IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

Plaintiffs,

v.

ACTING COMMISSIONER HEIDI TESHNER, in her official capacity, STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT,

Defendant,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON.

Intervenors.

Case Number: 3AN-23-04309CI

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On January 24, 2023, Plaintiffs, four parents of school aged children attending Alaska public schools, filed this lawsuit challenging the constitutionality of the statutes extending the correspondence school allotment program. On January 26, 2023, Intervenors moved to intervene as Defendants to defend their interests as beneficiaries of the program.

On March 8, 2023, the State moved to dismiss Plaintiffs' facial constitutional challenge, arguing that only an as-applied challenge would be appropriate, and such a challenge would require joinder of various school districts across the state as necessary

parties. On April 28, 2023, Plaintiffs filed an opposition to the State's motion to dismiss and cross moved for summary judgment.

For the reasons set forth below, this Court **DENIES** Defendant's Motion to Dismiss and **GRANTS** Plaintiffs' Motion for Summary Judgment.

Background

I. Introduction

Alaska's state education system includes public correspondence schools, which allow students to be educated "outside of traditional brick-and-mortal schools" usually by their parents.[1] These correspondence schools are publicly funded and subject to the Department of Education and Early Development (DEED)'s oversight.[2] All existing public correspondence schools in Alaska are run by local school districts.[3] In 2014, the Alaska state legislature passed AS 14.03.310, "authorizing school districts with correspondence programs to 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."[4]

According to the language of the statute, families may use these allotments to "purchase nonsectarian services and materials from a public, private, or religious organization."[5] The statute provides that the services and materials purchased must be

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[1] Defendant's Motion to Dismiss at 3 (March 8, 2023).
[2] *Id.*
[3] *Id.* (noting DEED is statutorily authorized to provide a centralized correspondence school, though it does not currently do so).
[4] *Id.* citing AS 14.03.310(a).
[5] AS § 14.03.310(b).

required for the student's course of study, be approved by the school district, and be aligned with state standards, among other requirements.[6] Families can receive up to $4,500 per student per school year in allotment money authorized by AS 14.03.310.[7]

II. Legislative history of AS 14.03.300 and .310

The relevant language of the statutes expanding the correspondence program, AS 14.03.300-.310, was initially proposed in 2013 in another piece of legislation, Senate Bill 100 ("SB 100").[8] SB 100's sponsor, then-Senator Dunleavy wrote in his sponsor statement: "[m]ost [correspondence programs] provide a student allotment to purchase educational services or materials to meet the student's Individual Learning Plan (ILP). Under SB 100, a parent may purchase services and materials from a private or religious organization with a student's allotment to meet the student's ILP."[9]

SB 100 was introduced as part of a legislative package which included Senate Joint Resolution 9 ("SJR 9"), which contained two proposed amendments to the Alaska State Constitution.[10] The first amendment proposed deleting the final sentence of Article VII, Section I of the Alaska State Constitution which provides, "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution."[11] The second amendment proposed adding language to Article IX, Section 6

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[6] AS §§ 14.03.310(b)(1)-(3).
[7] Intervenors' Response in Opposition to Plaintiffs' Cross-Motion for Summary Judgment at 2 (June 2, 2023) (hereinafter "Intervenors' Opposition").
[8] Memorandum in Support of Plaintiffs' Opposition to State of Alaska's Motion to Dismiss/Cross Motion for Summary Judgment at 4 (May 1, 2023) (hereinafter "Plaintiffs' Opposition and Cross-Motion for Summary Judgment").
[9] *Id.* at 7 (citing Exhibit 1 at 4-5).
[10] *Id.*
[11] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 13 (citing Exhibit 4, Senate Joint Resolution No. 9, 28th Leg., 2d Sess. (introduced Feb. 13, 2013)).

to read in pertinent part: " . . . nothing in this section shall prevent payment from public funds for the direct educational benefit of students as provided by law."[12] SJR 9 and SB 100 both died in committee and were not passed. As a result, the Alaska Constitution was never amended to allow spending public funds for the direct benefit of private educational institutions.

Later, the relevant language first introduced in SJR 9 was incorporated into House Bill 278 ("HB 278") by Committee in April 2014.[13] Senator Dunleavy addressed these added provisions and acknowledged that the language creating the correspondence homeschool program allotment program "was originally proposed under SB 100."[14] However, while addressing the Free Conference Committee, he did not mention the constitutional conflict disclosed in discussions of SB 100 and SJR 9.[15] HB 278 was enacted by the legislature in 2014 becoming AS 14.03.300-.310 without accompanying legislation to amend the Constitution.[16]

III. "Direct Benefit" Prohibition in Article VII, Section 1 of the Alaska Constitution

Article VII, Section 1 of the Alaska Constitution provides:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No

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[12] *Id.* ("No tax shall be levied, or appropriate of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose; however, nothing in this section shall prevent payment from public funds for the direct educational benefit of students as provided by law.")
[13] *Id.*
[14] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 14 (citing Exhibit 9).
[15] *Id.*
[16] *Id.* at 14 (citing 2014 Alaska Session Laws Chapter, § 15, 15).

