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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.

ACTING COMMISSIONER HEIDI TESHNER, in her official capacity, State of Alaska, Department of Education and Early Development,

Defendant,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON

Intervenors.

CASE NO: 3AN-23-04309CI

INTERVENORS' REPLY TO PLAINTIFFS' RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' characterization of the correspondence school program allotment as an unconstitutional "direct benefit" to private institutions defies common sense. When a state creates a program that grants struggling people a monthly allowance for food, no one views that program as a direct benefit to Fred Meyer or Wal-Mart or any other store. It is widely, and correctly, understood to be a direct benefit to *individuals*. The allowance permits them to make individual food choices to best meet their tastes and nutritional needs. Far from

directly benefiting any particular purveyor of groceries, the government does not even know in advance what someone will buy or where they will buy it.

The same is true here. The allotment that Parents receive through the program is a direct benefit only to them and to their children. The state does not control how families will spend an allotment. Instead, it gives each family the authority to spend it in a way the best meets their child's educational needs. And just as individuals, and not grocery stores, are direct beneficiaries of a food stamp program, families, and not private institutions, are the direct beneficiaries of the program here.

This view is supported not only by common sense, but by case law. The program does not violate Article VII, Section 1 even under the four-part test set out in *Sheldon Jackson College v. State*. And the broader reading of that provision advanced by Plaintiffs would put it at odds with the United States Constitution. This Court should reject Plaintiffs' invitation to find a state constitutional violation where none exists, and, in so doing, raise serious federal constitutional concerns where none currently exist. It should instead uphold the program and grant summary judgment for Intervenors and Defendant.

I. Parents' interpretation of "direct benefit" adheres to *Sheldon Jackson* and Article VII, Section 1 of the Alaska Constitution.

Throughout their brief in opposition, Plaintiffs misunderstand Parents' argument about what constitutes a "direct benefit" for purposes of Article VII, Section 1. Parents do not argue that "adding intermediaries makes [education expenditures] constitutional." Pls' Resp. at 32. Rather, the families participating in the program are not "intermediaries" at all. They, along with their children, are the beneficiaries of the program and have independent control over the ultimate use of the benefit. Participants in the program struck down in *Sheldon Jackson* were eligible only if they chose a private college in Alaska. *Sheldon Jackson College v. State*, 599 P.2d 127, 128 (Alaska 1979). By contrast, participants in the program here may spend allotments in various ways, including payments to both public and private providers—whether schools or not.

Plaintiffs never squarely address this core factual distinction between this case and *Sheldon Jackson*. It is true that an unconstitutional payment does not become constitutional

simply by adding a middleman through which to pass the payment. If, for instance, the state legislature wanted to provide direct payments to private schools and such payments were constitutionally prohibited, the mere fact that it made those payments through an escrow agent who, in turn, passed the payments along to private schools would not somehow sanitize the scheme. But that is hardly the situation here. Parents are not middlemen at all. They receive a fixed benefit which can be used to pay for educational goods or services from an array of private and public options. *See, e.g.*, Pls' Resp. at 21. The legislature did not intend to aid private schools, and the state has no ultimate control over how parents choose to use the benefit. The legislature designed the program to give families a resource that they could use to design the best individual educational experiences for their children, be that through public or private providers, or a combination of the two.

As Parents explained in their Response to Plaintiffs' Cross-Motion for Summary Judgment, the program also passes the four-factor test of constitutionality set out in *Sheldon Jackson*. Parents' Resp. at 8-12. The first *Sheldon Jackson* factor—the breadth of the beneficiary class—favors constitutionality because any Alaska family may enroll a child in the correspondence school program and receive an allotment. Parents' Resp. at 8-9 (discussing *Sheldon Jackson*, 599 P.2d at 128). The second factor of the *Sheldon Jackson* test, "the nature of the use to which the public funds are to be put" also favors constitutionality. *Sheldon Jackson*, 599 P.2d at 128. The nature of that use here, a broad range of private and public educational expenditures, is the opposite of *Sheldon Jackson*. In that case, students had one choice of how to use their tuition benefit—and the Court concluded that was akin to having no choice at all. And, as already discussed, the fourth *Sheldon Jackson* factor, whether the state has "merely channel[ed] funds through an intermediary," also weighs in the Parents' favor. *Id.* at 130. The word "channel" implies at least some state control over the ultimate destination of funds. Here, unlike in *Sheldon Jackson*, that control is absent, and only parents can decide whether to use their child's benefit at public or private institutions.

