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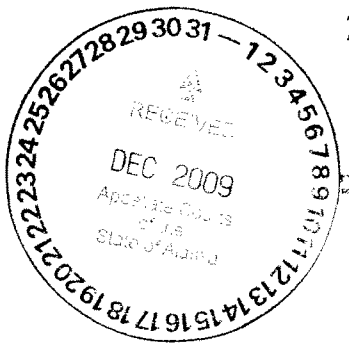
IN THE SUPREME COURT FOR THE STATE OF ALASKA



RICHARD HELLER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Appellees.	)	Supreme Court Case No. S-13551
	)	Trial Court No. 4FA-08-1193 Civ

ON APPEAL FROM THE
SUPERIOR COURT FOR THE STATE OF ALASKA, FOURTH JUDICIAL DISTRICT,
HONORABLE DOUGLAS BLANKENSHIP, SUPERIOR COURT JUDGE

APPELLANT'S OPENING BRIEF (Corrected)

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Filed on the 8th day of December, 2009

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Appellate Court Clerk's Office

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CONSTITUTIONAL PROVISIONS AND STATUTES PRINCIPALLY RELIED UPON

United States Constitution

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fourteenth Amendment, Sec. 1

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Constitution

Article 1, section 1

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article 1, section 19 (Amended 1994)

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State. [Amended 1994]

Alaska Statutes

Sec. 01.10.055. Residency.

(a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.

(b) A person demonstrates the intent required under (a) of this section

(1) by maintaining a principal place of abode in the state for at least 30 days or for a longer period if a longer period is required by law or regulation; and

(2) by providing other proof of intent as may be required by law or regulation, which may include proof that the person is not claiming residency outside the state or obtaining benefits under a claim of residency outside the state.

(c) A person who establishes residency in the state remains a resident during an absence from the state unless during the absence the person establishes or claims residency in another state, territory, or country, or performs other acts or is absent under circumstances that are inconsistent with the intent required under (a) of this section to remain a resident of this state.

Alaska Permanent Fund Dividend Statutes

Sec. 43.23.005. Eligibility.

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if the individual

(1) applies to the department;

(2) is a state resident on the date of application;

(3) was a state resident during the entire qualifying year;

(4) has been physically present in the state for at least 72 consecutive hours at some time during the prior two years before the current dividend year;

(5) is

(A) a citizen of the United States;

(B) an alien lawfully admitted for permanent residence in the United States;

(C) an alien with refugee status under federal law; or

(D) an alien that has been granted asylum under federal law;

(6) was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008_; and

(7) was in compliance during the qualifying year with the military selective service registration requirements imposed under 50 U.S.C. App. 453 (Military Selective Service Act), if those requirements were applicable to the individual, or has come into compliance after being notified of the lack of compliance.

(b) *[Repealed, Sec. 18 ch 4 SLA 1992].*

(c) A parent, guardian, or other authorized representative may claim a permanent fund dividend on behalf of an unemancipated minor or on behalf of a disabled or an incompetent individual who is eligible to receive a payment under this section. Notwithstanding (a)(2) - (4) of this section, a minor is eligible for a dividend if, during the two calendar years immediately preceding the current dividend year, the minor was born to or adopted by an individual who is eligible for a dividend for the current dividend year.

(d) Notwithstanding the provisions of (a) - (c) of this section, an individual is not eligible for a permanent fund dividend for a dividend year when

(1) during the qualifying year, the individual was sentenced as a result of conviction in this state of a felony;

(2) during all or part of the qualifying year, the individual was incarcerated as a result of the conviction in this state of a

(A) felony; or

(B) misdemeanor if the individual has been convicted of

(i) a prior felony as defined in AS 11.81.900_; or

(ii) two or more prior misdemeanors as defined in AS 11.81.900_.

(e) *[Repealed, Sec. 64 ch 21 SLA 1991].*

(f) The commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state

(1) in a time of national military emergency under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual; or

(2) while in the custody of the Department of Health and Social Services in accordance with a court order under AS 47.10 or AS 47.12 and placed outside of the state by the Department of Health and Social Services for purposes of medical or behavioral treatment.

(g) For purposes of applying (d)(1) of this section, the date the court imposes a sentence or suspends the imposition of sentence shall be treated as the date of conviction. For purposes of applying (d)(2)(B) of this section, multiple convictions arising out of a single criminal episode shall be treated as a single conviction.

(h) If an individual who would otherwise have been eligible for a permanent fund dividend dies after applying for the dividend but before the dividend is paid, the department shall pay the dividend to a personal representative of the estate or to a successor claiming personal property under AS 13.16.680_ If an individual who would otherwise have been eligible for a dividend and who did not apply for the dividend dies during the application period, a personal representative of the estate or a successor claiming personal property under AS 13.16.680_may apply for and receive the dividend. Notwithstanding AS 43.23.011_, the application for the dividend may be filed by the personal representative or the successor at any time before the end of the application period for the next dividend year.

Sec. 43.23.008. Allowable absences.

(a) Subject to (b) and (c) of this section, an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent

(1) receiving secondary or postsecondary education on a full-time basis;

(2) receiving vocational, professional, or other specific education on a full-time basis for which, as determined by the Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state;

(3) serving on active duty as a member of the armed forces of the United States or accompanying, as that individual's spouse, minor dependent, or disabled dependent, an individual who is

(A) serving on active duty as a member of the armed forces of the United States; and

(B) eligible for a current year dividend;

(4) serving under foreign or coastal articles of employment aboard an oceangoing vessel of the United States merchant marine;

(5) receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician who treated the illness if the treatment or convalescence is not based on a need for climatic change;

(6) providing care for a parent, spouse, sibling, child, or stepchild with a critical life-threatening illness whose treatment plan, as recommended by the attending physician, requires travel outside the state for treatment at a medical specialty complex;

(7) providing care for the individual's terminally ill family member;

(8) settling the estate of the individual's deceased parent, spouse, sibling, child, or stepchild, provided the absence does not exceed 220 cumulative days;

(9) serving as a member of the United States Congress;

(10) serving on the staff of a member from this state of the United States Congress;

(11) serving as an employee of the state in a field office or other location;

(12) accompanying a minor who is absent under (5) of this subsection;

(13) accompanying another eligible resident who is absent for a reason permitted under (1), (2), (5) - (12), (16), or (17) of this subsection as the spouse, minor dependent, or disabled dependent of the eligible resident;

(14) serving as a volunteer in the federal peace corps program;

(15) because of training or competing as a member of the United States Olympic Team;

(16) participating for educational purposes in a student fellowship sponsored by the United States Department of Education or by the United States Department of State;

(17) for any reason consistent with the individual's intent to remain a state resident, provided the absence or cumulative absences do not exceed

(A) 180 days in addition to any absence or cumulative absences claimed under (3) of this subsection if the individual is not claiming an absence under (1), (2), or (4) - (16) of this subsection;

(B) 120 days in addition to any absence or cumulative absences claimed under (1) - (3) of this subsection if the individual is not claiming an absence under (4) - (16) of this subsection but is claiming an absence under (1) or (2) of this subsection; or

(C) 45 days in addition to any absence or cumulative absences claimed under (1) - (16) of this subsection if the individual is claiming an absence under (4) - (16) of this subsection.