> money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The last sentence containing the "direct benefit prohibition" was included in Article VII, Section 1 after lengthy discussion and debate during the Alaska Constitutional Convention.[17] The minutes of the Constitutional Convention contain the Committee's detailed discussions regarding their intentions behind adding the "direct benefit" prohibition.[18] During these discussions, the delegates were informed that the Committee intended for the phrase "other private educational institutions" to include "any educational institution that is not supported and run by the state."[19]

Additionally, the Committee explained that the term "public funds" was chosen purposely:

> [B]ecause we felt that state funds may at times go through many hands before reaching the point of their work for the public, and so the term "public funds" was then used as a guide to every portion of our state financing, borough, city or other entity for the disbursement of these monies.[20]

Further, the Committee chose the term "direct benefit" with the intention to prevent spending for the "maintenance," "operation," "or other features of direct help" for private educational institutions.[21] Moreover, the Committee decided against prohibiting "indirect spending":

> Well, we feared that 'indirect' would make it impossible to give any of these welfare benefits, for instance, to

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[17] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 25 (citing Exhibit 18).
[18] *Id.*
[19] *Id.*
[20] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 24 (citing Exhibit 18 at 1514).
[21] *Id.*

> children who were in private school and we did not feel that any prohibition should go that far, and so the Committee did carefully consider that word and unanimously agreed that we should not use it.[22]

The overwhelming majority of delegates chose to include the "direct benefit" prohibition in Article VII, Section 1.[23]

IV. Procedural History

On January 26, 2023, two days after Plaintiffs filed the present lawsuit, Intervenors moved to intervene as Defendants to defend their interest as beneficiaries of the program. Intervenors are parents of children who are enrolled in the program and "use their allotment to pay tuition to private schools."[24] Intervenors contend that "[w]ithout the program, [they] would be unable to send their students to these private schools or would be able to do so only by incurring great financial hardship."[25] This Court permitted Intervenors' motion on February 10, 2023.

On March 8, 2023, the State moved to dismiss Plaintiffs' facial constitutional challenge, arguing that only an as-applied challenge would be appropriate, and such a challenge would require joinder of school districts as necessary parties. On April 28, 2023, Plaintiffs filed an opposition to the State's motion to dismiss and cross moved for summary judgment. This Court heard oral argument on the cross motions for summary judgment and motion to dismiss on October 24, 2023.

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[22] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 25 (citing Exhibit 18 at 1517).
[23] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 27 (citing Exhibit 18 at 1526).
[24] Intervenors' Opposition at 2.
[25] *Id.*

Legal Standard

I. Motion to Dismiss Standard

Under Civil Rule 8(a) a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[26] Civil Rule 12(b)(6) permits the dismissal of a complaint for "failure of the pleading to state a claim upon which relief can be granted."[27] On a motion to dismiss, courst may only consider the material contained in the pleadings.[28]

Motions to dismiss for failure to state a claim are viewed with disfavor and should rarely be granted.[29] Courts are obliged to construe complaints liberally and give the complaint the benefit of the doubt.[30] To survive a motion to dismiss a plaintiff need not prove the facts alleged in the complaint; it is enough that the complaint states "all the necessary elements constituting a claim for relief."[31] Additionally, in determining the sufficiency of a claim "it is enough that the complaint sets forth allegations of fact consistent with and appropriate to some enforceable cause of action."[32]

"[I]ssues of constitutional and statutory interpretation are decidedly questions of law, for which resorting to drafting history to clarify the meaning of language is common

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[26] Alaska R. Civ. P. 8(a).
[27] Alaska R. Civ. P. 12(b)(6).
[28] *Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999).
[29] *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986).
[30] *Id.*
[31] *Lintck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983).
[32] *Id.*

practice."[33] "This is true even in the limited scope of Rule 12(b)(6) motions to dismiss."[34] When interpreting the constitution, "[courts] first 'look to the plain meaning and purpose of the provision and the intent of the framers.'"[35]

Civil Rule 12(b)(7) allows defendants to assert by motion at the pleading stage, plaintiff's failure to join a party under Rule 19. Alaska Civil Rule 19 requires joinder of parties needed for just adjudication.

II. Summary Judgment Standard

Summary judgment is warranted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[36] A "material fact is one upon which resolution of an issue turns."[37] But Alaska has a "lenient standard for withstanding summary judgment" and this standard "serves the important function of preserving the right to have factual questions resolved by a trier of fact only after following the procedures of a trial."[38] All reasonable inferences must be drawn in favor of the non-moving party.[39]

A party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no genuine issues of material facts and that the moving party is entitled to judgment as a matter of law.[40] Once the moving party makes a prima

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[33] *Forrer v. State*, 471 P.3d 569, 584 (Alaska 2020).
[34] *Id.*
[35] *Id.* at 583 citing *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).
[36] Alaska R. Civ. P. 56.
[37] *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519 (Alaska 2014) (citing *Sonneman v. State,* 969 P.2d 632, 635 (Alaska 1998)).
[38] *Christensen*, 335 P.3d at 520-21 (quoting *Shaffer v. Bellows*, 260 P.3d 1064, 1069 (Alaska 2011)).
[39] 335 P.3d at 520 (citing *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 696 (Alaska 2014)).
[40] *Christensen*, 335 P.3d at 517.

facie showing of its entitlement to judgment, the burden shifts to the non-moving party to demonstrate the existence of a disputed genuine issue of material fact.[41] In order to succeed, the non-moving party must "set forth specific facts showing that [it] could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists."[42] "To create a genuine dispute of material fact there must be more than a scintilla of contrary evidence."[43] Additionally, the proffered evidence must "directly contradict the moving party's evidence."[44]

"[I]ssues of constitutional and statutory interpretation are decidedly questions of law, for which resorting to drafting history to clarify the meaning of language is common practice."[45] Statutes may be found to be unconstitutional as applied or unconstitutional on their face."[46]When interpreting the constitution, "[courts] first 'look to the plain meaning and purpose of the provision and the intent of the framers.'"[47] Courts "uphold a statute against a facial constitutional challenge if despite occasional problems it might create in its application to specific cases, [it] has a plainly legitimate sweep."[48]

