**IN THE SUPREME COURT FOR THE STATE OF ALASKA**

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| STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT, and COMMISSIONER DEENA BISHOP IN HER OFFICIAL CAPACITY,<br><br>Appellants,<br><br>vs.<br><br>EDWARD ALEXANDER, JOSH ANDREWS, SHELBY BECK ANDREWS, and CAREY CARPENTER,<br><br>Appellees,<br><br>ANDREA MORCERI, THERESA BROOKS, and BRANDY PENNINGTON.<br><br>Intervenor-Appellants. | **Supreme Court Nos. S-10983/S-19113** |

Trial Court Case No. 3AN-23-04309CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ADOLF V. ZEMAN

# BRIEF OF APPELLEES

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### ALASKA CONSTITUTIONAL PROVISIONS

**Article VII, Section 1**

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

### STATUTES

**AS 14.03.300**

(a) A district or the department that provides a correspondence study program shall annually provide an individual learning plan for each student enrolled in the program developed in collaboration with the student, the parent or guardian of the student, a certificated teacher assigned to the student, and other individuals involved in the student's learning plan. An individual learning plan must

> (1) be developed with the assistance and approval of the certificated teacher assigned to the student by the district;
>
> (2) provide for a course of study for the appropriate grade level consistent with state and district standards;
>
> (3) provide for an ongoing assessment plan that includes statewide assessments required for public schools under AS 14.03.123(f);
>
> (4) include a provision for modification of the individual learning plan if the student is below proficient on a standardized assessment in a core subject;
>
> (5) provide for a signed agreement between the certificated teacher assigned to the student and at least one parent or the guardian of each student that verifies compliance with an individual learning plan;
>
> (6) provide for monitoring of each student's work and progress by the certificated teacher assigned to the student.

(b) Notwithstanding another provision of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS

14.03.310, on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f).

**AS 14.03.310**

(a) Except as provided in (e) of this section, the department or a district that provides a correspondence study program may provide an annual student allotment to a parent or guardian of a student enrolled in the correspondence study program for the purpose of meeting instructional expenses for the student enrolled in the program as provided in this section.

(b) A parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment provided under (a) of this section if

(1) the services and materials are required for the course of study in the individual learning plan developed for the student under AS 14.03.300;

(2) textbooks, services, and other curriculum materials and the course of study

(A) are approved by the school district;

(B) are appropriate for the student;

(C) are aligned to state standards; and

(D) comply with AS 14.03.090 and AS 14.18.060; and

(3) the services and materials otherwise support a public purpose.

(c) Except as provided in (d) of this section, an annual student allotment provided under this section is reserved and excluded from the unreserved portion of a district's year-end fund balance in the school operating fund under AS 14.17.505.

(d) The department or a district that provides for an annual student allotment under (a) of this section shall

(1) account for the balance of an unexpended annual student allotment during the period in which a student continues to be enrolled in the correspondence program for which the annual allotment was provided;

(2) return the unexpended balance of a student allotment to the budget of the department or district for a student who is no longer enrolled in the correspondence program for which the allotment was provided;

(3) maintain a record of expenditures and allotments; and

(4) implement a routine monitoring of audits and expenditures.

(e) A student allotment provided under (a) of this section may not be used to pay for services provided to a student by a family member. In this subsection, "family member" means the student's spouse, guardian, parent, stepparent, sibling, stepsibling, grandparent, stepgrandparent, child, uncle, or aunt.

## STATEMENT OF ISSUES PRESENTED

1. Did the superior court err in concluding that a statutory scheme expressly authorizing expenditures of public funds to purchase educational services and materials from private or religious organizations, and further precluding DEED from imposing any restrictions on such expenditures, violates Article VII, Section 1 of the Alaska Constitution?

2. Did the superior court err in denying the State's Motion to Dismiss based on the argument that only an as applied constitutional challenge against school districts is allowed because neither the executive branch, via the Department of Education and Early Development ("DEED") and the Attorney General ("AG"), nor the legislature has any responsibility to ensure statutes authorizing expenditures of public education funds comply with the Alaska Constitution?

3. In addition to the federal constitutional right of parents to direct the education of their children under the Fourteenth Amendment, is there a federal constitutional right requiring the state to expend public funds on private education, thereby creating a constitutional conflict with the direct benefit prohibition in Article VII, Section 1 of the Alaska Constitution?

## STATEMENT OF THE CASE[1]

The plain language of Article VII, Section 1 dictates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution."[2] The delegates to the Constitutional Convention's understanding of the term "direct benefit" forbids public funds from being used to pay for education conducted at private institutions, even if paid through an intermediary.[3]

### A. Alaska Statutes 14.03.300-.310 Authorize Expenditures that Are Unconstitutional Under Article VII, Section 1.

The correspondence allotment program contained in AS 14.03.300-.310 was first proposed by its sponsor, then-Senator Dunleavy ("Dunleavy"), in Senate Bill 100 ("SB 100") in 2013. [Exc. 133-36] When SB 100 was proposed, "there already [was] a system where homeschoolers [could] enroll in a public homeschool system and get access to materials through approved vendors." [Exc. 119] The prior program was highly regulated;

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[1] For clarity and consistency with prior briefing, Appellants State of Alaska, Department of Education & Early Development and Commissioner Bishop are referred to as "the State"; Intervenor-Appellants Andrea Moceri, Theresa Brooks, and Brandy Pennington are referred to as "Intervenors"; and Appellees, Edward Alexander, Josh Andrews, Shelby Beck Andrews, and Carey Carpenter are referred to as "Plaintiffs" throughout this brief.

[2] *Turpin v. N. Slope Borough*, 879 P.2d 1009, 1013 n.7 (Alaska 1994) ("We generally give the word 'shall' mandatory effect"); *Fowler v. City of Anchorage*, 583 P.2d 817, 820 (Alaska 1978) ("Unless the context otherwise indicates, the use of the word shall denotes a mandatory intent.").

[3] *Sheldon Jackson College v. State*, 599 P.2d 127, 130 (Alaska 1979) ("[T]he core of the concern expressed in the direct benefit prohibition," was "government aid to *Education* conducted outside the public schools.").

DEED had enacted detailed regulations limiting how public funds could be spent, including a prohibition on use of public funds at private or religious schools.[4] [Exc. 115-16]

There is no dispute that AS 14.03.300-.310 expressly authorize the expenditure of public funds for private education: "A parent or guardian may purchase nonsectarian services and materials from a public, *private, or religious organization* with a student allotment" provided through the public correspondence program under a "student's Individual Learning Plan (ILP)."[5] [Exc. 113-14 (emphasis added)] The second major change proposed in SB 100 was prohibiting DEED from imposing any restrictions on these expenditures beyond those contained within .300(a) and .310 of these statutes, including eliminating all previously-existing restrictions that served to ensure the constitutional use of these funds. [Exc. 115-16]

The problem with this statutory scheme, which Dunleavy readily acknowledged, was that a constitutional amendment was necessary to allow the use of public funds to support education conducted at private institutions as intended by SB 100: "That cannot be done currently under constitutional language." [Exc. 134]

As SB 100's companion, Senate Joint Resolution No. 9 ("SJR 9"), was intended to resolve this constitutional issue. [Exc. 133-34] Also introduced in 2013, SJR 9 "propos[ed] amendments to the Constitution of the State of Alaska relating to state aid for education." [Exc. 140] In his SJR 9 sponsor statement, Dunleavy noted, "[c]urrently the Alaska

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[4] *See* history of 4 AAC 33.405 - 4 AAC 33.490. [Exc. 444-46 (memo from legislative counsel to Senator Gardner on constitutional questions related to SB 100)]

[5] AS 14.03.310(b) (emphasis added).

Constitution prohibits the use of public funds for the direct benefit of any private educational institution. The courts have determined that this ban extends to state funds being allotted to individual Alaskans who choose to attend a private school." [Exc. 239] In speaking at a Senate Finance Committee Meeting, Dunleavy "explained that SB 100 would be [the] program that would take place as a result of the language change in the constitution," and would "allow for private and/or religious educational vendors to be recognized as legitimate educational vendors." [Exc. 251-52] He further testified that he "felt that there was a program in SB 100 which he believed would be effective, but the constitution must be amended first." [Exc. 253]

SJR 9 proposed to amend Article VII, Section 1 to delete the final sentence: "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." [Exc. 140] SJR 9 further proposed amending Article IX, Section 6 to provide that "nothing in this section shall prevent payment from public funds for the direct educational benefit of students as provided by law." [Exc. 140]

SJR 9 died in Committee. However, the provisions of SB 100 were ultimately embedded in omnibus education legislation House Bill 278 ("HB 278"). [Exc. 150; Exc. 158; Exc. 200] HB 278 was enacted by the legislature in 2014.[6]

As enacted, AS 14.03.310 provides an "annual student allotment" to purchase "services and materials from a public, private, or religious organization" consistent with a student's ILP. Alaska Statute 14.03.300(b) provides, "Notwithstanding another provision

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[6] 2014 Alaska Sess. Laws Ch. 15, § 15.

of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS 14.03.310, on a student who is proficient or advanced on statewide assessments." Legislators, including sponsor Dunleavy, agreed that this plain text "removes the department's oversight of financial expenditures and the ILP." [Exc. 117-18]

### B. Plaintiffs File a Complaint Challenging the Constitutionality of AS 14.03.300-.310, and Parents Using the Challenged Allotments to Pay for Private School Tuition Intervene.

