IN THE SUPREME COURT OF THE STATE OF ALASKA

Governor Dunleavy, Michael Johnson, and Kelly Tshibaka, Appellants, v. Coalition for Education Equity, Appellee.	)	Supreme Court No. **S-17785**

Trial Court Case No. **1JU-19-00753 C**I

APPEAL FROM THE SUPERIOR COURT,
FIRST JUDICIAL DISTRICT AT JUNEAU,
THE HONORABLE DANIEL J. SCHALLY, JUDGE

OPENING BRIEF OF APPELLANTS

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AS 09.60.010. Costs and attorney fees allowed prevailing party

(a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully contested as determined by the court.

(b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

> (1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;
>
> (2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

> (1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and
>
> (2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a

substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

PARTIES

The appellants are Governor Michael J. Dunleavy, Governor of the State of Alaska, Kelly Tshibaka, Commissioner of Administration, and Michael Johnson, Commissioner of Education and Early Development (collectively, "the governor"). The appellee is the Coalition for Educational Equity, a non-profit organization ("the Coalition").

JURISDICTION

The governor timely appealed from the April 17, 2020, order of the superior court, the Honorable Daniel J. Schally, granting the Coalition's motion for attorney's fees. The Court has jurisdiction over this appeal under AS 22.05.010(a) and Appellate Rule 202(a).

ISSUES PRESENTED

Constitutional litigant fees. When the Coalition moved to intervene, it asserted a "direct financial" interest in the outcome of this case, which concerns millions of dollars in funding flowing from the State to its member school districts. Is the Coalition entitled to full fees as a constitutional litigant with no economic incentive to sue?

Excessive fees. The Coalition pled the same claims as the original plaintiff, adding only the claim that the governor violated the education clause. The superior court declined to expand the case to encompass that additional claim. Should the Coalition receive full fees for all of its attorneys' time—totaling twice the fees of the original plaintiff—even though its billing records fail to distinguish the time spent on its unsuccessful claim, and also include time spent on unrelated matters?

INTRODUCTION

This case was initiated by the Alaska Legislative Council, which was fully capable of litigating the constitutionality of forward appropriations. But the Coalition was nonetheless allowed to intervene after asserting a "direct financial" interest in the outcome because its member school districts are the recipients of the disputed state funds. [Exc. 9-10] Later, at the attorney's fees stage—long after having secured intervention—the Coalition reversed course and claimed "no financial stake in the outcome." [Exc. 67-68] The superior court accepted this about-face without explanation, and awarded the Coalition more than *double* the attorney's fees of the Council to pay for the Coalition's unnecessary participation in the Council's pre-existing lawsuit. [Exc. 93-95] The Court should reverse this fee award because the State of Alaska's scarce public funds should not be used to subsidize private attorneys' unnecessary, duplicative, and financially motivated intervention in litigation between branches of state government.

STATEMENT OF THE CASE[1]

Alaska funds its public schools through a mixture of state, local, and federal dollars.[2] The amount local school districts receive from the State in a given year is determined by how much money the legislature chooses to appropriate.[3] The money that

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1 The facts are set forth in the briefing in the merits appeal, S-17666. This brief repeats and summarizes facts relevant to the attorney's fees issue.

2 AS 14.17.410.

3 *See* AS 14.09.010(a); AS 14.17.400(b).

the legislature appropriates goes into the public education fund, where it can be disbursed to school districts by the Department of Education and Early Development.[4]

Because school districts rely heavily on state funding and must budget based on the money they will get, the legislature has tried to make sure that funds for the State's contribution are set aside well in advance of when they must be distributed. For example, in 2010 the legislature made two appropriations of over $1 billion each to the public education fund: enough state aid for the next fiscal year and the one after that.[5] In the years that followed, the legislature annually set aside during the next fiscal year the estimated amount of the state's public school contribution for the following year.[6] This approach ensured that the State's contribution was placed in the fund well in advance of distribution, giving school districts time to budget based on that amount.

But in 2015, the legislature drained the public education fund by subtracting over $1 billion from a prior appropriation to the fund.[7] In 2016 and 2017 the legislature did not set aside extra money to rebuild the fund's balance; each year it appropriated only enough

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4 AS 14.17.300(a); AS 14.17.400(b); AS 14.17.610.

