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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Alaska Statutes

Court Rules

Other Authorities

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 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.

INTRODUCTION

Striking down a duly enacted statute as unconstitutional is a serious and extraordinary exercise of the judicial power. "'A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"[1] Accordingly, this Court has held that "[d]ue respect for the legislative branch of government requires that we exercise our duty to declare a statute unconstitutional only when squarely faced with the need to do so."[2] Moreover, "[a] presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[3]

The restraint demanded by the separation of powers "is particularly so" where, as here, a plaintiff brings a facial challenge to a statute.[4] Because such a challenge seeks to invalidate a statute "*in toto*,"[5] this Court requires such plaintiffs to "establish at least that the law does not have a 'plainly legitimate sweep.'"[6] This standard recognizes that even if a statute "as applied" in some situations "might be unconstitutional,"[7] the judiciary must respect the law's permissible applications and not simply throw the good out with

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1 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 94 (Alaska 1988) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

2 *State v. American Civil Liberties Union*, 204 P.3d 364, 373 (Alaska 2009).

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

4 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

5 *E.g.*, *Planned Parenthood of the Great Nw.*, 436 P.3d at 992; *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007).

6 *Treacy*, 91 P.3d at 268.

7 *Id.*

the bad. There are more refined tools—including a properly filed as-applied challenge—that allow courts to "avoid interfering with the lawmaking process any more than is necessary."[8] In the U.S. Supreme Court, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'"[9]

The arguments of appellees (collectively, "Alexander") in support of their facial challenge ignore all of this. Their brief never once acknowledges the presumption of constitutionality. Nor does it even attempt to comply with this Court's command that a plaintiff "establish at least that the law does not have a 'plainly legitimate sweep'"[10] or to respond to the arguments of appellant ("DEED" or "the State"). Instead, Alexander defends the superior court's ruling under a legal standard of their own making that conflicts with this Court's case law and collapses the long-standing distinction between facial and as-applied challenges.

Alexander commits similar errors in defending their as-applied challenge. They do not contest most of DEED's points, including that DEED has limited statutory authority over school district approval of allotment spending and that the school districts are independent actors for purposes of liability under state law. Rather, Alexander turns to several arguments that again conflate facial and as-applied challenges, or fail entirely to appreciate how as-applied challenges work.

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8 *McAlpine*, 762 P.2d at 94.

9 *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

10 *Treacy*, 91 P.3d at 268.

This Court should reverse with instructions to enter judgment for DEED.

ARGUMENT

I. The superior court erred in holding AS 14.03.310 facially unconstitutional.

A. Alexander fails to show AS 14.03.310 lacks a plainly legitimate sweep.

As DEED explained in its opening brief, the superior court erred in holding that AS 14.03.310 lacks a plainly legitimate sweep. Contrary to the superior court's conclusion that the statute has merely "an occasional constitutional use," [Exc. 554] AS 14.03.310 has an easily identifiable and wide range of constitutional applications not covered by Article VII, Section 1. There are six categories of entities at which allotment spending could occur under the statute: (1) public non-school organizations, (2) religious non-school organizations, (3) (non-religious) private non-school organizations, (4) public schools, (5) religious schools, and (6) (non-religious) private schools. [At. Br. 19] Any spending at the first four falls clearly outside the scope of Article VII, Section 1, which by its terms applies just to spending at "any religious or other private educational institution[s]." And any spending at the last two are only *potentially* unconstitutional. [At. Br. 19] That is more than sufficient to confirm what Alaska law *presumes* to be true: that AS 14.03.310 has a core of "many" constitutional applications sufficient to constitute a plainly legitimate sweep and defeat any facial challenge.

Furthermore, as DEED showed, the superior court's error resulted from its misinterpretation of Article VII, Section 1, as prohibiting allotment spending at *any and all* religious and private organizations. According to the superior court, the statute could be constitutionally applied only when such spending occurred at "a handful of approved

public institutions." [Exc. 554]. In other words, the superior court understood only two of the six categories above to fall beyond the reach of Article VII, Section 1. But as DEED explained, that misreads the constitutional provision by omitting the word "educational." [At. Br. 22-23] Article VII, Section 1, does not bar the spending of public funds for the direct benefit of *any and all* religious and private organizations, but rather only the subset that are "educational institutions."