In May of 2022, Jodi Taylor—wife of Attorney General Treg Taylor—wrote a widely circulated opinion piece explaining how parents could use the public correspondence program student allotment to subsidize their child's private school tuition in four easy steps. [Exc. 201-06] Ms. Taylor's opinion piece elaborated that parents can use AS 14.03.310 to receive thousands of dollars under the State's publicly funded Base Student Allotment ("BSA") as reimbursement to subsidize private school tuition. [Exc. 202-205] Ms. Taylor explained, "Thanks to Dunleavy's 2014 statute, private schools have been added to the list of allowable vendors for parents." [Exc. 202]

As an example of how the reimbursement process worked, Ms. Taylor explained that her children attended St. Elizabeth Ann Seton ("SEAS") private school while also being enrolled in Anchorage School District's Family Partnership Charter School ("FPCS"). [Exc. 204] Because SEAS is an "approved FPCS vendor," Ms. Taylor could request a $4,000 reimbursement through FPCS for each student, which would cover two-thirds of each child's $6,000 private school tuition at SEAS. [Exc. 204]

On January 24, 2023, Plaintiffs, parents of school-aged children attending Alaska public schools, filed a complaint against the State which challenged the constitutionality of AS 14.03.300-.310, the statutes authorizing the spending of public funds at private schools. [Exc. 01-22] Intervenors, parents who are currently using the correspondence program allotments to pay their children's private school tuition, moved to intervene to defend these statutes as beneficiaries of the program. [R. 491-510] Intervenors asserted that without reimbursements for private school tuition, they would either be unable to send their children to private school, or would face financial hardship in doing so. [Exc. 23-34]

Rather than answer the complaint, the State filed a motion to dismiss, arguing that (1) Plaintiffs failed to state a claim that AS 14.03.300.-.310 is facially unconstitutional, and (2) this case should only proceed as an as-applied challenge against individual school districts because it "calls the school districts' actions into question." [Exc. 35-53] In response, Plaintiffs opposed the motion to dismiss—explaining school districts were not indispensable parties under Rule 19 in this case seeking declaratory and injunctive relief—and cross-moved for summary judgment on the facial challenge. [Exc. 054-103] The State, in turn, filed a cross-motion for summary judgment arguing that the facial challenge should fail. [Exc. 285-312]

Intervenors responded to Plaintiffs' motion for summary judgment by arguing that the correspondence allotment program benefits parents, and so using public funds to pay for private school tuition under the program does not run afoul of the direct benefit prohibition in the Alaska Constitution. [Exc. 450-61] Intervenors further argued that because they have a fundamental right to direct their children's education—they also have

a fundamental federal constitutional right obligating the State of Alaska to pay for their children's private education. Intervenors essentially asserted that Article VII, Section 1 of the Alaska Constitution conflicts with the First and Fourteenth Amendments of the United States Constitution. [Exc. 462-74]

### C. The Superior Court Denies the State's Motion to Dismiss and Grants Plaintiffs' Motion for Summary Judgment.

The superior court denied the State's motion to dismiss under Civil Rule 12(b)(6) for failure to state a claim, and Civil Rule 12(b)(7) for failure to join indispensable parties. [Exc. 552-56] The Court concluded that "Plaintiffs' constitutional challenges may proceed without joinder of individual school districts," as they were not necessary under Rule 19(a). [Exc. 555-56] The superior court further concluded that the State misinterpreted the "plainly legitimate sweep" standard in arguing for dismissal of Plaintiffs' facial challenge, and "[t]he fact that there are some possible constitutional applications of the provisions at issue cannot overcome the plain statutory text, bill sponsor's statements, and legislative history all the contrary." [Exc. 554-55]

The superior court then correctly concluded that the challenged statutes were facially unconstitutional by interpreting the statutes, the debates of the Constitutional Convention regarding Article VII, Section 1, and controlling precedent in *Sheldon Jackson College v. State*. [Exc. 556-70] Specifically, the superior court interpreted AS 14.03.300.-.310 to violate Article VII, Section 1 because "the statutes were drafted with the express purpose of allowing purchases of private educational services with the public correspondence student allotments." [Exc. 559]

The superior court then appropriately noted that "[t]his Court has a constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution," but it is not the role of the judiciary to legislate or rewrite facially unconstitutional statutes.[7] [Exc. 570-71] The superior court considered whether "[s]evering the portions of AS 14.03.310 dealing with private and religious organizations coupled with severing the provision preventing DEED from setting any limits on allotment spending" would cure the constitutional defect, explaining there is not a "workable way to construe the statutes to allow only constitutional spending and AS 14.03.300-.310 must be struck down as unconstitutional in their entirety."[8] [Exc. 571-73] The superior court appropriately declined to re-write this legislation, and therefore left the task of making any necessary policy determinations to the legislature.[9] [Exc. 573]

## SUMMARY OF ARGUMENT

Article VII, Section 1 of the Alaska Constitution prohibits spending public funds for the direct benefit of private educational institutions. Alaska Statutes 14.03.300-.310's legislative history shows that it was drafted for the specific purpose of allowing purchases

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[7] *State v. Planned Parenthood of Alaska (Planned Parenthood 2007)*, 171 P.3d 577, 579 (Alaska 2007) ("We are focused only on upholding the constitution and laws of the State of Alaska.").

[8] *State v. ACLU of Alaska*, 204 P.3d 364, 373 (Alaska 2009) ("Rather than strike a statute down, [courts] will employ a narrowing construction, if one is reasonably possible."); *Forrer v. State*, 471 P.3d 569, 598 (Alaska 2020) ("A provision is severable if 'the portion remaining . . . is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part.'" (quoting *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992)).

[9] *See* Appendix (containing replacement legislation, House Bill 202 ("HB 202")).

of private educational services with public funds through correspondence student allotments. The sponsor's statements demonstrated a clear understanding that such spending violates Article VII, Section 1, requiring an amendment to the Alaska Constitution to achieve this purpose. The superior court correctly concluded that the challenged statutes were facially unconstitutional by interpreting the statutes, the Constitutional Convention minutes concerning Article VII, Section 1, and applying controlling precedent: *Sheldon Jackson College v. State*.[10] [Exc. 556-70]

Intervenors agree with Plaintiffs that AS 14.03.300-.310 broadly authorizes the purchase of educational services and materials at private educational institutions and precludes DEED from imposing restrictions on such expenditures. [Int.-At. Br. 4] Intervenors argue that the superior court misinterpreted the Alaska Constitution, asserting that this authorization is not unconstitutional because it is a "direct benefit to individuals, not institutions . . . even if institutions derive some incidental benefit from an individual's choice." [Int.-At. Br. 7] According to the Intervenors these statutes do not violate Article VII, Section 1 of the Alaska Constitution. Although Intervenors did not brief the doctrine of stare decisis, they essentially ask this Court to overrule *Sheldon Jackson College v. State*. [Int.-At. Br. 18-20] Intervenors further argue that because they have a fundamental federal constitutional right to direct their children's education, the superior court striking AS 14.03.300-.310 as facially unconstitutional under Article VII, Section 1 "brought the Alaska Constitution into conflict with the United States Constitution." [Int.-At. Br. 25-46]

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[10] 599 P.2d 127.

Although it does not argue for a constitutional interpretation of the allotment statutes, and concedes that the statutes authorize some unconstitutional expenditures, the State misconstrues the "plainly legitimate sweep" standard to require upholding a statutory scheme as facially constitutional where the State can point to some examples of constitutional expenditures under the statutes. These statutes do not have a plainly legitimate sweep because they explicitly authorize the expenditure of public funds at private schools—something that is expressly prohibited by the constitution—and also deliberately prohibited DEED's oversight of this use of public funds.

Because it lacks any argument that the statutes are indeed constitutional, the State devotes the majority of its brief to procedural arguments, insisting that it cannot "be liable for the alleged unconstitutional use of allotment funds by particular public school districts." [State At. Br. 3, 36-39] The State, however, fails to explain why the legislature would have the authority to pass a facially unconstitutional statutory scheme in the first instance, nor why the State is not the proper party to defend it.[11]

Finally, because the State does not have an argument warranting reversal of the Order and Final Judgment as actually entered by the superior court, the State mischaracterizes the Order—which impacts only allotments—by arguing that the superior

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[11] *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 913-14 & nn.30-31 (Alaska 2000) (explaining "the governor has a duty to defend a law" and "[t]hat duty is executed by the attorney general.") (citing Alaska Const. art. III, § 16; AS 44.23.020); *Taylor v. Alaska Legis. Affs. Agency*, 529 P.3d 1146, 1155-56 (Alaska 2023) (discussing "governor's executive branch authority" and authority of "department heads, often titled commissioners . . . to enforce laws within their purview.").

court "*ended* the correspondence study program." [State At. Br. 3 (emphasis added)] Repeating this statement does not make it true. Other statutes, not at issue in this case, govern the correspondence school program.[12] Furthermore, to ensure continuity in the program, the legislature has already passed a replacement bill to provide for allotments during the upcoming school year, ending the false "crisis" the State complains of.[13] Simply put, the State's briefing does more to confuse than clarify the issues on appeal.

## ARGUMENT

### I. The Alaska Constitution Prohibits Public Funds Being Spent At Private Schools as Authorized by AS 14.03.300-.310.

#### A. Standard of Review

Issues of constitutional interpretation are reviewed de novo.[14] In reviewing constitutional challenges involving interpretation of the constitution, Alaska courts "first 'look to the plain meaning and purpose of the provision and the intent of the framers.'"[15] While courts "consider 'precedent, reason, and policy,' policy judgments do not inform [a court's] decision-making when the text of the Alaska Constitution and the framers' intent as evidenced through the proceedings of the Constitutional Convention are sufficiently

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12 *See* discussion *infra*, at Argument Section III.B.