(b) An individual may not claim an allowable absence under (a)(1) - (16) of this section unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state.

(c) An otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year. This subsection does not apply to an absence under (a)(9) or (10) of this section or to an absence under (a)(13) of this section if the absence is to accompany an individual who is absent under (a)(9) or (10) of this section.

(d) For purposes of (a)(7) of this section, "family member" means a person who is

(1) legally related to the individual through marriage or guardianship; or

(2) the individual's sibling, parent, grandparent, son, daughter, grandson, granddaughter, uncle, aunt, niece, nephew, or first cousin.

Sec. 43.23.095. Definitions.

In this chapter,

(1) "Alaska permanent fund" means the fund established by art. IX, Sec. 15 of the state constitution;

(2) "disabled" means physically or mentally unable to complete and sign an application due to a serious emotional disturbance, visual, orthopedic, or other health impairment, or developmental disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or other cause; "disabled" does not mean "incompetent";

(3) "dividend fund" means the fund established by AS 43.23.045_;

(4) "individual" means a natural person;

(5) "permanent fund dividend" means a right to receive a payment from the dividend fund;

(6) "qualifying year" means the year immediately preceding January 1 of the current dividend year;

(7) "state resident" means an individual who is physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055 ;

(8) "year" means a calendar year.

SLA 1998 ch. 44

An Act requiring, for purposes of permanent fund dividend eligibility, an individual to have been physically present in the state for at least 72 consecutive hours during the prior two years before the current dividend year; relating, for purposes of permanent fund dividend eligibility, to allowable absences for secondary and postsecondary education on a full-time basis, vocational, professional, or other education on a full-time basis when a comparable program is not reasonably available in the state, serving on active duty as a member of the armed forces of the United States, receiving continuous medical treatment or convalescing if the treatment or convalescence is not based on a need for climatic change, providing care for certain relatives with critical life-threatening illnesses, providing care for certain terminally ill relatives, settling the estates of certain relatives, serving as a member of the United States Congress, serving on the staff of a member from this state of the United States Congress, serving as an employee of the state, accompanying certain ill minors, accompanying another eligible resident who is absent for an allowable reason as the spouse, minor dependent, or disabled dependent of the eligible resident, or for any reason consistent with an individual's intent to remain a state resident; prohibiting, for purposes of permanent fund dividend eligibility, an individual from claiming an allowable absence unless the individual was a resident for at least six consecutive months immediately before leaving the state; making ineligible, for purposes of permanent fund dividend eligibility, certain individuals who are absent for more than 180 days during each of 10 qualifying years; relating to the definition of state 'resident' for purposes of permanent fund dividend eligibility and requiring a state resident to have the intent to remain indefinitely; relating to the qualifying year and defining that term for purposes of the permanent fund dividend program; relating to the eligibility for 1998 permanent fund dividends of certain spouses and dependents of eligible individuals; and providing for an effective date.

* **Section 1.** AS 23.40.210(e) is amended to read:

(e) In this section, "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain permanently in the state under the requirements of AS 01.10.055[,] and is absent only temporarily for reasons allowed under **AS 43.23.008** [AS 43.23.095(8)] or a successor statute.

* **Sec. 2.** AS 43.23.005(a) is amended to read:

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if **the individual**

(1) [THE INDIVIDUAL] applies to the department;

(2) [ON THE DATE OF APPLICATION THE INDIVIDUAL] is a state resident **on the date of application;**

(3) [THE INDIVIDUAL] was a state resident **during** [FOR AT LEAST] the **entire qualifying** [CALENDAR YEAR IMMEDIATELY PRECEDING JANUARY 1 OF THE CURRENT DIVIDEND] year;

(4) [THE INDIVIDUAL] has been physically present in the state at some time during the prior two [CALENDAR] years before the current dividend year; [AND]

(5) [THE INDIVIDUAL] is

(A) a citizen of the United States;

(B) an alien lawfully admitted for permanent residence in the United States;

(C) an alien with refugee status under federal law; or

(D) an alien that has been granted asylum under federal law**; and**

(6) was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008.

* **Sec. 3.** AS 43.23.005(a) is amended to read:

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if the individual

(1) applies to the department;

(2) is a state resident on the date of application;

(3) was a state resident during the entire qualifying year;

(4) has been physically present in the state **for at least 72 consecutive hours** at some time during the prior two years before the current dividend year;

(5) is

(A) a citizen of the United States;

(B) an alien lawfully admitted for permanent residence in the United States;

(C) an alien with refugee status under federal law; or

(D) an alien that has been granted asylum under federal law; and

(6) was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008.

* **Sec. 4.** AS 43.23.005(d) is amended to read:

(d) Notwithstanding the provisions of (a) - (c) of this section, an individual is not eligible for a permanent fund dividend for a dividend year when

(1) during the **qualifying** [CALENDAR YEAR IMMEDIATELY PRECEDING THAT DIVIDEND] year the individual was sentenced as a result of conviction in this state of a felony;

(2) during all or part of the **qualifying** [CALENDAR YEAR IMMEDIATELY PRECEDING THAT DIVIDEND] year, the individual was incarcerated as a result of the conviction in this state of a

(A) felony; or

(B) misdemeanor if the individual has been convicted of two or more prior crimes as defined in AS 11.81.900.

* **Sec. 5.** AS 43.23 is amended by adding a new section to read:

Sec. 43.23.008. Allowable absences. (a) Subject to (b) and (c) of this section, an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent

(1) receiving secondary or postsecondary education on a full-time basis;

(2) receiving vocational, professional, or other specific education on a full-time basis for which, as determined by the Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state;

(3) serving on active duty as a member of the armed forces of the United States;

(4) receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician that treated the illness if the treatment or convalescence is not based on a need for climatic change;

(5) providing care for a parent, spouse, sibling, child, or stepchild with a critical life-threatening illness whose treatment plan, as recommended by the attending physician, requires travel outside the state for treatment at a medical specialty complex;

(6) providing care for the individual's terminally ill parent, spouse, sibling, child, or stepchild;

(7) settling the estate of the individual's deceased parent, spouse, sibling, child, or stepchild, provided the absence does not exceed 220 cumulative days;

(8) serving as a member of the United States Congress;

(9) serving on the staff of a member from this state of the United States Congress;

(10) serving as an employee of the state in a field office or other location;

(11) accompanying a minor who is absent under (4) of this subsection;

(12) accompanying another eligible resident who is absent for a reason permitted under this subsection as the spouse, minor dependent, or disabled dependent of the eligible resident;

(13) for any reason consistent with the individual's intent to remain a state resident, provided the absence or cumulative absences do not exceed

(A) 180 days if the individual is not claiming an absence under (1) - (12) of this subsection;

(B) 120 days in addition to any absence or cumulative absences claimed under (1) or (2) of this subsection if the individual is not claiming an absence under (3) - (12) of this subsection; or

(C) 45 days in addition to any absence or cumulative absences claimed under (1) - (12) of this subsection.

