In the Supreme Court of the State of Alaska

State of Alaska, Department of Education & Early Development, and Commissioner Deena M. Bishop, in an official capacity, Appellants, and Andrea Moceri, Theresa Brooks, and Brandy Pennington, Intervenor-Appellants, v. Edward Alexander, Josh Andrews, Shelby Beck Andrews, and Carey Carpenter, Appellees.	Supreme Court Nos. S-19083/S-19113 Superior Court No. 3AN-23-04309 CI **Summary Order** Date of Order: **June 28, 2024**

Before: Maassen, Chief Justice, Borghesan, Henderson, and Pate, Justices, and Winfree, Senior Justice.*

Before us is an expedited appeal concerning the constitutionality of AS 14.03.300-.310. These statutes govern correspondence study programs offered by local school districts.[1] The statutes permit school districts to approve an allotment of

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* Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

[1] AS 14.03.300-.310. These statutes also permit the State Department of Education and Early Development to offer a correspondence study program, but the record in this case indicates it does not currently offer one.

public funds to families of students enrolled in a correspondence study program to purchase educational services and materials "from a public, private, or religious organization" in connection with their study.[2] On May 2, 2024, the superior court entered final judgment in this action declaring that AS 14.03.300-.310 are facially unconstitutional. The court ruled that these statutes violate article VII, section 1 of the Alaska Constitution, which prohibits the use of "public funds for the direct benefit of any religious or other private educational institution."

The State, through the Department of Education and Early Development, appeals this ruling, joined by intervenor parents Andrea Moceri, Theresa Brooks, and Brandy Pennington (collectively Moceri), who use allotment funds to pay their children's tuition at private schools. The plaintiffs in this action — Edward Alexander, Josh Andrews, Shelby Beck Andrews, and Carey Carpenter (collectively Alexander) — defend the superior court's ruling.[3] Because of the potential impact of the superior court's ruling on the many families whose children are enrolled in public correspondence programs and who rely on allotment funds, we expedited consideration of this appeal.[4] We now issue a summary order. A formal opinion more fully explaining our reasoning will follow at a later date.

We reverse the superior court's ruling that AS 14.03.300-.310 are facially unconstitutional. When a court rules a statute facially unconstitutional, it strikes down

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[2] AS 14.03.310(b).

[3] Parent Carlene Boden and the Matanuska-Susitna Borough School District each filed an *amicus curiae* ("friend of the court") brief in this appeal.

[4] We thank the parties, their attorneys, and *amici* for their commendable efforts to litigate this appeal in such an expedited fashion.

the statute in its entirety.[5] By contrast, a court may rule a statute unconstitutional as applied to a certain set of facts, while leaving the statute in effect as applied to other scenarios.[6] Plaintiffs face a high bar when trying to show that a statute should be ruled facially unconstitutional.[7] Our decisions have not always described the necessary showing consistently.[8] But we assume for purposes of this decision that Alexander need only make the less demanding showing: that the statute lacks a "plainly legitimate sweep."[9]

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[5] *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1000 (Alaska 2019) (describing facial challenge as "seeking to invalidate [a statute] *in toto*").

[6] *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) ("A holding that a statute is unconstitutional as applied simply means that under the facts of the case application of the statute is unconstitutional. Under other facts, however, the same statute may be applied without violating the constitution.").

[7] *See Planned Parenthood of the Great Nw.*, 436 P.3d at 992 (holding when party brings facial challenge to statute "[a] presumption of constitutionality applies, and doubts are resolved in favor of constitutionality"); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (explaining facial challenges are disfavored because they "often rest on speculation" and "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records' " (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004))).

[8] *Compare Kohlhaas v. State*, 518 P.3d 1095, 1104 (Alaska 2022) (explaining that "[w]e 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" (first alteration added) (quoting *Planned Parenthood of the Great Nw.*, 436 P.3d at 991-92))), *with Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 982 (Alaska 2022) (describing facial challenge as meaning "that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution" (quoting *ACLU of Alaska*, 204 P.3d at 372)).

[9] *Kohlhaas*, 518 P.3d at 1104.

Alexander has not made this showing because there are many constitutionally permissible uses of allotment funds. The parties all seem to agree that school districts can approve the use of allotment funds by students enrolled in correspondence study to purchase books, computers, and art supplies from private businesses. And the parties seem to agree that allotment funds can be spent on martial arts classes at a private gym and pottery lessons at an artist's studio. These providers are all "private organizations." But absent some unusual facts, none of them is a "private educational institution" for purposes of the Alaska Constitution's prohibition on direct benefits. Allotment funds can also be spent to enroll in classes at the University of Alaska, which is obviously an educational institution, but a public one. None of these uses of allotment funds entails a "direct benefit" to a "religious or other private educational institution."[10] Because there are many constitutionally permissible uses of allotment funds under AS 14.03.300-.310, these statutes have a "plainly legitimate sweep."[11] Therefore we reverse both the superior court's grant of summary judgment in favor of Alexander and its denial of the State's motion to dismiss Alexander's facial challenge to AS 14.03.300-.310.