13 This bill, HB 202, is attached in the Appendix. HB 202 includes an individual learning plan, authorizes correspondence program allotments for the upcoming school year, and directs the State Board of Education and Early Development to adopt regulations to implement the program consistent with Article VII, Section 1.

14 *Forrer*, 471 P.3d at 583.

15 *Id.* (quoting *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)).

clear."[16] This in turn means that where a court is "called upon . . . to exercise 'sound judicial interpretation' of the Alaska Constitution," it "may require referring to debates of the Constitutional Convention."[17]

"When interpreting a statute, courts look to the plain meaning of the statute, the legislative purpose, and the intent of the statute."[18] Statutes "may be found to be unconstitutional as applied or unconstitutional on their face."[19] When a statutory scheme violates the "minimum requirements" of the Alaska Constitution, including authorizing action in violation of "a [constitutional] prohibition," the Court is "compelled to strike down [the] statutes or regulations that violate" the prohibition.[20] Courts only "uphold a statute against a facial constitutional challenge if despite . . . *occasional* problems it might create in its application to specific cases, [it] has a *plainly* legitimate sweep."[21]

### B. The Superior Court Correctly Interpreted the Alaska Constitution Consistent with *Sheldon Jackson College v. State*.

The superior court correctly relied on the minutes of the Constitutional Convention and controlling precedent in *Sheldon Jackson College v. State* to conclude that Article VII,

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16 *Id.* (quoting *Nelson v. State*, 440 P.3d 240, 243 (Alaska 2019), then citing *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1176-77 (Alaska 2009)).

17 *Id.* at 584.

18 *Premera Blue Cross v. State*, 171 P.3d 1110, 1115 (Alaska 2007).

19 *State v. Planned Parenthood of the Great Nw. (Planned Parenthood 2019)*, 436 P.3d 984, 991 (Alaska 2019) (quoting *ACLU of Alaska*, 204 P.3d at 372).

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

21 *Planned Parenthood 2019*, 436 P.3d at 991-92 (quoting *Planned Parenthood 2007*, 171 P.3d at 581) (emphasis added).

Section 1 of the Alaska Constitution prohibits public education funds from being used to pay for private education as authorized by AS 14.03.300-.310. [Exc. 560-70]

As a threshold issue, there is no dispute over the proper interpretation of AS 14.03.300 and .310. Specifically, there is no dispute that AS 14.03.300 broadly authorizes the purchase of educational services and materials from private or religious organizations with publicly-funded allotments, and that AS 14.03.310(b) prohibits DEED from placing any restrictions on spending those funds.[22] As Intervenors concede, "Parents use their allotments to pay tuition for private schools."[23] [Int.-At. Br. 4] And the State "*agrees* with Alexander [Plaintiffs] and the superior court that the statute can be read to permit the purchase of educational services and materials from private organizations."[24] [State At. Br. 25]

Intervenors argue the superior court erred because "[t]he benefit created by AS 14.03.300-.310 is expressly granted to parents" and assert that because "parents, not the government, decide where to spend the money" this is an "'indirect' benefit[] to private

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[22] The State agrees that although "this specific provision's wording is convoluted," AS 14.03.310(b) "put school districts and parents—not DEED—in charge of student allotments." [Exc. 301]. *See also* Int.-At. Br. 8 ("AS 14.03.300 bars DEED from 'impos[ing] additional requirements' on a student participating in the program beyond the basic statutory requirements to ensure student proficiency.").

[23] *See also* Int.-At. Br. 8 (asserting "the whole point of this statute is to give parents the freedom to design a personalized education for their children, parents can select countless educational paths from public and private options.").

[24] Although the State dismisses the legislative history as a "red herring," [State At. Br. 24] the State fails to brief the only legal issue that could warrant reversal of the superior court's Order: an interpretation of AS 14.03.300-.310 that actually complies with the Alaska Constitution.

educational institutions." [Int.-At. Br. 7-13] This argument misinterprets both the meaning of "direct" versus "indirect" benefit, as well as the definition of "public funds." As this Court has concluded: "Where the framers expressly considered and rejected [a] . . . line of logic, we cannot in good conscience adopt it a mere six decades after-the-fact."[25]

Article VII, Section 1 of the Alaska Constitution prohibits spending public funds for the direct benefit of private educational institutions. In full, Article VII, Section 1 provides:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The final sentence contains a strict prohibition: "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." The minutes of the Alaska Constitutional Convention contain detailed discussions regarding the authoring Committee's intentions behind these words.

The Committee sought to "provide and protect for the future of our public schools."[26] The Committee chose the term "public funds" in acknowledgement that "state

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[25] *Forrer*, 471 P.3d at 589; *see also Se. Alaska Conservation Council*, 202 P.3d at 1176-77 (holding that courts must "enforce the considered judgment of the founders" regardless of any "attractive idea" or "deserving purpose" supporting the legislature's attempt to circumvent constitutional restrictions).

[26] 2 Proceedings of the Alaska Constitutional Convention at 1514 (hereinafter "Proceedings"). [Exc. 260-84 (excerpt of the Proceedings)]

funds" may go through many hands, but the term "public funds" was meant as a "guide to every portion" of this journey:

> [B]ecause we felt that state funds may at times go through many hands before reaching the point of their work for the public, and so the term "public funds" was then used as a guide to every portion of our state financing, borough, city or other entity for the disbursement of these monies.[27]

In writing the education clause, the Committee meant the phrase "other private educational institutions" to include "*any* educational institution that is not supported and run by the state."[28] This clause reflects a strict dichotomy: an educational institution could either be public or private.

The delegates extensively debated, and deliberately included the "direct benefit" prohibition in the education clause.[29] The Committee understood the "direct benefit" prohibition to prevent spending for "maintenance" or "operation" of a private educational institution, "or other features of direct help."[30] But the Committee did not prohibit "indirect" spending, where "it touches health and matters of welfare" of the child.[31]

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27 *Id.*

28 *Id.* at 1511 (emphasis added); *see also id.* at 1531-32 (discussing "system of public schools").

29 *Id.* at 1526. The proposed amendment to remove this direct benefit prohibition failed by a vote of 13 yeas to 41 nays. *Id.* at 1528-29.

30 *Id.* at 1514.

31 *Id.* (discussing examples such as "welfare cases for children in homes and when there are indigents in hospitals"); *id.* at 1517 (explaining "[w]ell, we feared that 'indirect' would make it impossible to give any of these welfare benefits, for instance, to children who were in private schools, and we did not feel that any prohibition should go that far").

Article VII, Section 1 reflects "a public educational system for all children."[32] If public funds were spent supporting private educational institutions, this would take "the benefit from the tax dollar" away from public schools and drain resources available for public students.[33] The Convention minutes indicate the delegates' understanding that Article VII, Section 1 would foreclose spending public funds for the direct benefit of private educational institutions, *regardless* of how many hands it passed through.

**i. *Sheldon Jackson* is controlling precedent.**

Despite the minutes of the Constitutional Convention carefully distinguishing between "direct" and "indirect" benefits, Intervenors attempt to redefine these terms. Intervenors' argument that the allotment spending is a benefit to parents, not private schools, was already considered and rejected by this Court in *Sheldon Jackson*. [Int.-At. Br. 7-10]

Recognizing "the distinction may at times appear more 'metaphysical' than precise," the *Sheldon Jackson* Court concluded that "the core of the concern expressed in the direct benefit prohibition" was "government aid to *Education* conducted outside the public schools."[34] *Sheldon Jackson* held that tuition reimbursements for private school students are a "direct benefit" to "private institutions, *or to those served by them*."[35] This

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32 *Id.* at 1520.

33 *Id.*

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

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

Court further reasoned that while "a direct transfer of funds from the state to a private school" was "constitutionally suspect," so too was "channeling the funds through an intermediary."[36] The Court concluded that providing public funds to students as a grant, for the students to then pay for private college tuition did not solve the constitutional problem.[37] Similarly, providing student allotments to parents under AS 14.03.300-.310, for the parents to then pay for private school courses or tuition, as approved in an ILP, is *still* a prohibited subsidy of private education. This Court rejected such attempts to circumvent the constitutional limitations by adding a "conduit for the transmission of state funds" to private educational institutions.[38] This Court emphasized that, "[s]imply interposing an intermediary 'does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the court has held with unvarying regularity that one may not do by indirection what is forbidden directly.'"[39]

Although Intervenors argue that the framers excluded "indirect" benefits from Article VII, Section 1, because "it might prohibit exactly the sort of innovation at issue here," that argument is also foreclosed by *Sheldon Jackson's* discussion of the framer's intent. [Int.-At. Br. 11] The minutes of the Constitutional Convention demonstrate that in

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36 *Id.* at 130.

37 *Id.* at 132.

38 *Id.*

39 *Id.* (quoting *Wolman v. Essex*, 342 F. Supp. 399, 415 (S.D. Ohio), *aff'd mem.*, 409 U.S. 909 (1972)).

choosing the phrase "direct benefit" instead of limiting educational spending to a "public purpose," the delegates understood that a "public purpose" could change with "prevailing" attitudes, whereas a prohibition on spending for the "direct benefit" of a private educational intuition would be more "restrictive."[40] [Exc. 78-80] The framers intentionally chose the "direct benefit" clause to prohibit the "innovation" of spending public funds to subsidize private education.