(b) An individual may not claim an allowable absence under (a)(1) - (12) of this section unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state.

(c) An otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year. This subsection does not apply to an absence under (a)(8) or (9) of this section or to an absence under (a)(12) of this section if the absence is to accompany an individual who is absent under (a)(8) or (9) of this section.

*** Sec. 6.** AS 43.23.028(a) is amended to read:

(a) By October 1 of each year, the commissioner shall give public notice of the value of each permanent fund dividend for that year and notice of the information required to be disclosed under (3) of this subsection. In addition, the stub attached to each individual dividend check and direct deposit advice must

(1) disclose the amount of each dividend attributable to income earned by the permanent fund from deposits to that fund required under art. IX, sec. 15, Constitution of the State of Alaska;

(2) disclose the amount of each dividend attributable to income earned by the permanent fund from appropriations to that fund and from amounts added to that fund to offset the effects of inflation;

(3) disclose the amount by which each dividend has been reduced due to each appropriation from the dividend fund, including amounts to pay the costs of administering the dividend program and the hold harmless provisions of AS 43.23.075;

(4) include a statement that an individual is not eligible for a dividend when

(A) during the **qualifying** [CALENDAR YEAR IMMEDIATELY PRECEDING THAT DIVIDEND] year the individual was convicted of a felony;

(B) during all or part of the **qualifying** [CALENDAR YEAR IMMEDIATELY PRECEDING THAT DIVIDEND] year, the individual was incarcerated as a result of the conviction of a

(i) felony; or

(ii) misdemeanor if the individual has been convicted of two or more prior crimes;

(5) include a statement that the legislative purpose for making individuals listed under (4) of this subsection ineligible is to

(A) obtain reimbursement for some of the costs imposed on the state criminal justice system related to incarceration or probation of those individuals;

(B) provide funds for payments to crime victims and for grants for the operation of domestic violence and sexual assault programs;

(6) disclose the total amount that would have been paid during the previous fiscal year to individuals who were ineligible to receive dividends under AS 43.23.005(d) if they had been eligible;

(7) disclose the total amount appropriated for the current fiscal year under (b) of this section for each of the funds and agencies listed in (b) of this section.

* **Sec. 7.** AS 43.23.095(8) is amended to read:

(8) "state resident" means an individual who is physically present in the state with the intent to remain **indefinitely** [PERMANENTLY] in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain **indefinitely** [PERMANENTLY] in the state under the requirements of AS 01.10.055 [, AND IS ABSENT ONLY FOR ANY OF THE FOLLOWING REASONS:

(A) VOCATIONAL, PROFESSIONAL, OR OTHER SPECIFIC EDUCATION FOR WHICH A COMPARABLE PROGRAM WAS NOT REASONABLY AVAILABLE IN THE STATE;

(B) SECONDARY OR POSTSECONDARY EDUCATION;

(C) MILITARY SERVICE;

(D) MEDICAL TREATMENT;

(E) SERVICE IN CONGRESS;

(F) OTHER REASONS WHICH THE COMMISSIONER MAY ESTABLISH BY REGULATION;

(G) SERVICE IN THE PEACE CORPS;

(H) TO CARE FOR THE INDIVIDUAL'S TERMINALLY ILL PARENT, SPOUSE, SIBLING, CHILD, OR STEPCHILD;

(I) FOR UP TO 220 DAYS TO SETTLE THE ESTATE OF THE INDIVIDUAL'S DECEASED PARENT, SPOUSE, SIBLING, CHILD, OR STEPCHILD; OR

(J) TO CARE FOR A PARENT, SPOUSE, SIBLING, CHILD, OR STEPCHILD WITH A CRITICAL LIFE-THREATENING ILLNESS WHOSE TREATMENT PLAN, AS RECOMMENDED BY THE ATTENDING PHYSICIAN, REQUIRES TRAVEL OUTSIDE THE STATE FOR TREATMENT AT A MEDICAL SPECIALTY COMPLEX];

* **Sec. 8.** AS 43.23.095 is amended by adding a new paragraph to read:

(10) "qualifying year" means the year immediately preceding January 1 of the current dividend year.

* **Sec. 9.** APPLICATION. AS 43.23.008(c), enacted by sec. 5 of this Act, applies only to periods of absence during January 1, 1998, and thereafter.

* **Sec. 10.** PERMANENT FUND DIVIDENDS FOR CERTAIN SPOUSES AND DEPENDENTS. (a) Notwithstanding the provision in AS 43.23.015(a) that the residency of an individual's spouse may not be the principal factor relied upon in determining the residency of the individual, an individual is eligible for a 1998 dividend if the individual was absent from the state while accompanying, as the spouse, minor

dependent, or disabled dependent, another person who was eligible for that dividend and was absent for a reason permitted under AS 43.23.095(8), as that statute read at the time of the absence. An individual is eligible for a 1998 dividend under this subsection only if the individual would have been otherwise eligible for the 1998 dividend and

(1) applied for the 1998 dividend during the 1998 application period; or

(2) if the individual did not apply during the 1998 application period, applies for the 1998 dividend before the end of the 1999 application period.

(b) The Department of Revenue shall prescribe and furnish an application form for claiming a 1998 dividend under (a)(2) of this section.

* **Sec. 11.** Section 10 of this Act is retroactive to January 1, 1998.

* **Sec. 12.** Sections 10 and 11 of this Act take effect immediately under AS 01.10.070(c).

* **Sec. 13.** Sections 1, 2, and 4 - 9 of this Act take effect January 1, 1999.

* **Sec. 14.** Section 3 of this Act takes effect January 1, 2000.

SLA 2003 ch. 69

An Act relating to allowable absences for certain members of the armed forces and their spouses and dependents for purposes of eligibility for permanent fund dividends; and providing for an effective date.

