IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Education & Early Development, and Commissioner Deena M. Bishop, in her official capacity,

Appellants,

v.

Edward Alexander, Josh Andrews, Shelby Beck Andrews, and Carey Carpenter,

Appellees,

Andrea Moceri, Theresa Brooks, and Brandy Pennington,

Intervenor-Appellants.

Supreme Court No.: S-19083/S-19113

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

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ADOLF V. ZEMAN, JUDGE

BRIEF OF APPELLANT STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT, et al.

TREG TAYLOR
ATTORNEY GENERAL

By: */s/ Margaret Paton Walsh*
Margaret Paton Walsh (0411074)
Chief Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5275

FIRST LIBERTY INSTITUTE

By: */s/ Lea E. Patterson*
Lea E. Patterson
Justin E. Butterfield
Hiram S. Sasser
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
(972) 941-4444

HUNTON ANDREWS KURTH LLP

By: */s/ Elbert Lin*
Elbert Lin
951 E. Byrd Street
Richmond, VA 23219
(804) 788-7202

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

AUTHORITIES PRINCIPALLY RELIED UPON ix

JURISDICTION 1

PARTIES 1

ISSUES PRESENTED 1

INTRODUCTION 3

STATEMENT OF THE CASE 4

I. Public correspondence school programs run by local school districts have long been one of the educational options available to public school students in Alaska. 4

II. In 2023, Alexander sued DEED, bringing a facial and as-applied constitutional challenge to AS 14.03.300–.310. 6

III. The superior court struck down AS 14.03.300–.310 as facially unconstitutional. 8

STANDARDS OF REVIEW 10

ARGUMENT 10

I. The superior court erred by striking down AS 14.03.300, which authorizes and governs individual learning plans for correspondence programs 10

II. The superior court erred in holding that AS 14.03.310, the statute providing for and governing student allotments, is *facially* unconstitutional. 13

A. A statute has a "plainly legitimate sweep" sufficient to survive a facial challenge if there is an identifiable core set of constitutional applications. 14

B. The superior court made legal errors that led it to vastly underestimate the range of constitutional applications of AS 14.03.310. 17

1. Alaska Statute 14.03.310 has an identifiable and wide range of constitutional applications. 17

2. The superior court misinterpreted Article VII, Section 1. 22

3. The legislative history of AS 14.03.310 does not save the superior court's mistaken interpretation of the constitution. 24

4. The superior court's and Alexander's efforts to limit the effect of the facial invalidation of AS 14.03.300–.310 do not cure the error 26

III. The superior court also erred in denying DEED's motion to dismiss and cross-motion for summary judgment on Alexander's *as-applied* challenge. 30

A. The Court erred by holding that DEED has the "ultimate responsibility" for the use of allotment funds. 30

B. Even if the school districts are not necessary parties, the superior court overlooked DEED's argument that it could not be liable for the conduct of the school districts. 36

C. Should the Court reverse the superior court's facial invalidation of the statutes but allow Alexander's as-applied challenge to proceed, that as-applied challenge should be remanded to superior court. 39

IV. Affirming the superior court's decision striking these statutes as facially unconstitutional would have wide-reaching harmful consequences. 40

A. The superior court's decision will create a significant and unanticipated disruption for many of Alaska's public school children. 41

B. The superior court's decision unwittingly invites challenges to many other state programs. 44

V. Rejecting the State's arguments will require this Court to address potentially thorny questions that could otherwise be avoided. 47

A. The Court will need to consider whether the alleged unconstitutional applications of AS 14.03.310 are consistent with the statute itself. 47

B. The Court will need to revisit its analysis of "direct benefit" in *Sheldon Jackson College*...48

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Alaska Ass'n of Naturopathic Physicians v. Alaska, Dep't of Commerce,
414 P.3d 630 (Alaska 2018) 34

Alaska Fish & Wildlife Conservation Fund v. State,
347 P.3d 97 (Alaska 2015) 15, 16, 21

Alaska State-Operated School System v. Mueller,
536 P.2d 99 (Alaska 1975) 37

Alaskans for a Common Language, Inc. v. Kritz,
170 P.3d 183 (Alaska 2007) 28

Beegan v. State, Dep't of Transp. & Pub. Facilities,
195 P.3d 134 (Alaska 2008) 10

Colorado Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 49

Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game,
357 P.3d 789 (Alaska 2015) 29

Haggblom v. City of Dillingham,
191 P.3d 991 (Alaska 2008) 16

Hallam v. Alaska Airlines, Inc.,
91 P.3d 279, 283 (Alaska 2004) 10

Hickel v. Cowper,
874 P.2d 922 (Alaska 1994) 24

Hootch v. Alaska State-Operated Sch. Sys.,
536 P.2d 793 (Alaska 1975) 4, 23, 41

Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles,
921 P.2d 620 (Alaska 1996) 15

Jefferson v. State,
527 P.2d 37 (Alaska 1974) 13

Kenai Peninsula Borough v. State,
532 P.2d 1019 (Alaska 1975) 36, 37, 38, 39

Kodiak Island Borough v. Mahoney,
71 P.3d 896 (Alaska 2003) 14

Kyle S. v. Alaska, Dep't of Health & Soc. Servs.,
309 P.3d 1262 (Alaska 2013) 39, 40

Meek v. Pittenger,
421 U.S. 349 (1975) 49

Mitchell v. Helms,
530 U.S. 793 (2000) 49

Municipality of Anchorage v. Repasky,
34 P.3d 302 (Alaska 2001) 36

Percoco v. United States,
598 U.S. 319 (2023) 28

Petersen v. State,
930 P.2d 414 (Alaska Ct. App. 1996) 16

Phelps-Roper v. Troutman,
712 F.3d 412 (8th Cir. 2013) 40

Planned Parenthood of The Great Nw. v. State,
375 P.3d 1122 (Alaska 2016) 28

Roberge v. ASRC Construction Holding,
503 P.3d 102 (Alaska 2022) 23

Roemer v. Board of Public Works of Maryland,
426 U.S. 736 (1976) 49

Sagoonick v. State,
503 P.3d 777 (Alaska 2022) 15

Schmidt v. Lessard,
414 U.S. 473 (1974) 29

Sheldon Jackson Coll. v. State,
599 P.2d 127 (Alaska 1979) 40, 48, 49

Sonneman v. Hickel,
836 P.2d 936 (Alaska 1992) 13

Sprague v. State,
590 P.2d 410 (Alaska 1979) 34

Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors,
205 P.3d 326 (Alaska 2009) 10

State v. ACLU of Alaska,
204 P.3d 364 (Alaska 2009) 15, 17

State, Dep't of Com., Cmty. & Econ. Dev., Div. of Ins. v. Progressive Cas. Ins. Co.,
165 P.3d 624 (Alaska 2007 .... .23

State, Department of Revenue, Child Support Enforcement Div. v. Beans,
965 P.2d 275 (Alaska 1998) 14, 15

State v. Planned Parenthood of Alaska,
35 P.3d 30 (Alaska 2001) 15

State v. Planned Parenthood of the Great Nw.,
436 P.3d 984 (Alaska 2019) 14

Stock v. State,
526 P.2d 3 (Alaska 1974) 16

Studley v. Alaska Pub. Offs. Comm'n,
389 P.3d 18 (Alaska 2017) 10

Treacy v. Municipality of Anchorage,
91 P.3d 252 (Alaska 2004) 14, 15, 16

Troxel v. Granville,
530 U.S. 57 (2000) 15, 16, 21

Tunley v. Municipality of Anchorage Sch. Dist.,
631 P.2d 67 (Alaska 1980) 38

United States v. Raines,
362 U.S. 17 (1960) 17

United States v. Reese,
92 U.S. 214 (1876) 28

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008) 17

Wielechowski v. State,
403 P.3d 1141 (Alaska 2017) 23, 24

Constitutional Provisions

Alaska Const. art. VII, § 1 .... *passim*

Alaska Statutes

AS 01.10.030 12

AS 14.03.016 35

AS 14.03.300 .... *passim*

AS 14.03.310 .... *passim*

AS 14.07.020 33

AS 14.08.021 36

AS 14.08.101 36

AS 14.08.111 .... 32, 36

AS 14.12.020 .... 36, 38
AS 14.14.090 .... 32, 36
AS 14.17.910 .... 27, 33
AS 14.43.400-.420 47
AS 22.05.010 1
AS 23.15.620-.660 45
AS 23.15.820-.850 46
AS 23.15.840 46
AS 23.25.835 46
AS 44.27.020 4

Alaska Regulations

4 AAC 33.405 31
4 AAC 33.405 - 4 AAC 33.490 .... 30, 31
4 AAC 33.420 32
4 AAC 33.421 32
4 AAC 33.422 32
4 AAC 33.426 32
4 AAC 33.460 .... 32, 33

Federal Statutes

29 U.S.C. 50 45
38 U.S.C. § 3501(a)(6) 18

Federal Regulations

20 C.F.R. § 411.167(a) 18
47 C.F.R. § 0.466(a)(5) 18

Court Rules

Alaska Appellate Rule 202(a) 1
Alaska Civil Rule 12(b)(7) 2
Alaska Rule 65 29

Other Authorities

Gordon Harris, Alaska Legislative Affairs Agency,
Alaska's Constitution: A Citizen's Guide (5th ed.) 18

2005 Inf. Op. Att'y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244 .... 4, 32, 41

Proceedings of the Alaska Constitutional Convention (PACC) (Jan. 9, 1956)........... 19, 41

AUTHORITIES PRINCIPALLY RELIED UPON

Constitutional provisions:

Article VII, Section 1.

Public Education

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.

Alaska Statutes:

AS 14.03.300.

Correspondence study programs; individual learning plans

(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.

Student allotments

(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.

Alaska Court Rules:

Alaska Civil Rule 12.

Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, unless otherwise directed when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counter-claim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The state or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counter-claim, within 40 days after the service upon the attorney general of the pleading in which the claim is asserted. A non-governmental party shall serve an answer to the complaint or to a cross-claim, or a reply to a counter-claim within, 40 days after service upon an officer or agency of the state appointed, authorized, or designated as agent to receive service for such party pursuant to statute. An individual in a foreign country who is served with a summons and complaint under subsection (d)(13) of Rule 4 shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 40 days after service upon that individual. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's

action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A decision granting a motion to dismiss is not a final judgment under Civil Rule 58. When the decision adjudicates all unresolved claims as to all parties, the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A decision granting a motion for judgment on the pleadings is not a final judgment under Civil Rule 58. When the decision adjudicates all unresolved claims as to all parties, the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other times as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under the rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except as provided in subdivision (h) (2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.
>
> (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.
>
> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter the court shall dismiss the action.

Alaska Civil Rule 19.

Joinder of Persons Needed for Just Adjudication

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subsection (a)(1) — (2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1) — (2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

JURISDICTION

Deena M. Bishop, in her official capacity as the Commissioner of the Alaska Department of Education and Early Development, hereby appeals from the April 12, 2024 order and May 2, 2024 final judgment issued by Superior Court Judge Adolf V. Zeman. [Exc. 541-573, 574] This Court has appellate jurisdiction under AS 22.05.010 and Alaska Appellate Rule 202(a).

PARTIES

The appellant is Deena M. Bishop, in her official capacity as the Commissioner of the Alaska Department of Education and Early Development ("DEED" or "the State"). The intervenor-appellants are Andrea Moceri, Theresa Brooks, and Brandy Pennington (collectively, "the intervenors").

The appellees are Edward Alexander, Josh Andrews, Shelby Beck Andrews, and Carey Carpenter (collectively, "Alexander").

ISSUES PRESENTED

The Alaska Constitution instructs that "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."[1]

[1] Alaska Const. art. VII, § 1.

As part of the public correspondence study program, AS 14.03.310 authorizes school districts and DEED to "provide an annual student allotment" to parents and guardians of enrolled students "for the purpose of meeting instructional expenses." Currently, only school districts provide such programs and student allotments. Parents and guardians may purchase "services and materials from a public, private, or religious organization" so long as certain requirements for those services and materials are met.[2]

1. Do the superior court's conclusions about student spending of allotment funds under AS 14.03.310 support its further invalidation of the rest of the correspondence study program under AS 14.03.300, which concerns individual learning plans?

2. Does AS 14.03.310, which authorizes parents to spend student allotments on "nonsectarian services and materials from a public, private, or religious organization" —and so can include spending on things like textbooks from a private publisher or pencils from an office-supply store—have a "plainly legitimate sweep" such that Alexander's facial constitutional challenge should have been dismissed?

3. Should Alexander's as-applied challenge to the constitutionality of particular school districts' applications of AS 14.03.310 have been dismissed under Alaska Civil Rule 12(b)(7) because those particular school districts have not been joined as necessary parties?

---

[2] AS 14.03.310(b).

4. Should DEED have been granted summary judgment on Alexander's as-applied challenge to the constitutionality of particular school districts' application of AS 14.03.310 because those particular school districts are not joined as defendants and DEED cannot be held liable for their conduct?

INTRODUCTION

For three decades, correspondence schools have helped Alaska meet the needs of its diverse population. For the last decade, local school districts have operated correspondence schools as authorized by AS 14.03.300. The 22,000 students enrolled annually in those schools use student allotment funds, provided under AS 14.03.310, to pay for courses and materials—textbooks, computers, pens, paper, and the like—if approved by their local school districts.

On April 12, 2024, the superior court ended the correspondence study program. It held that the use of allotment funds to pay private organizations for anything violates the Alaska Constitution's bar on using public funds to directly benefit private schools. Ignoring the plain text of Article VII, Section 1, and evidence establishing a variety of ways allotment funds can be used consistent with the Alaska Constitution, the superior court struck down AS 14.03.310 as facially unconstitutional. It then invalidated AS 14.03.300 as well—despite its having no role in allotment funding at all—thereby eliminating all direct statutory authority for correspondence programs and upending a critical component of Alaska's public-school system.

The superior court's erroneous invalidation of the correspondence school and student allotment programs should be reversed, as should its decision that the State—

which has not operated any correspondence schools for two decades—can be liable for alleged unconstitutional use of allotment funds by particular public school districts.

STATEMENT OF THE CASE

I. Public correspondence school programs run by local school districts have long been one of the educational options available to public school students in Alaska.

The Alaska Constitution mandates that the legislature shall establish and maintain a system of public schools open to all.[3] Under that mandate, the legislature created DEED to exercise general supervision of public schools.[4] Most control over public school districts, however, is delegated to local school boards to provide schools with the flexibility "to meet the varying conditions of different localities."[5] [Exc. 218-19, 227, 286] A key component in providing Alaska's public school districts that flexibility is the public correspondence school program. [Exc. 218] Local school districts have operated statewide correspondence school programs for over thirty years.[6]

The public correspondence school system was codified in 2014 in AS 14.03.300, which establishes requirements for school districts and DEED if operating such programs. DEED does not currently operate any correspondence programs and repealed the regulations for a state-run correspondence school in 2004. [Exc. 287] Alaska Statute 14.03.300 requires the provider of a correspondence program to develop an individual

---

[3] Alaska Const. art. VII, § 1.

[4] AS 44.27.020.

[5] *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 799 n.15, 803 (Alaska 1975).

[6] 2005 Inf. Op. Att'y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1.

learning plan for each enrolled student in collaboration with the student's parents and public school teacher.[7] At the same time that AS 14.03.300 was enacted, the legislature enacted Alaska's student allotment program under AS 14.03.310, which allowed the district providing a correspondence study program to give an allotment to the parents of enrolled correspondence-program students to pay for "services and materials" from a "public, private, or religious organization." The statute requires such spending to meet a number of statutory requirements, including that the services and materials "are required for the course of study in the individual learning plan developed for the student" and "otherwise support a public purpose."

Today there are thirty-six district-operated public correspondence school programs in Alaska, fifteen of which are statewide programs that offer services to students all across Alaska. [R. 658] The programs employ 261 public school teachers who serve the more than 22,000 Alaskan children currently enrolled in public correspondence school programs. [R. 658–59] Those programs play a critical role in helping to alleviate the state's teacher shortage, meeting the needs of students in remote areas for specific course requirements, and enabling students to meet their graduation requirements. [R. 660–61] One of the largest correspondence programs today is Mat-Su Central, a program of the Matanuska-Susitna Borough School District that enrolls over 2,000 students, has approved curricula from over 200 sources, and lists over 300 community instructional partners and vendors, both public and private. [Exc. 291, 314-317]

---

[7] AS 14.03.300(a).

II. In 2023, Alexander sued DEED, bringing a facial and as-applied constitutional challenge to AS 14.03.300–.310.

Alexander filed a complaint in the Anchorage Superior Court in January 2023, challenging the constitutionality of this decade-old public school program. [Exc. 1-22] The complaint alleged that student allotments spent by the parents of public correspondence school students on instructional services and materials violate Article VII, Section 1 of the Alaska Constitution, which mandates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution." [Exc. 18-21] Alexander contended that both AS 14.03.300—which governs the correspondence study program and requires the creation of individual learning plans—and AS 14.03.310—which authorizes student allotment funds—are facially unconstitutional. [Exc. 18, 21] In the event those statutes are found facially constitutional, Alexander alleged those statutes are unconstitutional "as [they are] currently being applied by DEED," based on allegations concerning correspondence programs run by two school districts. [Exc. 10-11, 21] A few days later, the intervenors—several parents of correspondence students—sought to intervene and were joined without opposition from the other parties. [R. 404–08, 376–77, 488]

Over the next several months, both DEED and Alexander filed the dispositive motions that underlie this appeal. First, DEED filed its motion to dismiss in March 2023. [Exc. 35-53] As to the facial challenge, DEED argued that both AS 14.03.300 and AS 14.03.310 have a "plainly legitimate sweep," and therefore are not facially unconstitutional. [Exc. 42-49] DEED noted, among other things, that Alexander's "real

target seems to be AS 14.03.310," given that the other statute has nothing to do with student allotments or the spending of state funds. [Exc. 45] As to the as-applied challenge, DEED argued that it should be dismissed for failure to join as necessary parties the school districts alleged to have allowed the unconstitutional spending of student allotments. [Exc. 36, 49-53]

Next, Alexander filed a cross-motion for summary judgment in May 2023, together with an opposition to DEED's motion to dismiss. [Exc. 54-102] Alexander argued principally that "[t]he statutes challenged in this case—AS 14.03.300–.310—have no purpose other than to expand Alaska's correspondence study program to allow public funds, in the form of student allotments, to be spent at private or religious educational organizations for educational services." [Exc. 54] Alexander's arguments centered mainly around legislative and constitutional history. [Exc. 57-67, 74-80] With respect to the as-applied challenge, Alexander argued that the school districts are not necessary parties because DEED has general supervisory authority over public schools. [Exc. 98]

Finally, in June 2023, DEED filed its own cross-motion for summary judgment, together with its opposition to Alexander's cross-motion and a reply in support of its original motion to dismiss. [Exc. 285-312] DEED explained that while "a motion to dismiss is a proper procedural vehicle here, DEED now cross-moves for summary judgment on both Alexander's facial and as-applied challenges to remove any possible 'disfavor' and to allow the Court to consider the attached materials outside the pleadings, which provide a more comprehensive picture of correspondence school programs in Alaska." [Exc. 292] With respect to Alexander's as-applied claim, DEED further urged

that even if the particular school districts were not necessary parties, Alexander cannot establish that DEED may be held legally liable for the conduct of those school districts, which are independent actors under state law. [Exc. 308-312]