On a motion for summary judgment, "[w]hen interpreting a statute, courts look to the plain meaning of the statute, the legislative purpose, and the intent of the statute."[49] "Statutes should be construed, whenever possible, so as to conform to the constitutions of

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[41] *Id.*
[42] *Id.*
[43] *Id.* at 518.
[44] *Id.* at 516.
[45] *Forrer v. State*, 471 P.3d 569, 584 (Alaska 2020).
[46] *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 991 (Alaska 2019).
[47] *Forrer*, 471 P.3d at 583 (citing *Wielechowski*, 403 P.3d at 1146).
[48] *Planned Parenthood of the Great Northwest,* 436 P.3d at 991.
[49] *Premera Blue Cross v. State*, 171 P.3d 1110, 1115 (Alaska 2007).

the United States and Alaska."[50] Additionally, "[l]egislative history and the historical context assist in [a court's] task of defining constitutional terms as understood by the framers."[51] Interpreting the Alaska Constitution "may require referring to debates of the Constitutional Convention."[52] While courts "consider 'precedent, reason, and policy,' policy judgments do not inform [their] decision-making when the text of the Alaska Constitution and the framers' intent as evidenced through the proceedings of the Constitutional Convention are sufficiently clear."[53]

Applicable Law

I. Statutory Constitutional Challenges

"A challenge to a statute must overcome a presumption of constitutionality."[54] "[Statutes] may be found to be unconstitutional as applied or unconstitutional on their face."[55] "An as-applied constitutional challenge requires evaluation of the facts of the particular case in which the challenge arises, while a facial challenge means that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution."[56] "When a statute's constitutionality is facially challenged, [courts] will uphold the statute even if it might occasionally create constitutional problems in its application, as long as it 'has a plainly legitimate sweep.'"[57]

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[50] *Id.*
[51] *Forrer*, 471 P.3d at 583 (internal citations and quotations omitted).
[52] *Id.* at 583.
[53] *Id.* (citing *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1176-77 (Alaska 2009)).
[54] *Planned Parenthood of the Great Northwest v. State,* 375 P.3d 1122, 1132 (Alaska 2016) (internal citations and quotations omitted).
[55] 436 P.3d at 991-92.
[56] *Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 982 (Alaska 2022) (internal citations and quotations omitted).
[57] 436 P.3d at 1132.

"[A court's] first step when presented with a question of constitutional law not squarely addressed by precedent, is to consult the plain text of the Alaska Constitution as clarified by its drafting history."[58] As noted above, Article VII, Section 1 provides:

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

"[Courts] do not interpret constitutional provisions in a vacuum—the document is meant to be read as a whole with each section in harmony with the others."[59] To that end, "[t]erms and phrases chosen by the framers are given their ordinary meaning as they were understood at the time, and usage of those terms is presumed to be consistent throughout."[60]

The Alaska Supreme Court has cautioned courts "look[ing] to other jurisdictions' experiences when interpreting similar constitution terms," to keep in mind that "each state constitution's . . . provisions are different and must be interpreted in light [of] their purpose and relevant history."[61]

Discussion

In their Complaint, Plaintiffs allege that AS 14.03.300-.310, which expand Alaska's correspondence study program to provide annual allotments for parents to purchase

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[58] *Forrer*, 471 P.3d at 585.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 585-586 ("Although we may look to other jurisdictions' experiences with interpreting similar constitutional terms, each state constitution's debt provisions are different and must be interpreted in light [of] their purpose and relevant history.").

services and materials from public, private, or religious organizations, as enacted violates Article VII, Section 1 of the Alaska State Constitution, which prohibits public funds from being paid "for the direct benefit" of any religious or private educational institution. The State argues dismissal is appropriate under both Civil Rule 12(b)(6) for failure to state a claim and 12(b)(7) for failure to join indispensable parties.

Plaintiffs argue AS 14.03.300-.310 are unconstitutional as enacted because "[b]y its plain text, the legislature has authorized purchasing educational services and materials from private organizations using public funds" in contravention of Article VII, Section 1 of the Alaska Constitution.[62] The State argues Plaintiffs' facial challenge fails because the statutes have a "'plainly legitimate sweep' and authoriz[e] a range of spending that does not even implicate Article VII, Section 1 of the Alaska Constitution, including purchases of materials and services from public educational institutions and from private vendors that are not 'educational institutions.'"[63] Intervenors contend that the challenged statutes are constitutional "[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."[64]

I. Plaintiffs' constitutional challenges survive dismissal.

The State argues Plaintiffs' facial constitutional challenge should be dismissed because the statutes have a "'plainly legitimate sweep' and authoriz[e] a range of spending

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[62] Plaintiffs' Reply in Support of Summary Judgment and Opposition to State of Alaska's Cross-Motion for Summary Judgment at 3 (July 21, 2023) (hereinafter "Plaintiffs' Reply and Opposition").
[63] State's Reply, Opposition and Cross-Motion for Summary Judgment at 1(June 2, 2024) (hereinafter "State's Reply, Opposition and Cross Motion").
[64] Intervenors' Opposition at 2.

that does not even implicate Article VII, Section 1 of the Alaska Constitution, including purchases of materials and services from public educational institutions and from private vendors that are not 'educational institutions.'"[65] Additionally, the State argues that Plaintiffs' as-applied challenge should be dismissed because of failure to join school districts as parties. This Court finds that both Plaintiffs' facial constitutional challenge and as-applied challenge survive dismissal under Rule 12(b)(6) and 12(b)(7), respectively.

