be a violation involving the connection of *two* fundamental rights. If there is no fundamental parental right to state-subsidized private education, then the "hybrid" claim necessarily fails. *E.g.*, *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) ("We hold that a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right."); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) ("Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child."). To hold otherwise would require the state to subsidize private education where parents assert an interest in directing the "religious private education" of their children. Intervenors' Opp'n at 24.

[134] Intervenors' Opp'n at 21-22. Intervenors further do not define their class based on any existing caselaw, but apparently are asserting parents who want to use public education funds provided by public schools to send their children to private schools constitute a class.

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interest in maintaining a system of public schools open to all students. Public schools rely on public funds to operate. Determining that providing public funds to private schools will reduce the money available to maintain the public school system has a rational relationship to the State's legitimate interest in public education. Indeed, the United States Supreme Court acknowledged that a state has a legitimate interest in supporting public education in *Espinoza*, but concluded that excluding only religious private schools, while funding other private schools, would be "fatally underinclusive."[135]

Contrary to Intervenors' assertions, the correspondence program allotment is not an "otherwise generally available public benefit" that they would be denied if the use of public funds for private education is found to violate the Alaska Constitution.[136] Intervenors have the choice, just like all parents of students in Alaska, to enroll their students in a public school (including a homeschool correspondence program), which will be held to public education standards and requirements, *or* they may choose to enroll their students in a private school, which cannot be paid for with public funds under the Alaska Constitution. Here, Intervenors insist that they should be able to both enroll their students in the public correspondence program and a private school, *and* have the public

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[135] 140 S. Ct. at 2261 (explaining a State's "interest in public education cannot justify a no-aid provision that requires only religious private schools to 'bear [its] weight.'" (citation omitted)).

[136] Intervenors' Opp'n at 14 ("Under Alaska's Constitution, the only way a parent can receive an otherwise generally available public benefit for her child's education, Plaintiffs argue, is if the parent chooses a public education.").

correspondence program pay for the private school. There is no fundamental right to have one's cake and eat it too.[137]

As the Arizona Court of Appeals concluded in *Niehaus v. Huppenthal*,[138] which Intervenors insist "applies perfectly here,"[139] there is no waiver of fundamental rights because "[p]arents are not coerced in deciding whether or not to participate in the" program.[140] Parents are "free to enroll their children in public school" or enroll their children in private school; "the fact that they cannot do both at the same time does not amount to waiver of their constitutional rights or coercion by the state."[141]

III. CONCLUSION

Alaska Statutes 14.03.300-.310 are unconstitutional as enacted because they authorize the expenditure of public funds for education at private institutions in violation of the direct benefit prohibition in the Alaska Constitution. Neither the State nor Intervenors have

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[137] Despite making arguments to the contrary, Intervenors simultaneously appear to concede this point. *Id.* ("After all, there is nothing that requires Alaska to enact the allotment program or to provide any aid to nonpublic school students.").

[138] 310 P.3d 983 (Ariz. Ct. App. 2013). *Niehaus* addressed challenges to the Arizona Empowerment Scholarship Accounts ("ESA"). The ESA did not violate Arizona's aid clause because it enhanced the ability of parents of children with disabilities to choose how to provide for their education. Of note, under the ESA program, students were *not* enrolled in public schools. Instead, to receive ESA funds, parents "promise not to enroll the student in public school" while receiving the funds. *Id.* at 989. And, if a parent elected to participate in the ESA program and "the parent then enrolled the child in a private school, ESA funds for tuition would be limited." *Id.* Unlike Alaska's correspondence program, the ESA is not a part of the Arizona public education system, although parents could stop participation in the ESA program at any time and re-enroll their student in public school. *Id.*

[139] Intervenors' Opp'n at 13.

[140] *Niehaus*, 310 P.3d at 989.

[141] *Id.*

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advanced an interpretation of AS 14.03.300-.310 that complies with the requirements of the Alaska Constitution. This court should therefore grant summary judgment in favor of Plaintiffs on their facial challenge, declare AS 14.03.300-.310 unconstitutional, and enjoin future expenditures of public funds for the direct benefit of private educational institutions under AS 14.03.300-.310.

In the event this court denies Plaintiffs' Motion for Summary Judgment on the facial challenge, the court should conclude the State is the proper party to defend the constitutionality of the statutes, and it should grant Plaintiffs a continuance under Rule 56(f) so that factual discovery may proceed for the as-applied challenge.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email on July 21, 2023, on the following:

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