5 One appropriation was contained in the supplemental appropriations bill for FY 2010 and became effective on April 18, 2010. Ch. 13, §§ 13(a), 22, SLA 2010. The other appropriation was contained in the general operating bill for FY 2011 and became effective on July 1, 2010. Ch. 41, §§ 26(n), 39, SLA 2010.

6 Ch. 3, §§ 25(e), 41, FSSLA 2011 (effective July 1, 2011); Ch. 15, §§ 26(f), 36, SLA 2012 (effective Dec. 1, 2012); Ch. 14, §§ 28(e), 39, SLA 2013 (effective Dec. 1, 2013); Ch. 16, §§ 28(c), 39, SLA 2014 (effective Dec. 1, 2014).

7 Ch. 23, § 31, SLA 2015 ("Section 28(c), Ch. 16, SLA 2014, is amended to read: (c) The sum of **$77,008,600** [$1,202,568,100] is appropriated from the general fund to the public education fund (AS 14.17.300)"). This amendment took effect on the last day of fiscal year 2014. *Id.* § 37.

money for state aid in the next fiscal year.[8] Adding to the budgeting uncertainty that school districts experienced, these appropriations were not finalized until the eve of the upcoming school year for which they were intended.[9]

The Thirtieth Legislature tried a new approach in 2018. Early in the legislative session it passed an appropriations bill for education only, separate from the regular operating budget.[10] Like previous years' appropriations to the public education fund, this bill appropriated money for state aid in the next fiscal year (FY 2019).[11] But instead of appropriating additional sums in the pending fiscal year (FY 2018) or the next one (FY 2019) to be set aside for the state's contribution in the following fiscal year, the legislature reached over a year into the future to appropriate funds in FY 2020.[12] To do so, the legislature delayed these latter appropriations' effective date until the first day of fiscal year 2020 (July 1, 2019)[13]—over a year after the bill's passage and after the next

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8 Ch. 3, § 26(h) – (i), 4 SSLA 2016; Ch. 1, § 39(g) – (h), 2 SSLA 2017.

9 Ch. 3, 4 SSLA 2016; Ch. 1, 2 SSLA 2017.

10 Ch. 6, SLA 2018 (passed as SCS HB 287).

11 Ch. 6, § 5(a) – (b), SLA 2018.

12 Ch. 6, §§ 4, 5(c) – (d), SLA 2018. These specific appropriations were: $30 million to the Department of Education and Early Development for distribution to school districts according to their adjusted average daily membership as defined in AS 14.17.410(b)(1)(A) – (D); the amount necessary to fund state aid under AS 14.17.410(b) in FY 20; and the amount necessary to fund student transportation under AS 14.09.010 in FY 20.

13 Ch. 6, § 8, SLA 2018.

general election. These appropriations were signed into law by then-governor William M. Walker on May 3, 2018.[14] Later that year, Michael J. Dunleavy was elected governor.

As the end of the 2019 legislative session neared, Attorney General Kevin Clarkson advised Governor Dunleavy in a published legal opinion that the forward appropriations made in HB 287 were constitutionally infirm, leaving no valid appropriation for public education in fiscal year 2020.[15] Yet the legislature did not make a new fiscal year 2020 appropriation for public education; instead it made a forward appropriation for fiscal year 2021.[16] Advised that no valid fiscal year 2020 appropriation for public school funding existed, Governor Dunleavy concluded that no money could be disbursed to school districts when the fiscal year began.

The Alaska Legislative Council, acting on behalf of the Alaska Legislature, sued the governor to resolve the impasse, seeking declaratory judgment that the governor had violated his duty to faithfully execute the laws and had infringed on the legislature's power of appropriation and duty to maintain Alaska's system of public education. [R. 182-84] So as not to jeopardize school operations while the dispute was pending, the Council and the governor jointly moved the superior court to permit the education funds' disbursement on a monthly basis, save $30 million in grant funds for school districts that the parties anticipated would not be due to be paid out until after the litigation's resolution. [R. 172-74; Exc. 30-31] The superior court granted the order. [R. 175]

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14 Ch. 6, SLA 2018.