A. Plaintiffs' facial constitutional claim survives 12(b)(6) dismissal under either standard used to analyze facial constitutionality.

Alaska courts have applied two different standards when determining questions of facial constitutional challenges. The more stringent standard provides that "[a] statute is facially unconstitutional if "no set of circumstances exists under which the Act would be valid."[66] The other standard directs courts "[to] uphold the statute even if it might occasionally create constitutional problems in its application, as long as it 'has a plainly legitimate sweep.'"[67]

To determine whether the challenged statute is constitutional [courts] first interpret the statute.[68] "Statutory construction begins with the language of the statute construed in light of the purpose of its enactment."[69] To that end, the interpretation of legislation by the governor and the agency that sponsored the bill is entitled to be given weight by courts

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[65] State's Reply, Opposition and Cross Motion at 1.
[66] *Javed v. Department of Public Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) (citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)).
[67] 375 P.3d at 1132.
[68] *Planned Parenthood of the Great Northwest*, 436 P.3d at 992.
[69] *Knolmayer v. McCollum*, 520 P.3d 634, 643 (Alaska 2022), *reh'g denied* (Dec. 8, 2022).

when construing the intent of the statute.[70]

In the State's Motion to Dismiss, it argues Plaintiffs fail to state a claim because the correspondence allotment program statutes "are not facially unconstitutional because they are capable of a range of possible applications that do not violate Article VII, Section 1 of the Alaska Constitution."[71] However, this argument misinterprets the "plainly legitimate sweep" standard by relying on an occasional constitutional use to save a plainly unconstitutional statute. As Plaintiffs argue, "the fact that a parent and teacher could spend money constitutionally under the correspondence program allotment with a handful of approved public institutions among hundreds of private organizations, does not make the broad sweep allowing purchases at 'private, or religious organization[s]' as distinct from 'public' organizations, plainly legitimate."[72]

Here, the plain text of the statutes clearly authorizes purchasing educational services and materials from private organizations with public funds, in direct contravention of the direct benefit prohibition of the Alaska Constitution. As evidenced by the legislative history of SB 100, the relevant language of which went on to be later enacted as the provisions at issue here, was introduced with two proposed constitutional amendments to change the Alaska Constitution to allow for spending public funds for the direct benefit of private educational institutions.

Additionally, Senator Dunleavy indicated during his presentation regarding those

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[70] 2A C. Sands, *Sutherland Statutory Construction* § 48.05, at 305–06 (4th ed., rev.1984); *State, Div. of Agriculture v. Fowler,* 611 P.2d 58, 60 (Alaska 1980). *Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 645 (Alaska 1991).
[71] Defendant's Motion to Dismiss at 2.
[72] Plaintiffs' Reply and Opposition at 22.

proposed constitutional amendments that the "Alaska State Constitution prohibits public funds going to private or religious *educational service providers*."[73] He further noted that "these partnerships and associated practices could be construed to be unconstitutional."[74] The fact that there are some possible constitutional applications of the provisions at issue cannot overcome the plain statutory text, bill sponsor's statements, and legislative history all to the contrary. As a result, the Plaintiffs' facial challenge survives dismissal.

II. Plaintiffs' constitutional challenges may proceed without joinder of school districts.

A finding of indispensability under Rule 19 requires a three-part analysis, as follows:

> First, the court must determine whether the parties are "necessary," according to the standards set forth in Civil Rule 19(a). Second, only if the parties are found to be necessary, the court must then determine if they can be joined. At this point in the inquiry, the court must decide whether it can exercise personal jurisdiction over the parties. Finally, if the court concludes that the parties are necessary and cannot be joined, it must determine whether they are "indispensable" by weighing the factors provided in Civil Rule 19(b).[75]

The State argues that this Court should not allow an as-applied challenge to go forward without the school districts as parties because "DEED does not currently administer any correspondence school programs—only the school districts do."[76] Further, the State argues that since "DEED cannot simply stand in for the school districts, defending their actions

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[73] *Id.* at 19 (citing Exhibit K) (emphasis in original).
[74] *Id.*
[75] *Matter of Pac. Marine Ins. Co. of Alaska in Liquidation*, 877 P.2d 264, 268–69 (Alaska 1994).
[76] Defendant's Motion to Dismiss at 2.

and representing their interests," Plaintiffs must join the school districts they believe are applying the law in a way that violates the constitution, "otherwise, the case needs to be dismissed."[77]

Plaintiffs argue that individual school districts are not necessary under Rule 19(a) since Rule 19(a)(1) indicates that a party is necessary if "in the person's absence complete relief cannot be accorded among those already parties," and as a result, the "State's argument fails in part one [of the joinder analysis]."[78] This Court agrees with Plaintiffs' argument that since DEED is charged with exercis[ing] general supervision over the public schools of the state" and also with "exercis[ing] general supervision over elementary and secondary correspondence study programs," DEED is the state agency with the ultimate responsibility to ensure public funds are used in accordance with the Alaska Constitution.[79] Further, this Court notes that not a single school district sought intervention. This Court finds that Plaintiffs' constitutional challenges may proceed without joinder of individual school districts.

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Since Plaintiffs' constitutional challenges survive dismissal, the next step of the analysis is to examine whether the statutes at issue violate Article VII, Section 1 of the Alaska Constitution. To determine if the statutes at issue are facially unconstitutional, this Court must examine the relevant legislative history of the statutes, the Constitutional

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[77] *Id.*
[78] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 44.
[79] *Id.* at 45-6.

Convention minutes concerning Article VII, Section 1, and previous Alaska caselaw interpreting and applying Article VII, Section 1. If this Court finds that the statutes at issue are facially unconstitutional, then the next step is to determine if the statute can be saved by severing the unconstitutional provisions.