In their Response, Plaintiffs do not directly respond to Parents' analysis of the first, second, and fourth factors of the *Sheldon Jackson* test. On the third *Sheldon Jackson*

factor— "the magnitude of the benefit conferred"—however, Plaintiffs argue that Parents "disregard[]" *Sheldon Jackson* because of their stated skepticism of the continued applicability of that factor. Pls.' Resp. at 33-34. Specifically, Plaintiffs argue that it does not matter that the cases underlying the third factor were later abrogated or overruled because the cases that did the abrogating or overruling were Establishment Clause cases. *See id.* Parents do not dispute Plaintiffs' observation that *Sheldon Jackson* was "not based on concerns about 'entanglement' between government and religion," Pls.' Resp. at 33, but the reasoning of the Establishment Clause cases that overruled the cases relied on by the *Sheldon Jackson* Court apply with equal force here. The *Sheldon Jackson* Court relied on *Roemer* and *Meek* (even though they were First Amendment Establishment Clause cases) for the third factor because those cases explained the distinction between "direct" and "indirect" benefits. *Sheldon Jackson*, 599 P.2d at 130. And those cases were later abandoned precisely because their distinction between those categories was flawed. They erred by ignoring "the principle of private choice." *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality opinion). Continued reliance on the third *Sheldon Jackson* factor enshrines that error which was later corrected by the U.S. Supreme Court. Just as "the government has not provided any 'support of religion'" where money "first passes through the hands (literally and figuratively) of numerous private citizens who are free to direct the aid elsewhere," the state does not provide a "direct benefit" to private educational institutions where parents may direct that aid elsewhere, including to public institutions. *See id.*

But, as Parents explained in their response, even if applied, the third *Sheldon Jackson* factor does not militate striking the program—particularly considering the strength with which the other three factors support upholding it. The benefit provided by the program may be comparable in "magnitude" to the benefit in *Sheldon Jackson*, but it also may not. It depends on how and where each family uses their allotment, which is—again—the crucial distinction between this case and *Sheldon Jackson*. It is not a benefit to private institutions, but to families. The presence of genuine choice makes the "magnitude" of any benefit to private educational institutions difficult to predict. That genuine choice also

makes it irrational to claim that the legislature created any particular benefit *to private institutions*. Plaintiffs' inability to specifically describe the perceived "magnitude" of the benefit highlights the problem with applying the third factor to the facts here. Plaintiffs explain the third factor as follows: "the magnitude of the benefits to be considered are the authorized expenditures for the direct benefit of private education across the entire correspondence program." Pls.' Resp. at 11 n.32. But though Plaintiffs offer as an example the breakdown of public and private *options* available through the Mat-Su Central Correspondence School, they do not state the percentage of allotment *dollars* that are spent at public and private options. Plaintiffs object that only 16 of the upwards of 300 vendors approved are public institutions. But it is unsurprising that there would be few publicly funded competitors in the realm of, for instance, pottery classes and Taekwondo instruction (both of which are included in Mat-Su Central's approved vendor list). https://www.matsucentral.org/learning/cip. It would also be unsurprising, however, if a larger percentage of allotment dollars are being spent on coursework with major public universities than with most of these niche small private vendors.[1]

Plaintiffs also contend that "[Parents'] participation in this litigation is proof that this program is a 'direct benefit' that violates the Alaska Constitution" because they rely on the program for "a substantial portion of [their] private school tuition." Pls.' Resp. at 34-35. Plaintiffs are partially right. The program *is* a direct benefit. But, as Parents' unique stories demonstrate, it is a direct benefit to families. And such benefits do not violate the Alaska Constitution. Plaintiffs continue to focus on Parents' particular uses of the benefit rather than the nature of the benefit itself. It is the latter question, who "directly benefits" from the program, that determines its constitutionality under Article VII, Section 1. When a government makes food stamps available to struggling families, as in the example above, it does not intend to benefit grocery stores. It provides food stamps to help families meet

[1] To the extent that the Court agrees with Plaintiffs that the third factor weighs in favor of a finding of unconstitutionality, and that it could be dispositive despite the other three factors, factual development is likely necessary to evaluate the actual magnitude of the benefit under Plaintiffs' definition.

their nutritional needs—any resulting benefit to grocery stores is incidental. Similarly, the program here is designed to help families meet their educational needs. And especially considering the many ways participating families use the program, it cannot be considered a "direct benefit" to private institutions.

