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

REPLY 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;
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> (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.

INTRODUCTION

Because the Coalition intervened in response to its school district members' asserted concerns about receiving millions of dollars in state funding, it is not a constitutional litigant entitled to full attorney's fees under AS 09.60.010. The school districts' interests here are akin to those of the school district in *Matanuska-Susitna Borough School District v. State*, whose economic interest in receiving school funding precluded public interest protection from fees in a lawsuit over that funding.[1] The Court should decline the Coalition's invitation to create an enormous loophole in AS 09.60.010(d)(2) by disregarding the school districts' financial interests here simply because they sued through a membership organization rather than directly.

Even if the Court upholds the superior court's conclusion that the Coalition was a constitutional litigant for purposes of AS 09.60.010, the Court should still reverse the fee award. The award was unreasonably high, inadequately explained, and included fees for an unsuccessful claim and work on unrelated matters. An award of fully *twice* as much attorney's fees as the Legislative Council for its duplicative litigation of the Council's claims should not stand. If nothing else, the Court should remand for a more careful look at the Coalition's billing records and fuller consideration of what award is "reasonable" under the circumstances of this case.

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[1] 931 P.2d 391, 403 (Alaska 1997).

ARGUMENT

I. The Court must consider the financial interests of the Coalition's members for purposes of assessing the Coalition's constitutional litigant status.

The Coalition, which is a membership organization, argues that the Court should disregard the financial interests of its members and conclude that it qualifies as a constitutional litigant simply because the organization itself lacks a financial interest. [Ae. Br. 7-10] But accepting this argument would allow any economically motivated litigant to easily circumvent the limitations of AS 09.60.010(d)(2) by suing through a membership organization rather than directly. To avoid gutting the statute in this way, the Court must consider the financial interests of the Coalition's members.

Considering the financial interests of an organization's members is consistent with the Court's precedent.[2] The Coalition's cited cases do not show, as the Coalition claims, that the Court ignores the financial interests of an organization's members for attorney's fee purposes—indeed, they establish the opposite. [Ae. Br. 7-10] In *Citizens for the Preservation of Kenai River, Inc. v. Sheffield*, the Court did not say that the interests of the plaintiff organization's members were irrelevant.[3] On the contrary, the Court recognized that the organization "represents the interests of individuals who themselves may have sufficient economic interest to rule out the possibility of public interest

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[2] *See*, *e.g.*, *Fairbanks N. Star Borough v. Interior Cabaret, Hotel, Rest. & Retailers Ass'n*, 137 P.3d 289, 292-94 (Alaska 2006) (considering the interests of the members of a nonprofit industry trade association and concluding, based on those interests, that it was an abuse of discretion to find that the association was a public interest litigant).

[3] *See* 758 P.2d 624, 627 (Alaska 1988).

status."[4] The Court proceeded to look at those member interests, concluding that they did not preclude public interest status because only a handful of the organization's hundred-plus members had substantial economic interests at stake.[5] The Court explained that "whether an entity is a public interest litigant cannot depend on the interests of a single member. Rather, it must depend on the interests of typical members."[6]

Alaska Conservation Foundation v. Pebble Limited Partnership and *Alaska Miners Association v. Holman* likewise do not show that the Court ignores the financial interests of an organization's members for attorney's fee purposes.[7] In both of those cases, the Court concluded that litigants lacked a sufficient economic incentive not because of some artificial distinction between the organizations and their members, but because the link between the litigation and *anybody's* future financial gains or losses was too indirect and speculative to preclude constitutional litigant status.[8] These cases do not establish that this Court "decline[s] to impute the interests of non-parties when evaluating a constitutional claimant's economic incentives" as the Coalition claims. [Ae. Br. 9] Indeed, the Court in *Alaska Conservation Foundation v. Pebble Limited Partnership*

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4 *Id*.

5 *Id*.

6 *Id*.

7 *See* 350 P.3d 273, 281-86 (Alaska 2015); 397 P.3d 312, 316-18 (Alaska 2017).

