Craig Richards (AK Bar No. 0205017)
LAW OFFICES OF CRAIG RICHARDS
810 N. Street, Ste. 100
Anchorage, Alaska 99501
(907) 306-9878
crichards@alaskaprofessionalservices.com

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

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

Plaintiffs,

v.

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' RESPONSE IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

ORAL HEARING REQUESTED

INTRODUCTION

The Alaska Constitution prohibits "direct aid" to private schools. But that provision does not forbid Alaska's Correspondence Study Program because it is a direct benefit for Alaskan parents, not schools. It empowers them to design their children's education, customizing it to meet each child's unique needs. The program accomplishes this individualized approach to education, in part, by awarding allotments to participating parents, which can be spent on services and materials purchased from an array of public

and private providers. Because allotted funds can only reach a private institution on the free and independent choice of the parent beneficiaries, the program does not constitute a "direct benefit" for private schools in violation of the Alaska Constitution. If, however, the Alaska Constitution *does* prohibit benefits like this one to families choosing private education, it impermissibly violates Intervenors' federal constitutional rights under the First and Fourteenth Amendments. This Court should therefore deny Plaintiffs' Cross-Motion for Summary Judgment and grant summary judgment in favor of Defendants, holding that the program is constitutional.

FACTUAL BACKGROUND

Alaska's Correspondence Study Program authorizes school districts or the Department of Education to grant "an annual student allotment to a parent or guardian of a student enrolled in the correspondence study program." AS 14.03.310(a). Families may use these allotments—which can be up to $4,500 in a school year per student—to pay for a student's "instructional expenses." *Id.*

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

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. Mot. to Intervene, 5. Without the program, Parents would be unable to send their students to these private schools, or would be able to do so only by incurring great financial hardship. *Id.* at 5–7.

On January 24, 2023, Plaintiffs filed this lawsuit challenging the program's constitutionality. Plaintiffs argue that the program violates Article VII, Section 1 of the Alaska Constitution, which prohibits the payment of public funds "for the direct benefit of any religious or other private educational institution." Compl. ¶¶ 56–72. On January 26, 2023, Parents moved to intervene as Defendants to defend their interest as beneficiaries of the program. This Court granted Parents' motion on February 10, 2023.

On March 8, 2023, Defendant moved to dismiss Plaintiffs' facial constitutional challenge, suggesting that only an as-applied challenge would be appropriate, and that such a challenge would require joinder of school districts as parties. Def.'s Mot. to Dismiss, 19. Shortly after, Parents filed a Statement of Non-Opposition. On April 28, 2023, Plaintiffs filed a response in opposition to Defendant's motion to dismiss and cross moved for summary judgment. Pls.' Opp. and Mot. for Summ. J.

LEGAL STANDARD

Summary judgment is proper when "the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *DeNardo v. Bax*, 147 P.3d 672, 676–77 (Alaska 2006). A court considering whether to grant a motion for summary judgment must draw "all reasonable inferences of fact from the proffered evidence . . . against the moving party and in favor of the non-moving party." *Id.* "Summary judgment, when appropriate, may be rendered against the moving party." Alaska R. Civ. P. 56.

ARGUMENT

I. The program is facially constitutional under the Alaska Constitution.

Article VII, Section 1 of the Alaska Constitution directs the legislature to "establish and maintain a system of public schools open to all children of the State." Alaska Const. art. VII, § 1. The constitution limits, to some degree, how the legislature may carry out this charge. While it permits funding for "public schools [and] other public educational institutions," it does not allow funding "for the direct benefit of any religious or other private educational institution." *Id.* But both the plain text of the provision and the words

of the framers who crafted the provision demonstrate that initiatives like the allotment program are permissible because they benefit *individuals*, not *institutions*.

A. Article VII, Section 1 should not be interpreted to prohibit "indirect benefits" to private schools because the framers of the Alaska Constitution rejected that phrase.

In their discussion of the minutes of the Alaska Constitutional Convention, Plaintiffs fail to address important evidence of what Article VII, Section 1 means when it prohibits spending public funds for the "direct benefit" of private schools. First, Delegate Armstrong, a member of the drafting Committee, offered helpful guidance about the definition of "direct." In his explanation of the provision, Delegate Armstrong said:

> In this third sentence we have used the word "direct." It was spelled out that the maintenance and operation or other features of direct help would be prohibited. **This was not intended and does not prohibit the contracting or giving of services to the individual child**, for that child benefits as his part of society.

2 Proceedings of the Alaska Constitutional Convention 1514 (Jan. 9, 1956) (emphasis added). Plaintiffs' interpretation would do just that. They read Article VII, section 1 as denying individual students the possibility of benefitting from a legislative grant of funds for educational services.