15 Alaska A.G. Op., 2019 WL 2112834 (May 8, 2019).

16 Ch. 1, §§ 33(i) – (j), 47 SSLA 2019 (effective July 1, 2020).

Over a month later, the Coalition for Education Equity moved to intervene in the litigation. [Exc. 1-14] The Coalition, a non-profit association whose members include Alaska school districts, argued that its interests in the litigation were not adequately represented by the Council because the Council had not secured an interim agreement for dispersal of the $30 million in grant funds to school districts and because it would likely not try to establish the "contours" of the legislature's minimum "funding obligation under Article VII, Section 1," the constitution's public education clause. [Exc. 10-12]

Over the Governor's objection, the superior court let the Coalition intervene but ruled that it could not litigate "the issue of the contours of the Alaska Constitution's requirement that the state fund education, because of the enormity and complexity of the issue." [Exc. 49] Instead, the court invited the Coalition to address only "the issues already part of this case" and "the eventualities that may come to pass if the Defendants prevail in this suit—i.e., how will state education funding be ensured in an immediate manner if the Defendants prevail" and the interim agreement expires. [Exc. 50]

After cross-motions for summary judgment, the superior court ruled in favor of the Council and the Coalition, concluding that the disputed forward appropriations were constitutional and the governor should have executed them. [Exc. 51-52] The governor has timely appealed that order on the merits in separate appeal S-17666.

The Council and the Coalition each moved for attorney's fees, and the superior court awarded the full amounts sought—$31,556.25 to the Council and $64,443.50 to the Coalition—without explanation beyond reference to the reasons stated in the fee motions.

[Exc. 93-96] The governor timely appealed from the fee awards. The Council and the governor later settled their fee dispute, so it is no longer part of this appeal.

STANDARDS OF REVIEW

In general, the Court "review[s] de novo whether the trial court applied the law correctly in awarding attorney's fees."[17] The Court has not yet announced the proper standard of review for superior court's determination as to whether a litigant qualifies for full fees (or protection from fees) as a constitutional litigant under AS 09.60.010.[18] The Court should review this determination de novo as a "legal conclusion based on the nature of the litigation" for the reasons expressed in Justice Winfree's concurrence in *Dep't of Health & Social Services v. Planned Parenthood of the Great Northwest*: the answer can be determined based on "the nature of the claim and relief sought and the possible direct economic interest in the claim" without "examination beyond the factual contours of the litigation itself," and "different results in similar litigation contours simply due to the deferential standard of review" would be undesirable.[19]

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17 *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 535 (Alaska 2015) (quoting *Lake & Peninsula Borough Assembly v. Oberlatz*, 329 P.3d 214, 221 (Alaska 2014)).

18 *DeVilbiss v. Matanuska-Susitna Borough*, 356 P.3d 290, 299 n.39 (Alaska 2015) (citing *Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 284 n.60 (Alaska 2015)) ("The parties have not briefed the possible standards of review for determinations relevant to protected constitutional claimant status under AS 09.60.010 … The specific determination of 'sufficient economic incentive' conceivably could be a discretionary determination by the superior court or a mixed question of fact and law. We do not need to decide that question here, but either way the basis for the determination rarely should require examination beyond the factual contours of the litigation itself.").

19 448 P.3d 261, 262-63 (Alaska 2019) (Winfree, J., concurring).

The Court also appears not to have yet announced the proper standard of review for a superior court's conclusion about what subset of a party's attorney's fees are reasonably related to claims that fall under the protection of AS 09.60.010 (i.e., constitutional claims on which a party prevailed and should receive full fees, or did not prevail and should be immune from fees). In both *Lake & Peninsula Borough Assembly v. Oberlatz*[20] and *Manning v. State, Dep't of Fish and Game*,[21] the Court remanded to the superior court to recalculate attorney's fees by allocating the time spent on different claims. Only *Manning* came back to this Court after the remand, and in an unpublished decision, the Court said that it "review[s] awards of attorney's fees for an abuse of discretion," but nonetheless appeared to assess de novo the issues the appellant raised about which subsets of attorney work could legally support fees.[22]

In the case at hand, de novo review rather than deference would be particularly appropriate because the superior court did not explain the reasoning behind its decision beyond reference to the contents of the Coalition's motion for fees. [Exc. 95-96] The Court should not defer to the superior court's implicit and unexplained conclusions rejecting the governor's challenges to the claimed fees.

