

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE )  
COUNCIL, on behalf of THE ALASKA )  
STATE LEGISLATURE , )

Plaintiff, )

v. )

HONORABLE MICHAEL J. )  
DUNLEAVY, in his official capacity as )  
Governor for the State of Alaska, KELLY )  
TSHIBAKA, in her official capacity as )  
Commissioner of Administration for the )  
State of Alaska, and MICHAEL )  
JOHNSON, in his official capacity as )  
Commissioner of Education and Early )  
Development for the State of Alaska, )

Defendants. )

Filed in the Trial Courts  
STATE OF ALASKA, FIRST DISTRICT  
AT JUNEAU

SEP 23 2019

By AS Deputy

Case No. 1JU-19-00753 CI

STATE'S OPPOSITION TO THE COALITION'S MOTION TO  
INTERVENE

Governor Dunleavy, Commissioner Tshibaka, and Commissioner Johnson

(collectively, the Governor) oppose the motion to intervene from Coalition for Education Equity, Inc. (the Coalition). This case raises a narrow legal issue: whether the Legislature in 2018 constitutionally appropriated future revenues to education for expenditure in fiscal year 2020. The Coalition's motion fails to demonstrate that it is entitled to intervene as of right to address this issue or that the court should grant permissive intervention.

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

**The Coalition does not meet the test for intervention as a matter of right.**

To determine whether a party is entitled to intervene as of right under Alaska Civil Rule 24(a) the courts apply a four-part test which requires: (1) the motion must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) the applicant must show that this interest may be impaired as a consequence of the action; *and* (4) the applicant must show that the interest is not adequately represented by an existing party.<sup>1</sup> “[A]ll four requirements must be met in order for a party to be entitled to intervene as a matter of right.”<sup>2</sup>

The Coalition does not qualify for intervention as of right because it did not timely file its motion for intervention and its interest in the issue before the court—the validity of the 2018 forward appropriations of education funds—is fully represented by the Legislative Council.

**A. The Coalition has not filed timely in light of the expedited nature of the case.**

Whether a party has moved to intervene in a timely manner depends on the facts of the case. The Alaska Supreme Court has adopted a four-part analysis to determine whether a motion to intervene meets Civil Rule 24’s timeliness standard, under which courts must consider:

- (1) the length of time the applicant knew or reasonably should have known that its interest was imperilled before it

---

<sup>1</sup> *Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29, 33 (Alaska 2007) (citing *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 911 (Alaska 2000)) (emphasis added).

<sup>2</sup> *Harvey v. Cook*, 172 P.3d 794, 799 (Alaska 2007)

moved to intervene; (2) the foreseeable prejudice to existing parties if intervention is granted; (3) the foreseeable prejudice to the applicant if intervention is denied; and (4) idiocratic circumstances which, fairly viewed, militate for or against intervention.<sup>3</sup>

Here, several of these factors but particularly the highly publicized nature of the legal dispute and the need for especially expedited briefing and decision-making render the Coalition's delay fatal to its intervention attempt. With respect to the first factor, the need for a lawsuit to resolve the education funding issue for 2020 has been clear for months, with the legislature authorizing the Legislative Council to proceed with the suit back in May.<sup>4</sup> The Governor signaled the administration's interpretation of the legality of the 2018 appropriations even earlier through the issuance of an attorney general opinion on May 8th.<sup>5</sup> As publicly anticipated, the Legislative Council filed the lawsuit on July 16, 2019. That same day, the parties filed the joint motion and proposed order regarding fiscal year 2020 education funding with the Court, the gist of which had already been announced and reported on.<sup>6</sup> But despite all of this publicity and the start

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
ANCHORAGE BRANCH  
1031 W. FOURTH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 269-5100

---

<sup>3</sup> *Scammon Bay Assoc., Inc. v. Ulak*, 126 P.3d 138, 143 (Alaska 2005).

<sup>4</sup> *See, e.g.*, James Brooks, *Alaska Legislature votes to prepare for education funding lawsuit against Gov. Dunleavy*, Anchorage Daily News (May 28, 2019), <http://www.adn.com/politics/alaska-legislature/2019/05/28/alaska-legislature-votes-to-prepare-for-education-funding-lawsuit-against-gov-mike-dunleavy/>; Suzanne Downing, "House, Senate agree to sue governor over forward funding of education." *Must Read Alaska* (May 28, 2019), <https://mustreadalaska.com/house-senate-agree-to-sue-governor-over-forward-funding-of-education/>.

<sup>5</sup> 2019 Op. Alaska Att'y Gen. (May 8).