As Plaintiffs acknowledge, the convention minutes also reveal that the framers expressly rejected the insertion of the words "or indirect" into Article VII, section 1. After "carefully consider[ing]" whether to include both words, the drafting committee ultimately rejected the words "or indirect" out of concern of the breadth of that phrase. Delegate Awes, another member of the drafting committee, explained that the committee "felt that the words 'or indirect' would, as Mr. Rivers said, reach out into infinity practically, and probably it is not even known what the results of what might be." *Id.* at 1517. Delegate Buckalew later voiced a similar concern:

> If the word 'indirect' is in there, it is going to eliminate almost any kind of aid. It will, for example, eliminate the free lunch, eliminate bus transportation, eliminate, for example . . . the state giving any support to the child because that would be indirect support to the institution. I think when the members vote on it, I think they ought to understand the word 'indirect'

> cuts out everything, just eliminates all kinds of support, and I don't think there is any question about it.

Id. at 1524. The statements of the framers at the Constitutional Convention confirm the important distinction between direct government benefits to private schools, which are prohibited, and indirect benefits, which are permissible. The statements of the delegates confirm that benefits flowing to individual students—like the program here—are at most indirect benefits to private schools.

Tellingly, the logic of Plaintiffs' arguments would threaten other programs in which the state expends public funds that may indirectly aid private schools. For example, an Alaska school district may "place" a student with disabilities at a private school after determining that the school will better suit the student's needs than a public school. *See* 4 AAC 52.140(f) (incorporating 34 C.F.R. § 300.325). Alaska also provides public transportation for private school students who travel comparable distances and similar routes to public school students. AS 14.09.020. These are precisely the kinds of services provided "to the individual child" that the constitutional framers meant to preserve with their exclusion of the word "indirect." But Plaintiffs' expansive reading of Article VII, section 1 would invalidate these programs as well. This Court should reject that interpretation, and hold that the correspondence study program is constitutional.

B. The statute's text does not violate Article VII, Section 1.

"Statutory interpretation in Alaska begins with the plain meaning of the statute's text." *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012). Alaska courts may also consider legislative history and purpose when interpreting a statute, but under the "sliding-scale approach," a party asserting legislative purpose contrary to a "clear and unambiguous" statute "bears a correspondingly heavy burden of demonstrating contrary legislative intent." *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019). 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. It therefore does not violate Alaska's no-aid provision.

The statute governing Alaska's correspondence study program authorizes school districts or the Department of Education to "provide an annual student allotment *to a parent or guardian* of a student enrolled in the correspondence study program." AS 14.03.310 (emphasis added). Beneficiaries may use this allotment to "purchase nonsectarian services and materials from a public, private, or religious organization." *Id.* Taken together, these provisions make clear that (1) the allotment is granted to parents, not schools, and, (2) parents may use those allotments to buy materials and services from public or private organizations. Under the statute's plain language, *parents*, not the government, decide where to spend the money. That is direct aid to families, not direct aid to private schools. The Alaska Constitution does not prohibit direct aid to parents. State and federal cases across the country treat true parental choice, as Alaska parents have here, as the key to a constitutional educational choice program. *See, e.g.*, *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Because the ultimate use of allotments is wholly dependent on the decisions of families, who may choose to buy services only from public organization, a plain reading of the statute cannot be construed as authorizing payment of public funds "for the direct benefit of any religious or other private educational institution." Alaska Const. art. VII, § 1.

Even if, however, this court finds the statutory meaning ambiguous, Alaska Supreme Court precedent requires the court to adopt this reading to preserve the statute. Where "ambiguous text is susceptible to more than one reasonable interpretation, of which only one is constitutional, the doctrine of constitutional avoidance directs [courts] to adopt the interpretation that saves the statute." *Planned Parenthood of the Great Nw.*, 436 P.3d at 992. If this court finds the statutory language ambiguous about whether the allotment is a benefit for families or for schools, precedent requires the court to interpret it as creating a benefit for families under the doctrine of constitutional avoidance. *See, e.g., id.* at 992.

The correspondence study program is constitutional based on the statute's plain language. Plaintiffs may not, therefore, attempt to use legislative history to read meaning into the statute that is absent on its face. Alaska courts look to a statute's purpose and legislative history to "give effect to the legislature's intent, with due regard for the meaning

the statutory language conveys to others." *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003). Rather than examine the legislature's intent about the operation of the statute and the nature of the benefit it creates, Plaintiffs focus on a particular legislator's perceived view of the statute's constitutionality. *See* Pls.' Opp. and Mot. for Summ. J., 22. Plaintiffs argue that then-Senator Dunleavy's statement at a Senate Education Committee meeting that the bill that became AS 14.03.300-.310 would not be permissible "currently under constitutional language" is evidence of an "unconstitutional purpose." *Id.* at 12, 21. But 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*. Plaintiffs cite no legislative history contradicting the text's plain language describing the allotment as a benefit for parents, and not for private schools. Nor did Plaintiffs discover any evidence that the legislature intended to encourage families to spend their allotments with private providers. To the extent a legislator had questions about whether courts would find a constitutional conflict within a statute,[1] those concerns are not relevant without evidence that the statute had an intended purpose that was in fact unconstitutional.