Regardless of whether correspondence program allotment spending is framed as a benefit to parents or an "educational benefit of their children," the statutes create a shadow voucher program allowing parents to purchase services and materials from private schools with public funds in violation of Article VII, Section 1. [Int.-At. Br. 11]

#### ii. The superior court correctly applied the *Sheldon Jackson* factors to determine that the expenditures authorized under AS 14.03.300-.310 are an unconstitutional direct benefit.

The superior court correctly considered all four factors identified by the *Sheldon Jackson* Court. [Exc. 563-70] Starting with the "breadth of the class to which statutory benefits are directed,"[41] the superior court explained if benefits are "provided without regard to status and affiliation," then those benefits "have universally been presumed [by courts] to be constitutional."[42] [Exc. 563] "Conversely, a benefit flowing only to private

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40 2 Proceedings at 1526 (explaining, in arguing in favor of the failed amendment to strike the direct benefit prohibition, that "the public purpose provision should be the only guidance when it comes to appropriation of public funds" because the "definition of public purpose must be made during every age in view of the conditions prevailing at that time.").

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

42 *Id.*

institutions, or those served by them, does not reflect the same neutrality and non-selectivity."[43] [Exc. 563] The Intervenors argue that because this allotment program is available to any school-age Alaskan enrolled in the correspondence study program, it is "neutral" under *Sheldon Jackson.* [Int.-At. Br. 15-16] The superior court, however, correctly explained that *Sheldon Jackson* "discussed 'neutrality' in regard to the type of benefit conferred to the educational institution, not in regards to the student's/parent's choice as to how the money is spent (i.e. only towards private educational institutions in the case of the tuition grant program versus to public, private, or religious institutions in the case of the allotment program)." [Exc. 564] The superior court noted examples from *Sheldon Jackson*, such as "police and fire protection" which "may provide the school with quite direct benefits, as when a campus fire is extinguished, such benefits are provided without regard to status and affiliation," and would be presumed constitutional.[44]

The superior court also correctly considered the second factor—the "nature of the use to which the public funds are to be put."[45] [Exc. 565] Under this factor, "the core of the concern expressed in the direct benefit prohibition involves government aid to Education conducted outside the public schools."[46] The superior court noted that the *Sheldon Jackson College* court found that the public funds expended under the tuition grant program, "constitute[d] nothing less than a subsidy of the education received by the student at his or

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43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

her private college, thus implicat[ing] fully the core concern of the direct benefit provision."[47] [Exc. 565] The superior court considered Intervenors' arguments that allotment funds can be used at a "variety of public and private vendors," and that the "state in no matter 'directs' which, if any, of these myriad options families select." [Int.-At. Br. 16-17; Exc. 565] The superior court did not err in rejecting this argument because "Article VII, Section 1 prohibits public funds directly benefitting private educational institutions" and so there is no requirement that the State, as opposed to parents, direct "where the public funds go." [Exc. 566]

As to the third factor, the superior court correctly considered the magnitude of the benefit conferred. [Exc. 566] In considering this factor, the superior court was careful to note that according to *Sheldon Jackson* "a court must consider, though *not in isolation*, the magnitude of the benefit conferred."[48] [Exc. 566] Furthermore, "[a] trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may."[49] The superior court rejected again Intervenors' argument that this is not a benefit for private schools, and instead is solely a benefit for parents, [Int.-At. Br. 10-13] noting "even though the tuition grant program benefitted the students who were able to finance their private college education in *Sheldon Jackson College*, the Court nonetheless found the program to be unconstitutional." [Exc. 567]

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47 *Id.* at 131.

48 *Id.* at 130.

49 *Id.*

The superior court considered where the allotment falls between a "trivial, though direct benefit" and a "substantial, though arguably indirect benefit," noting that just based on Intervenors' own use of the allotment program reimbursing private school tuition for just six students from kindergarten through high school, $351,000 in public funds could be spent on private school tuition, which is not a trivial expenditure. [Exc. 568] The superior court further noted that "if even a small percentage of students use their allotments for private school education, the magnitude is still substantial" across the entire correspondence program. [Exc. 567]

Fourth, the superior court discussed the form of the benefit, correctly explaining that "while a direct transfer of funds from the state to a private school will of course render a program constitutionally suspect, merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies."[50] [Exc. 568-69] Under this factor, "the superficial form of the benefit will not suffice to define its substantive character," and "interposing an intermediary does not have a cleansing effect and somehow cause the funds to lose their identity as public funds."[51] [Exc. 569] The superior court correctly found Intervenors' reasoning unpersuasive that "the allotment program is constitutional under this factor because the legislature has simply given the beneficiaries the *option* to spend those public funds on materials and services from public, private, or religious organizations, rather than the legislature *directing* funds in the allotment program

50 *Id.*

51 *Id.* at 132.

to private educational institutions." [Exc. 569; Int.-At. Br. 21] The Court correctly concluded that there is no substantive difference between "parents receiving the allotments and then paying a private school and the students in *Sheldon Jackson College* receiving tuition grants and then paying a private university." [Exc. 569-70]

As the superior court noted, Intervenors' statements that they "are using public funds to finance their children's private education," and "that without the allotment money they could not send their children to private school, or that doing so would create a significant financial burden" essentially conceded the benefit to private schools of higher enrollments due to these allotments. [Exc. 570] The superior court correctly applied the *Sheldon Jackson* factors to conclude that this program provides a direct benefit to education conducted at private educational institutions in violation of Article VII, Section 1 of the Alaska Constitution.

#### iii. *Sheldon Jackson* should not be overturned.

Intervenors argue this Court should "decline to continue to apply" the third *Sheldon Jackson* factor—the magnitude of the benefit.[52] [Int.-At. Br. 18-20] Accepting Intervenors' argument would require this Court to reconsider the meaning of a "direct benefit." In effect, Intervenors are asking this Court to overturn longstanding precedent in *Sheldon Jackson*, but fail to provide a reason—beyond their policy preferences—for doing so. This backdoor

[52] The State implicitly concedes that applying the *Sheldon Jackson* factors would lead to the conclusion that these statutes are facially unconstitutional by arguing, "[t]he Court will need to revisit its analysis of 'direct benefit' in *Sheldon Jackson*" and Intervenors "have called into question both the reach and vitality of that decision." [State At. Br. 48-49]

request to overturn *Sheldon Jackson* does not merit consideration, especially when Intervenors have failed to brief stare decisis. [Int.-At. Br. 18-20]

"When a common law court is asked to overrule one of its prior decisions, the principle of stare decisis is implicated."[53] This Court has "consistently held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling: '[This Court] will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.'"[54] When determining if overruling precedent would do more good than harm, "[this Court] must balance the benefits of adopting a new rule against the benefits of stare decisis."[55] The benefits of stare decisis include "providing guidance for the conduct of individuals, creating efficiency in litigation by avoiding the relitigation of decided issues, and maintaining public faith in the judiciary."[56]

Intervenors base their argument to overrule *Sheldon Jackson* on the premise that cases addressing the Establishment Clause, which *Sheldon Jackson* cited, have been

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53 *Pratt & Whitney Can. v. Sheehan*, 852 P.2d 1173, 1175 (Alaska 1993).

54 *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004) (quoting *State, Com. Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003) (internal quotations omitted)).

55 *Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595, 605 (Alaska 2021) (quoting *State v. Carlin*, 249 P.3d 752, 761-62 (Alaska 2011)).

56 *Carlin*, 249 P.3d at 761-62.

"abrogated or overruled" and therefore this Court needs to jettison the third factor.[57] [Int.-At. Br. 18-20; *see also* State At. Br. 49] But the abrogation of these cases has no impact on the continuing viability of *Sheldon Jackson* given the limited nature of this Court's reliance on those cases.[58] And *Niehaus v. Huppenthal* cited by the Intervenors is also distinguishable, and should not be considered persuasive authority for overturning *Sheldon Jackson*.[59]

Here, Intervenors' claims "fall squarely within the ambit of [this Court's] opinion in" *Sheldon Jackson*, and "while they strenuously criticize [*Sheldon Jackson's*] reasoning and holding in many respects, the [Intervenors] do not convincingly show good cause to

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[57] Intervenors rely on their flawed interpretation of an "indirect" benefit, asserting, "abandoning the third *Sheldon Jackson* factor also better reconciles the test set out in [Establishment Clause cases] with the text of the Alaska Constitution." [Int.-At. Br. 20].

[58] *Sheldon Jackson* discussed *Lendall* and *Meek* in describing examples of trivial, though direct, benefits as compared to substantial, though arguably indirect, benefits. *Sheldon Jackson*, 599 P.2d at 130 n.22. *Lendall* and *Meek* both addressed challenges under the Establishment Clause of the First Amendment. *Lendall v. Cook*, 432 F. Supp. 971, 973 (E.D. Ark. 1977) (addressing a challenge to an Arkansas scholarship program); *Meek v. Pittenger*, 421 U.S. 349, 351 (1975) (addressing challenge to "state law providing assistance to nonpublic, church-related, elementary and secondary schools"). Because the Alaska Constitution prohibits aid to all private educational institutions, changes in the Establishment Clause jurisprudence do not change the analysis of a "direct benefit" for purposes of *Sheldon Jackson*.