* **Section 1.** AS 43.23.008(a) is amended to read:

(a) Subject to (b) and (c) of this section, an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent

(1) receiving secondary or postsecondary education on a full-time basis;

(2) receiving vocational, professional, or other specific education on a full-time basis for which, as determined by the Alaska Commission on Postsecondary Education, a comparable program is not reasonably available in the state;

(3) serving on active duty as a member of the armed forces of the United States **or accompanying, as that individual's spouse, minor dependent, or disabled dependent, an individual who is**

(A) serving on active duty as a member of the armed forces of the United States; and

(B) eligible for a current year dividend;

(4) serving under foreign or coastal articles of employment aboard an oceangoing vessel of the United States merchant marine;

(5) receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician that treated the illness if the

treatment or convalescence is not based on a need for climatic change;

(6) providing care for a parent, spouse, sibling, child, or stepchild with a critical life-threatening illness whose treatment plan, as recommended by the attending physician, requires travel outside the state for treatment at a medical specialty complex;

(7) providing care for the individual's terminally ill parent, spouse, sibling, child, or stepchild;

(8) settling the estate of the individual's deceased parent, spouse, sibling, child, or stepchild, provided the absence does not exceed 220 cumulative days;

(9) serving as a member of the United States Congress;

(10) serving on the staff of a member from this state of the United States Congress;

(11) serving as an employee of the state in a field office or other location;

(12) accompanying a minor who is absent under (5) of this subsection;

(13) accompanying another eligible resident who is absent for a reason permitted under **(1), (2)** [(1) - (3)], (5) - (12), or (14) of this subsection as the spouse, minor dependent, or disabled dependent of the eligible resident;

(14) for any reason consistent with the individual's intent to remain a state resident, provided the absence or cumulative absences do not exceed

(A) 180 days **in addition to any absence or cumulative absences claimed under (3) of this subsection** if the individual is not claiming an absence under **(1), (2), or (4) - (13)** [(1) - (13)] of this subsection;

(B) 120 days in addition to any absence or cumulative absences claimed under **(1) - (3)** [(1) OR (2)] of this subsection if the individual is not claiming an absence under **(4) - (13)** [(3) - (13)] of this subsection **but is claiming an absence under (1) or (2) of this subsection**; or

(C) 45 days in addition to any absence or cumulative absences claimed under (1) - (13) of this subsection **if the individual is claiming an absence under (4) - (13) of this subsection**.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICATIONS. Notwithstanding permanent fund dividend application procedures or deadlines, an individual who qualifies for a dividend for 2003 because of the amendment to AS 43.23.008(a) made in sec. 1 of this Act, or who may apply on behalf of another who qualifies because of the amendment, may apply for the dividend by September 15, 2003. The Department of Revenue shall prepare a form for applications under this section.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

RETROACTIVITY. Section 1 of this Act is retroactive to January 1, 2002.

*** Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

JURISDICTIONAL STATEMENT

This court has jurisdiction under AS 22.05.01(c): "A decision of the superior court on appeal from an administrative agency may be appealed to the supreme court as a matter of right." The final Memorandum Decision and Order of the superior court was signed May 11, 2009, and distributed on May 20, 2009. [Exc. 15-32]

LIST OF ALL PARTIES

The parties are listed in the caption, i.e., appellant Richard Heller and appellee Department of Revenue.

STATEMENT OF ISSUES

I. Did the Superior court correctly interpret and apply AS 43.23.008 to deny a 2007 PFD to an Alaska resident, absent from August 2005 until December 2006 while serving in Iraq, solely on the basis that he had been deployed to Iraq from Alaska to soon in 2005 to qualify for an "allowable absence" during 2006?

II. Is it consistent with the equal protection clauses, interstate travel rights, and rights to keep and bear arms, guaranteed under the Alaska and United States Constitutions for an Alaskan soldier and resident to be denied an "allowable absence" for his military service during 2006, and thus to be denied his 2007 PFD, based on a duration residency requirement he was unable to fulfill in 2005 due to the date of his deployment?

STATEMENT OF THE CASE

The facts of this case are not in dispute. Richard Heller was assigned to the Headquarters Company of the 172d Stryker Brigade. The key dates in the chronology are as follows:

- 17 June 2005: Heller arrives in Alaska under military orders,[1] where he promptly registers to vote, obtains an Alaska driver's license, and changes his "State of Legal Residence" in military records to Alaska.[2]
- 14 August 2005: Heller is deployed to Mosul in Iraq.[3]
- 11 December 2006: Heller is returned to Alaska, following a120-day extension of what was to originally have been a one-year deployment.[4]

Mr. Heller applied for a 2007 PFD in March 2007, and the denial of that dividend is what is at issue here.[5]

Procedural History:

On August 1, 2007 Mr. Heller was sent a denial letter for his 2007 Permanent Fund Dividend.[6] He filed an informal appeal,[7] which was denied by a PFD technician who found, erroneously, that Mr. Heller had not arrived in Alaska until 17 June 2006,

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[1] Exc. 8.

[2] Exc. 3, 7, 10

[3] Exc. 10; R. 39.

[4] R. 40, 53.

[5] R. 31-34. (Subsequently, Mr. Heller was honorably discharged from the Army in December 2007. He remained living in Fairbanks at the time of his 27 December 2007 PFD hearing, planning to attend UAF (Exc. 10; Hearing CD). He did attend UAF in the spring semester of 2008, moving in the summer of 2008 to Anchorage to attend UAA, which offers a construction management program UAF does not. At both, Mr. Heller pays in-state tuition. Mr. Heller has received PFD's for 2008 and 2009.

[6] Exc. 1.

[7] Exc. 2-3.

that he had not obtained an Alaska ID or Driver's license, that he had not registered to vote in Alaska, and that he had not registered a vehicle in Alaska.[8] Mr. Heller filed a request for a formal hearing, pointing out that he had arrived in Alaska 17 June 2005, and shortly thereafter had registered to vote and had obtained an Alaska's driver's license, and had later registered two vehicles in Alaska.[9] The formal hearing was held December 27, 2007.[10] The hearing officer found in Mr. Heller's favor on all the contested issues of fact, but nonetheless concluded that Mr. Heller was still not eligible, resulting in affirmation of the denial.[11] The superior court also upheld Mr. Heller's denial.[12] This appeal followed.

STANDARD OF REVIEW

As there are no disputed factual findings here, this Court should review legal issues independently, under the substitution of judgment standard.[13]

ARGUMENT

Mr. Heller's dividend was denied on the basis that a military absence is not "allowable" because Mr. Heller, although a resident at the time of his deployment, had not been a resident for a long enough period, and military absences are not allowable for residents who are unable to fulfill a durational residency requirement of six months.

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[8] Exc. 4-5.

[9] Exc. 6-7.

[10] R. 14.

[11] Exc. 10-12.

[12] Exc. 13-30.

[13] *Eldridge v. State*, 988 P.2d 101, 103 (Alaska 1999).

Mr. Heller raises both a statutory interpretation argument and a constitutional argument. The first is that military members are statutorily entitled to combine *two* categories of allowable absence: an absence "for any reason consistent with the individual's intent to remain a state resident" which is *not* subject to any prior durational residency requirement, and an absence for active duty in the armed forces, and the proper application of these two in combination renders him eligible. The constitutional argument is that, to the extent that the statute is interpreted to require the conclusion that his 2007 PFD be denied on the basis that certain Alaska residents are given the benefit of an allowable absence, while other Alaska residents are not, based on a prior durational residency requirement, that interpretation is violative of his rights the Alaska and United States Constitutions.

I. Denial of Mr. Heller's 2007 PFD is erroneous as a matter of statutory interpretation.

The statutory interpretation dimension of this case entails the proper combined application of two "allowable absence" provisions in the Permanent Fund Division statute.