III. The superior court struck down AS 14.03.300–.310 as facially unconstitutional.

In April 2024, the superior court denied DEED's motion to dismiss and granted Alexander's motion for summary judgment, holding that both AS 14.03.300 and AS 14.03.310 "must be struck down as unconstitutional in their entirety." [Exc. 572-73]

As to Alexander's facial challenge, the superior court rejected DEED's argument that AS 14.03.300 and AS 14.03.310 have a "plainly legitimate sweep." [Exc. 553-55] The superior court reasoned that "the plain text of the statutes clearly authorizes purchasing educational services and materials from private organizations with public funds," which it then determined to be "in direct contravention" of the Alaska Constitution. [Exc. 554] In the superior court's view, that meant the statutes only had "an occasional constitutional use"—namely, in the limited circumstances when allotment money is spent at "a handful of approved public institutions" and not at any of the "hundreds of private organizations" approved by school districts for such spending [Exc. 554]

As for Alexander's as-applied challenge, the superior court only addressed DEED's argument that particular school districts were necessary parties not joined to the litigation. [Exc. 555-56] The superior court disagreed that the school districts were needed to award complete relief, concluding instead that DEED has the "ultimate

responsibility to ensure public funds are used in accordance with the Alaska Constitution." [Exc.556] The superior court did not acknowledge or address DEED's alternative argument that it could not legally be held liable for the decisions of the school districts. [Exc. 546]

Finally, the superior court considered, but rejected, the possibility of severing any parts of either AS 14.03.300 or AS 14.03.310. [Exc. 572] Specifically, the court found "that there is no workable way to construe the statutes to allow only constitutional spending" and thus held that AS 14.03.300 and AS 14.03.310 "must be struck down as unconstitutional in their entirety." [Exc. 572-73]

Soon thereafter, the parties briefed whether the superior court should stay its order to allow for this appeal. [R. 692–704, 754–57] Alexander urged the court to grant only a limited stay until June 30, 2024, while DEED argued for a stay pending the resolution of this anticipated appeal. [R. 692–93, 757] The superior court agreed with Alexander, and entered a limited stay on May 2, 2024. [Exc. 575-76]

On the same day, the superior court entered its final judgment. [Exc. 574] The judgment declared first that "AS 14.03.300–.310 are facially unconstitutional." [Exc. 574] It then stated that "[f]uture expenditures of public funds for the direct benefit of private educational institutions under AS 14.03.300-.310 is hereby enjoined." [Exc. 574]

STANDARDS OF REVIEW

This Court applies its independent judgment in deciding any constitutional question.[8] Decisions on motions to dismiss and motions for summary judgment are reviewed de novo.[9]

ARGUMENT

I. The superior court erred by striking down AS 14.03.300, which authorizes and governs individual learning plans for correspondence programs.

The superior court invalidated both AS 14.03.310 *and* AS 14.03.300 on the ground that they authorize an "allotment program" that violates the Alaska Constitution's limitations on the spending of public funds. [Exc. 572-73] Based solely on an analysis of potential allotment spending, the superior court concluded that both "AS 14.03.300-.310 are facially unconstitutional." [Exc. 571] And because it determined that "there is no workable way to construe the statutes to allow only constitutional spending," it held that both "AS 14.03.300–.310 must be struck down as unconstitutional in their entirety." [Exc. 572-73]

But contrary to the superior court's treatment of them, AS 14.03.300 and AS 14.03.310 are *separate* statutes, only the latter of which authorizes the challenged allotment program. Titled "student allotments," AS 14.03.310 provides that DEED or "a district that provides a correspondence study program may provide an annual student

---

8 *Studley v. Alaska Pub. Offs. Comm'n*, 389 P.3d 18, 22–23 (Alaska 2017); *Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 332 (Alaska 2009).

9 *Beegan v. State, Dep't of Transp. & Pub. Facilities*, 195 P.3d 134, 138 (Alaska 2008); *Hallam v. Alaska Airlines, Inc.*, 91 P.3d 279, 283 (Alaska 2004).

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."[10] The remainder of the statutory provision sets forth various limitations on the allotment spending, including that "[a] parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization."[11]

In contrast, AS 14.03.300 concerns "individual learning plans" for students in the correspondence program. Specifically, AS 14.03.300 requires that every school district providing a correspondence study program (or DEED, if it ran such a program) "provide an individual learning plan for each student enrolled in the program."[12] The learning plan must, among other things, "be developed with the assistance and approval of the certificated teacher assigned to the student by the district," provide a grade-appropriate "course of study," "provide for monitoring" of student progress, and include means of addressing any shortcomings in academic performance during the course of the school year.[13] Nothing in AS 14.03.300 authorizes any spending under the allotment program.

Accordingly, the superior court should at most have struck down AS 14.03.310. Though DEED believes the superior court erred in its conclusions about potential spending under the allotment program (as explained further below), those conclusions—even if correct—provide a basis only for invalidating AS 14.03.310. They do not call into

---

[10] AS 14.03.310(a).

[11] AS 14.03.310(b).

[12] AS 14.03.300(a).

[13] AS 14.03.300(a)(1)–(6).

question AS 14.03.300, because that separate statute does not authorize *any* spending under the allotment program, much less any of the potential spending that the superior court determined to be unconstitutional.

The superior court seemed to premise its decision to invalidate AS 14.03.300 on the fact that AS 14.03.300(b) "precludes DEED from 'placing any limits on the allotment funds being paid to private entities.'" [Exc. 572] But that reasoning does not stand up to scrutiny. While that subsection of AS 14.03.300 does indeed limit DEED's power over allotment spending authorized under AS 14.03.*310*, it does not *independently authorize* any allotment spending. Put another way, if AS 14.03.310 has been invalidated, there will be *no* allotment spending, and so AS 14.03.300(b) could have no effect on it. Nothing in AS 14.03.300(b) would or could continue to permit any of the potential spending that the superior court determined to be unconstitutional. Thus, even assuming the superior court was right to invalidate AS 14.03.*310*, it did not have a proper reason to reach out and *also* invalidate AS 14.03.*300*.

The superior court, it appears, thought that AS 14.03.300 and AS 14.03.310 must be treated as a *single* statute that rise or fall together unless severable. [Exc. 571] That is incorrect, as the two provisions are clearly distinct. But even if they weren't, AS 14.03.300 should have been severed. Under AS 01.10.030, legislation is severable so long as the "portion remaining, once the offending portion of the statute is severed, 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."[14] That standard is plainly met here, where, as explained, AS 14.03.300 concerns something entirely different from AS 14.03.310. It is "difficult to imagine any reason why the legislature which passed" both AS 14.03.300 and AS 14.03.310 "would not have also favored" prescribing individual learning plan requirements for the correspondence program under AS 14.03.300 even if it could not provide for student allotments under AS 14.03.310.[15]

The superior court's unjustified invalidation of an independently functioning, and fully constitutional, provision must be reversed.

II. The superior court erred in holding that AS 14.03.310, the statute providing for and governing student allotments, is *facially* unconstitutional.

In addition to erroneously invaliding AS 14.03.300, the superior court wrongly concluded that AS 14.03.310 lacked the "plainly legitimate sweep" required for a statute to survive a facial constitutional challenge. [Exc. 572-73] In so doing, the superior court misread Article VII, Section 1, and also eviscerated the longstanding distinction in this Court's case law, and American jurisprudence more generally, between facial and as-applied challenges.

---

14 *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992) (citing *Jefferson v. State*, 527 P.2d 37, 41 (Alaska 1974)).

15 *Id.*

A. A statute has a "plainly legitimate sweep" sufficient to survive a facial challenge if there is an identifiable core set of constitutional applications.

It is well-established that any duly enacted statute is "presumed to be constitutional."[16] This means that "[a] party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation."[17] And any "doubts are resolved in favor of constitutionality."[18]

Statutes "may be found to be unconstitutional as applied or unconstitutional on their face."[19] A facial challenge is more difficult to sustain. As this Court has long recognized, even if a statute can be shown to be unconstitutional as applied in some circumstances, it should not be stricken from the books entirely as facially invalid. Thus, in *State, Department of Revenue, Child Support Enforcement Div. v. Beans*, this Court rejected a facial challenge to a statute permitting the State to suspend the driver's licenses of child support obligors who were delinquent.[20] The Court acknowledged that in particular instances, such as if the statute were "applied so as to take away the license of an obligor who was *unable* to pay child support," "there would be no rational connection between the deprivation of the license and the State's goal of collecting child support,"

---

16 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004); *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 899 (Alaska 2003) (referring to the "[t]he presumption of constitutionality that we apply to all duly enacted rules and laws").

17 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019).

18 *Id*.

19 *Id*. at 991.

20 965 P.2d 725 (Alaska 1998).

which would make the statute unconstitutional as applied in that case.[21] But because the statute "need not be applied in such a manner," the Court found the statute "not unconstitutional on its face."[22]

To show that a statute is facially unconstitutional, a plaintiff "must establish at least that the law does not have a 'plainly legitimate sweep.'"[23] That inquiry considers whether there is an identifiable core set of applications that are constitutionally permissible, even if there might be some applications that would not be constitutional. In *Alaska Fish & Wildlife Conservation Fund v. State*, for instance, this Court held that the

---

[21] *Id.* at 728 (emphasis added); *see also Treacy*, 91 P.3d at 268 ("[A]lthough the ordinance could be enforced in ways that bear no rational connection to the municipality's goals, or in ways that unduly restrict the underlying substantive rights of movement, privacy, and speech, we need not deal with such possibilities on this facial review.").

[22] *Id.*; *see also State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) ("A holding of facial unconstitutionality generally means that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution. A holding that a statute is unconstitutional as applied simply means that under the facts of the case application of the statute is unconstitutional. Under other facts, however, the same statute may be applied without violating the constitution.") (internal footnote omitted).