Plaintiffs also find problematic the provision of the statute prohibiting the Department of Education from placing "any limitations on the purchase of services and materials outside those contained in AS 14.03.300–.310." *See id.* at 23. But this restriction underscores the statute's constitutionality. Not only does the statute place the sole responsibility for decisions on how to spend allotments with beneficiary families, but it prohibits the Department from meddling in that decision. This adds another layer of constitutional security, ensuring that the state is never acting to provide the benefit "directly" to any particular organization or category of organizations.

[1] Plaintiffs also acknowledge that then-Senator Dunleavy was apparently uncertain about how courts would rule on the statute. After inquiring whether Senator Gardner's office had determined that the bill was "not constitutional" or "questionable," Senator Gardner responded, "No one knows for sure unless there is a lawsuit." Pls.' Opp. and Mot. for Summ. J., 12 n.35.

II. The program is constitutional according to the four factors set out in *Sheldon Jackson College v. State.*

The correspondence study program passes constitutional muster under the test established by the Alaska Supreme Court in *Sheldon Jackson College v. State*. There, the Alaska Supreme Court struck down as unconstitutional a grant program awarding students at private colleges partial tuition payment. 599 P.2d 127, 128 (Alaska 1979). Determining that the program violated Alaska's no-aid provision, the Court set out a four-factor test to determine when a benefit to a private educational institution is impermissibly "direct" for purposes of Article VII, section 1. Those factors, along with case law from another state appellate court considering a nearly identical issue, weigh in favor of upholding the correspondence study program as it is currently constituted.

A. The program satisfies the *Sheldon Jackson* test.

The program at issue in *Sheldon Jackson* created grants for Alaska residents attending private colleges in Alaska. *Id.* at 128. Those grants were designed to cover the difference between the private college's tuition and the tuition charged by a public college in the same area. *Id.* Unlike the families enrolled in the correspondence study program, beneficiaries were not authorized to use their grants under the program for any purpose other than tuition at their private colleges. *See id.* at 131.

The Court in *Sheldon Jackson* set out four factors to evaluate whether a benefit constitutes a "direct benefit" to a "private educational institution" in violation of the Alaska Constitution. The Court looked to (1) "the breadth of the class to which statutory benefits are directed," (2) "the nature of the use to which the public funds are to be put," (3) "the magnitude of the benefit conferred," and (4) the form of the benefit because "the superficial form of a benefit will not suffice to define its substantive character." *Id.* at 130–31. Application of these factors to the correspondence study program confirms its constitutionality.

First, the breadth of the beneficiary class here is extremely wide. Unlike the program in *Sheldon Jackson*, which was available only to students at Alaska's private colleges, *see id.* at 128, any school-age Alaskan is eligible to enroll in the correspondence study program.

And these enrollees have a wide array of options of how to design their educational experience under the program. They can buy educational services through public institutions, private institutions, or a combination of the two.

Plaintiffs mistakenly analyze the first *Sheldon Jackson* factor by looking not to the breadth of the beneficiary class, but what they perceive to be the effect of the program, stating that it "subsidizes private schools by incentivizing parents to enroll their children in a public correspondence program and then receive reimbursements for private school classes." Pls.' Opp. and Mot. for Summ. J., 31.[2] Plaintiffs fail to acknowledge that families are eligible for allotments regardless of their educational choices. This is precisely the kind of state "neutrality" at the heart of the first *Sheldon Jackson* factor. *Sheldon Jackson*, 599 P.2d at 130. Accordingly, the first *Sheldon Jackson* factor points to the program's constitutionality.

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

[2] In addition to being an inaccurate statement of the first factor, Plaintiffs are simply wrong. The state does nothing to influence families' choices under the program, and therefore cannot be said to be "incentivizing parents" to choose private options.

Third, looking to the "magnitude of the benefit conferred," Plaintiffs are wrong to analyze this factor by comparing the dollar value of the allotment to the dollar value of the tuition grant in *Sheldon Jackson*. Pls.' Opp. and Mot. for Summ. J., 32. That is because the benefit here is not "conferred" on private schools at all. It is conferred on the beneficiary families. It is only through the free choice of those families that some of that money may be used to pay for services from private schools. For that reason, the third *Sheldon Jackson* factor does not suggest that the program violates Article VII, section 1.

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

In *Mitchell v. Helms*, the Court explained that its departure from its prior line of Establishment Clause cases was based on "the principle of private choice."[3] *Id.* at 816. The

[3] The U.S. Supreme Court has considered the constitutionality, under the Establishment Clause, of educational choice or similar programs that provided aid to students four times in the past forty years. Each time, the Court has made clear that, "where a government aid program is neutral with respect to religion" and "provides assistance directly to a broad class of citizens" who independently direct the aid, that program "is not readily subject to challenge." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). The Supreme Court has reiterated this holding repeatedly over the last couple of years. *See, e.g., Carson v. Makin*,

Court reasoned that "[i]f aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally and figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Id.* Similarly, where—as here—government funds are provided directly to families who may direct those funds as they please, the Alaska government cannot be using public funds "for the direct benefit of any religious or other private educational institution." Alaska Const. art. VII, § 1. Abandoning the third *Sheldon Jackson* factor also brings the standard in line with the text of the Alaska Constitution. Because, as discussed, the framers of the Alaska Constitution directly rejected the inclusion of "indirect" in Article VII, section 1, courts should not read that word back into the clause, regardless of a challenged benefit's "magnitude." *See Sheldon Jackson*, 599 P.2d at 130. 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.