The relevant "qualifying year" for the 2007 dividend, under AS 43.23.095(6),[14] is calendar year 2006. Mr. Heller was undisputedly a "resident" of Alaska throughout calendar year 2006 within the meaning of AS 43.23.095(7);[15] he had established his

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[14] "'Qualifying year' means the year immediately preceding January 1 of the current dividend year."

[15] " '[S]tate resident' means an individual who is physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055 or, if the

Alaska residency in June 2005, and was absent from Alaska during for the first eleven months of 2006 solely due to his military posting in Iraq, with every intention of returning to Alaska and remaining indefinitely, as he eventually did.

AS 43.23.008, the "allowable absence" statute, lists seventeen categories of allowable absences in subsection (a), of which two are relevant to this case. First, paragraph (a)(3) covers absences for "serving on active duty as a member of the armed forces of the United States," which Richard Heller was undisputedly doing. Second, paragraph (a)(17) covers absences "for any reason consistent with the individual's intent to remain a state resident," and it is undisputed that Richard Heller's intent throughout 2006 was to remain a state resident, as in fact it was from June 2005 on.[16]

The statute contains a prior durational residency requirement in subsection (b), applicable only to certain categories of the allowable absences listed in subsection (a), specifically, this applies to absences allowable under paragraphs (a)(1) – (16), but not to absences allowable under paragraph (a)(17). Thus, the requirement applies to military duty absences under (a)(3), but not to "any reason consistent" absences under (a)(17).

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individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055."

[16] Paragraph (a)(17) has particular time caps for absences allowable under that section, and those time caps depend on the individual's other claimed absences. For an applicant who is claiming an absence under thirteen of the sixteen other categories (paragraphs (a)(4) through (a)(16)), the time limit on the "any consistent reason" absence is 45 days, in addition to any absence period allowed under those thirteen categories. For an applicant who is claiming an absence under either of the two educational absence provisions (paragraphs (a)(1) and (a)(2)), the time limit on the "any consistent reason" absence is 120 days in addition to absences allowed under those two paragraphs. For an applicant who is claiming an absence for military service (paragraph (a)(3)), the time limit on the "any consistent reason" absence is 180 days in addition to any absences allowed under that paragraph.

The question presented here is the proper method of applying (a)(3) and (a)(17) in combination to Mr. Heller's absence.

The Department's interpretation, upheld by the superior court, contends that the durational residency requirement of subsection (b) requires that Mr. Heller, having been deployed on 17 August 2005, would have to show that he had been a resident of Alaska for six months prior to that date, i.e., by 17 February 2005. This is based on the language of subsection (b), "An individual may not claim an allowable absence under (a)(1) – (16) of this section unless the individual was a resident of this state for at least six consecutive months immediately before leaving the state." And at first blush, were that the only applicable provision, the Department's insistence on residency since 17 February 2005 would be valid.

But this ignores the fact that the legislature intended that applicants be able to claim allowable absences under (a)(17) in combination with (a)(3),[17] and that the legislature intended that allowable absences under (a)(17) *not* be subject to any six-month durational residency requirement.[18]

The Department's interpretation regards Mr. Heller's absence from 14 August 2005 to 11 December 2006 (more precisely, 1 January 2006 to 11 December 2006, since

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[17] This is clear from the language of (a)(17): " ... for any reason consistent with the individual's intent to remain a state resident, provided the absence or cumulative absences do not exceed ... 180 days *in addition to* any absences or cumulative absences claimed under (3) [military absences] of this subsection ..." (emphasis added).

[18] This is clear from the language of subsection (b): "An individual may not claim an allowable absence *under (a)(1) – (16)* of this subsection unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state" (emphasis added).

it is absences during the qualifying year that are at issue here) as not allowable, either as an "any reason consistent" absence under (a)(17) (because it exceeded 180 days during calendar year 2006), or as a military absence under (a)(3) (because Mr. Heller had not been a resident for a duration of six months prior to his deployment on 14 August 2005).

But this "either/or" analysis, giving each provision separate application to the facts, and finding that neither one makes his absence allowable, fails to consider the application of the two in combination, in the way the legislature intended.

Applying the two in combination, Mr. Heller was entitled to be absent for 180 days subsequent to his departure on 14 August 2005, under (a)(17), without regard to the fact that he had been a resident of Alaska for only about two months prior to that deployment.[19] The period of time from 14 August 2005 to 10 February 2006 (180 days) was thus an allowable absence under (a)(17) – or, if the analysis should be parsed by calendar years, his absence from 14 August 2005 up to 31 December 2005 was an allowable absence under (a)(17). After the 180 days, any further absence could only be allowable only if it fell within the parameters of one of the other subparagraphs. For Mr. Heller, it did; he was serving on active duty as a member of the armed forces of the United States, under subsection (a)(3), and by the time he had exhausted his time under (a)(17) – whether that date is set at 31 December 2005 or 10 February 2006 – he had been

[19] Having become a resident in June. (Had Mr. Heller not become a resident of Alaska, he would not have been eligible for any allowable absences. As noted more fully in the constitutional discussion infra, the statutory provision at issue here does not divide residents from non-residents, but rather divides long-term residents from short-term residents, based on the duration of residency.)

a resident of Alaska for over six months, since June 2005. Thus his absence from that date until his return 11 December 2006 was allowable.

This straightforward application of the two subsections in combination is the proper way the statutes should be interpreted. The fixation of the Department, and the superior court, on the language of subsection (b) as requiring that a military absence be preceded by six months' duration of residency "immediately before leaving the state" would be logical if the (a)(17) absence provision did not exist, or if it were subject to the same six months durational residency requirement as (a)(3) military absences, or if military absentees were required to choose between (a)(30 and (a)(17) rather than being allowed to utilize both. But the fact is that (a)(17) does exist, and the legislature clearly intended that it not be subject to any prior durational residency requirement, and clearly intended that it be available to individuals claiming a military absence, who are to be given the benefit both of an (a)(17) absence and an (a)(3) absence. To disallow Mr. Heller the benefit of both here, in combination with each other, is inconsistent with the statute.[20]

Although Mr. Heller thinks that this result flows logically from the text and structure of the statute, that interpretation is also consistent with the legislative history.

The legislative history from 1998 when AS 43.23.008 was first enacted is sketchy, although what history there is indicates that the requirement was meant to be that six

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[20] One difficulty with the Department's application of the statute to Mr. Heller is that it effectively made the six-month durational residency requirement into a ten-plus-month durational residency requirement; he was being required to show that he had been a resident of Alaska for over *ten* months prior to the start of the qualifying year, i.e., a resident since Feb. 14, 2005.

months' residency should be completed by the point at which the applicant was *claiming* the allowable absence.[21] Although this is only marginal, it does support Mr. Heller's argument that he is allowed to claim a military absence as long as he had, at the point at which he needed to start claiming that military absence (i.e., when his "any reason consistent" absence period was exhausted), been a resident of Alaska for six months.