[23] *Treacy*, 91 P.3d at 268 (citing *Troxel v. Granville*, 530 U.S. 57, 85 & n.6 (2000)) (Stevens, J., dissenting). Alaskan courts have also applied a more restrictive standard requiring there be "no set of circumstances exists under which the Act would be valid." *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996). The "plainly legitimate sweep" standard was initially applied in *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 35 (Alaska 2001), a case involving the right to privacy, but has subsequently been applied generally. *See*, *e.g.*, *Sagoonick v. State*, 503 P.3d 777, 811 n.96 (Alaska 2022); *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 104 (Alaska 2015). The State does not separately discuss the "no set of circumstances" standard because a statute that survives the "plainly legitimate sweep" test necessarily survives the "no set of circumstances" test, as well. *Treacy*, 91 P.3d at 260 n.14.

challenged statute had a "plainly legitimate sweep" simply because "the statute can be read constitutionally."[24] In *Treacy v. Municipality of Anchorage*, this Court held that a city's curfew for minors had a "plainly legitimate sweep" in light of the "sufficient nexus" between the statute and the city's interest in child welfare.[25] The Court acknowledged the possibility that the statute "could be enforced in ways that bear no rational connection to the municipality's goals, or in ways that unduly restrict the underlying substantive rights of movement, privacy, and speech," but stated that it "need not deal with such possibilities on this facial review."[26] And Justice Stevens' dissent in *Troxel v. Granville*—which the Court cited in *Treacy* as the basis for its adoption of this standard—took this same approach of looking for an identifiable core of constitutional applications.[27] As Justice Stevens explained, a statute should survive a facial challenge if "there are plainly any number of cases"—or "many circumstances"—in which the statute "would be constitutionally permissible."[28]

---

[24] 347 P.3d at 104.

[25] 91 P.3d at 268–69.

[26] *Id.* at 268. *See also Petersen v. State*, 930 P.2d 414, 429 (Alaska Ct. App. 1996) (statute was not unconstitutionally overbroad if there is a "hard core of cases to which ... the statute unquestionably applies") (quoting *Stock v. State*, 526 P.2d 3, 9 (Alaska 1974)); *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008) (concluding statute had a "plainly legitimate sweep" when "the facts fall within the 'hard core" of the ordinance" and "there was no arbitrary enforcement of the ordinance").

[27] *See Treacy v. Municipality of Anchorage*, 91 P.3d 252, 269 (Alaska 2004) (denying facial challenge when Court found that "the ordinance has a 'plainly legitimate sweep'") (quoting *Troxel v. Granville*, 530 U.S. 57, 85 (2000) (Stevens, J., dissenting)).

[28] *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting).

The focus of this "plainly legitimate sweep" inquiry is on the breadth of possible constitutional applications. Both this Court and the U.S. Supreme Court have cautioned against relying on "hypothetical" or "imaginary" cases where a statute might be unconstitutionally applied.[29] "The delicate power of pronouncing [a statute] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."[30]

B. The superior court made legal errors that led it to vastly underestimate the range of constitutional applications of AS 14.03.310.

In concluding that AS 14.03.310 lacks a "plainly legitimate sweep," the superior court wrongly held that the statute has only "an occasional constitutional use" or "some possible constitutional applications." [Exc. 554-55] To the contrary, the statute has a readily identifiable and wide range of constitutional applications. As explained below, the superior court's error stems from its misinterpretation of the plain text of Article VII, Section 1. [Exc. 554-55]

1. Alaska Statute 14.03.310 has an identifiable and wide range of constitutional applications.

A comparison of the plain language of AS 14.03.310 and that of Article VII, Section 1, reveals an easily identifiable core set of constitutional applications. Alaska Statute 14.03.310(b) permits parents and guardians of students in the public

---

[29] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449–50 (2008); *ACLU of Alaska*, 204 P.3d at 373 (noting "the potential problems with deciding the constitutionality of a statute in the absence of actual facts").

[30] *United States v. Raines*, 362 U.S. 17, 22 (1960).

correspondence program to purchase services and materials "from a public, private, or religious organization," subject to several other requirements. In contrast, Article VII, Section 1, prohibits payments "for the direct benefit of any religious or other private educational institution."

The constitutional prohibition applies to a narrower set of entities than the statute in two ways readily apparent from the text alone. First, the constitutional prohibition applies just to "religious or other private" entities, rather than the "*public*, private, or religious" entities referred to in the statute. Second, and more importantly, the constitutional prohibition applies only to "*educational* institution[s]," rather than the "organization[s]" referred to in the statute. Article VII, Section 1, does not define the term "educational institution," but there is ample evidence—generally in the world[31] and

[31] *See*, *e.g.*, Gordon Harris, Alaska Legislative Affairs Agency, Alaska's Constitution: A Citizen's Guide (5th ed.), at 126, available at https://akleg.gov/docs/pdf/citizens_guide.pdf (noting that an Alaska superior court has held that an entity was not an educational institution under the constitution because education was only one of its several activities); 38 U.S.C. § 3501(a)(6) (defining "educational institution" as "any public or private secondary school, vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or any other institution if it furnishes education at the secondary school level or above"); 20 C.F.R. § 411.167(a) (defining "educational institution" as "a school (including a technical, trade, or vocational school), junior college, college or university"); 47 C.F.R. § 0.466(a)(5) (defining "educational institution" as "a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research").

specifically from the framers of Alaska's Constitution[32]—that an "educational institution" is essentially a school.

The table below shows the legitimate sweep of AS 14.03.310 as compared to Article VII, Section 1's limits. There are possible uses of allotment funds that *might* be unconstitutional—if, for instance, they are actually authorized under the conditions specified in AS 14.03.310(b) and qualify as a "direct benefit" to a private educational institution. But there are many, many possible uses that extend far beyond the spending on public entities that the superior court focused on:

Allowed under Article VII, Section 1?

	Spending on ***schools***	Spending on ***non-schools***
Public entities:	✓	✓
Religious entities:	?	✓
Private entities:	?	✓

✓ = unquestionably constitutional use
? = potentially constitutional use

In short, there is a wide world of conceivable spending under AS 14.03.310 that is indisputably constitutional. Consider just the textbooks and other supplies that students in the correspondence program need. Where might those be purchased from? Perhaps the same private non-school organizations from which DEED obtains those supplies for its brick-and-mortar schools, every year, without any constitutional objection. In fiscal

---

[32] Proceedings of the Alaska Constitutional Convention (PACC) at 1532 (Jan. 9, 1956) (explaining that the expression "system of public schools" refers "not only to grade schools and high schools," but to "other educational institutions," including "a state university" and "vocational schools").

year 2024, DEED paid the private textbook publisher Houghton Mifflin Harcourt more than $4 million in public funds for a variety of services and materials.[33] And between July 3, 2023 and March 1, 2024, the State paid more than $860,000 just for "books and educational supplies" to nearly 90 other private businesses—including Amazon.com, Barnes & Noble, Staples, and several other private publishers.[34] If the State can use public funds to make such purchases from private organizations consistent with Article VII, Section 1, there is no basis to conclude that student allotment funds cannot also be constitutionally used in the same ways.

Then there is the array of private non-school vendors that might provide public correspondence school students with specialty curricula or extra-curricular activities. The record before the superior court on the parties' motions for summary judgment is replete with such examples. Mat-Su Central's correspondence program lists approved curricula from more than 200 different sources, including private organizations that no one would mistake for an "educational institution," such as GO Math, operated by Houghton Mifflin Harcourt, and Razzle Dazzle Creative Writing, which sells creative writing lessons.[35] The website also lists over 300 community instructional partners and vendors, including the Alaska Center for the Martial Arts, the Alaska Nautical School, Aurora's Cakery and

---

33 *See* https://checkbook.alaska.gov/#!/year/2024/explore/0/vendor_name/Houghton+Mifflin+Harcourt+Publishing+Co/0/department_name.

34 *See* Payment Detail Report for Fiscal Year 2024 (7/1/2023-3/3/2024), available as a spreadsheet at https://doa.alaska.gov/dof/reports/resource/pmt_detail_fy2024.xlsx.

35 Exc. 314-15; Exc. 332-344 (describing Houghton Mifflin Harcourt's GO Math program); Exc. 353-375 (describing Razzle Dazzle Learning offerings).

Bakery, Frontier Tutoring, and Sonja's Studio of Performing Arts. [Exc. 316-17] There is no serious argument that these private organizations constitute "educational institutions" either. Each merely offers classes or tutors for use as part of an individual learning plan.[36]

The bar for a "plainly legitimate sweep" is thus easily surpassed. As in *Alaska Fish & Wildlife Conservation Fund v. State*, there is no doubt that AS 14.03.310 "can be read constitutionally."[37] Or as Justice Stevens put it in *Troxel*, "there are plainly any number of cases"—or "many circumstances"—in which spending authorized by the statute "would be constitutionally permissible."[38]

To be clear, 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." In a proper as-applied challenge, such purchases would have to be evaluated for consistency with the statute's restrictions on allotment spending (*see infra* pp. 47-48) and the other requirements of Article VII, Section 1 (such as whether the purchase is for the "direct benefit" of the educational institution).

---

[36] Exc. 391, 393-400 (describing Alaska Center for the Martial Arts classes); Exc. 401-04 (describing Alaska Nautical School offerings); Exc. 317, 405 (describing Aurora's Cakery and Bakery course offerings); Exc. 406-414 (describing Frontier Tutoring program); Exc. 415-422 (describing Sonja's Studio of Performing arts dance and music courses).

[37] 347 P.3d 104.

[38] *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting).