Alexander does not even attempt to carry their burden of overcoming the presumption of constitutionality by showing that AS 14.03.310 lacks a plainly legitimate sweep. For starters, Alexander nowhere acknowledges, let alone tries to rebut, DEED's plain text explanation that the wide range of allotment spending at non-schools—such as the purchase of school supplies, textbooks, or extracurricular classes from private businesses like Amazon, Houghton Mifflin Harcourt, or Aurora's Cakery and Bakery—all falls indisputably outside the reach of Article VII, Section 1. [At. Br. 19-21] Nor could they, as Alexander has repeatedly acknowledged that Article VII, Section 1, concerns only the use of public funds at religious or private *schools*. They say so in their brief before this Court.[11] And they said the same in the draft "emergency regulations"

[11] *See* Ae. Br. 14-15 (restrictions on use of public funds was to protect public schools); *id*. at 15 & n.31 (noting that debate at the constitutional convention concerning "direct benefits" to educational institutions in Article VII, Section 1 would concern "children who were in private schools"); *id.* at 44 ("The Alaska Constitution does not disqualify schools from public aid because they are religious …."); *id.* ("Alaska's Constitution makes no legal distinction between religious and other types of private schools.").

submitted to the State to "correct" the alleged constitutional defects in AS 14.03.310.[12]

Alexander likewise does not defend the superior court's conclusion that AS 14.03.310 has only "an occasional constitutional use" or the court's misreading of Article VII, Section 1, that led to that mistaken conclusion. [Exc. 554] Alexander instead asserts that DEED is "intentional[ly] misreading," "misstat[ing]," "mischaracteriz[ing]," and "cherry pick[ing]" the superior court's statements. [Ae. Br. 25, 30] But Alexander never identifies a specific error or mischaracterization, much less attempts to provide an alternative explanation for the superior court's statement that "purchasing educational services and materials from private organizations with public funds" is "in direct contravention" of Article VII, Section 1. [Exc. 554]. That statement clearly reflects a fundamentally mistaken understanding that Article VII, Section 1, reaches *all* private organizations and not just private "educational institutions." And that understanding, as DEED has pointed out, would render unconstitutional far more than just the student allotment program, including the millions that the State pays annually to private organizations like Amazon or Houghton Mifflin Harcourt for textbooks and other services and materials for brick-and-mortar schools, as well as numerous long-uncontroversial public-private partnerships. [At. Br. 29, 44-47] Alexander waves away

[12] Those draft regulations define "religious or private educational institution" as "any non-public private school, university, or other institution primarily engaged in an educational mission." [Exc. 661].

these issues as "not before this Court," but they tellingly never say DEED's concerns are unjustified.[13]

B. Alexander relies instead on an erroneous theory of facial constitutionality.

1. Alexander wrongly contends that a statute with *any* unconstitutional application is facially unconstitutional.

Rather than attempt to meet this Court's requirement that they "establish at least that the law does not have a 'plainly legitimate sweep,'"[14] Alexander invents their own standard for facial constitutionality. According to Alexander, DEED has "the analysis backward" in asking whether "it is possible to make constitutional expenditures under the statutory regime." [Ae. Br. 29][15] That, in Alexander's view, is an improper effort to use a constitutional application of a statute "to save an unconstitutional provision." [Ae. Br. 29]

Instead, Alexander appears to believe that a statute is facially unconstitutional if it permits any unconstitutional application and, conversely, that a statute is facially constitutional only if it is constitutional in every application. They say, for example, that "a 'facial challenge' is nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution." [Ae. Br. 27] Likewise, they contend that "[w]hen a statutory scheme violates the 'minimum requirements' of the Alaska

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13 Ae. Br. 36 ("If other statutes authorize unconstitutional spending, they will have to be separately addressed.").