Both Alexander and Moceri have argued that we should decide the narrower question of whether the use of allotment funds to pay students' tuition for full-

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[10] Alaska Const. Art. I, § 7.

[11] *See Planned Parenthood of the Great Nw.*, 436 P.3d at 1000 (statute withstands facial challenge despite some unconstitutional applications so "long as it 'has a plainly legitimate sweep'" (quoting *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1133 (Alaska 2016))); *see also Troxel v. Granville*, 530 U.S. 57, 85 (2000) (Stevens, J., dissenting) (declaring that statute has plainly legitimate sweep when it "plainly sweeps in a great deal of the permissible").

time enrollment in private school is constitutional. They argue that Moceri and other parents' affidavits attesting to receipt of allotment funds for this purpose create a sufficient factual basis in the record to permit us to rule on the constitutionality of the statutes as applied to these facts. We decline to make such a ruling at this point.

First, there is a threshold question whether AS 14.03.300-.310, which authorize "correspondence study programs," should be interpreted to permit the use of allotment funds to pay for full-time enrollment in a private school.[12] In the proceedings below, the State argued that the statutes did not permit allotment funds to be spent in this way. But the superior court did not address this point, and on appeal the parties have not briefed it. If the statute does not permit allotment funds to pay for full-time enrollment in private school, that would make it unnecessary to decide whether this use is unconstitutional. Moreover, we must interpret the statute before we can decide whether it is constitutional as applied to a given set of facts.[13] But the statutory interpretation question has not been presented for our decision.

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[12] For example, the State has adopted a regulatory definition of "correspondence study program" that means "any educational program . . . that provides . . . for each secondary course, less than three hours per week of scheduled face-to-face interaction, in the same location, between a teacher certificated under AS 14.20.020 and each class . . . ." and, "for elementary students, less than 15 hours per week of scheduled face-to-face interaction, in the same location, between a teacher certificated under AS 14.20.020 and each full-time equivalent elementary student." 4 Alaska Administrative Code (AAC) 33.490(17) (2024); 4 AAC 09.990(a)(3) (2024).

[13] *See Planned Parenthood of the Great Nw.*, 436 P.3d at 992 ("If an ambiguous text is susceptible to more than one reasonable interpretation, of which only one is constitutional, the doctrine of constitutional avoidance directs us to adopt the interpretation that saves the statute.").

Second, we decline to decide an as-applied constitutional challenge when the entity that took the allegedly unconstitutional action is not a party to the lawsuit. Although Alaska courts have authority to issue declaratory judgments, they may do so only when there is an "actual controversy" between the parties,[14] which means "that the conduct of one party adversely affects the interest of another."[15] Under AS 14.13.300-.310 it is school districts, not the State, that design students' individual learning plans and authorize particular uses of allotment funds to purchase services and materials in connection with those plans. For this reason, Alexander's claim that certain uses of allotment funds are unconstitutional cannot proceed without joining a school district that has authorized those uses of allotment funds.[16] The superior court rejected this argument, which was error. We therefore vacate the court's denial of the State's motion to dismiss Alexander's as-applied challenge and remand for further proceedings. To proceed with an as-applied challenge on remand, Alexander must decide which particular uses of allotments he believes are unconstitutional and then identify and join the school district or districts that authorized that spending.[17]

Because we do not decide whether any particular use of allotment funds

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[14] AS 22.10.020(g); *Jefferson v. Asplund*, 458 P.2d 995, 998-99 (Alaska 1969).

[15] *Keen v. Ruddy*, 784 P.2d 653, 656 (Alaska 1989) (citing *Bowers Off. Prods. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1988)).

[16] *See* Alaska R. Civ. P. 19(a) ("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) . . . complete relief cannot be accorded among those already parties.").

[17] Our decision leaves open the question of whether the State itself is a necessary party to an as-applied challenge to AS 14.03.300-.310.

violates the Alaska Constitution's prohibition on direct benefits to private educational institutions, we decline to decide at this time Moceri's argument that the United States Constitution *requires* school districts to permit the use of allotment funds to pay private school tuition. But this argument remains part of the litigation on remand, and the superior court must address it.

At oral argument Moceri made an oral motion to stay the superior court's order if we remand for further proceedings. Because we have reversed the superior court's ruling that AS 14.03.300-.310 are facially unconstitutional, there remains no court order in place restricting the use of allotment funds. We decline to issue a preemptive stay of any future orders the superior court may issue in connection with Alexander's as-applied challenge. Parties may seek a stay of any future superior court orders after they are issued.[18]

For these reasons, we REVERSE the judgment of the superior court and REMAND for further proceedings.

Clerk of the Appellate Courts

M. Montgomery

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Meredith Montgomery

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[18] Alaska R. App. P. 205 ("A motion for a stay will normally not be considered by the supreme court unless application has previously been made to the trial court and has been denied, or has been granted on conditions other than those requested.").

cc: Judge Zeman
Trial Court Clerk

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