2. The superior court misinterpreted Article VII, Section 1.

The superior court's erroneous holding that AS 14.03.310 lacked a "plainly legitimate sweep" resulted from its misinterpretation of Article VII, Section 1, as prohibiting any spending of public funds at *any and all* private organizations. The superior court agreed with Alexander's argument that "for the purposes of public funding, the Alaska Constitution establishes just two categories: public and non-public institutions." [Exc. 561] And based on that strict dichotomy, the court concluded that "purchasing educational services and materials from private organizations with public funds" is "in direct contravention" of Article VII, Section 1. [Exc. 554] That meant, the superior court explained, that the statute has only "an occasional constitutional use" in those circumstances where allotment money is spent at "a handful of approved public institutions among hundreds of private organizations." [Exc. 554]. In short, the superior court determined that purchases from public organizations are the *only* legitimate applications in the sweep of the statute.

That misreads Article VII, Section 1. The text of that provision prohibits spending public funds for the direct benefit of any "religious or other private *educational institution*," not any "private organization" whatsoever. The superior court—encouraged by Alexander—simply rewrote the constitutional text.

The closest the superior court comes to explaining this error is its assertion that the words "organization" and "institution" are synonymous. [Exc. 559-60 & n.95] But that misses the point. Even if that is true, the superior court failed to give meaning to the qualifying word "educational." It is well-settled that "[t]he general rule in constitutional

construction is to give import to every word and make none nugatory."[39] Here, the word "educational" limits the reach of the prohibition in Article VII, Section 1. It does not bar the spending of public funds for the direct benefit of any and all private institutions, but rather only the subset that are "educational institutions." And when compared to the plain text of AS 14.03.310, which unambiguously permits using public allotment funds to pay "private[] or religious *organization[s]*," it is clear that the statute has a very wide range of applications that do not come within the more limited reach of Article VII, Section 1.

The superior court also seems to suggest that records from the constitutional convention support its decision to read the word "educational" out of Article VII, Section 1. [Exc. 560-62] But they do not—and in any event, as this Court has made clear, the "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself."[40] The debates of the constitutional convention may "help define" those words, *if* the plain meaning is not clear.[41]

The superior court's use of the constitutional convention records defies these instructions in multiple ways. It does not point to any lack of clarity in the meaning of the adjective "educational," nor does it identify any evidence about what limitation the

---

[39] *Hootch*, 536 P.2d at 801; *see also Roberge v. ASRC Construction Holding*, 503 P.3d 102, 104 (Alaska 2022) (when construing a statute, courts "must presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous'") (quoting *State, Dep't of Com., Cmty. & Econ. Dev., Div. of Ins. v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 629 (Alaska 2007)).

[40] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).

[41] *Id.* at 1147.

delegates thought the word put on Article VII, Section 1. Instead, the superior court merely waves at those debates and then proceeds to do what this Court has said cannot be done: "hypothesize [a] differently worded provision[]"[42] that draws a strict dichotomy between "public and non-public institutions." [Exc. 561]

3. The legislative history of AS 14.03.310 does not save the superior court's mistaken interpretation of the constitution.

The superior court also suggests that the legislative history of AS 14.03.310 supports its conclusion. [Exc. 557-60] After a brief review of the legislative history, the superior court agreed with Alexander that AS 14.03.310 "clearly authorizes the expenditure of public funds for educational purposes at private institutions." [Exc. 559]. It also observes that there was discussion in the legislative history about the constitutionality of certain applications of the statute. [Exc. 558]

But that history is a red herring in several respects. First, this Court has made clear that "[q]uestions concerning the constitutionality of a statute are questions of law" to which courts apply "independent judgment."[43] The judiciary does not defer to the legislature, even when interpreting "ambiguous constitutional provisions."[44]

Second, the legislative debate over the proposed statutes' constitutionality was, in any event, equivocal at best. For example, Alexander cited statements of then-Senator Dunleavy, the sponsor of the legislation enacted as AS 14.03.300–.310, suggesting that

---

42 *Id.* at 1146.

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

44 *Id.* at 925.

he believed public funding for even a single private-school class would be unconstitutional. [Exc. 134] But the legislative history also includes statements showing that Senator Dunleavy and other legislators recognized that the constitutionality of different types of student allotment spending was undecided.[45]

Third, even as to the meaning of the words the legislature used in AS 14.03.310, the legislative history adds nothing. After examining the history, the superior court's conclusion about the meaning of the statute is no different from DEED's. DEED *agrees* with Alexander and the superior court that the statute can be read to permit the purchase of educational materials and services from private organizations.

As described above, the problem with the superior court's reasoning is its failure to give meaning to the word "educational" in Article VII, Section 1, an error that cannot be saved by anything in the legislative history. It is *that* failure that led the superior court to conclude, wrongly, that the Alaska Constitution permits the spending of public funds *only* at public institutions and that AS 14.03.310, therefore, has only "an occasional constitutional use" in those circumstances where allotment money is spent at "a handful of approved public institutions." [Exc. 554] Nothing in the legislative history of AS 14.03.310—or anything else—supports that rewriting of the Alaska Constitution.

---

45 Exc. 424 ("Issue of constitutionality *can only be determined by the courts* . . . .") (emphasis added); *see also* Exc. 442 (noting that one possible "solution" to uncertainty about the constitutionality of "public/private partnerships using public educational funding" was to "[d]o nothing and continue practices and hope such practices are constitutional and do not get challenged in court").

4. The superior court's and Alexander's efforts to limit the effect of the facial invalidation of AS 14.03.300–.310 do not cure the error.

In its stay order, the superior court attempted to rectify its error in granting Alexander's facial constitutional challenge. The State argued that the superior court's invalidation of AS 14.03.300–.310 meant that correspondence programs would "evaporate" and "remove[] that educational option." [R. 697–98] The superior court denied that its decision had that effect, saying that it "did not find that correspondence study programs were unconstitutional" and insisting that while it had found AS 14.03.300–.310 facially unconstitutional, "correspondence programs continue to exist after [its] Order." [Exc. 579]

Likewise, in opposing a stay from this Court Alexander urged that the superior court's decision was "narrow." Pointing to the injunction—which says that "[f]uture expenditures of public funds for the direct benefit of private educational institutions under AS 14.03.300-.310 is hereby enjoined"—Alexander argued that the Order does not prevent the correspondence program from continuing. Instead, Alexander contended, "the only restriction" the superior court's order imposes is "to repeat the Alaska Constitution's admonition that public funds cannot be spent for the direct benefit of private schools."[46]

But for at least three reasons, neither post-hoc effort by the superior court or Alexander cures the superior court's error. *First*, the superior court has ruled as a matter of law that AS 14.03.300 and 14.03.310 are "facially unconstitutional" and "struck down

---

[46] Opposition to the State's Emergency Motion for Stay Pending Appeal, at 5.

as unconstitutional in their entirety." [Exc. 571, 573] The superior court went on to make clear that it believed this meant the statutes would have no further effect whatsoever, as it expressly called on the legislature to "craft constitutional legislation" if it "believes these expenditures are necessary." [Exc. 573] In short, while the injunction may be limited, the superior court's opinion and order are unequivocal in their breadth and reach. Even if a school district could approve certain spending without fear of a contempt order for violating the injunction, the superior court's order still has the effect of stripping school districts of any power to approve or distribute allotment funding. School districts are barred by statute from "expend[ing]" "district money, including state aid," except under "applicable local law and state and federal constitutional provisions, statutes, and regulations"[47] Districts could face liability (including potential damages and attorneys' fees) for funding either a correspondence or allotment program pursuant to the now-invalid statutes.

Second, the injunction that Alexander sought, received, and now relies upon was not an appropriate form of narrowing relief in a facial constitutional challenge. As the superior court itself correctly recognized in its opinion, a statute can be narrowed in a facial challenge only by construing specific words narrowly or by excising certain language. [Exc. 571] For example, a statute that says "a school district may discriminate among students on the basis of age, aptitude, and race" could be properly narrowed by

---

47 AS 14.17.910(b).

severing the words "and race."[48] But that is not what the superior court has done here. Instead, it has effectively *added* words to the statute, such that it now reads: "A parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment *provided that they are not expenditures of public funds for the direct benefit of private educational institutions*." That is not an appropriate use of the judicial power.[49] Indeed, as the superior court itself recognized in its opinion, "[i]f the legislature believes these expenditures are necessary—then it is up to them to craft constitutional legislation to serve that purpose—*that is not this Court's role*." [Exc. 572-73(emphasis added)]

Third, even if a statute could be narrowed on a facial challenge by using a limited injunction, the one issued in this case is still fatally flawed. As Alexander admits, the injunction "does nothing more than order the State to obey the Alaska Constitution" by "repeat[ing] the Alaska Constitution's admonition that public funds cannot be spent for the direct benefit of private schools."[50] But this Court has held that an injunction

---

48 *E.g.*, *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 190 (Alaska 2007) (narrowing facially unconstitutional statute by excising one sentence).

49 *Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122, 1154 (Alaska 2016) (Fabe, C.J., concurring) ("Attempting to patch together a constitutional statute from the remaining portions of the law" would be an improper "exercise in rewriting the law"); *see also Percoco v. United States*, 598 U.S. 319, 337 (2023) (warning that the legislature should not give courts "uncut marble with instructions to chip away all that does not resemble David") (Gorsuch, J., concurring) (citing *United States v. Reese*, 92 U.S. 214, 221 (1876)).

50 Opposition to the State's Emergency Motion for Stay Pending Appeal, at 5.

requiring a party "to obey the law" lacks the specificity required under Alaska Rule 65.[51] Indeed, if such an injunction were permissible, courts could and should do the same for all other applicable constitutional protections. And that would render as-applied challenges entirely irrelevant, as courts could in every facial challenge simply award an injunction that says: "All future unconstitutional applications of this statute are enjoined."