[59] The statutes considered by the Arizona Court of Appeals in *Niehaus* provide Empowerment Scholarship Accounts ("ESA") for parents of students with recognized disabilities to cover a variety of expenses. *Niehaus v. Huppenthal*, 310 P.3d 983, 984 (Ariz. Ct. App. 2013). Under the ESA statutes, students could not simultaneously be enrolled in a public school district or charter school while receiving an ESA. *Id.* at 984-85. *Niehaus* further relied heavily on the Arizona Supreme Court's prior interpretation of specific terms such as "appropriation" in the Aid Clause of the Arizona Constitution. *Id.* at 987-88.

revisit this precedent."[60] Although Intervenors would undoubtedly prefer to receive allotments to subsidize their children's private school tuition, this policy preference is not a compelling reason for this Court to revisit its definition of a direct benefit.[61]

## II. The Superior Court Did Not Err In Concluding AS 14.03.300-.310 Are Facially Unconstitutional.

The superior court correctly concluded that AS 14.03.300-.310 are facially invalid. [Exc. 570-71] The State's arguments that AS 14.03.300-.310 are facially constitutional are fundamentally flawed because the State approaches the analysis backwards. The State flips the "plainly legitimate sweep" standard on its head by insisting that the potential to make constitutional expenditures with an allotment under AS 14.03.310 somehow saves the legislature's broad unconstitutional authorization to spend public funds at private schools, which are plainly within the category of "private, or religious organization[s]." [State At. Br. 13-21]

To make its argument, the State mischaracterizes the superior court's Order, and then attacks that mischaracterization as inconsistent with Article VII, Section 1. [State At. Br. 22-24] Rather than presenting this Court with a coherent argument that the statutes can be interpreted to comply with the Constitution, the State attempts to poke holes in the superior court's Order based on an intentional misreading. [State At. Br. 47]

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60 *Thomas*, 102 P.3d at 943.

61 *Carlin*, 249 P.3d at 757 (Alaska 2011) ("Stare decisis compels [the Court] to approach overruling one of [its] prior decisions carefully.").

This Court should reject the State's arguments misinterpreting both the nature of a facial challenge and the Order and Final Judgment of the superior court, and affirm the superior court.

### A. The State Flips the "Plainly Legitimate Sweep" Analysis on its Head.

Alaska Statutes 14.03.300-.310 are unconstitutional as enacted. By their plain text, the legislature authorized purchasing services and materials from private educational institutions using public funds. Article VII, Section 1 mandates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution." The legislature broadly authorizing such purchases, and explicitly precluding DEED from imposing any restrictions to keep expenditures within constitutional bounds, is facially unconstitutional because it is in direct contravention of a constitutional prohibition. It thus creates more than an "occasional problem" in "specific cases," and does not have a "plainly legitimate sweep."[62]

Statutes "may be found to be unconstitutional as applied or unconstitutional on their face."[63] "A facial challenge to a law's constitutionality alleges that the law is

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

[63] *Planned Parenthood 2019*, 436 P.3d at 991 (quoting *ACLU of Alaska*, 204 P.3d at 372).

unconstitutional 'as enacted.'"[64] In other words, "a 'facial challenge' is nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution."[65]

When a statutory scheme violates the "minimum requirements" of the Alaska Constitution, including authorizing action in violation of "a [constitutional] prohibition," the Court is "compelled to strike down [the] statutes or regulations that violate" the prohibition.[66] Thus, for example, this Court has struck down statutes that created exclusive guide areas in violation of the common use clause in the Alaska Constitution,[67] statutes that authorized state bonds in violation of constitutional limit on state debt,[68] and statutes that authorized the collection and use of an assessment on salmon in violation of the dedicated funds clause.[69]

Because AS 14.03.300-.310 expressly authorize paying for education conducted at private institutions with public funds, these statutes clearly violate the direct benefit prohibition of the Alaska Constitution.[70] It is undisputed that in enacting AS 14.03.300-

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64 *Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 981 n.64 (Alaska 2022) (quoting *Planned Parenthood 2019*, 436 P.3d at 1000).

65 Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1238 (2010), cited in *Planned Parenthood 2019*, 436 P.3d at 991 n.29.

66 *Owsichek*, 763 P.2d at 496.

67 *Id*.

68 *Forrer*, 471 P.3d at 590.

69 *State v. Alex*, 646 P.2d 203, 208 (Alaska 1982).

70 The State conceded below that the plain text of these statutes authorize the purchase of educational services, such as private school classes, at private educational institutions. [Exc. 295 ("For purchases that *do* involve religious or other private educational institutions, like private school classes . . .")] The State also specifically conceded that using the allotment to pay for private school tuition is possible under the statutes' plain

.310, the legislature authorized spending public funds at private schools.[71] The plain statutory text does not provide any limits on these expenditures. And so long as educational outcomes are achieved, the legislation deliberately removed DEED's ability to impose restrictions. In fact, the challenged statutes nullified pre-existing regulations that were developed in response to a DEED audit identifying unconstitutional expenditures.[72]

The superior court correctly concluded that the State's argument that only an as-applied challenge may go forward "misinterprets the 'plainly legitimate sweep' standard by relying on an occasional constitutional use to save a plainly unconstitutional statute." [Exc. 554]

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text. [Exc. 296 ("True, a school district *could* violate Article VII, Section 1 by allowing a parent to spent student allotment funds on full-time private school tuition . . . ."); Exc. 297 ("Although conceivably an individual learning plan with these characteristics could be layered over a full-time private school education . . . .")]

[71] In briefing before the superior court, the State attempted to put forth a facially constitutional statutory interpretation in its Motion to Dismiss by relying on the AG Opinion—authored by Deputy Attorney General Cori Mills after Attorney General Taylor recused himself—concluding that spending public funds for a student to attend some number of private school classes would be constitutional if the purpose was to support public education. [Exc. 38-41, 46-48 (State's Motion to Dismiss); Exc. 207-10 (delegation of authority to Mills); Exc. 226-27, 232 (AG Opinion)] On appeal, the State has abandoned advancing any statutory interpretation that using public funds to purchase private school classes or tuition complies with Article VII, Section 1, thereby conceding that the statutes authorize unconstitutional spending under *Sheldon Jackson*. [State At. Br. 19-21 (asserting "purchases that do involve religious or other private educational institutions are not necessarily unconstitutional; they simply need not be considered to conclude that AS 14.03.310 has a 'plainly legitimate sweep.'")]

[72] As explained in a memorandum from legislative counsel, "[i]ndeed, a departmental audit in the past decade resulted in the additional controls over expenditures of public funds by parents and districts in regulations that the bill seeks to overturn." [Exc. 444-46]

The State insists that because it is *possible* to make constitutional expenditures under the statutory regime, the court must parse the expenditures under each student's individual learning plan on a district-by-district basis to determine whether each expenditure violates the Constitution. This is not required. As this Court has previously explained in rejecting a similar argument, the "no set of circumstances" language from *United States v. Salerno* is "not a rigid requirement" in considering a facial challenge.[73] The standard is not meant to be used as a shield or "justification for avoiding constitutional review."[74] Instead, the analysis this Court undertakes when a statute authorizes both constitutional actions and unconstitutional actions is to determine whether it is possible to "sever[] a limited portion of a statute, which [the Court] found unconstitutional, from the balance of the statute, which [the Court] found valid."[75]

Stated another way, there is no instance when a constitutional provision in a statute can save an unconstitutional provision. None of the cases cited by the State so hold. There must be a possible constitutional interpretation of a statute to save it from a facial challenge, and in that case, only an "as applied" challenge may go forward.[76] But if there is no way

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[73] *State v. Planned Parenthood*, 35 P.3d 30, 34-35 (Alaska 2001) (citing 481 U.S. 739, 745 (1987)).

[74] *Id.* at 35.

[75] *Id*. (citing *Javed v. State Dep't of Public Safety,* 921 P.2d 620, 625-26 (Alaska 1996)).

[76] *See Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 104 (Alaska 2015) ("But we will uphold a statute against a charge that it is facially unconstitutional even if it might sometimes create problems as applied, as long as the statute 'has a plainly legitimate sweep.' And the Fund admits the statute can be read constitutionally: 'At most, AS 16.05.330(c) gives the Boards discretion to consolidate and streamline the permitting

to narrowly construe the statute to avoid a constitutional infirmity,[77] and the offending provision cannot be severed, as is true here, the statute in its entirety must be struck as facially unconstitutional.[78]

### B. The Superior Court Correctly Interpreted the Constitution and Struck Both AS 14.03.300 and .310 as Unconstitutional.

To confuse the issues and mask the fatal flaws in its arguments that a facial challenge is inappropriate, the State blatantly misstates the scope of the Order and Final Judgment and argues that the superior court erred in concluding that Article VII, Section 1 "prohibits any spending of public funds at *any and all* private organizations." [State At. Br. 22] In doing so, the State cherry picks quotes in the Order out of context. [State At. Br. 22] The State also mischaracterizes the superior court's stay order. [State At. Br. 26-29]

Contrary to the State's contentions, the superior court did not "rewr[i]te the constitutional text;" [State At. Br. 22] it instead appropriately refused to rewrite a statutory scheme which authorized purchases that facially conflict with the Alaska Constitution. [Exc. 571-73] And, indeed, the State did not ask for the superior court to rewrite the statutes: "None of the language in the challenged statutes is facially unconstitutional such

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process by issuing permits to areas, villages, communities, or groups.' The Fund's facial challenge to the statute's constitutionality therefore fails.").

[77] No party is arguing that a narrowing construction is possible to avoid the constitutional infirmity.