8 *See Alaska Conservation Found*., 350 P.3d at 285 ("No matter the result, the underlying litigation could not directly affect any Pebble Project opponent's economic interests.") *Alaska Miners Association*, 397 P.3d at 317 ("This case is fundamentally about the ballot-initiative process and not a case about whether the Pebble Project should go forward.").

explicitly acknowledged that even the economic incentives of a third-party funder of litigation—i.e., somebody who is one step farther removed than an actual member of a plaintiff organization—could be relevant to fees "if that third party controlled the litigation or the claimant were merely acting on behalf of the third party."[9]

The Coalition asserts that the Court has never "attributed a 'sufficient economic incentive' to an entity when its members or constituents alone may derive some financial benefit." [Ae. Br. 7] That is not accurate. In *Fairbanks North Star Borough v. Interior Cabaret, Hotel, Restaurant & Retailers Ass'n*, the Court considered the economic interests of the members of a nonprofit industry trade association and concluded, based on those member interests, that the superior court abused its discretion in finding that the association lacked sufficient economic incentive to sue.[10] And in *Kachemak Bay Watch, Inc. v. Noah*, the Court considered the economic interests of a nonprofit's directors and concluded that the superior court did not abuse its discretion in finding that the nonprofit had sufficient economic incentive to sue.[11] Contrary to the Coalition's position, considering the interests of an organization's members for attorney's fee purposes is consistent with—and indeed, required by—the Court's precedent. [Ae. Br. 7-10]

Not only is considering the interests of an organization's members consistent with the Court's precedent, it also makes good sense. An organization like the Coalition exists and acts on behalf of its members and relies on its members' interests to support its

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9 *Alaska Conservation Found.*, 350 P.3d at 285 n.64.

10 137 P.3d 289, 294 (Alaska 2006).

11 935 P.2d 816, 828 (Alaska 1997).

standing to sue and its justification for intervention in litigation. [Exc. 6-10, 17] If its members' interests are relevant for purposes of standing and intervention, they should be relevant for purposes of attorney's fees as well. An organization should not be able to have its cake and eat it too, touting its members' interests when they are strategically helpful and then disavowing those interests by hiding them behind the organizational structure when they are strategically unhelpful. Allowing such gamesmanship would gut AS 09.60.010(d)(2), making it trivially easy for a financially motivated litigant to avoid the statute's limitations with the simple expedient of suing through an organization.

Because the superior court must consider the interests of the Coalition's members, the Coalition's attempts to distinguish *Matanuska-Susitna Borough School District v. State*[12] and *City of Kotzebue v. State*[13] fail. [Ae. Br. 12-14] The Coalition is correct that the school district and the city in those cases sued directly rather than acting through a membership organization; but—as just explained—this artificial distinction is unavailing. [*Id*.] It does not matter that the Coalition "(unlike its members) is not entitled to any portion of the appropriation" at issue in this case. [Ae. Br. 8] Although the financial interests of a single Coalition member might not be enough to preclude constitutional litigant status, the Court must consider the interests of the Coalition's "typical members,"[14] and those typical members are school districts analogous to the plaintiffs in *Matanuska-Susitna Borough School District* and *City of Kotzebue*. [Exc. 17]

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12 931 P.2d 391, 402-03 (Alaska 1997).

13 166 P.3d 37, 46 (Alaska 2007).

14 *See Citizens for the Preservation of Kenai River*, 758 P.2d at 627.

II. The Coalition's members' financial interest in this litigation is neither indirect nor speculative, and how they plan to spend the money is irrelevant.

The Coalition is not a constitutional litigant because its member school districts had enormous economic incentive to litigate over millions of dollars in school funding regardless of the constitutional nature of the claims in the case.

The superior court should have considered the Coalition's own repeated statements of financial interest in assessing the Coalition's economic incentives. [Exc. 2-10] Those statements included that its members "have a financial interest in the outcome of this case" [Exc. 2]; that this "financial interest is even more direct" than that of a church advocating a tax exemption because its members "may be deprived of funds" [Exc. 7]; and that it had a "direct financial" interest "at stake" in the case. [Exc. 9-10] The Coalition argued this case could cost its members state funding, and sought a court order to "immediately release state funding." [Exc. 10-11, 42-43, 21]

The Coalition disavows those statements, which it made in support of intervention, and complains that the governor has "failed to provide any authority to indicate that the standard for a direct, sufficient interest [for purposes of intervention] under Civil Rule 24(a) is synonymous with a sufficient economic incentive under AS 09.60.010." [Ae. Br. 7] But of course these concepts are not synonymous, and the governor is not arguing that they are. A litigant may move to intervene in a case based on many different kinds of interests, including interests that are not financial at all—for example, the

sponsors of a ballot initiative may intervene to defend the law they proposed.[15] But a litigant may also move to intervene in a case based on assertions of financial interest, and those assertions should not simply evaporate when the case reaches the attorney's fees stage.