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20 329 P.3d 214, 226-28 (Alaska 2014).

21 355 P.3d 530, 540 (Alaska 2015).

22 2018 WL 3934807 at *2-4 (Alaska Aug. 15, 2018), *reh'g denied* (Aug. 30, 2018).

ARGUMENT

I. The Coalition is not a constitutional litigant entitled to full fees under AS 09.60.010 because it had a financial interest in this litigation.

This case is about the allocation and distribution of state money, and the Coalition relied on its interest in that money to intervene. It argued that it had a "direct, substantial, and significantly protectable" interest in this case, giving it a right to intervene under Civil Rule 24(a). [Exc. 6] It noted that "[t]his standard is satisfied when an intervenor has a direct financial interest in the outcome of the litigation and there are constitutional issues at stake" and claimed that it "easily satisfies this standard." [*Id*.] It asserted that its members "have a financial interest in the outcome of this case." [Exc. 2] It argued that this "financial interest is even more direct" than that of a church advocating a tax exemption, observing that its members "may be deprived of funds" depending on the case's outcome. [Exc. 7] It later reiterated that it had a "direct financial" interest "at stake" in the case. [Exc. 9-10] Although the governor opposed intervention—arguing that the Council adequately represented the Coalition's interests—the superior court granted the Coalition intervention as of right under Rule 24(a). [Exc. 29-32, 45, 50 n.19]

Only after having secured intervention and prevailed on the merits did the Coalition suddenly switch from claiming a "direct financial . . . interest[] at stake in this litigation" to claiming "no financial stake in the outcome." [Exc. 9, 83] The Coalition's Executive Director submitted an affidavit asserting that the Coalition intervened only out of "concerns about the Alaska Constitution, the requirements of the Education Clause, and the delivery of an adequate education to all Alaska children." [Exc. 54] But these

generalized policy "concerns" would not have supported intervention as of right.[23] The Coalition cannot have it both ways: having expressly asserted a "direct financial" interest to secure intervention, it should not later be permitted to assert "no financial stake" in the outcome to secure full attorney's fees under AS 09.60.010. [Exc. 9, 83]

The Coalition's own words aside, its members' interest in receiving millions of dollars in state funding gave it a "sufficient economic incentive" to intervene, disqualifying it from full fees under AS 09.60.010. The Court has said that its cases pre-dating this statute "provide the guiding parameters for the meaning of 'sufficient economic incentive' under AS 09.60.010."[24] In one such directly analogous case, *Matanuska-Susitna Borough School District v. State*, the Court agreed that a school district's economic interest in school funding precluded public interest litigant status in a suit over school funding.[25] The Matanuska-Susitna Borough and its school district had challenged the State's school funding laws and lost.[26] The Court held that "the economic interest compelling this suit is substantial enough to defeat the Borough and District claim of public interest litigant status," noting that both parties stood to gain from the litigation, "either by increased state funding or decreased taxes."[27]

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23 *See State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984) ("[T]he requisite interest for intervention as a matter of right must be direct, substantial, and significantly protectable"); *Neese v. State*, 218 P.3d 983, 988 (Alaska 2009) ("Not everyone affected by a lawsuit is entitled to intervene.").

24 *Alaska Conservation Found.*, 350 P.3d at 281.

25 931 P.2d 391, 403 (Alaska 1997).

26 *Id*.

27 *Id*. at 402-03.

Similarly, where the City of Kotzebue sought reimbursement from the State for hundreds of thousands of dollars in jail-operation costs, the Court concluded that it had a "strong economic interest" in receiving state funds that provided a sufficient economic incentive to sue, quoting the holding in *Matanuska-Susitna Borough School District* that "[w]here the sums at stake in a suit are large enough to prompt suit regardless of the public interest, public[-]interest litigant status will be denied."[28]

In more recent cases, the Court has emphasized that "*direct* economic benefit is needed"[29] and that "indirect or attenuated economic benefits"[30] based on "future possibilities and contingencies well outside the contours of the litigation"[31] do not preclude constitutional litigant status. But the requisite directness was present here: the Coalition argued that this case could cost its members state funding, and it sought a mandatory injunction requiring the governor to "immediately release state funding." [Exc. 10-11, 42-43, 21] Receiving millions of dollars in state funding is a direct

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28 *City of Kotzebue v. State, Dep't of Corr.*, 166 P.3d 37, 47 (Alaska 2007) (quoting *Matanuska–Susitna Borough Sch. Dist.*, 931 P.2d at 403).