Looking to the final factor, the form of the benefit conferred by the program is not a "superficial" difference from direct payments from the state to private schools. *See id.* at 131. Plaintiffs incorrectly describe the program as "providing student allotments to parents . . . for the parents to then pay for private school classes." Pls.' Opp. and Mot. for Summ. J., 33. According to Plaintiffs, the program thus runs afoul of the *Sheldon Jackson* Court's warning that "merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies." *Sheldon Jackson*, 599 P.2d at 130. But parents need not—and often do not—use the allotment to "pay for private school classes," or for any materials or services from private institutions. Pls.' Opp. and Mot. for Summ. J., 33. The legislature has not, then, "merely channel[ed] the funds through an intermediary."

---

142 S. Ct. 1987, 1997 (2022) (noting that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (explaining that "the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools.").

Sheldon Jackson, 599 P.2d at 130. In *Sheldon Jackson*, the legislature knew—and intended—upon enactment of the tuition grant program that every dollar awarded would flow to private colleges. That money could pass through beneficiaries, but those beneficiaries had no capacity to divert it to another purpose. Here, by contrast, the legislature has not channeled the funds at all—it does not even know where they will end up. That decision rests with the families in the program. Application of the four factors laid out in *Sheldon Jackson* confirms that the program does not violate Article VII, section 1.

B. Case law in other states supports a constitutional distinction between the challenged program and the one struck down in *Sheldon Jackson*.

There are few cases out of Alaska courts interpreting the rule in *Sheldon Jackson*, but there is helpful instruction from another state appellate court. The Arizona Court of Appeals considered a very similar challenge to the one before this Court. In 2013, that court considered a state constitutional challenge to the Arizona Empowerment Scholarship Accounts ("ESA") program, which made educational savings accounts available to Arizona students with disabilities. *Niehaus v. Huppenthal*. 310 P.3d 983 (Ariz. Ct. App. 2013). Like the program beneficiaries here, the families of those students were then permitted to choose the best use of the funds allotted to them through the ESA program. Among other claims, the plaintiffs in that case argued that the ESA program violated Article 9, Section 10 of the Arizona Constitution, which states that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." Ariz. Const. art. IX, § 10 ("no-aid clause"). Like plaintiffs here, the Arizona plaintiffs argued that—because families could choose to use ESA funds at private schools—the program was unconstitutional under the no-aid clause.

The Arizona plaintiffs' argument relied heavily on a case previously decided by the Arizona Supreme Court, *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009). *See Niehaus*, 310 P.3d at 983. In *Cain*, the Arizona Supreme Court invalidated a pair of private school voucher programs as unconstitutional under the no-aid clause. The court held that the program was an impermissible "direct appropriation of public funds" to private schools. *Cain*, 202 P.3d at 1184. It made no difference, the court wrote, that "[t]he checks or warrants first pass[ed]

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

The *Niehaus* court, however, distinguished *Cain*. Unlike the voucher programs struck down in *Cain*, the ESA program was not exclusively available for use for tuition at private schools. On the contrary, parents were permitted to "customize an education that meets their child's unique educational needs." *Niehaus*, 310 P.3d at 987. They could do this by paying tuition at a private school, but they could also choose from a wide variety of other educational services. *See id.* Ultimately, the families had "discretion as to how to spend the ESA funds without having to spend any of the aid at private or sectarian schools." *Id.* at 988. Because of this discretion, and because "no funds in the ESA [were] earmarked for private schools," the Arizona Supreme Court held that the ESA program was constitutional. *Id.* at 989. In so doing, the court "reject[ed] Niehaus's notion that if any state funds end up at private schools the program is automatically unconstitutional." *Id.* at 988.

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

III. Plaintiffs' claim fails because prohibiting parents from using a general educational benefit at a private school violates the federal constitutional right to direct the upbringing of one's child.

Plaintiffs' claim fails because it would apply Alaska's no-aid provision in a manner that this court is "obligated by the Federal Constitution to reject." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020). 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. And that is true *even if* the Alaska Constitution *requires* private-school parents to be excluded (as previously explained, the state Constitution does not, in fact, require this). The U.S. Supreme Court's two most recent educational-choice cases stand for the proposition that a state may not burden or discriminate against federal constitutional rights—even if it arguably has an interest in doing so. In short, in a conflict between the Alaska and U.S. constitutions, the latter prevails.