II. Under Plaintiffs' interpretation, the Alaska Constitution requires the state to violate fundamental liberty interests guaranteed by the United States Constitution.

Neither the Alaska Constitution nor *Sheldon Jackson* prohibit the allotment program. The Court can and should stop there by denying Plaintiffs' claim. If, however, the Court accepts Plaintiffs' position, which it need not and should not, then the Court is setting up a collision between its ruling and the U.S. Constitution. If the Alaska Constitution requires the legislature to discriminate against parents choosing private schools, then the Alaska Constitution is, under that reading, in conflict with the Due Process Clause of the Fourteenth Amendment, which has long protected the right to choose private education as fundamental. This is, in fact, what happened in the Supreme Court's recent educational-choice decision in *Espinoza v. Montana Department of Revenue*, though involving religious schools. 140 S. Ct. 2246 (2020). There, the legislature enacted a school-choice program that included religious school options, and the state court held that the Montana Constitution required the state to discriminate against parents who chose religious schools by denying them a financial benefit available to others. In short, the state court's reading of the state constitution created a conflict between state and federal constitutional law that did not exist in the first place, did not need to exist, and which was, of course, ultimately resolved in favor of the federal charter by the U.S. Supreme Court. By reading the Alaska Constitution in a manner that avoids conflict with the U.S. Constitution, this Court can and should avoid the needless problem that the state court in *Espinoza* created.

Parents' Equal Protection argument and their "hybrid right" argument under the First and Fourteenth Amendments require this Court to apply strict scrutiny. And Plaintiffs do not argue that they can satisfy that exacting standard. Because Plaintiffs' interpretation

cannot do so, and because it fails to satisfy even rational-basis review, its adoption would invalidate Article VII, Section 1 under the U.S. Constitution.

A. Plaintiffs' interpretation reads the Alaska Constitution as requiring the state to violate fundamental liberty interests guaranteed by the United States Constitution.

There is nothing "new" about the federal constitutional right asserted by Parents here. *Contra* Pls.' Resp. at 6, 31, 36. In fact, "the interests of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interest recognized by [the Supreme Court]." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also id.* at 77 (Souter, J., concurring in judgment) ("As we first acknowledged in *Meyer*, the right of parents to 'bring up children' and 'to control the education of their own' is protected by the Constitution." (citation omitted)); *id.* at 80 (Thomas, J., concurring in judgment) ("I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce v. Society of Sisters* holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them." (citation omitted)). Any perceived novelty in Parents' arguments stems from Plaintiffs' misunderstanding of them. Parents do not, as Plaintiffs claim, advocate for a "fundamental parental right that requires a state to subsidize private education."[2] Pls.' Resp. at 36. Rather, Parents argue that when they choose to enroll their children in a private school rather than a public one, they are exercising the fundamental right to "direct the upbringing and education of [their] children" as recognized by the United States Supreme Court in *Pierce v. Soc'y of Sisters*. 268 U.S. 510, 534-35 (1925). And the United States Constitution

[2] Confusingly, Plaintiffs simultaneously contend that Parents advance a theory that would require a state to subsidize private education and that "[Parents] concede that under the federal constitution states may prohibit the use of public funds for private schooling." Pls.' Resp. at 30-31, 35. Neither is true. The U.S. Constitution neither mandates that a state enact a program granting a benefit for private schooling, nor does it permit a state to—as Plaintiffs advocate here—enact a flat ban on ever allowing public funds to be used for private schooling.

prohibits the state from denying them access to an otherwise available benefit—in this case, participation in the program—because they choose to exercise that fundamental right.

Consider a hypothetical scenario based on another early parental rights case. In *Meyer v. Nebraska,* the U.S. Supreme Court struck down a Nebraska statute that prohibited the teaching of foreign languages to grade school children. 262 U.S. 390 (1923). A parochial school teacher challenged the law when he was tried and convicted for teaching German to a ten-year-old. *Id.* Acknowledging that there was some state interest in "foster[ing] a homogenous people with American ideals prepared readily to understand current discussions of civic matters," the Court nevertheless held that the statute violated the constitutional rights of both teachers and parents. *Id.* at 402. It violated the teacher's right "to teach and the right of the parents to engage him so to instruct their children." *Id.* at 400.