[78] *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 209 (Alaska 2007) ("Having decided that the OEI unconstitutionally infringes upon the speech rights of government officials and employees, and that it limits Alaskans' ability to participate fully in public life, we must next determine if the law can be saved by severing any unconstitutional provisions.").

that the Court should sever it." [Exc. 303] The superior court noted, and agreed with, the State's concerns regarding the wide swath of "gray area" spending (in other words, potentially unconstitutional spending) under the plain text of these statutes, and therefore declined to engage in an elaborate line-drawing exercise or to make the policy judgments necessary to rewrite these provisions to comply with the Constitution.[79]

Simply put, there could be many potential ways for the legislature to authorize purchases of education services at public institutions, or to authorize the purchase of school supplies and textbooks to support a correspondence education (which further could be accomplished via means besides an allotment). In fact, the legislature has already passed such a bill.[80] But the broad text of the challenged statutes explicitly authorizing expenditures on "services and materials" at "public, private, or religious organization[s]," and removing any ability to place constitutional limits on spending, made it impossible for the Court to narrow or sever the unconstitutional statutory provisions without rewriting the statutes.[81] [Exc. 571-73] The superior court did not err.

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[79] "Severing the portions of AS 14.03.310 dealing with private and religious organizations coupled with severing the provision preventing DEED from setting any limits on allotment spending would not be enough to save the remainder of AS 14.03.300-.310. This Court echoes the State's concerns regarding how organizations are characterized and the 'gray area spending,' and finds that it is not possible to sever certain provisions to create a reasonable narrowing construction. As a result, this Court finds that there is no workable way to construe the statutes to allow only constitutional spending and AS 14.03.300-.310 must be struck down as unconstitutional in their entirety." [Exc. 572-73]

[80] *See* Appendix (HB 202).

[81] *State, Div. of Workers' Comp. v. Titan Enters., LLC*, 338 P.3d 316, 321 (Alaska 2014) ("We do not rewrite statutes even when the legislative history suggests that the legislature may have made a mistake in drafting, but here, there is no indication the legislature made such a mistake. Even if the Division is correct . . . '[t]he Division's

## III. The State's Other Arguments As To The Facial Challenge Should Be Rejected.

### A. The State is Incorrect that AS 14.03.300 Should be Severed and Saved as Constitutional.

The State argues that the superior court erred by striking down AS 14.03.300 and .310, which it insists "are *separate* statutes." [State At. Br. 10-13] This argument is fatally flawed because (1) it ignores the unambiguous legislative history explaining how these statutes work together to allow public funds to be spent at private schools (2) it minimizes the role of AS 14.03.300(b) which bars DEED from imposing *any* restrictions on allotment expenditures.

As a threshold matter, the State seems to forget that below it conceded that it "does not ask the Court to craft a narrowing construction or sever any provisions—only to reject the facial challenge." [Exc. 302] The State insisted that a "range of constitutional applications" meant no narrowing was required, and that "[n]one of the language in the challenged statutes is facially unconstitutional such that the Court should sever it." [Exc. 303] The State's argument to sever AS 14.03.300 was waived and should not be heard for the first time on appeal.[82]

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remedy lies with the legislature, not this court.'" (quoting *State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins. v. Alyeska Pipeline Serv. Co*., 262 P.3d 593, 598 (Alaska 2011))).

[82] *Tybus v. Holland*, 989 P.2d 1281, 1285 (Alaska 1999) ("We will not consider arguments that parties fail to raise in the lower court, let alone arguments they have conceded below, unless the trial court committed plain error."); *see also Wettanen v. Cowper*, 749 P.2d 362, 364 (Alaska 1988) (holding argument waived because litigant not only failed to raise argument in lower court but also because he "implicitly conceded" the inapplicability of his argument).

If the Court considers this argument, it should not sever AS 14.03.300. The State now insists that the superior court should have left AS 14.03.300 in place because "it does not *independently authorize* any allotment spending." [State At. Br. 12] This ignores that leaving AS 14.03.300(b) in place prohibits DEED from "impos[ing] any additional requirements," including compliance with the Alaska Constitution. As the superior court appropriately concluded, these statutes were intertwined and intended to function together, such that it was unreasonable to assume that the legislature would have enacted these statutes once the central pillar of expanding allotments to be spent at private schools was removed.

As this Court explained in *Forrer v. State*, courts are directed to excise constitutionally infirm portions of laws, and to save the remainder where possible:

> A provision is severable if "the portion remaining . . . is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part." However, when the invalidation of a central pillar "so undermines the structure of the Act as a whole," then "the entire Act must fall."[83]

The central pillar of this regime is to allow parents to purchase educational services and materials from private educational institutions with public funds via a correspondence program allotment so long as it is consistent with an ILP. Alaska Statute 14.03.300 was part of the unconstitutional scheme to authorize unconstitutional spending. And there would be no need to statutorily authorize ILPs except as a vehicle for the unconstitutional

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83 471 P.3d at 598 (internal footnotes omitted).

allotments.[84] Because the legislative history, sponsor's statements, and plain text of AS 14.03.300-.310 are clear that the overarching purpose of both statutes is to allow public funds to be spent at private schools and to prevent DEED from imposing restrictions so long as educational outcomes are achieved, it is not "reasonably possible" for the Court to "employ a narrowing construction."[85]

As the superior court clarified, its Order "lays out that the purpose and effect of AS 14.03.310 was to allow unconstitutional spending . . . [and] AS 14.03.300(b) specifically prohibits DEED from employing any narrowing construction"—"together, that overbreadth of authorized expenditures and the ban on narrowing [by DEED] is what invalidated both statutes." [Exc. 581] The superior court "reiterate[d], it is not the Court's role to draft legislation and determine policy for the state through impermissibly revising otherwise unconstitutional statutes. Since [the superior court] found no indication that the legislature intended AS 14.03.300, which contains the provision concerning individual learning plans, to stand alone without the other related provisions of AS 14.03.310, it found AS 14.03.300-.310 to be unconstitutional in their entirety." [Exc. 581-82] The superior court did not err in finding AS 14.03.300 was part of the facially unconstitutional scheme to allow unconstitutional spending in violation of the Constitution.

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[84] Another false premise of the State's argument is that the correspondence school program does not exist without the statutes authorizing individual learning plans in AS 14.03.300(a). As briefed *infra*, Section III.B., this argument is incorrect; the correspondence program still exists without both statutes.

[85] *ACLU of Alaska*, 204 P.3d at 373 (advancing pre-enforcement challenge to statute criminalizing possession of marijuana as-applied in specific circumstances).

### B. The State's Other "Sky is Falling" Arguments are Irrelevant and Not Before this Court.

Another false premise that the State advances is that the superior court's Order destroyed "public correspondence schools," suggesting that the only possible solution is to uphold the challenged statutes as facially constitutional. [State At. Br. 40-44] The superior court, however, only struck the correspondence program *allotment* as provided in AS 14.03.300-.310 as facially unconstitutional.[86] [Exc. 574] As explained by the superior court, it did not eliminate the public correspondence program (homeschooling) in Alaska:

> [T]he State mischaracterizes and misreads this Court's April 12th Order. To reiterate, the only statutes at issue in this case are AS 14.03.300-.310, which expanded the allotment program for correspondence study students. As a result, this Court did not find that correspondence study programs were unconstitutional. Correspondence (homeschooling) programs existed before AS 14.03.300-.310 were enacted, and correspondence programs continue to exist after this Court's Order. [Exc. 579]

Other statutes not struck down by the superior court govern the correspondence school program.[87] The program continued to exist after the superior court struck down AS 14.03.300 and .310 as unconstitutional.

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[86] To the extent the State addresses the many reasons that a parent may choose to homeschool a student, based on the erroneous assumption that the superior court's Order eliminated the "correspondence study program," this is irrelevant to whether the specific allotment program in AS 14.03.300-.310 violates the direct benefit prohibition in the Alaska Constitution. [State At. Br. 41-44] This case is not about whether parents may choose to homeschool their children; this case is about the constitutionally permissible uses of a publicly funded allotment program.

[87] *E.g.*, AS 14.07.020(a)(9) (providing DEED shall "exercise general supervision over elementary and secondary correspondence programs offered by municipal school districts or regional educational attendance areas; the department may also offer and make available

The superior court also correctly noted that nothing in its Order prevented the legislature from passing a new statute providing for correspondence program allotments that comply with the Alaska Constitution. [Exc. 572-73] The legislature has in fact already done so.[88]

The State also argues that affirming the superior court's decision that AS 14.03.300 and .310 are unconstitutional will have untold impacts on other state programs. [State At. Br. 44-47] Those programs and those statutes are not before this Court. This Court must analyze the constitutionality of the statutes at issue in *this* case, without consideration to future challenges that may arise.[89] If other statutes authorize unconstitutional spending, they will have to be separately addressed.

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to any Alaskan through a centralized office a correspondence study program"); AS 14.17.430 ("Except as provided in AS 14.17.400(b), funding for the state centralized correspondence study program or a district correspondence program, including a district that offers a statewide correspondence study program, includes an allocation from the public education fund . . ."); AS 14.07.050 ("Textbooks for use in the public schools of the state, including a district-offered statewide correspondence study program, shall be selected by district boards for district schools . . ."). DEED and the State Board of Education and Early Development also continue to regulate the correspondence program now. *See* 4 AAC 33.405-4 AAC 33.490. [Exc. 662-65 (memo addressing the correspondence study programs after the superior court's Order)]

88 *See* Appendix (HB 202).