III. AS 14.03.300-.310 violates Article VII, Section 1, rendering the allotment program facially unconstitutional.

Plaintiffs argue that the relevant legislative history, Constitutional Convention minutes, and previous Alaska caselaw indicate that statutes at issue are facially unconstitutional. The State argues that "even though a school district could violate Article VII, Section 1 when administering student allotments, that does not justify striking the allotment statutes down entirely because the statutes also have many constitutional applications."[80] Intervenors argue that "both the plain text of the provision and the words of the framers who crafted the provisions demonstrate that initiatives like the allotment program are permissible because they benefit *individuals*, not *institutions*."[81] Each of these arguments is addressed below.

A. Relevant Legislative History

The first step in determining if a challenged statute is constitutional, is for courts to interpret the challenged statute.[82] When interpreting a statute, courts look to the plain meaning as well as the drafting history.[83] Additionally, "[t]he interpretation of legislation by the governor and the [bill's sponsor] is entitled to be given weight by the court in

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[80] State's Reply, Opposition, and Cross Motion at 14.
[81] Intervenors' Opposition at 4 (emphasis in original).
[82] *Planned Parenthood of the Great Northwest*, 436 P.3d at 992.
[83] *Forrer*, 471 P.3d at 583.

construing the intent of the statute."[84]

Importantly, courts "give unambiguous statutory language its ordinary and common meaning, but the 'plain meaning rule' is not an exclusionary rule; [courts] will look to legislative history as a guide to construing a statute's words."[85] Ultimately, "[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."[86]

Here, Plaintiffs argue that AS 14.03.300-.310's legislative history "shows that it was drafted for the specific purpose of allowing purchases of private educational services with the public correspondence student allotments."[87] Further, Plaintiffs argue "[t]he sponsor's statements further demonstrate an understanding that this spending violated Article VII, Section 1, such that amending the Alaska Constitution was required for the statute to achieve its intended purpose."[88] Plaintiffs argue that "[t]his Court is entitled to consider the fact that AS 14.03.300-.310's legislative sponsor believed the constitution must be amended for his bill to achieve its intended purposes in determining whether the statutes have a plainly legitimate sweep as required to survive review."[89]

The State argues "although legislative history can aid in interpreting disputed statutory language, the parties' dispute is not over what the statute says."[90] Additionally,

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[84] *Flisock v. Division of Retirement & Benefit*, 818 P.2d 640, 645 (Alaska 1991).
[85] *Roberge v. ASRC Construction Holding*, 503 P.3d 102, 104 (Alaska 2022).
[86] *Id.*
[87] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 17.
[88] *Id.* at 17.
[89] *Id.* at 23.
[90] State's Reply in Support of Cross-Motion for Summary Judgment at 14 (August 9, 2023) (hereinafter "State's Reply").

the State posits that "[a] legislator's opinion about what the constitution requires is of no matter—the Court must determine this for itself."[91] Specifically, the State contends that "Senator Dunleavy explained that various 'public/private partnerships that were already part of correspondence school programs could be construed to be unconstitutional,' noting that the issue of constitutionality can only be determined by the courts or we can change our constitutional language to align with our practices."[92] In response to the State's arguments, Plaintiffs argue that "read in total, AS 14.03.200-.310 clearly authorizes the expenditure of public funds for educational purposes at private institutions, and prohibits DEED from imposing limitations on this expenditure of public funds regardless of constitutional requirements."[93]

This Court agrees with Plaintiffs' arguments and finds that the legislative history of AS 14.03.200-.310 clearly demonstrates that the statutes were drafted with the express purpose of allowing purchases of private educational services with the public correspondence student allotments. Even though the State argues that there is a significant difference between "organization" and "educational institution" and since the statute authorizes the spending of allotment funds on services and materials from a "public, private, or religious organization" not a "religious or other private educational institution" that the statutes are not facially unconstitutional,[94] this Court does not find this argument

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[91] *Id.*
[92] *Id.* at 15.
[93] Plaintiffs' Reply and Opposition at 8.
[94] State's Reply, Opposition and Cross Motion at 10. ("But these phrases are meaningfully different—of course, not every 'organization' is an 'educational institution.').

compelling.[95] Rather, as Plaintiffs contend, "[t]o the extent the State is requesting this Court uphold the statutes as facially valid based on the word "organization" instead of "institution," such reading is unreasonable and finds no support in the legislative history[.]"[96]

B. Constitutional Convention Discussion Regarding Article VII, Section 1

Interpreting the Alaska Constitution "may require referring to debates of the Constitutional Convention."[97] While courts "consider 'precedent, reason, and policy,' policy judgments do not inform [their] decision-making when the text of the Alaska Constitution and the framers' intent as evidenced through the proceedings of the Constitutional Convention are sufficiently clear."[98]

Plaintiffs argue that "[t]he Committee chose the term "public funds" in acknowledgment that "state funds" may go through many hands, but the term "public funds" was meant to "guide [] every portion of this journey[.]"[99] Further, Plaintiffs argue "the Committee meant the phrase 'other private educational institutions' to include '*any* educational institution that is not supported and run by the state."[100] Plaintiffs maintain that the delegates chose to include the "direct benefit" prohibition proposed by the Committee, understanding that the "Committee understood the 'direct benefit' prohibition to prevent