The more illuminating legislative history is from five years later. In 2003, the legislature enacted "An Act Relating to allowable absences for certain members of the

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[21] In response to a question about whether the six-month durational residency requirement was replacing the separate requirement that the applicant be a resident for the entire qualifying year, then-committee aide Tom Williams stated:

> Mr. Chairman, Senator Adams, first of all, the requirement that you be a resident for a particular calendar year to qualify for the dividend remains. This does not change that. This is a current regulatory provision that prevents someone from coming into the state for a few days, declaring residency, and then *immediately claiming* an allowable absence, departing for any of the fully allowable reasons. It simply says that you must be a resident for six consecutive months prior to *claiming* one of the fully allowable absences. It does in no way reduce the requirement that you must be a resident for the full qualifying year.
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> ...
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> And probably the clearer language, Mr. Chair, Senator Adams, is the amendment #1 language, that was the language being substituted. And it simply says "an individual may not claim an allowable absence under (a)(1) to (a)(13) [and those are the fully allowable absences] of this section unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state." You still have to be a resident for the entire qualifying year. It just says that during that qualifying year you can't be allowably absent for more than 180 days without having been a resident 6 months before you started to *claim* that absence.

Tape of hearing before Senate Finance Committee on H. 2, Feb. 9, 1998, Tape SFC-98 #24 (Testimony of Tom Williams). (This tape was cited to the superior court by counsel for the Department, who offered to supply it to both the court and counsel for appellant, R. 109, an offer counsel for appellant accepted, R. 70-71.)

armed forces and their spouses and dependents for purposes of eligibility for permanent fund dividends,"[22] amending paragraph (a)(17) into its current form.

Prior to the amendment, those claiming a military absence were allowed a maximum of 45 days for an additional "any reason consistent" absence.[23]

As a result of the amendment, military members were to be allowed 180 days of "any reason consistent" absences, the same as an individual claiming no other reason-specific allowable absences.

The measure was clearly pro-military; the legislature wanted to "demonstrate[e] your patriotic thank-you to the members of the Reserves, the Guards, and those in active duty military."[24]

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[22] SLA 2003, ch. 69. Other amendments to other portions of the statute have followed, but are not relevant to the discussion here. Later in 2003, the legislature changed the provision relating to terminally ill family members, SLA 2003, ch. 116. In 2006, the legislature amended the statute to create new allowable absences for Peace Corps and U.S. Olympic Team members, SLA 2006, ch. 42. (That was the version of the statute in effect when Mr. Heller applied in 2007). In 2008, another amendment created an allowable absence for participating in a student fellowship sponsored by the federal Departments of State or Education, SLA 2008, ch. 36. (That is the version of the statute in effect currently.)

[23] This was the same period allowed to most of the claimants under other categories of allowable absences. At the time, there were 14 categories, of which 13 were reason-specific and the 14th was the "any reason consistent" provision. Only those individuals claiming no other (reason-specific) allowable absences were allowed 180 days for an "any reason consistent" absence. Those claiming a reason-specific allowable absence were allowed 45 days for an "any reason consistent" absence, except that the two categories of individuals absent for educational reasons were allowed 120 days of "any reason consistent" absence.

[24] Minutes of Senate Finance Committee, April 17, 2003, on Senate Bill 148 (testimony of Mark Riehle, staffer to Sen. Cowdery). Available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00388&end_line=00529&time=0904&date=20030417&comm=FIN&house=S.

The specific situation prompting passage of the bill was a Navy Reserve member who had been activated to military service following Sep. 11, 2001. He served overseas for ten months, and then returned to the United States where he spent seven weeks in California caring for his quadriplegic brother. The "allowable absence" statute required that his dividend be denied, because his non-military absence had exceeded 45 days.

Although the amendment was intended in part to address that unfortunate Reservist's situation, it was not limited to that context. As then-Deputy Commissioner of the Department of Revenue Larry Persily put it:

> He further explained this would also cover people who are discharged from the military and have just 45 days to return to Alaska. It's the intent of the statute to have them return because they have been claiming Alaska as their home and collecting the dividend while they were stationed elsewhere. With this change they would have 180 days to return to Alaska after their discharge. As noted by the sponsor, it would also cover people called to active duty unexpectedly. Both populations would be covered.[25]

The reference to "people called to active duty unexpectedly" would refer to someone who might be ineligible before the amendment, but eligible after the amendment. This is the situation that might arise if a reservist, or an active-duty soldier on leave, were outside the state temporarily for non-military reasons consistent with an intent to return, for a period exceeding 45 days but less than 180 days, and then suddenly were to be called to active duty without an opportunity to return to Alaska first.

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[25] Minutes of the Senate State Affairs Committee, April 8, 2003, on Senate Bill 148, testimony of Larry Persily, Deputy Commissioner of Dept. of Revenue. Available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00993&end_line=01118&time=1540&date=20030408&comm=STA&house=S.

Encompassing this population, as was intended, would logically mean that the "any reason consistent" absence could precede, as well as follow, the military absence.

In another key passage from the legislative history, before the House Finance Committee,

> LARRY PERSILY, DEPUTY COMMISSIONER, DEPARTMENT OF REVENUE, provided information on the legislation. He observed that active duty days do not count against the recipient. The question is the amount of time permissible in addition to the allowable absence. Currently those in armed forces are only allowed to be absent [outside of their active service] for 45 days; students are allowed to be absent for up to 120 days [outside of the school year]. Residents are allowed 180 days or military active duty time plus 45 days. Someone called for 90 days of active duty, who took a 60-day vacation [150 total days] would be okay. *The bill changes the requirement to military time plus 180-days. Representative Berkowitz concluded that active duty would be like being in the state. Mr. Persily agreed that, as it pertains to eligibility, active time would be like being in the state.*[26]

Thus, the amendment was intended to allow active military members both their active service military time and an additional 180 days of "any consistent reason" time, without regard to whether the individual had met a 6-month durational residency requirement prior to the "any consistent reason" time; it was designed to protect military members sent out of the state for active duty; it was intended to cover more than one "population," not just those who were absent from Alaska subsequent to their allowable military absence period, but also those absent from Alaska prior to their allowable

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[26] Minutes of the House Finance Committee, May 17, 2003, on Senate Bill 148. testimony of Larry Persily, Deputy Commissioner of Dept. of Revenue (emphasis added). Available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00144&end_line=00205&time=1038&date=20030517&comm=FIN&house=H.

military absence period; and in essence it was intended to count active duty time as the equivalent of being in the state.