<sup>6</sup> *See, e.g.*, James Brooks, *Alaska Legislature one month from education funding lawsuit against Gov. Dunleavy*, Anchorage Daily News (June 14, 2019), <https://www.adn.com/politics/alaska-legislature/2019/06/14/alaska-legislature-one-month-from-education-funding-lawsuit-against-gov-dunleavy/>.

of a new fiscal year in which payments were due to school districts, the Coalition waited an additional five and a half weeks after the complaint was filed to submit its motion for intervention. Its filing on Friday, August 23, occurred approximately half an hour after leaving a message for counsel for the governor indicating for the first time its desire to intervene.

To support its claim that its motion is timely, the Coalition suggests that the Court has “recognized that a motion to intervene will not be considered untimely” if it is filed on or before the date the answer was filed and before the trial court makes any substantive rulings. [Motion at 4-5] But to the contrary, the case the Coalition cites for this proposition, *Anchorage Baptist Temple v. Coonrod*, instead declined to decide the merits of the timeliness issue, even though the proposed intervenors there filed the case before the State had answered.<sup>7</sup> And the Alaska Supreme Court has repeatedly noted that “there are no fixed standards for determining when a motion to intervene as a matter of right is timely; rather the determination lies ‘within the discretion of the trial judge.’”<sup>8</sup> This case is one of the rare ones where weeks matter and the Coalition’s delay was improper given the urgency of the matter and the notice that it had.

---

month-from-education-funding-lawsuit-against-gov-dunleavy/, (noting that Attorney General “had said the state will make payments month by month to school districts in order to avoid affecting them while the lawsuit proceeds”).

<sup>7</sup> 166 P.3d 29, 33 n.12 (Alaska 2007).

<sup>8</sup> *Red Top Mining, Inc. v. Anthony*, 983 P.2d 743, 746 (Alaska 1999) (quoting *Peter Pan Seafoods v. Stepanoff*, 650 P.2d 375, 378-79 (Alaska 1982)).

Second, this delay prejudices the Governor. To analyze the foreseeable prejudice that granting the motion would cause the parties, courts “focus specifically on the prejudice flowing from [the applicant’s] delay rather than the potential prejudice that might generally result from granting intervention.”<sup>9</sup> Here, the parties have already submitted a briefing schedule that requires cross motions for summary judgment to be filed in ten days on an important issue of first impression. The Governor’s counsel was already busy briefing the planned issue when the Coalition filed its motion to intervene and now is approaching the filing deadline with uncertainty as to whether brand new issues from the Coalition’s proposed complaint are going to require analysis. Particularly in prominent litigation such as this, the Governor’s briefs must undergo review within the Department of Law prior to filing and counsel have already prepared to use the remaining days prior to the deadline to finalize a brief responding to the Legislative Council’s complaint. Requiring the Governor to address new and tangential arguments as to the meaning and contours of the Alaska Constitution’s education clause with only a few days’ notice amid briefing centered on appropriations, veto, and budgeting clauses prejudices the Governor. Likewise, if this delay results in any adjustment of the briefing deadlines or judicial decision, that likewise prejudices the Governor because he is unable to satisfy his responsibility to execute only valid appropriations pending this Court’s decision.

---

<sup>9</sup> *Kirk v. Demientiff*, 145 P.3d 512, 518 (Alaska 2006).

The third factor in the delay analysis, potential prejudice to the Coalition stemming from the denial of intervention does not weigh in favor of granting intervention. To the extent the Coalition has an interest in the Court's analysis of the appropriations clauses, it is adequately represented by the Legislative Council, as discussed below. To the extent the Coalition wishes to litigate whether every penny of appropriated money for education is constitutionally required under the Education Clause, it may do so in separate litigation and is not prejudiced as to that question by exclusion from this case.

The fourth factor requires the court to consider idiocratic circumstances for or against intervention. Here, the unique facts of the case—the fact that it concerns the constitutionality of an appropriation of funds that are currently being spent and the importance of speedy and thorough resolution of the appropriations issue at the heart of the case—militate against allowing this late intervention. The parties have requested that this case be extraordinarily expedited in light of the weighty issues and the importance of getting timely resolution regarding the legality of payments that are due monthly and which are vital to education in Alaska. While an interested party requesting intervention might be timely if it files prior to dispositive motions in an ordinary case, an intervention motion on the eve of summary judgment motion filings in this case is too late.

Taken together these factors decidedly warrant rejecting the Coalition's motion for intervention as untimely.

**B. The Legislative Council adequately represents the Coalition's Asserted Interests in the Constitutionality of the 2018 appropriations.**

The Coalition's asserted interest in the constitutionality of the 2018 education appropriations is more than adequately represented by the Legislative Council. The Alaska Supreme Court has established a presumption of adequate representation when government entities are parties to a lawsuit.<sup>10</sup> This presumption can only be overcome by demonstrating "collusion, adversity of interest, possible nonfeasance, or incompetence."<sup>11</sup> The Coalition has failed to make this showing.