*   *   *

Alaska Statute 14.03.310 has a readily identifiable and wide range of constitutional applications and, thus, a "plainly legitimate sweep" that requires dismissal of Alexander's facial challenge. The superior court's contrary conclusion is premised on a rewriting of Article VII, Section 1, that strikes the word "educational." That revision has no basis in the law and, indeed, would render unconstitutional far more than just the student allotment program. The millions that the State pays annually to private organizations like Amazon or Houghton Mifflin Harcourt for textbooks and other services and materials for its brick-and-mortar public schools would also be unlawful. The superior court's decision on facial constitutionality was wrong—as it seems now to have recognized too late—and should be reversed.

---

[51] *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015); *see also Schmidt v. Lessard*, 414 U.S. 473, 474–76 (1974) (injunction against "further enforcement of the present Wisconsin scheme" did not satisfy specificity requirements of the federal analogue to Alaska Rule 65 needed "to avoid the possible founding of a contempt citation on a decree too vague to be understood").

III. The superior court also erred in denying DEED's motion to dismiss and cross-motion for summary judgment on Alexander's *as-applied* challenge.

A. The Court erred by holding that DEED has the "ultimate responsibility" for the use of allotment funds.

In the complaint, Alexander alleged that, if the facial challenge was denied, its claim should be treated as an as-applied challenge against DEED based on the spending allowed by particular school districts' student allotment programs. [Exc. 21] The complaint included allegations concerning the Anchorage and Matanuska-Susitna Borough school districts. [Exc. 10-11] DEED moved to dismiss that claim arguing that those particular school districts were necessary parties under Rule 19(a)(1). [Exc. 49-53]

As DEED explained below, the court could not grant complete relief without the school districts because DEED does not distribute allotment funds. [Exc. 51] Alaska Statute 14.03.310(a) authorizes "the department *or* a district that provides a correspondence study program" to provide annual student allotment funds to the parents or guardians of the public-school students enrolled in that program. DEED does not provide a correspondence study program. While it previously offered a statewide correspondence study program, that program no longer exists, [Exc. 217 n.13], and even Alexander has acknowledged that "all current correspondence programs are district-provided." [Exc. 8] Further, the current regulations for correspondence study programs, 4 AAC 33.405–.490, expressly apply only to "correspondence study programs offered by

a school district,"[52] so any new DEED-operated program would require new regulations. Consistent with that, Alexander's allegations of purportedly improper uses of allotment funds all concern funds provided to parents by the Matanuska-Susitna Borough and Anchorage school districts, not by DEED. [Exc. 9-11]

The superior court rejected the "complete relief" argument on the ground that "DEED is the state agency with the ultimate responsibility to ensure public funds are used in accordance with the Alaska Constitution." [Exc. 556] For several reasons, that cursory conclusion is wrong as a matter of law.

First, individual districts are, by statute, responsible for ensuring their correspondence study programs comply with state law. They, not DEED, must ensure that allotment funds are kept separate from other funds,[53] account for the balance of unexpended allotments,[54] return unexpended allotments to the district's budget if the student unenrolls,[55] maintain records of expenditures and allotments,[56] and implement a routine monitoring of audits and expenditures.[57] The districts must also ensure that correspondence students are receiving at least half of their core coursework through the

---

52 4 AAC 33.405 ("4 AAC 33.405 - 4 AAC 33.490 apply to correspondence study programs offered *by a school district*, including statewide correspondence study programs.") (emphasis added).

53 AS 14.03.310(c).

54 AS 14.03.310(d)(1).

55 AS 14.03.310(d)(2).

56 AS 14.03.310(d)(3).

57 AS 14.03.310(d)(4).

program, unless the district decides to waive that requirement under limited circumstances.[58] Districts are also required to provide DEED with a "statement of assurance" that they will comply with the regulations governing correspondence programs, and unless DEED has exercised its (non-mandatory) option to place a district on a "plan of correction," it is required to approve a correspondence program as long as the district provides a statement of assurance.[59]

Second, the legislature specifically withheld from DEED the authority to direct school districts regarding their allocation of student allotment funds. Under AS 14.03.310(b)(2), parents and guardians of public-school students enrolled in a correspondence program may use a student allotment to purchase "textbooks, services, and other curriculum materials and the course of study" if they are "approved *by the school district*."[60] Nothing in the statute provides that DEED can approve (or disapprove) the purchase of such material with student allotments. Further, as Alexander has repeatedly pointed out, AS 14.03.300(b) expressly prevents DEED from altering the

---

[58] 4 AAC 33.426(a) & (c).

[59] 4 AAC 33.420 ("Except as provided in 4 AAC 33.460(c), *the department will approve a school district to operate a correspondence program after the receipt of the statement required under this section*. Once approved, a district is not required to submit a new statement each year, except that a district must submit a new statement before implementing a change in its program.") (emphasis added).

[60] AS 14.03.310(b)(2)(A) (emphasis added); *see also* AS 14.08.111(9) (regional school boards review and select education materials); AS 14.14.090(7) (borough and municipal school boards review and select education materials); 4 AAC 33.421(d) & (h) (correspondence programs must use education materials approved by the district); 4 AAC 33.422(b) (purchased educational material belong to the district); *see* 2005 Inf. Op. Att'y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1 (district must approve correspondence learning materials in advance).

restrictions and requirements for the use of student allotments in AS 14.03.310.[61] And finally, AS 14.17.910(b) charges that the districts *themselves* are responsible for spending state-granted money consistent with the law: "[a]ll district money, including state aid, shall be received, held, allocated and expended *by the district* under applicable local law and state and federal constitutional provisions, statutes, and regulations."

Contrary to the superior court's conclusion, then, the statutes that charge DEED with "general supervision" of district-run correspondence programs do not require it to police the day-to-day operation of those programs, or even to ensure they comply with the law.[62] The implementing regulations make that clear, saying that DEED "may"—but need not—monitor districts' programs for compliance with the regulations governing correspondence programs and place districts on a "plan of correction" for violation of those regulations.[63] And in all events, even if DEED's "general supervision" required day-to-day oversight (which it does not), that general authority is limited by more

---

61 *See*, *e.g.*, Appellees' Opposition to State's Emergency Motion for Stay Pending Appeal at 9–10; Exc. 58 ("AS 14.03 .300-.310 was intended to specifically *remove DEED's ability to impose any additional restrictions on the purchase of services and materials from private educational institutions*, so long as educational outcomes were achieved."); Exc. 76 ("[AS 14.03.300(b)] means that while developing the ILP, a 'certified teacher,' 'parent or guardian,' and 'student,' can agree to a 'course of study for the appropriate grade level,' and *the Department cannot place any limitations on the purchase of services and materials outside of those contained in AS 14.03.300-.310*.") (emphases added).

62 AS 14.07.020(9).

63 4 AAC 33.460(a) & (c).

specific statutory provisions granting districts authority over the spending of allotted funds.[64]

The school districts, not DEED, thus have the last word when it comes to operating their correspondence and student allotment programs and deciding which services and materials may be purchased with student allotment funds. They have the power and the duty to comply with Article VII, Section 1 in administering student allotment funds just as they must comply with all parts of the Constitution in all their actions. Further, the districts—not DEED—are also the sources for the facts needed to adjudicate any as-applied challenge.

With no statutory basis for their claim that DEED has "ultimate responsibility" for the use of student allotment funds, Alexander pointed below to an opinion letter issued by the Alaska Department of Law to DEED regarding the student allotment program. [Exc. 101-02, 214-32] But that letter is fully consistent with the analysis above. It is well within DEED's general supervisory authority over district-run correspondence programs to ask the Attorney General for legal advice on how student allotments may be spent, which it might then use to provide guidance to districts. That does not mean, and nothing in the letter suggests, that DEED has the power to actually control any such spending.

---

[64] *Alaska Ass'n of Naturopathic Physicians v. Alaska, Dep't of Commerce*, 414 P.3d 630, 636-37 (Alaska 2018) ("Although various statutory sections should be harmonized when possible, more specific sections control over general sections."); *Sprague v. State*, 590 P.2d 410, 415 n.14 (Alaska 1979) ("We note also the familiar rule of statutory construction that a specific provision will govern even though general provisions, standing alone, would include the same subject.").

Relatedly, Alexander submitted to the superior court as supplemental authority a letter sent from the Attorney General to all Alaska school districts informing them that they need to comply with AS 14.03.016, Alaska's parental rights and notification statute. [R. 810–12] Alexander argued that the letter shows DEED does "indeed have a role in specifically directing compliance with the law by all Alaska school districts." [R. 807]

That argument fails, too. The letter concerns DEED's duty with respect to AS 14.03.016, a parental notification statute. [R. 810] It does not address DEED's or any district's role with respect to district-run correspondence school programs or district spending of state funds, all of which, as described above, is governed by numerous statutes and regulations that put significant responsibility on the districts themselves.[65]

In sum, the superior court erred in holding that DEED has the "ultimate responsibility" to ensure that school districts use public funds in accordance with the Alaska Constitution. [Exc. 556] Its decision denying DEED's motion to dismiss Alexander's as-applied challenge for failure to join the necessary school districts should, therefore, be reversed.

---

65 In denying the State's Rule 19(a) motion, the superior court noted that "not a single school district sought intervention." [Exc. 556] That is relevant only to whether the districts "claim[] an interest" in the case sufficient to require joinder under the alternate grounds set forth in Rule 19(a)(2). It is irrelevant to the State's argument for dismissal under Rule 19(a)(1).

B. Even if the school districts are not necessary parties, the superior court overlooked DEED's argument that it could not be liable for the conduct of the school districts.

In its cross-motion for summary judgment, DEED argued in the alternative that even if the school districts are not necessary parties to Alexander's as-applied challenge, DEED may not in any event be liable for a district's unconstitutional application of AS 14.03.310. As DEED explained, because it is undisputed that DEED does not run a correspondence program, Alexander can seek as-applied relief against DEED only if it can be established that DEED stands in the school districts' shoes for purposes of liability. [Exc. 308-12] The superior court's failure to address that argument provides another ground for reversal with respect to Alexander's as-applied challenge.