As a "remedial" statute, the amendment should be given a liberal interpretation in favor of the populations intended to be benefitted and the public interest being addressed.[27]

By virtue of the fact that Mr. Heller took concrete steps to establish his Alaska residency upon arriving in Alaska on 17 June 2005, his absence during the period 14 August 2005 to 31 December 2005 (and even further, to 10 February 2006) was allowable under paragraph (a)(17), *to which the six-months-prior residency requirement does not apply*. Thus, by the point at which those 180 days of "any reason consistent" absence were exhausted and he needed to start relying on his militarily-warranted absence, he had been a resident of Alaska for more than six months. Thus his absence during 2006 while in Iraq, whether dated from 1 January 2006 or from 10 February 2006, was an "allowable" absence under paragraph (a)(3), with the "six months prior" requirement fulfilled by his (a)(17)-statutorily-recognized residency in Alaska during

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[27] See *Berg v. Popham*, 113 P.3d 604, 608 (Alaska 2005) (CERCLA and Alaska counterpart to be construed liberally in light of remedial scheme); *Imperial Mfg. Ice Cold Coolers Inc. v. Shannon*, 101 P.3d 627, 630 (Alaska 2004) (Little Miller Act is remedial in nature and to be liberally construed to effectuate its purpose); *Western Alaska Bldg. & Constr. Trades Council v. Inn-Vestment Associates of Alaska Inc.*, 909 P.2d 330, 333 (Alaska 1996) ("Because this legislation is a remedial act for the benefit of construction workers, it is therefore liberally construed to effectuate its beneficent purpose"); *State Mechanical v. Liquid Air*, 665 P.2d 15, 20 (Alaska 1983) ("Being remedial and preventative in nature, the Occupational Safety and Health Act must be construed liberally in favor of the workers whom it was designed to protect"); *Gutterman v. First Nat'l Bank*, 597 P.2d 969, 972 (Alaska 1979) (exemption laws are remedial in character and should be liberally construed in favor of the debtor).

2005 – his active duty time being the equivalent of being in the state, in accordance with the legislative intent. That is the proper interpretation of the 2003 amendment as applied to Mr. Heller's situation.

The superior court opined that this would "render the 'before leaving' language in AS 43.23.008(b) meaningless with respect to the military."[28] This is a misapplication of that principle of statutory interpretation. The legislature can specify the circumstances under which a particular requirement is or is not applicable without making that requirement "meaningless." The "before leaving" language in AS 43.23.008(b) is inapplicable to "any other reason" absences under AS 43.23.008(a)(17); that does not render the "before leaving" language in (b) meaningless, just inapplicable to that particular situation, or those particular situations, because that is what the legislature specified. The legislature in 2003 wanted to make the full six months of the "any other reason" absence, together with its exemption from any prior durational residency requirement, available to those also claiming an allowable military absence, and passed language doing so. The court is being asked to give that language its logical application here. The six-month durational residency requirement will still have application to many other situations, but it should not deprive Mr. Heller of his entitlement to an allowable absence under the combined effect of (a)(3) and (a)(17).

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[28] Exc. 23.

Finally, this interpretation has the advantage of avoiding possible constitutional infirmity. [29] The nature of that constitutional infirmity is discussed in the following section.

III. To the extent that AS 43.23.008 imposed a durational residency requirement on Mr. Heller that he did not meet, it works an invidious and unconstitutional discrimination, in violation of his rights to equal protection, his right to travel, and his right to keep and bear arms, under the Alaska and United States Constitutions

If this Court agrees with the statutory interpretation point above, there is no need to reach the constitutional arguments. This section may still be relevant to the interpretation, however, since this Court should if possible construe the applicable regulations and statutes so as to avoid the danger of unconstitutionality.

This court has noted that "the right to move about" is fundamental.[30] "[T]he United States Supreme Court has said: 'Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty' protected by the Fourteenth Amendment to the United States Constitution."[31]

A. Unfortunately, Alaska's legal history reflects a marked antipathy towards non-residents, towards recent residents, and towards military personnel.

Apparently due largely to historical reasons,[32] Alaska seems to have presented

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[29] *Alaskans for a Common Language, Inc. v. Kritz,* 170 P.3d 183, 192 (Alaska 2007); *Dept of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

[30] *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 264 (Alaska 2004).

[31] *Id.*, quoting *Williams v. Fears*, 179 U.S. 270 (1900).

[32] Exploitation of Alaska by non-resident interests was a significant cause of resentment. "The civil war between non-resident and resident interests became the most divisive and consistent dynamic in Alaskan politics," T. Cole, "Alaska's Civil War: Residents vs. Non-Residents," in "Blinded by Riches: the Permanent Funding Problem

more that its share of issues involving the inclination of its laws to favor residents over non-residents, and to favor long-term residents over short-term residents. The United States Supreme Court has on several occasions invalidated various Alaska territorial and state statutes that unduly favored Alaska residents or that created durational residency requirements.[33] This Court has also struck down durational residency requirements in several instances,[34] although it has also upheld parts of such statutes that the United

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and the Prudhoe Bay Effect" (2004, Institute of Social & Economic Research), available at: http://www.alaskaneconomy.uaa.alaska.edu/blindedbyriches.pdf.

[33] See *Mullany v. Anderson*, 342 U.S. 415 (1952) (invalidating Territorial law under which resident commercial fishermen paid $50 for licenses available to resident commercial fishermen for $5); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (invalidating "Alaska hire" law favoring residents over non-residents); *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating Permanent Fund Dividend plan under which each adult resident received one dividend unit for each year of residency subsequent to 1959).

[34] See *State v. Van Dort*, 502 P.2d 453 (Alaska 1972) (invalidating 75-day voter residency requirement); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (invalidating hiring preferences for job applicants with one-year state residency); *State v. Adams*, 522 P.2d 1125 (Alaska 1974) (invalidating one-year durational residency requirement for filing a divorce action); *Williams v. Zobel*, 619 P.2d 422 (Alaska 1980) (invalidating income tax statute exempting all income for individuals who had filed an Alaska tax return reporting gross income from sources within Alaska for three or more years); *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264 (Alaska 1984) (invalidating statute which diminished workers' compensation benefits for recipients who moved out of Alaska); *Schaefer v. Vest*, 680 P.2d 1169 (Alaska 1984) (invalidating statute requiring domicile in Alaska on or before Jan. 3, 1959 to qualify for Alaska Longevity Bonus); *Carlson v. State CFEC,* 919 P.2d 1337 (Alaska 1996) (invalidating statute tripling commercial fishing license fees for non-residents). See also *Peloza v. Freas,* 871 P.2d 687 (Alaska 1994) (invalidating municipal charter provision requiring three-year durational residency to run for city council); *Gilman v. Martin*, 662 P.2d 120 (Alaska 1983) (invalidating municipal ordinance requiring one-year residency in Borough for participation in land lottery); *Noll v. Alaska Bar Association*, 649 P.2d 241 (Alaska 1982) (invaliding Bar Rule imposing in-state domicile requirement to take bar examination).