A. Alaska may not impose a bar on the parents of nonpublic school students receiving a public benefit.

Plaintiffs have asked this court to strike down the allotment program on the grounds that it violates the state constitution's bar on direct aid to private institutions. Pls.' Opp. and Mot. for Summ. J., 3–4. In effect, Plaintiffs argue that the constitution's bar on providing direct aid to *institutions* extends to the indirect aid that comes from *parents* who make an independent choice to spend their allotment money at a private school. *Id.* 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. *Id.* at 25–27; Compl. ¶ 70.

If Plaintiffs made this argument about what the legislature *should* prioritize, it would not pose a constitutional problem. After all, there is nothing that requires Alaska to enact the allotment program or to provide any aid to nonpublic school students. But when Plaintiffs implicitly argue that Alaska may *never* provide aid to a parent exercising her right to provide her child with a private education, it clashes with numerous U.S. Supreme Court holdings "that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Tax'n Without Representation*, 461 U.S. 540, 545 (1983)). This

basic rule of constitutional law has been applied in a variety of contexts, from the right to travel to the right to freely exercise one's religion.[4]

There is no reason to doubt that the rule against conditioning benefits also applies to the "fundamental" right of parents to "direct the education and upbringing" of their children. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). As "perhaps the oldest of the fundamental liberty interests recognized by" the Court, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion), it is akin "to the specific freedoms protected by the Bill of Rights." *Glucksberg*, 521 U.S. at 720. Thus, like other fundamental rights, the right to send one's children to a private school is entitled to "heightened protection against government interference." *Id.*

Swap out religious schools for private schools, and the arguments that Plaintiffs advance are identical to those that were rejected by the U.S. Supreme Court in two recent cases. First, in *Espinoza v. Montana Department of Revenue*, the Court held that a state cannot condition an educational benefit on the recipient not exercising her free exercise right to use the benefit at a religious school. 140 S. Ct. 2246, 2262 (2020). In that case, Montana had established a scholarship program that enabled recipients to direct aid to schools, including religious ones. Invoking the state constitution's no-aid provision, the Montana Supreme Court struck down the program because it "provided 'no mechanism' for preventing aid from flowing to religious schools" and thus could not "be construed as consistent with the no-aid provision." *Id.* at 2253.

---

[4] *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 465 (2017) (holding that the state may not "put [a church] to the choice between being a church and receiving a government benefit."); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 251 (1974) (holding that the state may not condition publicly funded medical care on the recipient's right to travel.); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that the state may not condition an unemployment benefit on a person working on the Sabbath in violation of her beliefs.); *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that the state cannot condition a tax exemption for veterans on the beneficiary swearing an oath to not overthrow the government by unlawful means).

In reversing, the U.S. Supreme Court held that the state court "was obligated by the Federal Constitution to reject the invitation" to strike down the program based on the no-aid provision. *Id.* at 2262. When it instead accepted that invitation, Montana "penalize[d]" the free exercise rights of families by "cutting [them] off from otherwise available benefits if they choose a religious private school." *Id.* at 2261. Since conditioning aid in this manner "inevitably deters or discourages the exercise of First Amendment rights," Montana's application of the no-aid provision failed strict scrutiny. *Id.* at 2256. Although the state constitution arguably commanded the decision, the supreme court had a duty to "'disregard[]' the no-aid provision and decide[] this case 'conformably to the [C]onstitution' of the United States." *Id.* at 2262.

Second, in *Carson v. Makin*, the Court held that Maine could not condition an educational benefit on the recipient not exercising her free exercise right to use the benefit for a religious education. 142 S. Ct. 1987, 1997 (2022). In that case, Maine operated a tuition assistance program for parents who live in school districts without secondary schools. Under the program, parents could choose a school—public or private—so long as it was not "sectarian." Maine had justified the exclusion of parents seeking a "sectarian" education, in part, on the state's interest in "stricter separation of church and state than the Federal Constitution requires." *Id.* at 1997–98.

As in *Espinoza*, the Court rejected the state's attempt to justify the exclusion of certain people exercising a constitutional right from a public benefit based on a state's purported interest. A state's "interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise." *Id.* at 1998 (internal quotation marks omitted). The exclusion thus failed strict scrutiny because a "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* When the state "condition[s] the availability of benefits" based solely on religion, the Court held, it "effectively penalizes the free exercise" of religion." *Id.* at 1997.

The same logic from *Espinoza* and *Carson* applies here. In each instance, the state created a program that provided financial benefits for parents to exercise their fundamental constitutional right to direct the upbringing of their children. In *Espinoza* and *Carson*, the state did so through scholarships and tuition assistance payments that parents could use at private schools; here, the state does so through allotments that parents may spend on a variety of educational services, including those provided by private institutions. Also in each circumstance, the availability of a benefit was conditioned—or would be conditioned—on the non-exercise of a fundamental constitutional right. In *Espinoza* and *Carson*, the availability of an otherwise generally available benefit was conditioned on parents not using it for *religious* education; here, Plaintiffs ask the state to condition the benefit on parents not using it for *private* education. Pls.' Opp. and Mot. for Summ. J., 25–27; Compl. ¶ 70.