14 *Treacy*, 91 P.3d at 268.

15 *See also, id.* at 25 ("The State flips the 'plainly legitimate sweep' standard on its head by insisting that the potential to make constitutional expenditures with an allotment under AS 14.03.310 somehow saves the legislature's broad unconstitutional authorization to spend public funds at private schools.").

Constitution, including authorizing action in violation of 'a [constitutional] prohibition,' the Court is 'compelled to strike down [the] statutes or regulations that violate' the prohibition." [Ae. Br. 27] And finally, Alexander argues that "when a statute authorizes both constitutional actions and unconstitutional actions," "the statute in its entirety must be struck as facially unconstitutional" if "the offending provision cannot be severed." [Ae. Br. 29-30]

Alexander's novel theory is also evidenced in their repeated (and false) contention that DEED "does not argue for a constitutional interpretation of the allotment statutes." [Ae. Br. 10, 13 n.24, 25, 28 n.71] Nearly twenty pages of DEED's opening brief, of course, is devoted to arguing that AS 14.03.310 is facially constitutional notwithstanding that there *may* be some unconstitutional applications. What Alexander must mean, therefore, is that DEED has not offered an interpretation of the statute that would make it facially constitutional *under their approach to that question*—i.e., an interpretation that would make *every* application unquestionably constitutional and foreclose *any* possible unconstitutional application.

The problem for Alexander is that this theory of facial constitutionality is plainly wrong. First, Alexander's view that facial constitutionality requires every application of a statute to be constitutional runs afoul of the most basic premise of facial challenges. It is black-letter law that a court "will uphold a statute against a charge that it is facially

unconstitutional *even if it might sometimes create problems as applied*."[16] The law recognizes claims arising from those unconstitutional applications, but those are *as-applied* challenges, not *facial* challenges. Thus, it is Alexander's purported standard, which collapses the critical distinction between facial and as-applied challenges, that is "fundamentally flawed." [Ae. Br. 25]

Second, Alexander can point to no authority supporting their novel theory that courts are "compelled" to strike down any statute that might be applied unconstitutionally. [Ae. Br. 27] The three cases cited by Alexander certainly do not do that, since each involves statutes that—unlike AS 14.03.310—were unconstitutional in all applications. In *Owsichek v. State, Guide Licensing & Control Bd.*, the Court confronted two statutes that authorized a state board to grant to hunting guides "exclusive guide areas" from which all other guides could be excluded.[17] The Court concluded that such areas were categorically prohibited by the Alaska Constitution's "common use clause," and thus there were no possible constitutional applications of the statutes.[18] In *Forrer v. State*, the statute at issue was held to create "state debt" barred by Article IX, Section 8 of the Alaska Constitution—again, not just in some applications, but *always*.[19] And in *State v. Alex*, the challenged statute created an assessment on the sale of salmon that the Court

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16 *Alaska Fish & Wildlife Conservation Fund*, 347 P.3d at 104 (emphasis added); *Planned Parenthood of Alaska*, 171 P.3d at 581.

17 763 P.2d 488 (Alaska 1988).

18 *Id.* at 496.

19 471 P.3d 569, 585-90, 599 (Alaska 2020).

found could not be considered anything but a dedication of revenues to a special purpose in violation of Article IX, Section 7 of the Alaska Constitution.[20]

Alexander also cites a law review article entirely out of context. Alexander accurately quotes the article as stating that a facial challenge is "nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution." [Ae. Br. 27] But the article was not saying, as Alexander misleadingly suggests, that every potential conflict between a statute and the Constitution can give rise to a facial challenge. Rather, the article was making an entirely unrelated *semantic* point that a facial challenge "is a challenge to the action of a *legislature*," and not "a challenge to a *statute*."[21]

Third, even Alexander is unable to adhere to their own invented theory. Alexander argues that the temporary allotment statute passed recently by the legislature (HB 202) is facially constitutional. [Ae. Br. 31] But just like AS 14.03.310, the plain text of HB 202 permits spending allotment funds anywhere, including at private educational institutions, so long as the spending is "for implementation of the student's individual learning plan."[22] Under Alexander's theory, that possibility of unconstitutionality should make the law facially unconstitutional. That Alexander ignores this fact is simply further confirmation that their theory is wrong.