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[95] The Court notes the Merriam-Webster dictionary defines 'institution' as "an established organization or corporation (such as a bank or university) especially of a public character." 'Organization' appears as one of the first synonyms for 'institution.'
[96] Plaintiffs' Reply and Opposition at 19.
[97] *Id.* at 583.
[98] *Id.* (citing *Se. Alaska Conservation Council*, 202 P.3d at 1176-77).
[99] *Id.* at 24.
[100] *Id.* at 25.

spending for 'maintenance' or 'operation' of a private educational institution, 'or other features of direct help.'[101]

The State argues that "[Plaintiffs] suggest that most spending under the student allotment statutes is unconstitutional by conflating the statute's wording with the constitution's."[102] Essentially the State argues that there is a significant difference between "organization" and "educational institution" and since the statute authorizes the spending of allotment funds on services and materials from a "public, private, or religious organization[s]" not a "religious or other private educational institution" that the statutes are not facially unconstitutional.[103]

In response, Plaintiffs argue that "for the purposes of public funding, the Alaska Constitution establishes just two categories: public and non-public institutions."[104] Plaintiffs support this argument with citations to the Constitutional Convention proceedings and by referencing the Alaska Supreme Court's interpretation of the language of Article VII, Section 1 as "designed to commit Alaska to the pursuit of public, not private education."[105] Ultimately, Plaintiffs argue that the Constitution Convention minutes indicate the delegates' understanding that Article VII, Section 1 would foreclose spending public funds for the direct benefit of private educational institutions, *regardless* of how many hands it passed through and *regardless* of whether the stated intention of such

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[101] *Id.*
[102] State's Reply at 10.
[103] *Id.* ("But these phrases are meaningfully different—of course, not every "organization" is an "educational institution.").
[104] Plaintiffs' Reply at 12.
[105] *Id.* (citing *Sheldon Jackson College v. State*, 599 P.2d 127, 129 (Alaska 1979)).

spending was to further the public purpose of education."[106] Notably, the State does not make any arguments citing to the Constitutional Convention.

The Constitutional Convention minutes and the delegates' discussions of Article VII, Section 1 clearly support Plaintiffs' arguments regarding constitutionality.

C. Previous Alaska Caselaw

In *Sheldon Jackson College v. State*, the Alaska Supreme Court considered whether a tuition grant program violated Article VII, Section 1's prohibition of payment of public funds "for the direct benefit of any religious or other private educational institution."[107] The tuition grant program at issue awarded Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student's private college and tuition charged by a public college in the same area.[108] The *Sheldon Jackson College* court found that the tuition grant program violated the "direct benefit" prohibition set out in Article VII, Section 1 and as a result, held that the statutes authorizing the program were facially unconstitutional.[109]

When examining other similar provisions in other jurisdictions, the Sheldon-Jackson court found "[t]he Alaska Constitution is apparently unique in its express ban only on 'direct' benefits."[110] In examining the Constitutional Convention minutes, the *Sheldon Jackson College* court found that "Article VII, Section 1 was designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental

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[106] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 27.
[107] *Sheldon Jackson College*, 599 P.2d at 127.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 130.

indifference to any student choosing to be educated outside of the public school system."[111] Through examining how other courts distinguished between "direct" and "incidental" benefits, the *Sheldon Jackson College* court set out four factors "helpful in determining generally the type of government action intended to be prohibited by Article VII's direct benefit clause."[112]

1. Breadth of the class to which statutory benefits are directed.

The first factor examines the "breadth of the class to which statutory benefits are directed."[113] If the benefits in question are "provided without regard to status and affiliation," then those benefits "have universally been presumed [by courts] to be constitutional."[114] "Conversely, a benefit flowing only to private institutions, or to those served by them, does not reflect the same neutrality and non-selectivity."[115] In applying the first factor to the tuition grant program, the *Sheldon Jackson College* court found "[u]nlike a statute that provides comparable dollar subsidies to all students, Alaska's tuition grant program [was] not neutral, inasmuch as the only incentive it creates is the incentive to enroll in a private college."[116]

Here, Plaintiffs argue that similarly to the tuition grant program in *Sheldon Jackson College*, "AS 14.03.300-.310 subsidizes private schools by incentivizing parents to enroll their children in a public correspondence program and then receive reimbursements for

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[111] *Id.* at 129.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 131.

private school classes."[117] Intervenors argue that unlike the program in *Sheldon Jackson College*, which was available only to students at Alaska's private colleges, the allotment program is available to "any school-age Alaskan enrolled in the correspondence study program."[118] Further, Intervenors argue that enrollees in the program, "have a wide array of options of how to design their educational experience under the program . . . [t]hey can buy educational services through public institutions, private institutions, or a combination of the two."[119] Additionally, Intervenors argue that "Plaintiffs fail to acknowledge that families are eligible for allotments regardless of their educational choices . . . this is precisely the kind of state "neutrality" at the heart of the first *Sheldon Jackson* factor."[120]

However, the *Sheldon Jackson College* court discussed "neutrality" in regard to the type of benefit conferred to the educational institution, not in regards to student's/parent's choice as to how the money is spent (i.e. only towards private educational institutions in the case of the tuition grant program versus to public, private, or religious institutions in the case of the allotment program). The *Sheldon Jackson College* court used "police and fire protection" to illustrate this point; "though the police and fire protection afforded a private school may provide the school with quite direct benefits, as when a campus fire is extinguished, such benefits are provided without regard to status and affiliation, and have universally been presumed to be constitutional."[121]

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[117] Plaintiff's Opposition and Cross-Motion for Summary Judgment at 31.
[118] Intervenors' Opposition at 8.
[119] *Id.*
[120] *Id.* at 9.
[121] *Sheldon Jackson College*, 599 P.2d at 130.