29 *Alaska Miners Ass'n v. Holman*, 397 P.3d 312, 317 (Alaska 2017) (emphasis in original).

30 *Alaska Conservation Found.*, 350 P.3d at 283.

31 *Id.* at 284.

economic benefit—it is nothing like the speculative[32] or indirect[33] economic benefits that the Court has found insufficient. Where—as here—substantial sums of money are at stake in the litigation, claimants have sufficient economic incentive to sue.[34]

The Coalition's non-profit status (and its members' intended use of the money) does not matter, because the Court has never held that a non-profit cannot have economic incentives,[35] nor that a litigant's intended use of money is somehow relevant. An interest

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[32] *See, e.g.*, *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1193, 1198-99 (Alaska 1995) (holding that seafood producers were public interest litigants because they would only benefit from the litigation if other administrative barriers were overcome); *Alaska Miners Ass'n*, 397 P.3d at 317 (holding that pro-mining interests lacked a sufficient economic incentive to challenge the certification of a ballot initiative that could impact the Pebble mining project because the case was not about the mine and the economic impact on them was indirect and speculative).

[33] *See, e.g.*, *Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1218-19 (Alaska 1996) (holding that although fishing associations may have had an economic incentive to try to stop oil and gas leasing, the economic benefit from the litigation was too indirect to constitute a sufficient economic incentive).

[34] *See DeVilbiss*, 356 P.3d at 299 (finding sufficient economic incentive where "[t]he direct economic benefit of a successful suit would have been in the tens of thousands of dollars"); *Murphy v. City of Wrangell*, 763 P.2d 229, 233 (Alaska 1988) (finding sufficient economic incentive after considering possible award of punitive damages and the fact the case was filed in superior court seeking more than $25,000 in total damages); *In re 1981, 1982, 1983, 1984 & 1985 Delinquent Prop. Taxes Owed to the City of Nome, Alaska*, 780 P.2d 363, 368 (Alaska 1989) (concluding that tens of thousands of dollars in tax relief was "sufficient economic incentive" to bring claim; noting that "a person who stands to receive substantial economic benefit from a favorable resolution of his claim likely will not be deterred from bringing that claim by the prospect of an adverse award of attorney's fees."); *Eldridge v. State, Dep't of Revenue*, 988 P.2d 101, 104 (Alaska 1999) (concluding that the interest in receiving a PFD for six family members was a sufficient economic incentive); *Bruner v. Petersen*, 944 P.2d 43, 50 (Alaska 1997) ("[T]he economic incentive of $10,000 in wages, coupled with the request for punitive damages for an additional $10,000, demonstrates a sufficient economic incentive to bring the suit...." (internal quotation marks omitted)).

[35] *Dep't of Health & Soc. Servs. v. Planned Parenthood of Great Nw.*, 448 P.3d 261, 265 (Alaska 2019) (Winfree, J., concurring) ("[N]on-profit status does not necessarily

in obtaining money is an "economic incentive" regardless of how the money will be spent. The Matanuska-Susitna Borough School District would have spent additional state funds on schools,[36] and the City of Kotzebue would have spent them on jails,[37] but their interest in obtaining the funds nonetheless gave them an economic incentive to sue.