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20 646 P.2d 203, 207-08 (Alaska 1982).

21 Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1238 (emphases in original).

22 Ae. Br. Appendix (HB 202) at § 4(c).

2. To the extent Alexander suggests facial constitutionality turns on the number of possible *unconstitutional* applications, that is also incorrect.

In at least one instance, Alexander appears to offer a slightly different theory of facial constitutionality—specifically, that a statute lacks a "plainly legitimate sweep" if it has "more than an 'occasional problem.'" [Ae. Br. 26] But that, too, does not help Alexander. To begin with, it is legally wrong. In the case law, the inquiry into "plainly legitimate sweep" always focuses on the breadth of possible *constitutional* applications, not the potential *unconstitutional* applications.[23] So long as a core of constitutional applications exist, the statute must survive. Thus, this Court "will uphold a statute against a charge that it is facially unconstitutional even if it might sometimes create problems as applied, *as long as* the statute has a plainly legitimate sweep."[24]

Consistent with that, both this Court and the U.S. Supreme Court have cautioned against relying on "hypothetical" or "imaginary" cases where a statute might be

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[23] *See Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 104 (Alaska 2015) (statute has a "plainly legitimate sweep" because "the statute can be read constitutionally"); *State v. ACLU of Alaska*, 204 P.3d at 372 ("We are thus not being asked to declare the amended statute facially unconstitutional, for it has many clearly constitutional applications . . . ."); *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"); *see also Troxel v. Granville*, 530 U.S. 57, 85 (2000) (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") (Stevens, J., dissenting).

[24] *Alaska Fish & Wildlife Conservation Fund*, 347 P.3d at 104 (emphasis added; internal quotations omitted).

unconstitutionally applied.[25] The fact is that it is virtually impossible to quantify exactly how often a statute might be applied unconstitutionally. So when this Court has observed that a facially constitutional statute might "sometimes" or "occasional[ly]" create problems, it was not setting a numerical threshold against which the statute must be measured. Indeed, the U.S. Supreme Court has held in a different context that the term "occasionally" has "no clear meaning" and is too "vague" to serve as an objective standard.[26]

In all events, even if the number of unconstitutional applications were relevant, the burden of proof is *Alexander's*, and they have not come close to meeting it. Alexander offers nothing affirmative to substantiate their bald claim that the statute creates "more than an 'occasional problem' in 'specific cases.'" [Ae. Br. 26] And contrary to Alexander's assertions, [Ae. Br. Br. 10, 22 n.52, and 28 n.71] DEED has not conceded there are or will necessarily be *any* unconstitutional applications of AS 14.03.310.[27] As DEED explained, even where allotment spending might occur at a private educational institution, it still must be determined whether the spending was even permissible under the statute and, if so, whether it was for the "direct benefit" of the institution. [Ae. Br. 47-

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25 *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").

26 *Vance v. Ball State Univ.*, 570 U.S. 421, 443 (2013).

27 *See* At. Br. 19 (acknowledging only that "[t]here 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") (emphasis in original).

48] Those additional hurdles may well prevent many—perhaps *all*—of the allegedly unconstitutional applications. [Ae. Br. 47-48][28]

C. Alexander has abandoned any claim that the superior court's injunction cures the superior court's errors.

In its opening brief, DEED explained why this Court should reject Alexander's suggestion that the injunction somehow cures the superior court's errors as to AS 14.03.310. To the extent it was intended to narrow the effect of the superior court's rulings, the injunction—which merely parrots Article VII, Section 1—was both ineffective and improper in doing so. [At. Br. 26-29] Among other things, the injunction was not an appropriate form of narrowing relief in a facial constitutional challenge and, in all events, was not a permissibly worded injunction under Alaska Rule 65. Alexander has not attempted to answer any of those arguments and thus has rightly abandoned any claim that the injunction rectifies the superior court's errors.