The Coalition now claims that this case was never about money and that the amount of its members' state funding was not at stake, but this is both inaccurate and inconsistent with the arguments quoted above. [Ae. Br. 13-14] The Coalition reasons that "school funding was never actually in jeopardy" because the governor "had already promised to sign the same appropriation amounts into law if the Legislature passed them in a new bill." [*Id*.] But the legislature did *not* pass them in a new bill—indeed, if it had, this case would not exist. [At. Br. 5] This case was about what funding the Coalition's members would receive given a reality in which the legislature *refused* to pass a new education funding bill. [*Id*.] Although neither the legislature nor the governor wanted schools to go completely unfunded, their disagreement over education funding was the impetus for this case. [At. Br. 4-5] And although they stipulated to interim funding during the litigation, their stipulation did not cover $30 million of the disputed appropriations, as the Coalition itself emphasized below. [Exc. 11; R. 172-74]

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[15] *See, e.g., Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 914 (Alaska 2000).

A dispute over $30 million creates a sufficient economic incentive to litigate regardless of the constitutional issues involved.[16] And on top of that $30 million, this case will impact the Coalitions' members' future funding because if the legislature can forward-fund education, their funding will be protected from possible reductions by new governors through the item veto power.[17] This case is thus far more analogous to *Matanuska-Susitna Borough School District* and *City of Kotzebue*, in which disputes over public money created a sufficient economic incentive,[18] than it is to *Alaska Conservation Foundation v. Pebble Limited Partnership* and *Alaska Miners Association v. Holman*, in which the litigation's impacts on economic interests were speculative.[19] The Coalition complains that *Matanuska-Susitna Borough School District* and *City of Kotzebue* predated the current statute and were decided under an abuse of discretion standard.

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16 *See Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 403 ("Where 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."); *DeVilbiss v. Matanuska-Susitna Borough*, 356 P.3d 290, 299 (Alaska 2015) (finding sufficient economic incentive where "[t]he direct economic benefit of a successful suit would have been in the tens of thousands of dollars").

17 *See* State's Opening Brief in S-17666 at 32-33; Reply Brief in S-17666 at 13-15.

18 *See Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 403 ("[T]he Borough and District also stood to gain from bringing suit, either by increased state funding or decreased taxes. They had a substantial economic incentive for bringing suit against the State."); *City of Kotzebue*, 166 P.3d at 47 (holding that the city had a "strong economic interest in the action at issue" where it "sought reimbursement for hundreds of thousands of dollars in jail-operation costs").

19 *See Alaska Conservation Found*., 350 P.3d at 285 ("No matter the result, the underlying litigation could not directly affect any Pebble Project opponent's economic interests.") *Alaska Miners Association*, 397 P.3d at 317 ("This case is fundamentally about the ballot-initiative process and not a case about whether the Pebble Project should go forward.").

[Ae. Br. 12-13] But the Court has said that such older cases "provide the guiding parameters for the meaning of 'sufficient economic incentive' under AS 09.60.010."[20]

As explained in the governor's opening brief, the fact that the school districts will use the disputed funds to pay for schools is irrelevant. [At. Br. 12-13] The Coalition at first seems to agree with this, acknowledging that "neither the status of the entity nor the entity's intended use of its benefit in and of itself matters to the analysis," and deriding the governor's argument on this point as a "useless line of briefing." [Ae. Br. 8] But the Coalition nonetheless repeatedly asserts—implicitly acknowledging that the governor's briefing on this point is indeed useful—that its member school districts will use the disputed funds "for the benefit of the school children." [Ae. Br. 8, 9, 10-11]

The Coalition then argues that its members' intended use of the funds matters because the Court held in *City of Valdez v. Copper Valley Electric Association, Inc*., that a utility was entitled to public interest litigant status when it sought to recover payments that would have been credited on its customers' bills.[21] [Ae. Br. 10-12] But *City of Valdez* did not, as the Coalition asserts, "h[o]ld that [the utility] did not have sufficient economic incentive to sue"—indeed, neither the word "economic" nor the word "incentive" appears anywhere in the *City of Valdez* opinion.[22] [Ae. Br. 11] Instead, the Court analyzed the other three prongs of the now-abrogated public interest litigant doctrine—such as whether "only a private party [can] have been expected to bring the suit"—none of which

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

21 740 P.2d 462, 466 (Alaska 1987).

22 *See id*.

remain relevant to the attorney's fees analysis today.[23] And in *Matanuska-Susitna Borough School District*, the Court distinguished *City of Valdez*, noting that the utility had been "required by law to pass along savings to its customers," which was not true of the school district.[24] *Matanuska-Susitna Borough School District*—which involved a school district and actually analyzed the issue of economic incentive[25]—is far more on point here than *City of Valdez*, which involved an electric utility and did not mention economic incentive.[26]

In sum, because the Coalition intervened due to its members' concern about receiving millions of dollars in state funding—a direct economic incentive—the Coalition is not a constitutional litigant entitled to full attorney's fees under AS 09.60.010.