Not only does the Coalition not qualify as a constitutional litigant under AS 09.60.010, but the purposes of the statute are not served by awarding full fees for its unnecessary intervention in this case. When the legislature enacted AS 09.60.010 to abrogate the Court's common-law public interest litigant doctrine, it was concerned that the doctrine had "created an unbalanced set of incentives for parties litigating issues that [fell] under the public interest litigant exception,'" and that "'[t]his imbalance [had] led to increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens.'"[38] The legislature retained a narrowed version of the exception that is meant to protect claimants from liability for fees

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mean an entity cannot have sufficient economic interests to motivate litigation. Non-profit status does not mean than the entity eschews profits; it simply means that profits, if any, remain with the entity for its mission rather than being distributed to shareholders."); *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 820–21, 828 (Alaska 1997) (upholding denial of public interest litigant status to a non-profit corporation); *see also Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982) (holding that a church had a sufficient private interest to preclude public interest litigant status); *Alaska State Federation of Labor v. State, Dept. of Labor*, 713 P.2d 1208, 1212 (Alaska 1986) (holding that a labor federation was not a public interest litigant because it was motivated by protecting the wages of the members of its member unions).

36 *See Matanuska-Susitna Borough Sch. Dist*., 931 P.2d 391.

37 *See City of Kotzebue*, 166 P.3d 37.

38 *Krone v. State, Dep't of Health and Social Servs*. 222 P.3d 250, 254 (Alaska 2009) (quoting Chapter 86, § 1(b), SLA 2003)).

(either their own, or those of the opposing party if they lose) in order to encourage them to bring their constitutional claims before the courts.[39]

But here, this purpose is not served by awarding the Coalition full fees for intervening in the Council's pre-existing lawsuit. The Coalition's participation was not necessary to bring these claims before the Court. Both sides of the case were already adequately represented by attorneys paid for with public funds. When government entities are parties to a lawsuit, courts presume that the public is adequately represented because those entities are charged by law with representing the interests of the people.[40] There is no reason to encourage private litigants to unnecessarily intervene in litigation between branches of government with promises of full attorney's fees.

The Coalition's participation did not add anything of substance because the superior court denied its attempt to inject an additional constitutional issue into the litigation. [Exc. 44-50] The court limited the Coalition's intervention to addressing (1) "how will state education funding be ensured in an immediate manner if the Defendants prevail," and (2) "the issues already part of this case." [Exc. 50] The Coalition failed to meaningfully address the first of these concerns. And the Council itself

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[39] *See Meyer v. Stand for Salmon*, 450 P.3d 689, 693 (Alaska 2019) ("The statutory framework's purpose is encouraging and protecting eligible constitutional claimants.") (Winfree, J., concurring); *Alaska Conservation Found.*, 350 P.3d at 284 n.60 ("The legislature intended AS 09.60.010 to encourage and protect constitutional litigants"); *City of Kotzebue*, 166 P.3d at 46 ("If a party possesses a sufficient economic incentive to sue, there is less need to fear that the potential burden of an attorney's fee award would deter the plaintiff from pursuing beneficial litigation.") (quoting *Eyak Traditional Elders Council v. Sherstone, Inc*., 904 P.2d 420, 425–26 (Alaska 1995)).

[40] *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 913 (Alaska 2000).

competently litigated the original constitutional questions it had raised. The Coalition's echoing of the Council's pre-existing claims should not increase this case's drain on the public treasury by over $60,000.

If the Court agrees with the governor that the Coalition is not entitled to full fees under AS 09.60.010, the Court should remand for the superior court to consider whether the Coalition should receive partial fees under Civil Rule 82. Subsection (b)(3) of Rule 82 allows the superior court to vary an attorney's fee award based on a variety of factors, including "other equitable factors deemed relevant." As the governor argued below, such a variation is warranted in this case for the same reasons discussed here. [Exc. 79-80]

II. The superior court improperly awarded attorneys' fees for claims the Coalition did not prevail on and work not related to this case.

Even if the Court upholds the superior court's conclusion that the Council was a constitutional litigant for purposes of AS 09.60.010, the Court should still reverse the fee award because it included fees for an unsuccessful claim and unrelated matters.

In moving for fees, the Coalition asserted that it "prevailed on the two constitutional claims that it brought, and because it brought no other claims, all of its fees are properly recoverable under the statute." [Exc. 67] But in fact, the Coalition did not prevail on the only claim in its complaint that was meaningfully different from the Council's pre-existing claims—i.e., its claim that the governor violated the education clause. Both "counts" of the Coalition's complaint alleged that the governor's refusal to execute the disputed forward appropriations violated Article VII, section 1, because it "results in public school funding that falls below constitutionally required levels."