Although 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*, the exclusion of "some members of the community from an otherwise generally available public benefit because of their" exercise of a right is not. *Carson*, 142 S. Ct. at 1998. Since conditioning aid in this way "penalizes" parental rights by "cutting families off from otherwise available benefits" and "inevitably deters or discourages the exercise of" those rights, it fails strict scrutiny. *Espinoza*, 140 S. Ct. at 2261, 2256.

In sum, Alaska was not required to enact the correspondence study program. Indeed, its legislature may have chosen not to create such a program for any number of reasons. But what Alaska *cannot* do is follow the course advocated by Plaintiffs and impose a constitutional ban on public aid to parents exercising their right to provide their children with a private education. Plaintiffs have asked this court "to apply a state law no-aid provision to exclude" parents who exercise their right to send their children to private school programs. *Id.* at 2262. It is "obligated by the Federal Constitution to reject the invitation." *Id.*

IV. Plaintiffs' claim fails under the federal Equal Protection Clause because the state does not have an interest in making it more difficult for one group of people to obtain a public benefit.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). Because Plaintiffs' requested remedy would impose a structural barrier to a discrete class of people obtaining an otherwise generally available public benefit, it violates equal protection in two ways. First, a state does not have a compelling interest in using a constitutional provision barring aid to institutions to prohibit aid to a group of individuals defined by their exercise of a constitutional right. Second, a state does not have a rational basis to use a constitutional provision to make it more difficult for one class of people to obtain benefits from the government than all others.

A. Alaska's interest in not aiding institutions does not justify a prohibition on aiding individuals.

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). To determine whether these classifications are permissible, courts apply three levels of scrutiny. Laws that disadvantage a suspect class or infringe on a "fundamental" right must be "precisely tailored to serve a compelling governmental interest" to satisfy strict scrutiny. *Plyler*, 457 U.S. at 217. To merit intermediate scrutiny, laws that target things like gender must serve "important governmental objectives" and "be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). And if a law warrants neither strict nor immediate scrutiny, it will be upheld "so long as it bears a rational relationship to some legitimate end." *Romer*, 517 U.S. at 631.

As explained above, the right of parents "direct the education and upbringing" of their children is "fundamental." *Glucksberg*, 521 U.S. at 720. Thus, the only way a law burdening this right will satisfy equal protection is if it is "suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440

(1985). With this lawsuit, Plaintiffs seek to impose a rule of law that prohibits the provision of public funds to parents for their children's private education. Since Plaintiffs' relief would not only burden the right of a class of parents to direct the upbringing of their child—but would impose a structural bar to them *ever* obtaining aid while exercising that right—it fails strict scrutiny.

The U.S. Supreme Court has repeatedly struck down laws that are far less restrictive than the constitutional bar that Plaintiffs seek to impose here. For example, the Court has rejected efforts by states to impose residency requirements for the receipt of public benefits. In *Shapiro v. Thompson*, the Court held it violated the right to interstate travel for a state to deny welfare benefits to otherwise eligible applicants solely because they recently moved to the state. 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). The Court came to a similar conclusion in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261–63 (1974), in which it held that Arizona's interest in its "fiscal integrity" and desire to restrict migration could not justify a durational residency requirement for would-be beneficiaries receiving certain kinds of public medical care. Likewise, in *Zobel v. Williams*, the Court struck down a dividend program enacted by Alaska that tied benefit amounts to the length of a citizen's residence. 457 U.S. 55 (1982).

The Court applied the same logic in *Zablocki v. Redhail*, 434 U.S. 374 (1978), in which it struck down a Wisconsin law that barred people from getting married unless they paid outstanding child support. "When a statutory classification significantly interferes with the exercise of a fundamental right," the Court held, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.* at 388. Although Wisconsin may have had an interest in ensuring that child support obligations were fulfilled, its interest did not justify restricting a person's right to get married.

To be sure, the restriction that Plaintiffs seek to impose is not the same as those in the above cases. It is worse. In *Shapiro* and *Memorial Hospital*, the states impermissibly restricted a person's right to travel—but only for a limited time. And in *Zablocki*, the state

unlawfully restricted a person's right to marry—but only until he honored his child support obligations.