2. Nature of use

"A second criterion in determining the constitutionality of a state aid program, is the nature of the use to which the public funds are to be put."[122] "As is apparent from the convention debate, the core of the concern expressed in the direct benefit prohibition involves government aid to Education conducted outside the public schools."[123] The *Sheldon Jackson College* court found that the public funds expended under the tuition grant program "constitute[d] nothing less than a subsidy of the education received by the student at his or her private college, thus implicate fully the core concern of the direct benefit provision."[124]

Here, Plaintiffs argue "while the stated justification of AS 14.03.300-.310 may be to further educational outcomes, the chosen input is providing public funds, in the form of student allotments, to parents to pay for education materials and services at private schools . . . [and] this implicates the core concern of the direct benefit prohibition."[125] Intervenors argue the correspondence program is substantially different from the tuition grant program because unlike in *Sheldon Jackson College*, the funds from the allotment program can be used at a "variety of public and private vendors."[126] Further, Intervenors argue that the allotment program is constitutional under this factor because the "state in no matter 'directs' which, if any, of these myriad options families select."[127]

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[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Plaintiff's Opposition and Cross-Motion for Summary Judgment at 31.
[126] Intervenors' Opposition at 9.
[127] *Id.*

This Court does not find the Intervenor's argument compelling because neither the plain language of Article VII, Section 1, nor the *Sheldon Jackson College* court's analysis implicates the State directing where the public funds go; rather Article VII, Section 1 prohibits public funds directly benefitting private educational institutions.

3. Magnitude of the benefit conferred

"Third, in determining whether a school is directly benefitted by public funds, a court must consider, though *not in isolation*, the magnitude of the benefit conferred."[128] "A trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may."[129] In *Sheldon Jackson College*, the Court found the "magnitude of the benefits bestowed under the tuition grant program [to be] quite substantial."[130]

Here, Plaintiffs argue "[u]nder the correspondence study program, a student's entire allotment (totaling thousands of dollars a year per year), may be used to purchase classes from a private school."[131] Further, Plaintiffs note that Intervenors all claimed an interest in this litigation because they use their correspondence program allotments to "pay tuition" for their children to attend private schools.[132] The State argues that allotment spending involving private educational institutions "would need to be evaluated on its facts, taking into account the "magnitude" of the benefit to the private educational institution."[133]

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[128] *Sheldon Jackson College*, 599 P.2d at 130 (emphasis added).
[129] *Id*
[130] *Id.* at 131.
[131] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 33.
[132] *Id.* at 32 (citing Intervenors' Motion to Intervene at 1).
[133] State's Reply, Opposition and Cross Motion at 11.

Intervenors argue that "Plaintiffs are wrong to analyze this factor by comparing the dollar value of the allotment to the dollar value of the tuition grant in *Sheldon Jackson College*."[134] Rather, they maintain that the benefit is not conferred to private schools at all, but rather is conferred to the beneficiary families.[135] Intervenors argument is not persuasive because even though the tuition grant program benefitted the students who were able to finance their private college education in *Sheldon Jackson College*, the Court nonetheless found the program to be unconstitutional.

In response to this argument, Plaintiffs argue "[c]ontrary to the implicit arguments of the State, even assuming there was a *de minimus* exception, it would not apply here; these statutes authorize the purchase of private educational services and materials across more than 30 correspondence programs."[136] Instead, Plaintiffs argue the appropriate way to consider the "magnitude" of the benefits is to look at the "authorized expenditures across the entire program."[137] To that end, Plaintiffs point to the fact that "the statutory authorization contains no limits on the number of students who may enroll in the correspondence program, nor the amount of expenditures at private institutions that may be authorized under an [individualized learning plan], throughout a district, or collectively across the entire program."[138] Read another way, if even a small percentage of students use their allotments for private school education, the magnitude is still substantial.

Intervenors' argument that the "dollar value of the allotment" should not be

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[134] Intervenors' Opposition at 10.
[135] *Id.*
[136] Plaintiffs' Reply and Opposition at 14.
[137] *Id.*
[138] *Id.* at 14-15.

considered is directly in opposition to the Court's reasoning in *Sheldon Jackson College*. There, the Court envisioned a level of direct benefit, which would not rise to the level of a constitutional violation. The Court explained, "[a] trivial though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may."[139]

Here, the question under this factor is where the allotment program falls between the "trivial, though direct benefit" and the "substantial, though arguably indirect benefit" situations described by the *Sheldon Jackson College* court. For example, Intervenors in this case have a total of six school-aged children between them who received student allotment money for the 2022-23 school year.[140] If this Court assumes (as Intervenors contend) that families may receive up to $4,500 per student per school year and that Intervenors continued to use the full amount of their children's allotment to subsidize their tuition at private schools (as they are currently doing) from kindergarten through high school, then by the time those six children graduated high school, $351,000 would have been spent on their private school tuition.[141] This is by no means a 'trivial' amount of money.