89 *E.g.*, *Brause v. State*, 21 P.3d 357, 359 (Alaska 2001) ("The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute," and "grapple with hypothetical possibilities"); *see also White v. Univision of Va. Inc. (In re Urban Broad. Corp.)*, 401 F.3d 236, 245 (4th Cir. 2005) (explaining courts do not have "to predict the *res judicata* effect of its orders on a hypothetical future case. Moreover, even if a court attempted to do so, any such prediction could only be based on rank speculation.").

## IV. The State's Motion To Dismiss Was Properly Denied Because Individual School Districts Are Not Indispensable Parties.

If this Court affirms the superior court's decision that AS 14.03.300 and .310 are facially unconstitutional, there is no need to reach the State's arguments regarding the as-applied challenge. In any event, even if the Court reverses that decision, the superior court correctly applied Rule 19 in denying the State's Motion to Dismiss. A motion to dismiss is subject to de novo review.[90]

The State's brief raises a host of procedural issues insisting that the superior court should have dismissed DEED from this case, and instead parsed each expenditure on a school district-by-school district basis. [State At. Br. 30-39] In furtherance of this argument, the State incorrectly insists that Plaintiffs are unfairly seeking to hold the State "liable" for the actions of individual school districts in the as-applied constitutional challenge.[91] [State At. Br. 36-40] The State's repeated attempts to disclaim all

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[90] *Hahn v. Geico Choice Ins. Co.*, 420 P.3d 1160, 1166 (Alaska 2018) ("We review decisions granting or denying motions to dismiss de novo." (quoting *Varilek v. City of Houston*, 104 P.3d 849, 851 (Alaska 2004))).

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

responsibility for the executive branch to ensure public funds are spent consistent with the requirements of the Alaska Constitution should be rejected.[92]

The superior court correctly concluded that school districts were not necessary parties under Rule 19(a). The superior court reasoned that DEED is charged with exercising general supervision over public schools, and further with exercising general supervision of over elementary and secondary correspondence programs, such that "DEED is the state agency with the ultimate responsibility to ensure public funds are used in accordance with the Alaska Constitution." [Exc. 556] The superior court further noted "that not a single school district sought intervention" pursuant to Rule 19(a)(2). [Exc. 556]

This is entirely consistent with "[t]he proper test for determining whether parties are indispensable [as] set out in Civil Rule 19."[93] This Court has explained Rule 19 requires a three-part analysis:

> First, the court must determine whether the parties are "necessary," according to the standards set forth in Civil Rule 19(a). Second, only if the parties are found to be necessary, the court must then determine if they can be joined. At this point in the inquiry, the court must decide whether it can exercise personal jurisdiction over the parties. Finally, if the court concludes that the parties are necessary and cannot be joined, it must determine whether they are "indispensable" by weighing the factors provided in Civil Rule 19(b).[94]

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92 *Alaskans for a Common Language*, 3 P.3d at 913-14 & nn.30-31 (citing Alaska Const. art. III, § 16; AS 44.23.020); *Taylor*, 529 P.3d at 1155-56 (discussing authority of "commissioners . . . to enforce laws within their purview.").

93 *Pacific Marine Ins. Co. v. Harvest States Coop. (In re Pacific Marine Ins. Co.)*, 877 P.2d 264, 268 (Alaska 1994).

94 *Id.* at 268-69.

The State's argument failed in part one: individual school districts were not "necessary" under Rule 19(a). Rule 19(a)(1) indicates that a party is necessary if "in the person's absence complete relief cannot be accorded among those already parties." In other words, whether a party is necessary depends on the relief requested. As the State acknowledged in its Motion to Dismiss, Plaintiffs sought "[a]n order declaring AS 14.03.300-.310 is unconstitutional" and "[a]n order enjoining any current or future use of public funds to reimburse payments to private educational institutions pursuant to AS 14.03.300-.310." [Exc. 41] This declaratory and injunctive relief can be provided without joining school districts even via an as-applied challenge. [Exc. 574]

Moreover, DEED, and its counsel, the Attorney General, have the duty to ensure public funds are spent constitutionally. DEED has the statutory duty to "exercise general supervision over the public schools of the state," and to "exercise general supervision over elementary and secondary correspondence study programs."[95] In fact, prior to the enactment of AS 14.03.300 and .310, and consistent with its authority, DEED had adopted regulations specifically ensuring that allotments were only spent in accordance with the Constitution.[96] When executive agencies, like DEED, have questions regarding the interpretation of laws passed by the legislature, the Attorney General is "the officer charged

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95 AS 14.07.020(a)(1), (9). [Exc. 584-89]

96 *See* 4 AAC 33.405 – 4 AAC 33.490 [Exc. 115-16; Exc. 444-46 (addressing student fund accounts with state oversight); Exc. 663-64]

by law with advising" executive agencies who enforce the law "as to the meaning of it."[97] The Attorney General has the authority to ensure compliance with Alaska's Constitution.[98]

By design, AS 14.03.300(b) removed DEED's ability to "impose additional requirements" to ensure that spending under the program in fact satisfies constitutional requirements.[99] This contention—that the legislature can undo DEED's responsibly over how public funds are spent—conflicts with DEED's obligation to provide oversight over the public school system, including oversight over public school funding.[100] DEED's concession that it has no ability to restrict how public funds are used only underscores

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97 *Allison v. State*, 583 P.2d 813, 816 n.15 (Alaska 1978) (quoting *Smith v. Mun. Court of Glendale Judicial Dist.*, 334 P.2d 931, 935 (Cal. Dist. App. 1959)).

98 *Taylor*, 529 P.3d at 1156 (Alaska 2023) (noting that the "attorney general's common law authority to sue on the State's behalf to enforce a constitutional mandate is not distinct from a governor's constitutional authority to sue on the State's behalf (through an attorney general).")

99 AS 14.03.300(b) ("Notwithstanding another provision of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS 14.03.310, on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f)."). In SB 100's legislative history, Ms. Mischel, attorney for Legislative Legal Services, discussed problems related to Article VII, "point[ing] out that one of the regulations that the department sets up for district correspondence programs requires a reporting from the district on who is attending and what the performance is. Without the department looking at that it would be left up to the district to do. The department would not have a role in reviewing the report and making adjustments under SB 100." [Exc. 120]

100 The public education fund, created by statute in 2005, holds funds appropriated for education from the general fund. *See* AS 14.17.300(a). *See also* AS 14.17.430 (providing "funding for the state centralized correspondence study program or a district correspondence program . . . includes an allocation from the public education fund"); 14.07.020(a)(9) (describing DEED's duty to "exercise general supervision over elementary and secondary correspondence study programs offered by municipal school districts or regional educational attendance areas"); 14.07.020(a)(1) (describing DEED's duty to "exercise general supervision over the public schools of the state").

Plaintiffs' arguments that AS 14.03.300-.310 has a plainly unconstitutional sweep. But despite its lack of knowledge and the unconstitutional restrictions placed on its oversight, DEED as the State agency overseeing education funding has the ultimate responsibility to ensure public funds are used in accordance with our Constitution. Relief can and should therefore be granted without joining individual districts.

The State also argues that this case should have proceeded against the State "only if it can be established that DEED stands in the school districts' shoes for purposes of liability." [State At. Br. 36 (citing Exc. 308-12)] This argument is misplaced as this is not a tort case where Plaintiffs are seeking damages against anyone. Rather, the purpose of this case is to ensure constitutional use of public funds. Under the State's argument, the superior court, not DEED, would now be responsible for providing oversight of individual school districts. Specifically, the superior court would be the arbiter of delineating all "the gray areas"—when AS 14.03.300-.310 fails to offer any basis to do so—by engaging in a line-drawing exercise after parsing through all allotment expenditures at each school district under an as-applied challenge. In other words, the State requests that the superior court audit the correspondence program allotment expenditures *and then* craft a new correspondence program allotment statute authorizing only constitutional expenditures.[101]

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[101] The Amici, Matanuska-Susitna Borough School District and Carlene Boden, request this same result based on the misunderstanding that the only way to provide an allotment program is to uphold these statutes. However, the superior court's Order concluded that the expansion of the allotment program that occurred under AS 14.03.300-.310 (along with the removal of DEED's ability to restrict expenditures) make these statutes facially unconstitutional. The legislature could, and indeed has, passed a bill providing for allotments without these facially constitutional defects. *See* Appendix.