The restriction Plaintiffs seek to impose, by contrast, has no comparable limiting principle. Unlike the above cases, an entire class of people would be *permanently* barred from an otherwise generally available public benefit due to their exercise of a right, rather than being temporarily ineligible pending a waiting period or addressing an outstanding legal obligation. Indeed, the *only* way the class would be eligible for a benefit is if (1) Alaska rescinded a constitutional amendment restricting the legislature's power to bestow a benefit on the class[5] and (2) the legislature then enacted a law bestowing the benefit. Absent both of those events happening, an entire class of parents would be ineligible to receive a benefit that they could use to exercise a constitutional right.[6]

In sum, Alaska arguably has an interest in barring direct aid to private *institutions* due to the constitution's no-aid provision. But if, in acting pursuant to that state constitutional interest, Alaska categorically bars the legislature from providing aid to *individuals* exercising a constitutional right, then its actions fail strict scrutiny under the federal Constitution because they are not narrowly tailored to achieve a compelling state interest. *Zablocki*, 434 U.S. at 388. Again, Alaska does not have to create a program like this one. But once it does, courts "must not give effect to state laws that conflict with federal law[]," even if a state constitution commands them to do so. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015).

---

[5] Again, adopting for purposes of argument Plaintiffs' reading. On its proper reading, the provision does not so restrict the legislature.

[6] The state's argument fares no better. The state argues for a line-drawing exercise in which certain expenses from the allotment program—say, classes at a private university—would likely be constitutional whereas other expenses—like tuition at a private school—would likely be unconstitutional. This argument has the same defects as Plaintiffs', but on a smaller scale. Whereas Plaintiffs would bar *all* private school families from receiving public benefits, the state would only bar some private school families. *See* Def.'s Mot. to Dismiss, 13 (arguing that private school tuition is unconstitutional, but some private school classes are not). Whether under strict scrutiny or rational basis, the state's argument fails equal protection.

B. Alaska does not have a rational basis to disqualify a class of citizens as ineligible for a type of public benefits.

As demonstrated above, Plaintiffs' requested relief fails strict scrutiny because parents have a "fundamental" right under the Fourteenth Amendment that would be unconstitutionally burdened by Alaska barring them from a benefit due to their exercise of a right. But Plaintiffs' argument fails for other reasons as well. While a law's classifications that do not burden a fundamental right will be upheld unless they "lack[] a rational relationship to legitimate state interests," the one here fails to meet even that more permissive standard. *Romer*, 517 U.S. at 632.

Plaintiffs have effectively asked this court to interpret Alaska's bar on using public funds for the "direct benefit" of private educational institutions as a structural barrier to the legislature's power to provide otherwise generally available public benefits to a class of people. Pls.' Opp. and Mot. for Summ. J., 3–4. But just as an overly broad restriction on an *individual's* right will fail equal protection, so too will a restriction on the *legislature's* power to provide a benefit to a person solely because she exercises a right. While Alaska does not have to enact *any* benefit program, if it does, the federal Constitution prohibits it from drawing distinctions between groups based solely on their exercise of a constitutional right. Plaintiffs' proposed reading of the Alaska Constitution does just that, drawing a distinction between two categories of parents: (1) those who use the benefit at public schools; and (2) those who use the benefit at nonpublic schools. That distinction violates the Fourteenth Amendment's equal-protection clause because it turns on, and therefore burdens, the exercise of a fundamental federal right—that to direct the upbringing of your children by sending them to private school. *See* Section III.A, *supra*.

The U.S. Supreme Court's decision in *Romer v. Evans* is directly on point. 517 U.S. 620 (1996). In that case, the Court struck down an amendment to the Colorado Constitution, on equal protection grounds, that barred state and local governments from enacting anti-discrimination measures to protect gays and lesbians. The Court began by explaining that, absent a law burdening a fundamental right or targeting a suspect class, most laws satisfy equal protection even though they "classif[y] for one purpose or another."

517 U.S. at 631. Thus, so long as a law's classification bears "a rational relation to some legitimate end," it is constitutional. *Id.*

Yet, even under the Court's more permissive rational basis review, the amendment in *Romer* was unconstitutional. It imposed a "special disability" on a class of people by restricting the legislature's power to provide them—and them alone—with benefits and protections enjoyed by everyone else. *Id.* For that reason, the amendment not only failed rational basis, but its "disqualification of a class of persons from the right to seek specific protection from the law [was] unprecedented" in American law. *Id.* at 633. As the Court put it: "It is not within our constitutional tradition to enact laws . . . declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." *Id.* By singling out one group of people as beyond the power of the legislature to benefit, Colorado had engaged in "a denial of equal protection of the laws in the most literal sense." *Id.*

The relief that Plaintiffs seek is no different from what the Court condemned in *Romer*. In each case, a party was seeking to use a state constitutional amendment to restrict a legislature's ability to benefit a discrete group of people. In *Romer*, the state wanted to straitjacket the legislature's power to protect gays and lesbians from discrimination; here, Plaintiffs want to curb the legislature's ability to provide certain parents with public benefits. The object of the discrimination in each case is different, but in both instances it is unconstitutional.

Again, there is nothing that required Alaska to enact an aid program like the present one. Indeed, there are any number of reasons it may not want to do so—limited resources, different priorities, preferred education policies. But the state cannot be structurally barred from providing a particular group of people—particularly a group of people defined by their exercise of a constitutional right—with a benefit. This would be the natural consequence of Plaintiffs' broad reading of Article VII, section 1. Such exclusion based on the exercise of a constitutional right is not only virtually "unprecedented"— it is a violation of equal protection. *Romer*, 517 U.S. at 633.