II. The superior court should not have struck AS 14.03.300.

Even if the superior court's conclusion that AS 14.03.310 is facially unconstitutional was correct—and it is not—the court should not have also struck AS 14.03.300. As DEED explained, AS 14.03.300 "does not authorize any spending under the allotment program, much less any of the potential spending that the superior court determined to be unconstitutional." [At. Br. 10-12]

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[28] *See also Reasner v. Alaska, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 394 P.3d 610, 618 (Alaska 2017) ("For a statute to be unconstitutional as applied to a particular set of facts, the statute must *actually apply* to those facts.").

Alexander contends that DEED waived this argument. [Ae. Br. 32] Not so. DEED expressly argued to the superior court that AS 14.03.300 and AS 14.03.310 are "two statutes" and that each have a "'plainly legitimate sweep'—and are thus facially constitutional." [Exc. 44] Regarding AS 14.03.300 in particular, the State argued that a school district "could develop [ILPs] for its correspondence school students that meet all the criteria listed in AS 14.03.300 without even approaching any constitutional lines," and so AS 14.03.300 "is straightforwardly capable of being applied without triggering any Article VII, Section 1 concerns." [Exc. 45]

On the merits, Alexander asserts that "these statutes were intertwined and intended to function together." [Ae. Br. 33] As DEED explained, however, the plain text of the statutes shows that they operate independently. Alaska Statute 14.03.300 concerns the formulation of individual learning plans, and AS 14.03.310 authorizes and governs student allotments. [At. Br. 12] Alexander notes that AS 14.03.300(b) creates a carve-out for the requirements of AS 14.03.310. [Ae. Br. 33] But that is precisely the point. That carve-out makes clear that the two statutes are intended to be, and indeed are, separate and distinct.

Alexander's additional argument that "leaving AS 14.03.300(b) in place prohibits DEED from 'impos[ing] any additional requirements'" on the allotment spending [Ae. Br. 33] simply makes no sense. If AS 14.03.310 has been invalidated, *there will be no allotment spending*. Whatever concerns AS 14.03.300(b) might present with respect to allotment spending, they would be eliminated with AS 14.03.310.

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.

As DEED further demonstrated, the superior court committed two errors with respect to Alexander's alternative as-applied challenge. It wrongly denied DEED's motion to dismiss that claim for failure to join the school districts as indispensable parties, and then it additionally erred by failing to address DEED's contention on summary judgment that DEED may not in any event be liable for a district's unconstitutional application of AS 14.03.310. So, if this Court reverses the superior court's facial invalidation of the statutes, it should also direct judgment for DEED on the as-applied challenge. Alexander's responses are unpersuasive.

A. The superior court erred in denying DEED's motion to dismiss Alexander's as-applied challenge.

The school districts were necessary parties under Rule 19(a)(1) because they—not DEED—have "ultimate responsibility" over allotment spending in the correspondence programs. That is apparent from (i) the specific statutory and regulatory provisions governing those programs, (ii) the fact that AS 14.03.300 and 14.03.310 withhold from DEED any authority to direct the districts' decisions regarding allotment spending, and (iii) the districts' independent duty to comply with the law and the state constitution. [At. Br. 31-34]

In response, Alexander points to DEED's duty to "exercise general supervision" over the public schools and districts' correspondence study programs. [At. Br. 39 & 40 n.100 (citing AS 14.07.020(a)(1) & (9))] But DEED explained why that "general" duty is, among other things, limited by more specific statutory provisions and regulations.

[At. Br. 32-33 & n. 60] Indeed, Alexander *admits* (repeatedly) that "AS 14.03.300(b) removed DEED's ability to 'impose additional requirements' to ensure that spending under the program in fact satisfies constitutional requirements." [Ae. Br. 40][29] Alexander offers no answer to any of that other than to suggest that the legislature cannot "undo" general duties with more specific limitations. [Ae. Br. 40] What the legislature grants, however, the legislature can also take away.