The Alaska Supreme Court's decision in *Alaskans for a Common Language v. Kritz* illustrates the kinds of factual showings required to demonstrate "collusion, adversity of interest, possible nonfeasance, or incompetence."<sup>12</sup> There plaintiffs sought a declaration from the court that an initiative was unconstitutional. The sponsors of the initiative sought to intervene on the Lieutenant Governor's side to defend the initiative. The court found that "two circumstances could raise questions in the mind of the public about whether the executive branch is committed to defending the constitutionality of the initiative with conviction and vigor."<sup>13</sup> First, the Attorney General's Office questioned the constitutionality of the initiative, despite recommending certification. Second, the governor personally opposed the initiative and made public statements to

---

<sup>10</sup> *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 913 (Alaska 2000).

<sup>11</sup> *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984).

<sup>12</sup> *Kritz*, 3 P.3d at 913.

<sup>13</sup> *Id.*

that effect.<sup>14</sup> Because of this, the court found that there could be “an appearance of adversity” and allowed for intervention.

The Coalition has made no such showing here. The Legislative Council has given no indication that it will fail to zealously litigate the question of the power of the legislature to create forward appropriations. Quite the opposite, when confronted with the Governor’s position as elucidated in an Attorney General opinion and invited to avoid litigation by passing a new appropriation in the same amount with the promise that it would not be vetoed, the legislature stuck to its position about the validity of forward appropriations and authorized the Legislative Council to bring suit.<sup>15</sup>

Instead of identifying any divergence on the legal issue presented in the Legislative Council’s suit, the Coalition has asserted that a disagreement with tactical decisions made by the Legislative Council demonstrates that the Coalition’s interests are not adequately represented. This argument fails for two reasons. First, the Alaska Supreme Court has held that a difference in litigation strategy alone is not enough to justify intervention.<sup>16</sup> Second, the parties’ stipulation in this matter does not actually harm the Coalition’s interests as it claims. The Coalition argues that because the Legislative Council agreed to monthly payments of formula funding pending the

---

<sup>14</sup> *Id.*

<sup>15</sup> See Alex McCarthy, *Lawsuit pits role of Legislature against power of governor*, Juneau Empire (May 28, 2019) <https://www.juneauempire.com/news/lawsuit-pits-role-of-legislature-against-power-of-governor/>.

<sup>16</sup> *Coonrod*, 166 P.3d at 36 (“[D]ifferences in trial strategy do not establish a right to intervention.”).

outcome of this litigation but did not also secure an agreement that the State would pay the supplemental \$30 million appropriation at the same time, it was not adequately protecting the Coalition's interests in receiving that money. [Motion at 11] But the Coalition fails to acknowledge that this supplemental appropriation would not be paid out to its members before the likely resolution of the superior court proceedings, even if it were part of the stipulation. Although estimated state aid based on the statutory basic need formula is paid on a monthly basis beginning every July and then adjusted when final state aid numbers are calculated, supplemental disbursements are one-time grants paid to each school district only after the October student enrollment count is complete and the State has had a chance to analyze each district's proportionate share.<sup>17</sup> These payments are available, at the earliest, in late January or early February of each year.<sup>18</sup> The parties have proposed that the superior court litigation be resolved well before February, making any agreement over interim payment from the 30 million dollar appropriation unnecessary. The Legislative Council's perceived failure to secure this payment is thus not a failure and not an example of failing to advocate in favor of enforcement of the appropriations.

Finally, resolution of the issue in the Coalition's proposed complaint regarding the constitutionally required level of support for schools is not relevant or necessary to deciding the issue presented in this case about the constitutionality of forward

---

<sup>17</sup> Affidavit of School Finance Manager Elwin Blackwell dated August 30, 2019, attached as exhibit A, ¶¶ 2-4.

<sup>18</sup> *Id.* at ¶ 6.

appropriations of future revenue. The Coalition's interest in resolving the question of the required level of state funding for education is thus not impaired by this litigation and can be brought separately in a non-expedited lawsuit that allows time for exploration of the factual issues that it raises.

**The Coalition should not be granted permissive intervention.**

This court should exercise its discretion to deny the Coalition permissive intervention. The Coalition has not demonstrated that it should be granted permissive intervention. Permissive intervention may be granted only "upon timely application" when "an applicant's claim or defense and the main action have a question of law or fact in common."<sup>19</sup> And "[e]ven where this commonality is established the superior court may deny a request to intervene where 'the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'"<sup>20</sup> Here, the application is untimely for the reasons discussed above.<sup>21</sup> And permissive intervention at this stage would also be prejudicial to the Governor. Merits briefing in this case is to be filed within ten days of this response to the motion to intervene, making any decision on intervention too close to the proposed merits briefing due date to allow the Governor to brief a response to an entirely new complaint.