V. Plaintiffs' claim fails because barring the use of the allotment for private education impermissibly burdens Parents' "hybrid" rights.

Plaintiffs have asked this court to strike down the student allotment program on the grounds that it unconstitutionally provides direct benefits to private institutions. Pls.' Opp. and Mot. for Summ. J., 4. As explained above, if this court were to construe Alaska's no-aid provision to bar the parents of *all* nonpublic students from obtaining otherwise generally available aid from the government, then it would run headfirst into the U.S. Supreme Court's jurisprudence on parental rights under the Fourteenth Amendment. But even as the rights of all parents of nonpublic school students would be affected by such a ruling, parents who send their children to religious schools would be uniquely injured because they would suffer an injury to their parental rights *and* their Free Exercise rights. Thus, even if this court rejects the argument that a ruling in favor of Plaintiffs would violate the rights of countless parents ensured by the Fourteenth Amendment, it should credit the argument that it would violate the "hybrid" rights of religious parents also guaranteed by the federal Constitution.

A hybrid right—as defined by *Employment Division v. Smith*, 494 U.S. 872 (1990)—involves the right to free exercise connected with some communicative activity or parental right, including one invoking "the Free Exercise Clause in conjunction with" the right of parents "to direct the education of their children." *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). By way of example, the U.S. Supreme Court cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972)—in which the Court invalidated "compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school"—as a case involving hybrid rights. *Smith*, 494 U.S. at 881.

Both the U.S. and Alaska Supreme Court apply strict scrutiny to hybrid rights.[7] The Alaska Supreme Court has stated that it "require[s] proof of a compelling state interest in

[7] *See Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay) ("[U]nder th[e] Court's precedents, even neutral and generally applicable laws are subject to strict scrutiny where . . . a plaintiff presents a 'hybrid' claim," including "a claim involving the violation of the right to free

'a hybrid situation' where the facts indicated a possible violation of the Free Exercise Clause and some other constitutionally protected right." *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 940 (Alaska 2004).

Those facts are plainly present here. Plaintiffs have requested that this court strike down a program disbursing aid to parents, which they can use at private schools, to comply with the state's bar on providing aid to private institutions. Although facially neutral, this prohibition would fall unevenly on parents like Andrea Moceri and Theresa Brooks, whose hybrid rights—here, the right to direct the upbringing of their children and the right to freely exercise their religion—would be infringed by a bar on them receiving aid for a religious private education. *See* Mot. to Intervene, Moceri Aff., ¶ 5, Brooks Aff., ¶ 6 (explaining their decisions to provide their children with a religious education).

Alaska may have a "compelling state interest" in prohibiting aid to private institutions, but where that interest implicates a hybrid right, strict scrutiny demands that any prohibition be narrowly tailored. Plaintiffs' requested relief fails this standard twice over: first, by turning a prohibition on institutional aid into one on individual aid; second, through a facially neutral prohibition that would nonetheless fall unevenly on parents who "direct 'the religious upbringing' of their children . . . by sending [them] to religious schools." *Espinoza*, 140 S. Ct. at 2261 (citing *Yoder*, 406 U.S. at 213–14 and *Pierce*, 268 U.S. at 533–34).

In sum, Plaintiffs have argued for a rule of law that would put the Alaska Constitution on a collision course with the federal Constitution and the hybrid rights it guarantees. Courts are bound by the Supremacy Clause to "not give effect to state laws that conflict with federal law[]." *Armstrong*, 575 U.S. at 324. This includes "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Plaintiffs' application of Alaska's no-aid provision would violate the hybrid rights of

---

exercise *and* . . . the right of parents 'to direct the education of their children.'" (quoting *Smith*, 494 U.S. at 881)).

numerous parents, including two parents before this court. Because the federal Constitution does not permit Plaintiffs to attain the relief they seek, their argument fails.

CONCLUSION

The allotment component of the correspondence study program does not violate the Alaska Constitution. Parents therefore respectfully request that this Court deny Plaintiffs' Cross-Motion for Summary Judgment and, for the reasons stated above, instead grant summary judgment in favor of Intervenors and Defendant. Alternatively, this Court should grant Defendant's Motion to Dismiss.[8]

Dated this 2nd day of June, 2023.

LAW OFFICES OF CRAIG RICHARDS
Counsel for Intervenors

By: */s/ Craig Richards*
Craig Richards (AK Bar No. 0205017)

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

Jeff Rowes* (TX Bar No. 24104956)
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
Tel: 512-480-5936
jrowes@ij.org

*Admitted *pro hac vice*

Attorneys for Intervenors

[8] For the reasons stated in Parents' Statement of Non-Opposition to that motion, and for the reasons explained above, the any dismissal should not be limited to the narrow grounds argued in Defendant's motion to dismiss.