Nor does it help Alexander that the Attorney General is responsible for advising the executive agencies on the meaning of the law those agencies enforce. [Ae. Br. 39-40] As DEED acknowledged, "[i]t 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." [At. Br. 34] But that does not change, or say anything about, DEED's power to actually control any such spending.

Alexander also looks to DEED's purported "obligation" to provide "oversight over public school funding." [Ae. Br. 40][30] But neither statutory provision cited by Alexander—AS 14.17.300(a) and AS 14.17.430—even *mentions* DEED. DEED does,

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[29] *See also*, Ae. Br. 32 (AS 14.03.300(b) "bars DEED from imposing *any* restrictions on allotment expenditures") (emphasis in original); *id.* at 33 ("AS 14.03.300(b) . . . prohibits DEED from 'impos[ing] any additional requirements,' including compliance with the Alaska Constitution."); *id.* at 34 ("AS 14.03.300(b) specifically prohibits DEED from employing any narrowing construction.").

[30] *See also id.* at 41 (claiming DEED is "the State agency overseeing education funding [with] the ultimate responsibility to ensure public funds are used in accordance with our Constitution").

unsurprisingly, play a role in public school funding. Alaska Statute 14.17.400, for instance, requires DEED to reduce state aid for school districts on a *pro rata* basis if the public education fund cannot cover the aid authorized for the fiscal year, and AS 14.17.910 requires districts to maintain financial records "in the form required by [DEED] and are subject to audit by [DEED]." But as DEED pointed out in its opening brief, *the districts themselves* are charged by statute with the responsibility to spend state-granted money consistent with the law, including constitutional provisions like Article VII, Section 1. [At. Br. 33] Alaska Statute 14.17.910(b) not only expressly states that "State aid" is for "general operational purposes *of the district*," and that all such aid "shall be received, held, allocated, and expended by the district," but it further imposes on those districts the obligation to spend those funds consistent with "applicable local law and state and federal constitutional provisions, statutes, and regulations."

Finally, Alexander makes two arguments that—like their arguments elsewhere—conflate facial and as-applied challenges. The first is that regardless of who the parties to an as-applied action are, a court can award the complete relief Alexander seeks—namely, a declaration that "AS 14.03.300–.310 is unconstitutional" and an injunction against "any current or future use of public funds to reimburse payments to private educational institutions pursuant to AS 14.03.300–.310." [Ae. Br. 39] That is wrong. No as-applied challenge could result in a declaration that the statutes are unconstitutional—that is what a facial challenge is for. Further, injunctions under Alaska Rule 65(d) are binding "only upon the parties to the action," their agents, and "those persons in active concert or

participation with them."[31] Even Alexander does not contend the districts fall into any of those categories. Consequently, if only the as-applied challenge were to survive and *DEED* were enjoined against approving allotment spending in particular ways, that injunction would not bind the *districts*. While such an injunction against DEED might imply the districts would be similarly enjoined under principles of *stare decisis* if a separate claim were brought against them, that just proves Alexander cannot get complete relief *in this case* without the districts as defendants.

Next, Alexander claims that because the Governor and Attorney General have the duty to defend laws enacted by the legislature, the school districts need not be joined to the as-applied action. [Ae. Br. 10 & n.11] Wrong again. The Attorney General's office is obligated to defend Alaska statutes against *facial* challenges, as those are challenges to the statutes *in toto* and therefore challenges to actions by the State itself.[32] But the Attorney General has no duty or statutory authority to defend independent governmental entities—including school districts—in an as-applied challenge,[33] which contests not the validity of the statutes *per se* but the particular governmental entities' *actions* in applying

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31 *See Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945) (holding with respect to identical Fed. R. Civ. P. 65 that courts "may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"); Wright & Miller, Persons Bound by an Injunction or Restraining Order, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.) ("The only significant exception to [the bar on enjoining nonparties] involves nonparties who have actual notice of an injunction and are guilty of aiding or abetting or acting in concert with a named defendant or the defendant's privy in violating the injunction.").