4. Form of the benefit

Fourth, "while a direct transfer of funds from the state to a private school will of course render a program constitutionally suspect, merely channeling the funds through an

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[139] *Sheldon Jackson College*, 599 P.2d at 130.
[140] Motion to Intervene as Defendants at 2 (January 26, 2023).
[141] This Court reached this figure by calculating $4,500 in yearly allotment money multiplied by 13 years of schooling, which totals $58,500 per student, multiplied by six children.

intermediary will not save an otherwise improper expenditure of public monies." "The courts have expressly noted that the superficial form of a benefit will not suffice to define its substantive character."[142] "Finally, though the tuition grants are nominally paid from the public treasury directly to the student, the student here is merely a conduit for the transmission of state funds to private colleges."[143] "Simply interposing an intermediary does not have a cleansing effect and somehow cause the funds to lose their identity as public funds."[144]

Plaintiffs argue that like the tuition grant program at issue in *Sheldon Jackson College*, "[s]ubstantively, AS 14.03.300-.310 allocates public funds in the form of student allotments for the direct benefit of private educational institutions."[145] Intervenors argue that since the "parents need not—and often do not—use the allotment to 'pay for private school classes,' or for any materials or services from private institutions" that as a result, "the legislature has not merely channeled the funds through an intermediary."[146] Intervenors' argument that the allotment program is constitutional under this factor because the legislature has simply given beneficiaries the *option* to spend those public funds on materials and services from public, private, or religious organizations, rather than the legislature *directing* funds in the allotment program to private educational institutions. This Court does not find this reasoning persuasive.

Further, this Court sees no difference between parents receiving the allotments and

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[142] *Id.* at 130-31.
[143] *Id.* at 132.
[144] *Id.*
[145] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 34.
[146] Intervenors' Opposition at 11-12.

then paying a private school and the students in *Sheldon Jackson College* receiving tuition grants and then paying a private university. In fact, the Intervenors explicitly acknowledge that they are using public funds to finance their children's private educations. They note that without the allotment money they could not send their children to private school, or that doing so would create a significant financial burden. Parents have the right to determine how their children are educated. However, the framers of our constitution and the subsequent case law clearly indicate that public funds are not to be spent on private educations. This Court finds the *Sheldon Jackson College* case to be squarely on point in this case.

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This Court has a constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution. But it is not the role of this Court and other members of the judiciary to be "legislators, policy makers, or pundits charged with making law."[147] Rather, to reiterate, while courts "consider 'precedent, reason, and policy,' policy judgments do not inform [their] decision-making when the text of the Alaska Constitution and the framers' intent as evidenced through the proceedings of the Constitutional Convention are sufficiently clear."[148]

Here, the plain language of Article VII, Section 1 dictates that "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution." Additionally, the minutes of the Alaska Constitutional Convention

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[147] *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 579 (Alaska 2007).
[148] *Id.* (citing *Se. Alaska Conservation Council*, 202 P.3d at 1176-77).

demonstrate that the delegates' understanding of the term "direct benefit" forbids the use of public funds for educational materials and services from private educational institutions. Coupled with the Alaska Supreme Court's test in *Sheldon Jackson College* and the legislative history and language of AS 14.03.300-.310 itself, unequivocally demonstrate that AS 14.03.300-.310 are facially unconstitutional.

IV. Portions of the challenged statutes cannot be severed and the remainder saved.

The Alaska Supreme Court has directed that "when constitutional issues are raised, this court has a duty to construe a statute, where reasonable, to avoid dangers of unconstitutionality. Rather than strike a statute down, [courts] will employ a narrowing construction, if one is reasonably possible."[149] "A provision is severable if "the portion remaining . . . is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part."[150] "However, when the invalidation of a central pillar 'so undermines the structure of the Act as a whole, then the entire Act must fall.'"[151]

Plaintiffs argue that since "the statutes expressly authorize public funds to be paid to private institutions for education, and deliberately removed DEED's ability to narrow this authorization, the statutes cannot be reasonably construed to allow only constitutional spending."[152] In the alternative, Plaintiffs suggest severing "private, or religious" from AS

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[149] *State v. ACLU of Alaska*, 204 P.3d 364. 373 (Alaska 2009).
[150] *Forre*r, 471 P.3d at 598.
[151] *Id.*
[152] Plaintiff's Reply and Opposition at 23.

14.03.310 such that it would only allow purchases from a "public" organization.[153] Further, Plaintiffs argue that severing the provision in AS 14.03.300(b) which expressly precludes DEED from "placing any limits on the allotment funds being paid to private entities" would be necessary.[154]

The State "does not ask the Court to craft a narrowing construction or sever any provisions."[155] Rather, the State asks this Court to reject Plaintiffs' facial challenge as a matter of law "because the statutes have a plainly legitimate sweep, thereby leaving [Plaintiffs] to pursue an as-applied challenge."[156] In response to severing Plaintiffs' suggested provisions, the State argues that "not every 'private' or 'religious' organization is an 'educational institution,' so many purchases from such organizations would not even implicate Article VII, Section 1."[157]

Severing the portions of AS 14.03.310 dealing with private and religious organizations coupled with severing the provision preventing DEED from setting any limits on allotment spending would not be enough to save the remainder of AS 14.03.300-.310. This Court echoes the State's concerns regarding how organizations are characterized and the "gray area spending,"[158] and finds that it is not possible to sever certain provisions to create a reasonable narrowing construction. As a result, this Court finds that there is no workable way to construe the statutes to allow only constitutional spending and AS

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[153] Plaintiffs' Opposition and Cross-Motion for Summary Judgment at 41.
[154] *Id.* at 40-41.
[155] State's Reply, Opposition and Cross Motion at 18.
[156] *Id.* at 19.
[157] *Id.* at 20.
[158] *Id.* at 11-12.

14.03.300-.310 must be struck down as unconstitutional in their entirety.

If 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.

Conclusion

For the foregoing reasons, the State's Motion to Dismiss is **DENIED** and Plaintiffs' Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 12th day of April, 2024.

ADOLF V. ZEMAN
Superior Court Judge

I certify that on the 12th of April 2024, a copy was mailed/emailed to:

L. Sherman; S. Kendall; M. Paton-Walsh; K. West; C. Richards; J. Rowes; D. Hodges

Caroline Randive, Law Clerk