As the superior court concluded, however, this represents a fundamental misunderstanding regarding the role of the Court: "it is not the Court's role to draft legislation and determine policy for the state through impermissibly revising otherwise unconstitutional statutes." [Exc. 581-82]

## V. There Is No Federal Right to State-Subsidized Private Education.

The superior court noted that "Intervenors explicitly acknowledge that they are using public funds to finance their children's private educations." [Exc. 570] The superior court was correct to conclude that "[p]arents have the right to determine how their children are educated. However, the framers of our constitution and subsequent case law clearly indicate that public funds are not to be spent on private educations." [Exc. 570] Intervenors insist that the "trial court's incorrect interpretation and application of Article VII, section 1 brought the Alaska Constitution into conflict with the United States Constitution" on the assumption that because parents have a "fundamental, federal constitutional right to direct the education of their children," they *also* have the right to have the state subsidize their parental choices by paying for private education. [Int.-At. Br. 25 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925))] It is undisputed that parents have a right to direct the upbringing of their children.[102] But equating a parent's right to choose to send their children

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Emergency regulations similarly could have been promulgated for the upcoming school year. [Exc. 657-61; Exc. 662-65; Exc. 666-67]

[102] *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing cases addressing "the interest of parents in the care, custody, and control of their children."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (concluding that a law requiring children to attend public schools interferes with "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401

to private school with a right requiring the state to pay for private education is a bridge too far. [Int.-At. Br. 27-33]

There simply is no federal right to state-subsidized private education. [Int.-At. Br. 25-46] Intervenors concede as much: "[t]his is, of course, not to say that Alaska was under any constitutional obligation to create a program, like the one here, providing aid to families who choose a private education for their children." [Int.-At. Br. 26] Intervenors further acknowledge that the United States Supreme Court has explicitly held that a "State need not subsidize private education."[103] [Int.-At. Br. 26] Federal law requires only that "once a State decides to [fund private schools], it cannot disqualify some private schools solely because they are religious."[104] Bluntly put, none of the cases cited by Intervenors hold that there is a right to state-subsidization of private education. [Int.-At. Br. 26-33] Because Intervenors' federal claims all hinge on the existence of a federal right requiring states to subsidize private education, and there is no such right, their hybrid rights theory predicated on this theory necessarily fails as well.[105] [Int.-At. Br. 42-46]

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(1923) (addressing challenged statute forcing schools to teach only in English, and concluding "[t]he protection of the Constitution extends to all, to those who speak other languages" in directing the upbringing of their children).

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

104 *Carson*, 142 S. Ct. at 1997 (discussing *Espinoza*, 140 S. Ct. 2246 (concluding a program that provides benefits to private schools, but excludes a subset of schools solely based on being religious or sectarian private schools, violates the Free Exercise Clause of the First Amendment)).

105 For "hybrid" rights caselaw to even apply there must be a violation involving the connection of *two* fundamental rights. *E.g.*, *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) ("We hold that a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim

As this Court concluded in *Sheldon Jackson*, Alaska's "direct benefit prohibition" is "unique" in that it "bans aid to all private educational institutions, including those with no religious affiliation."[106] This prohibition "disengages the state from the undesirable task of withholding benefits solely on the basis of religious affiliation."[107] Instead, for purposes of determining the constitutional bounds of expenditures of public funding for education, the Alaska Constitution establishes just two categories: public and non-public educational institutions.[108] The Alaska Constitution does not disqualify schools from public aid because they are religious, and therefore does not implicate cases addressing the Free Exercise Clause or Establishment Clause of the First Amendment of the United States Constitution. Because there is no fundamental right to state-funded private education, and because Alaska's Constitution makes no legal distinction between religious and other types of private schools, Intervenors' argument that Alaska's direct benefit prohibition is subject

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of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right."); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) ("Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child.").

106 599 P.2d at 129-32 (concluding "all private educational institutions were meant to be included"). Upon reviewing the Constitutional Convention minutes, this Court concluded that Article VII, Section 1 of the Alaska Constitution "was thus designed to commit Alaska to the pursuit of public, not private education." *Id.* at 129.

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

108 The delegates defined "private educational institutions" as "any educational institution that is not supported and run by the state." 2 Proceedings at 1511.

to strict scrutiny based on "discrimination against private-school parents" fails. [Int.-At. Br. 36-39]

There also is no equal protection violation. The allotment is not a "generally available public benefit" that other Alaskans can use to fund private education but the Intervenors cannot. The constitutional prohibition barring the use of public funds for private education applies equally to all Alaskans.

In any event, ensuring *public* funds are used only for *public* education serves a legitimate state interest. The State undeniably has a legitimate interest in maintaining a system of public schools open to all students. Indeed, the United States Supreme Court acknowledged that a state has a legitimate interest in supporting public education in *Espinoza*, concluding only that explicitly excluding religious private schools, while funding all other private schools, would be "fatally underinclusive."[109]

Intervenors have the choice, just like all parents of students in Alaska, to enroll their students in a public school, which will be held to public education standards and requirements, *or* they may choose to enroll their students in a private school, which cannot be paid for with public funds under the Alaska Constitution. Here, Intervenors insist that they should be able to simultaneously enroll their students in both the public correspondence program and a private school, *and then* have the public correspondence

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[109] 140 S. Ct. at 2261 (explaining a State's "interest in public education cannot justify a no-aid provision that requires only religious private schools to 'bear [its] weight.'" (citation omitted)).

program allotment reimburse them for private school tuition. There is no fundamental right to such a scheme.

## CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court affirm the superior court's grant of summary judgment on the facial challenge, and affirm the superior court's denial of the State's motion to dismiss.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 10th day of June, 2024.

CASHION GILMORE & LINDEMUTH

By: Lauren Sherman

Scott M. Kendall
Alaska Bar No. 0405019
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**SCS CSHB 202(FIN) am S(efd add S): "An Act relating to the availability and administration of opioid overdose drugs in public schools; relating to correspondence study programs; and relating to allotments for correspondence study programs; and relating to an annual report relating to Substance Abuse and Mental Health Services Administration grants and opioid overdose drug distribution; and providing for an effective date."**

SENATE CS FOR CS FOR HOUSE BILL NO. 202(FIN) am S(efd add S)

"An Act relating to the availability and administration of opioid overdose drugs in public schools; relating to correspondence study programs; and relating to allotments for correspondence study programs; and relating to an annual report relating to Substance Abuse and Mental Health Services Administration grants and opioid overdose drug distribution; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 14.30 is amended by adding a new section to article 3 to read:

**Sec. 14.30.145. Opioid overdose drugs.** (a) Each school district shall ensure that

(1) a person trained to administer an opioid overdose drug is on site

(A) when the main school building of each school in the school district is open to students or staff, including periods when the school building is open before and after school hours and during weekend activities; and



(B) during each school-sponsored event conducted on school grounds;

(2) the main school building of each school in the school district has at least two doses of an opioid overdose drug available on site; and

(3) at least one dose of an opioid overdose drug is available during a school-sponsored event conducted on school grounds.

(b) The Department of Health shall provide each school district with the opioid overdose drug required under this section. The commissioner of health shall develop and provide to each school district a short training video about how and when to administer an opioid overdose drug.

(c) A school district, school, or individual is not liable for civil damages for an injury to another individual resulting from a failure to possess or maintain an opioid

overdose drug under this section.

(d) In this section,

(1) "main school building" means the building on school grounds where most of the students of the school are educated during regular school hours and the principal, nurse, and other administrative staff of the school are located;

(2) "opioid overdose drug" has the meaning given in AS 17.20.085(e);

(3) "school district" means a borough school district, a city school district, a regional educational attendance area, and a state boarding school;

(4) "school grounds" means a building, structure, athletic playing field, playground, parking area, or land contained within the real property boundary line of a school in a school district.

* **Sec. 2.** AS 17.20.085(e) is amended by adding a new paragraph to read:

(5) "school district" has the meaning given in AS 14.30.145(d).

* **Sec. 3.** AS 17.20.085 is amended by adding new subsections to read:

(f) Notwithstanding a provision or rule of law to the contrary, a school district, if acting under a standing order or protocol under (a) or (c) of this section, may receive a supply of opioid overdose drugs from the department and may possess opioid overdose drugs for the purposes of AS 14.30.145.

(g) Notwithstanding a provision or rule of law to the contrary, a person, if



acting under a standing order or protocol under (a) or (c) of this section, may administer an opioid overdose drug under AS 14.30.145 to a person at risk of experiencing an opioid overdose.

* **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIVIDUAL LEARNING PLANS; STUDENT ALLOTMENTS. (a) Notwithstanding AS 14.03.300 or 14.03.310, the department or a district that provides a homeschool or correspondence study program shall annually provide an individual learning plan for each student enrolled in the program developed in collaboration with the student, the parent or guardian of the student, a certificated teacher assigned to the student, and other individuals involved in the student's learning plan.

(b) The board shall adopt regulations establishing standards for individual learning plans. The regulations must require that an individual learning plan

(1) provide a course of study appropriate to the student's grade level and consistent with state and district standards;

(2) incorporate an ongoing assessment plan that includes statewide

assessments required for public schools under AS 14.03.123(f);

(3) include provisions for modifying an individual learning plan if the student is below proficient on a standardized assessment in a core subject;

(4) provide for quarterly monitoring of a student's work and progress by the certificated teacher assigned to the student.

(c) The department or a district that provides a homeschool or correspondence study program may provide an annual student allotment to a parent or guardian of a student enrolled in the homeschool or correspondence study program. A parent or guardian may use the allotment only for implementation of the student's individual learning plan.

(d) The department shall monitor the use of allotments distributed under this section.

(e) The department or a district that provides a correspondence study program shall submit an annual report to the department that includes

(1) the number of students enrolled in the program;

(2) the demographic information of the students enrolled in the program;

(3) an accounting of student allotment funds that have been disbursed;



(4) assessment and proficiency scores of the students enrolled in the program; and

(5) a review of curricula that has been provided by the program or purchased using allotment funds."

(f) The department shall include the information reported to the department under (e) of this section in the report to the legislature required under AS 14.07.168.

(g) The board shall adopt regulations to implement this section consistent with art. VII, sec. 1, Constitution of the State of Alaska.

(h) In this section,

(1) "board" means the state Board of Education and Early Development;

(2) "department" means the Department of Education and Early Development;

(3) "district" has the meaning given in AS 14.17.990.

* **Sec. 5.** Section 4 of this Act is repealed July 1, 2025.

* **Sec. 6.** AS 17.20.085(d) is repealed.

* **Sec. 7.** Section 6 of this Act takes effect January 1, 2027.