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[23] In *Alaska Conservation Found*., 350 P.3d at 279-81, the Court explained the history of its common-law public interest doctrine for attorney's fees, which developed four prongs over time: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds, will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? and (4) Would the litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance? But the legislature abrogated that common-law doctrine when it passed the current attorney's fees statute in 2003, preserving only the "fourth prong" about "whether the litigant had sufficient economic incentive for bringing suit." *Id*. at 281. Thus, the Court's "prior cases interpreting the economic incentive prong of the public interest litigant test" are still relevant today, but cases interpreting and applying the other three prongs—like *City of Valdez*—are not. *Id*.

[24] *Matanuska-Susitna Borough Sch. Dist*., 931 P.2d at 403.

[25] *See id*. at 402-03.

[26] *See City of Valdez*, 740 P.2d at 466.

III. The Coalition should not receive fees for work on its unsuccessful claim about the level of state funding required by the Education Clause.

Even if the Court upholds the superior court's conclusion that the Coalition 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. The Coalition claimed that the governor violated Article VII, section 1, because his actions resulted in school funding that "falls below constitutionally required levels." [Exc. 18-21] The Coalition did not prevail on this claim—the superior court issued no such ruling. [Exc. 21, 51-52]

The Coalition argues that it should receive fees for this unsuccessful claim anyway because it was sufficiently related to the successful claim—that is, the claim about the governor's duty to execute forward appropriations. [Ae. Br. 16-18] But the superior court concluded that the Coalition's Education Clause claim was so distinct that it could not even reasonably be litigated alongside the Council's claim about forward appropriations. [Exc. 46-50] The Coalition's Education Clause claim was thus not so inextricably intertwined that work on it is tantamount to work on the successful claim. The Coalition should not be awarded public dollars to which it not entitled to simply because its billing records fail to distinguish between claims.[27]

[27] *See Meyer v. Stand for Salmon*, 450 P.3d 689, 692-93 (Alaska 2019) (Winfree, J., concurring) ("Constitutional litigants have been aware of this legal framework since at least our *Manning* decision; the need to segregate fees should come as no surprise.").

IV. The Coalition's fees were unreasonably high—fully double the Legislative Council's—and included fees for work not related to this case.

Even putting aside the Coalition's unsuccessful claim, the Court should reverse the fee award and remand for recalculation because the award was unreasonably high, inadequately explained, and included improper fees.

The superior court's unexplained rejection of the governor's unrebutted challenges to some of the Coalition's billing entries requires a remand because "it is not self-evident from the order or the record how or whether the superior court resolved the governments' contentions."[28] As pointed out both below and in the governor's opening brief, 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[29] and to the Coalition's press releases and interviews.[30] [Exc. 79; At. Br. 17-18] The Coalition has never defended those contested billing entries, either below or in its brief for this Court. [Exc. 82-92; Ae. Br. 16-18] But the superior court nonetheless awarded the Coalition every cent it asked for, rejecting the governor's unrebutted challenges to those billing entries without any explanation. [Exc. 95]

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

29 *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.").

30 *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.").

This error alone requires a remand. And it exemplifies the superior court's failure to carefully consider the issue of attorney's fees or to scrutinize the Coalition's billing records for reasonableness. Such cavalier distribution of public funds is inappropriate. The State of Alaska's coffers are not unlimited, particularly in the current context, and public funds can be put to many better uses than overpaying the Coalition's private attorneys—for example, paying for education.

Alaska Statute 09.60.010(c)(1) provides for "full *reasonable* attorney fees," and the word "reasonable" must have meaning. Here, the superior court unreasonably awarded the Coalition fully *twice* as much attorney's fees as the Legislative Council simply for its duplicative litigation of the Council's claims, without explanation. [Exc. 554-57] The governor's challenge to this excessive fee award is not an attempt to "collaterally attack the superior court's Order granting [the Coalition's] Motion to Intervene." [Ae. Br. 15-16] Rather, the governor asks the Court to give meaning to the word "reasonable" and apply the statute in light of its purposes, which are not served by this award. [At. Br. 13-15] Even if the Court concludes that the Coalition was a constitutional litigant entitled to full reasonable fees, it should remand for consideration of what award is actually "reasonable" under the circumstances of this case.

CONCLUSION

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