---

<sup>19</sup> Alaska Civil Rule 24(b).

<sup>20</sup> *Harvey v. Cook*, 172 P.3d 794, 801 (Alaska 2007) (quoting Alaska Civil Rule 24(b)).

<sup>21</sup> *See Bridges v. Banner Health*, 201 P.3d 484, 492 (Alaska 2008) (holding that where motion for intervention as of right was untimely, court did not abuse discretion in denying permissive intervention based on same timeliness reason).

Even more prejudicially, the Coalition’s proposed complaint raises significant issues of fact, the resolution of which would require prolonged discovery including expert discovery on the adequacy of education funding in Alaska in 2019. As the Alaska Supreme Court has repeatedly recognized, “additional parties are always the source of additional questions, briefs, objections, arguments and motions.”<sup>22</sup> And here, permitting the Coalition to intervene and argue its education clause claim would dramatically expand the scope and focus of the lawsuit. The Coalition’s complaint alleges that “the appropriation of the Supplemental Grant Funding is necessary for the State to meet its obligation under the Education Clause of the Alaska Constitution to provide constitutionally adequate public school funding for the 2019-2020 school year.”

[Proposed Compl. ¶ 20] This puts at issue what dollar figure for state support satisfies the constitutional floor of the State’s funding obligations, and whether the supplemental \$30 million was a required part of that.

The minimum level of state aid necessary to satisfy the State’s constitutional obligation to “establish and maintain a system of public schools”<sup>23</sup> is a mixed question of fact and law. Answering this question in a judicial proceeding would be an enormous undertaking, as evidenced by the *Moore v. State* litigation initiated by the Coalition in 2004. In *Moore*, three years of litigation and a four-week trial elapsed before then-superior court judge Sharon Gleason determined that the State adequately funded

---

<sup>22</sup> *Kritz*, 3 P.3d at 915.

<sup>23</sup> Alaska Const. art. VII, § 1.

education.<sup>24</sup> The Legislative Council's important—and entirely separate—question of whether the legislature has the power to forward appropriate future revenue should not be bogged down by resolution of the Coalition's unrelated claim under the education clause.

Because the Governor has agreed to make payments to school districts of state aid under AS 14.17.410 pending the resolution of this litigation, any complications and slowing of the process prejudices the Governor's ability to receive relief and exercise his constitutional control over appropriations before the appropriation is expended and the issue becomes moot. Likewise, failure to resolve the validity of the supplemental 30 million dollar appropriation will delay its disbursement or reappropriation. Additionally, the Coalition's complaint asserts constitutional litigant status and seeks attorney's fees, adding to litigation cost.<sup>25</sup> [Proposed Compl. at 7]

The more appropriate role for the Coalition given the prejudice to the Governor is that of amicus curiae. The Alaska Supreme Court has recognized that in an existing lawsuit, "the most effective and expeditious way to participate is an amicus curiae brief and not by intervention."<sup>26</sup>

---

<sup>24</sup> See *Moore v. State*, 3AN-04-9756 CI, Decision and Order at 184 (June 21, 2007).

<sup>25</sup> The Governor does not think the Coalition would qualify as a constitutional litigant given the financial interests of its membership, but litigating that issue would likewise involve litigation costs.

<sup>26</sup> *Kritz*, 3 P.3d at 915.

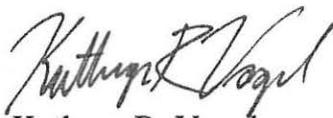
Finally, *if* this Court grants the Coalition permissive intervention, at a minimum—in order to preserve judicial resources and encourage swift adjudication of this case—the Coalition’s role should be limited. Courts have recognized the need to impose conditions or restrictions on intervention, both as to the claims that interveners can address and defend and/or the level of participation in a case.<sup>27</sup> To avoid delaying resolution of the legislature’s power to forward appropriate future revenue, the Coalition should not be allowed to insert additional claims pertaining to the meaning of the education clause and the necessary amount of school funding into this litigation.

### CONCLUSION

For all of the foregoing reasons, the Court should deny the Coalition’s motion to intervene.

DATED September 3, 2019.

KEVIN G. CLARKSON  
ATTORNEY GENERAL

By:   
Kathryn R. Vogel  
Assistant Attorney General  
Alaska Bar No. 1403013

---

<sup>27</sup> See *Weidner v. State*, 684 P.2d 103, 114 (Alaska 1984) (holding superior court did not abuse discretion in limiting intervention to one count of plaintiff’s complaint); see also 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1922 (3d ed. 2008) (“Since the trial court has full discretion to grant or deny an application for permissive intervention under Rule 24(b), it may if it chooses impose conditions on its grant of the application. There are many reported instances in which conditions of this kind have been imposed.” (footnotes omitted)).