[Exc. 18-21] The Coalition demanded a declaratory judgment that "Defendants' refusal to execute Ch. 6, SLA 2018 violates the Education Clause." [Exc. 21]

The Coalition did not prevail on this claim: although the superior court's order discussed the education clause, the court did *not* rule that the governor violated the education clause, did *not* issue the Coalition's requested declaratory judgment to that effect, and did *not* opine on the constitutionally required level of public school funding. [Exc. 51-52] Indeed, the court refused to consider the claim at all, reasoning that the "minimum level of state aid necessary to satisfy the state's constitutional obligation to fund public education in Alaska" is a "colossal issue" that was "fundamentally different" from—and could not reasonably be litigated alongside—the "pure legal issue" about forward appropriations raised by the Council. [Exc. 46-48]

Because the Coalition did not prevail on its education clause claim, it is not entitled to attorneys' fees related to that claim;[41] i.e., it is not entitled to fees devoted to researching and litigating the level of state aid necessary to satisfy the state's constitutional obligation to fund public education. As Justice Winfree has observed, "the statute applies to claims, which must be analyzed separately," and "the need to segregate fees should come as no surprise" given the Court's precedent.[42]

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41 *See Meyer*, 450 P.3d at 691 ("Stand for Salmon is entitled to recover attorney's fees devoted in any reasonably connected way to the constitutional claims on which it prevailed. But Stand for Salmon is not entitled to recover any attorney's fees devoted solely to the constitutional claims on which it did not prevail.").

42 *Id*. at 692-93 (Winfree, J., concurring).

Unfortunately, the Coalition's billing records did nothing to distinguish the time spent on its unsuccessful claim. [Exc. 60-64] Below, the Coalition argued that this should not matter because it probably was not much time. [Exc. 90] But regardless of how much time was spent on this unsuccessful claim, it is time that the Coalition is not entitled to be reimbursed for with limited public dollars. It was the Coalition's responsibility to keep clear billing records that would allow the parsing out of time spent on successful versus unsuccessful claims.[43] Because the Coalition did not do this, the superior court should not have awarded it fees—or, at least, should have reduced its fees accordingly.

On top of that, some entries in the Coalition's billing records do not reflect genuine litigation costs because they relate not to this case but to other potential litigation planned by the Coalition's attorneys[44] and to the Coalition's press releases and interviews.[45] When the governor pointed these billing entries out below, the Coalition gave no response to defend them. [Exc. 79, 82-92] The superior court should have at least minimally scrutinized the Coalition's billing records rather than awarding its attorneys every cent of the public dollars they sought without explanation. [Exc. 95] "A court must make sufficient findings to permit meaningful review of an attorney's fees award," and

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43 *See id*.

44 *See* Exc. 64, entries for Howard Trickey on 11/5/2019 ("Conference with M. Singer to review history of supplementals and relationship of case to adequacy suit.") and 11/6/2019 ("Conference with M. Singer on tie between pending cases and 'adequacy' standard for presentation at CEE members meeting.").

45 *See* Exc. 64, entries for Howard Trickey on 11/7/2019 ("…draft message to client on language for press release.") and 11/8/2019 ("Draft summary of Judge's decision on forward funding for client to send to members and to use in press interviews.").

the superior court failed to do so here because "it is not self-evident from the order or the record how or whether the superior court resolved the governments' contentions."[46]

Finally, as a point of comparison, the Council's attorneys spent just over 140 hours litigating this case compared to the almost 200 hours billed by the Coalition's attorneys. [Exc. 58; R. 630] Given that the Council and the Coalition were each represented by two experienced attorneys—indeed, the Coalition's lead attorney has more than 43 years of legal experience, with "recognized expertise in education law and Alaska constitutional law" [Exc. 57]—the Coalition's attorneys should not have required so many more hours to litigate a case that *the Council*'s attorneys conceived and initiated. Having rejected the Coalition's only independent claim, it was unreasonable for the superior court to award the Coalition fully *twice* as much attorney's fees as the Council simply for its duplicative litigation of the Council's pre-existing claims. [Exc. 554-57]

CONCLUSION

For these reasons, the Court should reverse the award of attorney's fees in favor of the Coalition.

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46 *State v. Schmidt*, 323 P.3d 647, 668 (Alaska 2014).