Now suppose that Nebraska, having unsuccessfully tried to prohibit the teaching of foreign languages to young children, instead offered families a set tuition benefit to be used at any grade school in the state, as long as that school did not teach foreign languages to young children. Such a law would be similarly unconstitutional. The law would be struck down because, where a fundamental right exists, a state is forbidden not only from prohibiting the exercise of that right, but also from conditioning the receipt of a benefit on the relinquishment of that right. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (citing *Regan v. Tax'n Without Representation*, 461 U.S. 540, 545 (1983)). And if Nebraska enacted such a law, parents who wanted their children to learn German—like those whose children learned German from Mr. Meyer 100 years ago—would not be asserting a "new federal constitutional right" to state subsidies for the teaching of German to their young children if they challenged it. *See* Pls.' Resp. at 36. Rather, they would be vindicating the longstanding parental rights recognized in *Meyer* in a new context.

So too here, Parents do not advocate for a new federal constitutional right to subsidies for a private school education. Parents have readily acknowledged that the Alaska legislature did not have to enact a program granting an educational allotment to families.

Parents' Resp. at 17. But in choosing to send their children to private schools, Parents are exercising their fundamental right to choose a private school education for their children. *See Pierce*, 268 U.S. 510. Alaska may not directly prohibit Parents from exercising that right. And the Alaska Constitution also may not bar the legislature from providing aid only to families who exercise that fundamental right—an outcome inevitable under Plaintiffs' interpretation of Article VII, Section 1.

And as Parents explained in their Response to Plaintiffs' Motion for Summary Judgment, their argument is well supported by recent precedent. Parents' Resp. at 15-17. In the past three years, the Supreme Court has twice held that a state may not condition the receipt of an educational benefit on the relinquishment of the beneficiary's right to freely exercise his religion. In both *Espinoza v. Montana Department of Revenue* and *Carson v. Makin* the Court held that the state need not create a benefit granting parents access to private educational options—in Montana, a tax credit scholarship program, and in Maine, a tuition benefit program. But once the states enacted those programs, they could not exclude families who—in an exercise of their First Amendment right to freely exercise their religion—chose a religious school for their children. *Espinoza*, 140 S. Ct. 2246 (2020); *Carson*, 142 S. Ct. 1987 (2022). The fundamental right in question is different here, but the outcome should not be. A state constitution cannot prohibit the legislature from providing aid to families simply because they exercise a fundamental federal constitutional right.

B. The Court should apply strict scrutiny, and Plaintiffs have not argued that they can meet that exacting standard.

If this Court agrees with Plaintiffs' interpretation of Article VII, Section 1, it must apply strict scrutiny to that provision for two reasons. First, under Equal Protection Clause precedent, an exclusion of a class of people based on the exercise of a fundamental right must satisfy strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Second, because Parents are asserting a "hybrid right" involving both their right to freely exercise their religion and their right to control the upbringing and education of their children, a provision burdening that right must satisfy strict scrutiny. *Thomas v. Anchorage*

Equal Rts. Comm'n, 102 P.3d 937, 940 (Alaska 2004). Under this standard, the prohibition advocated by Plaintiffs must be narrowly tailored to serve a compelling state interest. Total exclusion of families who choose private schools from the program cannot meet this standard, and Plaintiffs do not argue that it can.

Plaintiffs offer only one reason why their interpretation of the Alaska Constitution should not be subject to strict scrutiny—there is no "fundamental parental right requiring the state to subsidize private education." Pls.' Resp. at 36; *see also* Pls.' Resp. at 37 n.133 ("If there is no fundamental parental right to state-subsidized private education, then the 'hybrid' claim necessarily fails."). Again, Parents agree. There is, however, longstanding acknowledgment that a parent's right to "direct the upbringing and education of [their] children" includes the right to send those children to private school. *Pierce*, 268 U.S. at 535. Plaintiffs' broad interpretation of the Alaska Constitution lumps in with private institutions—on whom the state cannot bestow a "direct benefit"—individual Alaskans exercising their fundamental parental rights as articulated in *Pierce*. Under Plaintiffs' interpretation, the Alaska Constitution prohibits the state from granting those *individuals* a benefit if they will use it at a private school—even though they would have been free to use the benefit to purchase identical educational services from a public institution.