As a general rule, "authorized activities of such subdivisions as municipalities and school districts are almost universally considered to be independent actions not subjecting the state to liability."[66] "The legislature delegated the state's authority to manage the operations of the schools to local school districts."[67] Thus, local school districts are independent governmental entities, not subordinate divisions of DEED. So just as the State of Alaska is not liable when the Municipality of Anchorage transgresses

---

66 *Kenai Peninsula Borough v. State*, 532 P.2d 1019, 1022–23 (Alaska 1975).

67 *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 306 (Alaska 2001); AS 14.12.020(b) ("[e]ach borough or city school district shall be operated on a district-wide basis under the management and control of a school board"); AS 14.14.090 (duties of borough and municipal school boards); AS 14.08.021 (delegating authority to operate public schools in unorganized boroughs to regional attendance areas); AS 14.08.111 (duties of regional school boards); AS 14.08.101 (powers of a regional school board)

statutory or constitutional boundaries in exercising its delegated authority, DEED is not liable if and when the Anchorage School District does so.

Kenai Peninsula Borough v. State is directly on point. There, a borough brought a claim seeking a declaration that it was acting as an agent of the State when a school bus the borough operated was involved in an accident.[68] This Court rejected the position that the borough was acting as an agent of the State when it provided school transportation, even though the borough did so in accordance with statutory direction pursuant to the legislature's constitutional duty to establish and maintain public schools,[69] and notwithstanding the fact that the State "supervise[d] the transportation service insofar as it related to [state] funding" and "also had certain regulations in effect" about safety.[70] The Court explained that "[i]f a political subdivision acts with a substantial degree of independence under authority delegated by the state, liability may not be imposed on the state as a result of such activity."[71] By contrast, in *Alaska State-Operated School System v. Mueller*, the Court held that the Alaska State-Operated School System (ASOS)—which provided education for the children of the unorganized borough—was an instrumentality of the State. There, ASOS operated "directly on behalf of and under the auspices of the state," "unlike [the] local public school systems" in *Kenai Peninsula Borough*.[72]

---

68 *Id.* at 1020.

69 *Id.* at 1021–27.

70 *Id.* at 1024.

71 *Id.* at 1022.

72 536 P.2d 99, 102 (Alaska 1975).

Here, just as in *Kenai Peninsula Borough*, "there is no authority for making [a] claim against the State, but the agency exercising the delegated authority must respond for its own actionable conduct."[73] Both the Anchorage and Matanuska-Susitna Borough school districts are governed by local school boards elected by local voters.[74] Although DEED has general oversight and issues regulations that districts must follow, the local school districts "act[] with a substantial degree of independence under authority delegated by the state"[75] when they run their schools, including when they administer their correspondence program student allotments. As described above, the legislature has chosen to make this a matter of local control, not DEED control. Even though subject to DEED oversight, the school districts are not acting as agents of DEED, and DEED is therefore not liable for their actions.

Alexander did not address this argument except to assert that DEED's liability is irrelevant because the as-applied claims do not seek damages, but rather declaratory and injunctive relief. [Exc. 499-500] But in an as-applied challenge, the declaration and

---

73 *Kenai Peninsula Borough*, 532 P.2d at 1022.

74 Each borough or city school district is operated under the management and control of a school board, and each school district in the unorganized borough is operated under the management and control of a regional school board. AS 14.12.020. *See Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 75 (Alaska 1980) ("The Anchorage School Board was created by the authority of the state legislature, and is the delegated state authority to govern its school district and manage the operations of the schools within that district. . . . While the school board is elected by the same voters as is the municipal assembly, and is also a part of the Municipality of Anchorage, it is a legislative body with legal responsibilities which in important respects are distinct from those exercised by the assembly. Nowhere is the independent status of the Anchorage School Board more apparent than in school system budgetary matters.").

75 *Kenai Peninsula Borough*, 532 P.2d at 1024.

injunction must be against the *defendant* for violating the Constitution. Indeed, *Kenai Peninsula Borough itself* was a declaratory judgment case.[76] Tellingly, Alexander cited no authority for the proposition that a party may seek a declaratory judgment against a defendant that is not itself violating the law.

C. Should the Court reverse the superior court's facial invalidation of the statutes but allow Alexander's as-applied challenge to proceed, that as-applied challenge should be remanded to superior court.

As a matter of law, Alexander's facial and as-applied challenges should both be dismissed for the reasons given above. But if this Court were to dismiss the facial challenge and reject the State's legal arguments for dismissing the as-applied challenge, it should remand the as-applied claim to the superior court to develop the factual record required to decide that claim.

An as-applied challenge "requires evaluation of the facts of the particular case in which the challenge arises."[77] Alexander acknowledged as much by seeking to "conduct factual discovery on their as-applied claims if the statutes are not struck down as facially unconstitutional."[78] Such further factual development would be required, for instance, to determine whether—and how much of—the allotment spending approved by the Mat-Su Central Correspondence School actually violates Article VII, Section 1. That will require

---

[76] *Id*. at 1020 ("The borough . . . filed a complaint against the state seeking a declaratory judgment").

[77] *Kyle S. v. Alaska, Dep't of Health & Soc. Servs.*, 309 P.3d 1262, 1268 (Alaska 2013).

[78] Exc. 505; R. 851–52 (Plaintiffs' affidavit requesting discovery for as-applied claim).

information about which businesses and organizations received allotment spending in order to determine which, if any, are "private educational institutions." Further, *Sheldon Jackson College v. State*'s fact-intensive test for "direct benefit" will require knowing the magnitude of the allotment spending on private educational institutions, which requires assessing the amount of allotment spending against the allegedly unlawful allotment spending.[79] None of that information is before the Court. If the Court allows the as-applied claim to proceed, it should be remanded to the superior court.[80]

IV. Affirming the superior court's decision striking these statutes as facially unconstitutional would have wide-reaching harmful consequences.

If affirmed and allowed to go into effect, the superior court's decision will have substantial negative consequences, beyond its already troubling changes to the plain text of Article VII, Section 1 (*see supra* pp. 22-25) and this Court's jurisprudence on the fundamental distinctions between facial and as-applied constitutional challenges (*see supra* pp. 26-29). For one thing, the superior court's complete invalidation of AS 14.03.300 and 14.03.310 will create a massive disruption for many of Alaska's public school children. For another, the superior court's decision—and particularly its conclusion that any payment of public funds to private organizations implicates the Alaska Constitution—will call into question numerous other statutory programs that partner with private organizations to provide education and vocational training programs.

---

[79] 599 P.2d 127 (Alaska 1979).

[80] *E.g.*, *Kyle S.*, 309 P.3d 1268 n.22 (citing *Phelps-Roper v. Troutman*, 712 F.3d 412, 416–17 (8th Cir. 2013), as instance of remanding an as-applied challenge to the trial court for development of factual record).

A. The superior court's decision will create a significant and unanticipated disruption for many of Alaska's public school children.

The delegates to Alaska's constitutional convention recognized correspondence schools as one of several ways to deliver public education to Alaska's children existing since before statehood.[81] The fact that local school districts have operated public correspondence schools in Alaska for over 30 years—and the last ten years under AS 14.03.300-.310—is a testament to their importance to Alaska's public school system, and their critical role in educating tens of thousands of Alaskan public school students every year.[82]

Alexander cynically claims—and the superior court agreed—that student allotment funding is nothing more than an incentive for parents to enroll their children in private school. [Exc. 83-84; 563-64] But Alaska families choose public correspondence schools for myriad reasons, including:

- *Cultural preservation*: Families wishing to maintain traditional lifestyles and cultural practices may opt for correspondence schooling to allow children to learn at home while participating in cultural, hunting, or fishing activities that are integral to their heritage.

---

[81] *See Hootch*, 536 P.2d at 803 (the framers of Alaska Constitution's education clause envisioned "different types of educational opportunities including boarding, correspondence and other programs . . ."); PACC at 1525 (January 9, 1956) (Delegate Coghill on correspondence schools in the Territory of Alaska).

[82] 2005 Inf. Op. Att'y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1.

- *Flexibility for students with special needs*: Correspondence schools provide opportunities for students who require accommodations for learning disabilities, medical conditions that might require them to attend classes from a hospital room, or other circumstances that prevent them from attending a traditional brick-and-mortar school.
- *Family needs*: In rural Alaska, where job opportunities can be scarce and seasonal, correspondence schooling allows students to assist with or fully engage in family responsibilities that provide essential support, such as subsistence hunting and gathering. This education format enables students to balance their schooling with contributing significantly to their family's subsistence and survival, ensuring they can participate in essential activities that are both economically necessary and culturally significant.
- *Geographical isolation and school closure*: For families in isolated locations or areas experiencing declining populations, correspondence schooling serves as a crucial educational lifeline. Whether the nearest school is hundreds of miles away or local schools have closed due to insufficient student numbers, correspondence schooling ensures uninterrupted access to formal education, adapting seamlessly to both geographical and demographic challenges.[83]

---

[83] *See* Tegan Hanlon, *2 more Alaska schools close due to shrinking enrollments*, Anchorage Daily News, Aug. 8, 2017, https://www.adn.com/alaska-news/education/2017/08/08/two-more-alaska-schools-close-due-to-shrinking-enrollments/.

- *Continuity of education*: During times when a teacher might be unavailable due to illness or family emergency, teacher vacancy, or other reasons, correspondence courses can provide continuity of learning, ensuring that students' education does not suffer.
- *Curriculum expansion and specialized instruction*: Correspondence courses enhance one-room schoolhouses by providing access to a broader curriculum and specialized subjects like advanced mathematics or science, which may not be feasible due to staffing constraints or lack of local experts. This arrangement ensures students receive a comprehensive education that prepares them for future academic and career opportunities, despite the limitations of their immediate educational environment.