32 AS 44.23.020(b)(3) ("The attorney general shall . . . represent the state in all civil actions in which the state is a party.").

33 *See generally* AS 44.23.020 (defining duties and powers of the attorney general).

that statute.[34] Alexander simply continues to fail to appreciate the critical differences between a facial and as-applied challenge.

B. The superior court additionally erred in denying DEED's motion for summary judgment on Alexander's as-applied challenge.

Even if the districts were not indispensable parties, Alexander cannot seek as-applied relief *against DEED* because DEED does not stand in the districts' shoes for purposes of liability. Here, just as in *Kenai Peninsula Borough v. State*,[35] the school districts identified by Alexander in their as-applied challenge are not acting as agents of the State. [At. Br. 36] Accordingly, DEED cannot be liable, and the school districts "must respond for [their] own actionable conduct."[36]

Alexander does not contest that the school districts are not the agents of DEED, but rather asserts that this fact is irrelevant. According to Alexander, it does not matter that DEED cannot be liable for the districts' conduct because the complaint seeks only to "ensure constitutional use of public funds," and is "not a tort case where Plaintiffs are seeking damages against anyone." [Ae. Br. 41]

This argument once again highlights Alexander's failure to understand how constitutional challenges—and here particularly, as-applied challenges—work. Just as the plaintiff seeking damages in a tort case must prove the defendant liable for breaching a

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34 *Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 982 (Alaska 2022) ("An as-applied [constitutional] challenge requires evaluation of the facts of the particular case in which the challenge arises.").

35 532 P.2d 1019 (Alaska 1975).

36 *Id*. at 1022.

duty, the plaintiff in an as-applied challenge must prove the defendant liable for its actions in applying a statute unconstitutionally. Even though Alexander is seeking an injunction and not damages, that injunction must be issued against *someone* who has been adjudicated to have violated the law. If DEED does not stand in the shoes of the districts, as Alexander concedes, DEED cannot be the subject of the injunction arising from the districts' allegedly unconstitutional conduct. The districts themselves must be the defendants.

The same failure of understanding infects Alexander's objection that having to sue the districts would make the courts the "arbiter" of all their allotment expenditures. [Ae. Br. 41] That courts must make determinations as to individual applications of a statute is just how as-applied challenges work[37]—not a reason to excuse Alexander from having to sue the parties that would actually be liable for the alleged unconstitutional applications. And of course, once one successful as-applied challenge has been brought, the holding in that case would be binding (or at least persuasive, depending on the court issuing the ruling) in future cases involving "the same challenge" and very likely deter similar behavior.[38] So to the extent Alexander is suggesting that the superior courts will

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[37] *E.g.*, *Kyle S. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 309 P.3d 1262, 1268 (Alaska 2013) ("An as-applied challenge requires evaluation of the facts of the particular case in which the challenge arises.").

[38] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 376 (2010) (Roberts, C.J., concurring) (noting that an "as-applied" ruling "would mean that any other corporation raising the same challenge would also win").

become overwhelmed by as-applied challenges against individual districts, that too is wrong.

C. At minimum, the Court should remand the as-applied challenge to the superior court.

If this Court reverses the superior court's facial invalidation of the statutes but allows Alexander's as-applied challenge to proceed, that as-applied challenge should be remanded to the superior court. As DEED explained, Alexander conceded below the need to "conduct factual discovery on their as-applied claims if the statutes are not struck down as facially unconstitutional." [At. Br. 39 (citing Exc. 505; R. 851-51)] In their brief here, Alexander does not challenge that point and therefore concedes that if the as-applied challenge survives, there is more work to be done in the superior court below.

CONCLUSION

For the reasons above and those in DEED's opening brief, this Court should reverse the superior court order in its entirety and remand with instructions to enter judgment for DEED. Alternatively, if this Court reverses the superior court's decision holding AS 14.03.300–.310 facially unconstitutional, but affirms its decision that Alexander properly brought an as-applied challenge against DEED, this Court should remand with instructions to enter judgment for DEED on the facial challenge and for further proceedings on the as-applied claim.