Plaintiffs do not argue that their interpretation can satisfy strict scrutiny. And it cannot. The state interest articulated by Plaintiffs—which they describe as "legitimate," not "compelling"—is its "interest in maintaining a system of public schools open to all students." Pls.' Resp. at 37-38. Even if that interest *is* compelling, the prohibition Plaintiffs' advance is not narrowly tailored. A ban on direct aid to private institutions themselves—the interpretation suggested by the plain text of the Alaska Constitution—is a far narrower means to achieve the asserted state interest than a blanket ban on direct aid to *individuals* who may or may not use that aid to buy goods or services from private institutions.

C. Discrimination against families choosing private schools also fails rational-basis review.

In Plaintiffs' view, the Alaska Constitution prohibits the state legislature from ever enacting an educational aid program that benefits families who choose private schools—

no matter how that program is designed. Such a restriction cannot satisfy even rational basis review. Even under that standard, a state may not single out a class of people for "special disability" by restricting the state legislature from providing them with benefits and protections available to others. Parents' Resp. at 22-23 (citing *Romer v. Evans*, 517 U.S. 620 (1996)). That is precisely what Plaintiffs' interpretation of Article VII, Section 1 would do here. It hamstrings the Alaska legislature in its pursuit of creative solutions to meet the unique educational needs of Alaskan children. It singles out for "special disability" families whose needs are best met by private education providers, forbidding the legislature from ever designing a program that directly benefits them.

Rather than respond to Parents' argument under *Romer*, Plaintiffs argue that Parents are trying to "have [their] cake and eat it too" because their use of the program involves dual enrollment in the public correspondence school and a private school. Pls.' Resp. at 38-39. But that is simply the nature of the program as designed by the legislature—families must first enroll in the public correspondence school, and then receive the allotment to use as they please. Along with dual enrollment in a public correspondence school and a private school, the program also permits dual enrollment in the public correspondence school and public universities—a use that would be constitutional even under Plaintiffs' theory. But under Plaintiffs' expansive reading of the Alaska Constitution, no educational benefit program—no matter how it was designed—could pass constitutional muster if it was granted directly to parents who may ultimately choose to spend it at private institutions. The unique practical design of the correspondence school program, involving in some cases dual enrollment in public and private schools, is irrelevant to the constitutional legitimacy of the prohibition advanced by Plaintiffs.

Nor does *Niehaus*, as Plaintiffs contend, indicate a different outcome. *See* Pls.' Resp. at 39. The *Niehaus* plaintiffs argued, among other things, that Arizona's Empowerment Scholarship Accounts (ESA) program was unconstitutional because participating parents had to agree not to enroll their children in public school. *Niehaus v. Huppenthal*, 310 P.3d 983, 989 (Ariz. Ct. App. 2013). But the program there was not like the program here, in which enrollment in the public correspondence school is a precondition to receipt of the

allotment benefit. Rather, the state's two educational options were mutually exclusive by design. When the court there stated that "the fact that [parents cannot enroll their children in public and private school] at the same time does not amount to waiver of their constitutional rights," *id.*, it was simply acknowledging the state's ability to ensure that families were not double dipping, so to speak. That is, that they were not enrolled full time in a traditional public school while receiving extra funds through the ESA program. A comparable requirement here would be one prohibiting students from enrolling both in a public correspondence school and full time in their traditional local public school. The state is permitted to offer as mutually exclusive options traditional public school and public correspondence school—with its attendant allotment benefit. What it may not do, however, is impose a constitutional bar on *ever* providing public benefits to parents who exercise their right to choose a private education.

CONCLUSION

For the above reasons, and the reasons already stated in Intervenors' Response in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, Parents ask this Court to deny Plaintiffs' Cross-Motion for Summary Judgment and instead grant summary judgment for Intervenors and Defendant. Alternatively, this Court should grant Defendant's Motion to Dismiss.

Dated this 9th day of August, 2023.

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CERTIFICATE OF SERVICE

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