In short, Alaskans depend on these programs for a variety of reasons. In fact, more than 22,000 public school children are currently enrolled in correspondence school programs. [R. 658] And without the correspondence study program for next year, those students and families will need to find other education providers—a process that will prove difficult for many students with particular needs or special course requirements, such as Advanced Placement and International Baccalaureate courses, foreign language courses, or specialized career and technical courses. [R. 661] Alaska's public school students also rely on correspondence courses to satisfy DEED's graduation requirements; without correspondence study programs, some Alaska public school students may have to defer their graduation. [R. 661] The loss of those educational resources will also likely

disproportionately affect students in rural Alaska who would not have access to robust course offerings in the smaller school. [R. 661]

One might think that striking down the correspondence study program will merely direct those 22,000 public-school students into brick-and-mortar schools. But even if every correspondence study program student had a brick-and-mortar alternative to go to tomorrow—which is not the case—the superior court's decision will still cause massive problems by exacerbating Alaska's already significant shortage of public-school teachers. [R. 660] The State's public-school system depends on correspondence school programs and student allotments to alleviate that shortage. [R. 660] The decision below will simply compound that problem if affirmed. Even assuming the 261 public school teachers currently serving students through correspondence study programs were re-assigned to brick-and-mortar schools, the State would still need to hire more than *1,000 new teachers* to replace the program—a task that would be "challenging, if not impossible." [R. 660] And that problem is particularly acute in the state's rural communities, where the public-school teacher shortage is worse.

B. The superior court's decision unwittingly invites challenges to many other state programs.

The superior court's decision will likely also have sweeping unintended consequences for the State's ability to provide necessary public services beyond the correspondence study system. The State partners with public and private organizations to operate several other education and vocational training programs. All use public funding, and so all may invite challenges, if this Court affirms the superior court's erroneous

conclusion that any payment of public funds to private organizations violates the Alaska Constitution.

For example, the State has several statutory programs intended to provide vocational training primarily to adult work force participants. One is the State Training and Employment Program (STEP).[84] The STEP is administered by the Department of Labor and Workforce Development and provides "grants to eligible persons who provide training and employment assistance services."[85] It further includes a grant program under which "[a] person who provides training and employment services may apply for a grant from the program and may use the grant to augment or improve public access to the training and employment services provided, including a registered apprenticeship program under 29 U.S.C. 50."[86]

Thirty-four entities have recently received STEP grants—public funds paid directly to the recipient.[87] Of those, only three—the Alaska Department of Transportation and Public Facilities, the University of Alaska Fairbanks MAPTS, and the University of Alaska Southeast—are public entities. The other 31 entities are a diverse collection of

---

[84] AS 23.15.620–.660.

[85] AS 23.15.620(a).

[86] AS 23.15.620(b).

[87] *Id.* A complete list of the 34 recipients of STEP grants for fiscal year 2024 is available at https://awib.alaska.gov/training-programs/step-grant-providers.html.

private organizations including trade schools,[88] preschool teacher training centers,[89] tribal organizations,[90] and Catholic Social Services.

Another statutory program operated by the Department of Labor and Workforce Development is the Alaska Technical Vocational Education Program (TVEP).[91] That program is also funded through public funds (unemployment-insurance contributions) and "award[s] grants" "to technical and vocational education entities."[92] For the last decade, funds collected under this program have been distributed to ten entities in proportions established by statute in AS 23.25.835. More than 20 percent of those funds are allocated by statute to five private entities: the Southwest Alaska Vocational and Education Center, Yuut Elitnaurviat—The People's Learning Center, Partners for Progress in Delta, the Amundsen Educational Center, and Ilisagvik College.[93]

---

88 *E.g.*, the Alaska Carpenters Training Trust in Anchorage and Fairbanks; the Alaska Joint Electrical Apprenticeship & Training Trust, a joint partnership between The Alaska Chapter of the National Electrical Contractors Association and The International Brotherhood of Electrical Workers Local 1547; and the Joint Apprentice Committee run by United Association Plumbers and Steamfitters Union Local 367.

89 *E.g.*, Anchorage Vineyard Family Resource Center, which provides teacher training for Alaska pre-school teachers across the state.

90 *E.g.*, the Knik Tribe, which provides commercial driver's license (CDL) training and training in welding, equipment operation and mechanics, and the medical field; Cook Inlet Tribal Council, which offers training to Alaska Native/American Indian individuals in construction and CDL, and training for office assistants and heavy equipment operators; and the Bristol Bay Native Corporation, an indigenous-owned corporation that offers CDL training.

91 AS 23.15.820-.850.

92 AS 23.15.840(a).

93 Ilisagvik College is an independent, non-profit corporation; the other four are 501(c)(3) organizations.

Finally, DEED's Alaska Commission on Postsecondary Education also operates the Alaska Education Grant Program.[94] The program provides a grant of up to $4,000 a year for four years to Alaska residents enrolled at least half time "at an institution located in the state," without regard to its public or private status.[95] Those include eight two-year schools (including three private schools); 17 four-year schools (seven of which are private); and a career & technical school (AVTEC - Alaska's Institute of Technology).

V. Rejecting the State's arguments will require this Court to address potentially thorny questions that could otherwise be avoided.

If this Court rejects the State's arguments regarding the facial and as-applied challenges to AS 14.03.310 and accepts the superior court's expansive reading of Article VII, Section 1's prohibition on the use of public funds, it will also be required to address several issues that could otherwise be avoided.

A. The Court will need to consider whether the alleged unconstitutional applications of AS 14.03.310 are consistent with the statute itself.

In striking the statutes as facially unconstitutional, the superior court's analysis was incomplete. It analyzed only two questions: whether the statute permitted allotment spending at private organizations, and whether such spending may be for the "direct benefit" of those organizations. On that basis, it jumped to the conclusion that the overwhelming majority of applications of the statute are unconstitutional.

---

[94] AS 14.43.400-.420.

[95] A listing of Alaska post-secondary institutions that participate in the Alaska Education Grant Program is available at https://acpe.alaska.gov/Alaska-Postsecondary-Institutions.

But as the State argued in its motion to dismiss, AS 4.03.310(b) itself imposes several further constraints on allotment spending. [Exc. 37-38] The services and materials must be "nonsectarian," "required for the course of study in the individual learning plan developed for the student," must "support a public purpose,"[96] and be "approv[ed] [by] the school district," "appropriate for the student," and "aligned to state standards."[97] Even under the superior court's erroneous understanding of Article VII, Section 1, many of the applications it assumed to be unconstitutional may actually be barred by the statute itself.

These statutory limitations further illustrate why the superior court was wrong to strike the statutes as facially unconstitutional, because the applications depend on facts and decisions by school districts not before the court. But at minimum, they are factors that must be considered before this Court could affirm the superior court's sweeping decision below.

B. The Court will need to revisit its analysis of "direct benefit" in *Sheldon Jackson College*.

The next question this Court must decide, if it rejects the State's arguments, is the question of "direct benefit." Even if Article VII, Section 1, reaches *all* private organizations, as the superior court erroneously concluded, payments to those organizations must also qualify as "direct benefits" to be unconstitutional. The Court addressed the meaning of that phrase in *Sheldon Jackson Coll. v. State*,[98] but the

---

96 AS 14.03.310(b).

97 AS 14.03.310(b)(2.)

98 599 P.2d 127 (Alaska 1979).

intervenors have called into question both the reach and vitality of that decision. [Exc. 457–462]

First, the intervenors have argued for a narrow understanding of the fourth *Sheldon Jackson* factor. [Exc. 460-61] They contend that "[b]ecause allotted funds can only reach a private institution on the free and independent choice of the parent beneficiaries, the program does not constitute a 'direct benefit' for private schools in violation of the Alaska Constitution." [Exc. 451] The superior court rejected that argument, but this Court would have to address it before it could hold that AS 14.03.310 is unconstitutional either facially or as applied. [Exc. 563-70]

Second, the intervenors have also contended that there is reason to doubt "the continued applicability" of the third *Sheldon Jackson* factor. [Exc. 457] As the intervenors have explained, the third *Sheldon Jackson* factor derives from U.S. Supreme Court cases that are no longer good law: *Roemer v. Board of Public Works of Maryland*[99] and *Meek v. Pittenger*.[100] [Exc. 457-60] Those cases have been abrogated or overruled,[101] and so before applying the third *Sheldon Jackson* factor, this Court will have to address its continued vitality.

---

[99] 426 U.S. 736 (1976).

[100] 421 U.S. 349 (1975).

[101] *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1251–52 (10th Cir. 2008) (acknowledging abrogation of *Roemer*); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (plurality opinion) (holding *Meek* is "no longer good law").

CONCLUSION

This Court should reverse the superior court because (1) AS 14.03.310 has a "plainly legitimate sweep"; (2) the court erred in holding that AS 14.03.300 is facially unconstitutional simply because it believed AS 14.03.310 was unconstitutional; and (3) Alexander's as-applied challenge should have been brought against the school districts, not against DEED. This Court should therefore reverse the decision of the superior court denying the State's Motion to Dismiss and granting Alexander's Motion for Summary Judgment, and then remand to the superior court with instructions to enter judgment for the State.

Alternatively, if this Court reverses the decision of the superior court holding AS 14.03.300–.310 facially unconstitutional, but affirms the decision holding that Alexander properly brought an as-applied challenge, it should remand to the superior court with instructions to enter judgment for DEED on Alexander's facial challenge and for further proceedings on the as-applied claim.

Finally, DEED respectfully requests that if this Court intends to affirm the superior court's decision in its entirety, the Court issue an opinion contemporaneously with that decision, so that the legislature can immediately craft replacement legislation with knowledge of the applicable constitutional boundaries for public spending.