States Supreme Court has later invalidated.[35]

Historically, military residents of Alaska have been a particular target for such treatment. During territorial days, it was held that a soldier stationed at a base within Alaska could not become an "inhabitant" or "resident" of Alaska for purposes of filing a divorce case, notwithstanding the fact that the soldier had lived in Alaska for four years and had decided to make Alaska his permanent home shortly after arriving.[36] Another soldier, despite the fact that he had lived in Anchorage for over a year with the intention to make it his domicile, was obliged to go to court to force the Territory to grant him a hunting license.[37] In fact, Alaska's Constitution, albeit in other respects an enlightened, progressive and judicious document, enshrined in its voter redistricting sections a discriminatory provision against military personnel that eventually had to be revised.[38]

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[35] In the *Hicklin v. Orbeck* litigation, the Alaska Supreme Court struck down the one-year durational residency requirement of the "Alaska Hire" law, but upheld the rest of the statute favoring residents over non-residents. The United States Supreme Court ruled that the case was not moot by the invalidation of the durational residency requirement, and that the resident preference violated the Privileges and Immunities Clause, *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

The *Zobel* case attacked the constitutionality of two statutes, one of which granted a state income tax exemption to individuals who had filed Alaska tax returns for three or more years, the other of which geared an individual's PFD amount to the individual's years of residency since statehood. The Alaska Supreme Court invalidated the tax statute, 619 P.2d 422, but sustained the PFD payment scheme, 619 P.2d 448. The United States Supreme Court overturned the PFD payment provisions, *Zobel v. Williams*, 457 U.S. 55 (1982).

[36] *Wilson v. Wilson*, 10 Alaska 616 (D. Alaska 1945).

[37] *Buckner v. DuFresne*, 10 Alaska 121 (D. Alaska 1941).

[38] Alaska Constitution Article VI, §3 formerly provided: "Reapportionment shall be based upon *civilian* population within each election district as reported by the census" (emphasis added). (This was in some respects reminiscent of United States Constitution

This forms the backdrop against which the constitutionality of this particular provision has to be assessed.

B. The provision at issue here is a durational residency requirement rather than a residency requirement.

It is important to note that, under the current structure of the PFD statutes, absences beyond the parameters of the "allowable absences" of AS 43.23.008 do not make one a non-resident for PFD purposes; they make one a resident who is ineligible for a PFD. That is, the specific provision at issue here does not draw a distinction between residents and non-residents; it draws a distinction between two categories of residents, i.e., residents able to claim an allowable absence and residents not able to claim an allowable absence.[39]

Article I, §2, directing the representatives be apportioned among the States according to their numbers, "determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.") The Alaska Supreme Court invalidated the categorical exclusion of military personnel from the census data for redistricting purposes on federal equal protection grounds in *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972). In subsequent redistricting cases, the Alaska Supreme Court upheld plans that partially discounted military populations by use of voter registration statistics, *Groh v. Egan*, 526 P.2d 863 (Alaska 1974) and by use of surveys of military personnel regarding residency, *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska 1983). Following the 1990 census, then-Governor Hickel decided not to discount military population figures at all, and his plan was then attacked for failing to do so, but the Alaska Supreme Court upheld the plan on that point, *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992). Prior to the 2000 census, Alaska voters amended the constitution, through Legislative Resolve No. 74, to rewrite Article VI completely. See *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). The current constitutional provision requires the newly-created Redistricting Board to base reapportionment "upon the population of each house and senate district as reported by the official decennial census of the United States" with no mention of disparate treatment of the military. Alaska Constitution Article VI, §3.

[39] As noted, Mr. Heller's status as an Alaska resident during 2006 is not disputed, Exc. 11 ("nothing in the record established in this appeal suggests that he severed his

Prior to 1998, the statute was structured differently; the then-list of cognizable absences was included in the definition of "resident" for PFD purposes,[40] such that

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underlying Alaska residency when he went to Iraq; only his PFD eligibility appears to have been affected"); Exc. 19 (Mr. Heller "met the general residency requirements under AS 01.10.055 and the definition of 'state resident' in AS 43.23.095(7)").

Being a "resident" for PFD purposes during the qualifying year fulfills the requirement in AS 43.23.005(a)(3), but does not fulfill the separate eligibility requirement in AS 43.23.005(a)(6) that any physical absences during the year be shown to have been allowable. Thus, demonstrating residency within the meaning of the PFD statute does not suffice, because some residents are not eligible.

[40] Former AS 43.23.095(8) read:

> "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain permanently in the state under the requirements of AS 01.10.055 , and is absent only for any of the following reasons:
>
> (A) vocational, professional, or other specific education for which a comparable program was not reasonably available in the state;
>
> (B) secondary or postsecondary education;
>
> (C) military service;
>
> (D) medical treatment;
>
> (E) service in Congress;
>
> (F) other reasons which the commissioner may establish by regulation;
>
> (G) service in the Peace Corps;
>
> (H) to care for the individual's terminally ill parent, spouse, sibling, child, or stepchild;
>
> (I) for up to 220 days to settle the estate of the individual's deceased parent, spouse, sibling, child, or stepchild; or
>
> (J) to care for a parent, spouse, sibling, child, or stepchild with a critical life-threatening illness whose treatment plan, as recommended by the attending physician, requires travel outside the state for treatment at a medical specialty complex; ...

The 1998 amendment eliminated all the text following the second reference to AS 01.10.055. (It also substituted "indefinitely" for "permanently" in both appearances in the first paragraph.) SLA 1998, ch. 44, sec. 7. It enacted also enacted the new "allowable absences" statute, AS 43.23.008, and added to the general eligibility provision (AS 43.23.005(a)) an eligibility requirement in subsection (6) (separate from requirement of residency during the qualifying year, which appeared in subsection (3)) that the applicant "was at all times during the qualifying year, physically present in the state or, if

absences beyond the cognizable list did make one a non-resident for PFD purposes. The 1998 change made compliance with the new allowable absence statute (AS 43.23.008) a separate eligibility requirement from that of residency. This was intentional:

> The bill also makes a number of technical changes all of which we support. It moves the allowable absences provisions out of the definition and into the body of the legislation, which allows us to tell people, even though you're a missionary and out of state and believe that you're an Alaskan, we don't have to tell them they're not a resident. What we can tell them, if this legislation goes through, is that, even though they may really be a resident, they don't qualify for a dividend, because they're just not on the list. [41]

The statute as currently structured does not purport to use durational residency to distinguish residents from non-residents; instead it creates two subdivisions of residents, those eligible and ineligible for an allowable absence, based in part on durational residency. "A durational residency requirement, which draws a distinction between new and old residents based on the length of their residency, must be distinguished from a residency requirement, which draws a distinction between residents and nonresidents. Generally, a state has much more authority to draw distinctions between residents and nonresidents than between long- and short-term residents."[42] Distinctions between long- and short-term residents "bestow[] a sort of second-class citizenship on newcomers."[43]

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absent, was absent only as allowed in AS 43.23.008." SLA 1998, ch. 44, sec. 2. As such, residency and allowability of absences became two separate criteria for eligibility.

[41] Tape of hearing before Senate Finance Committee on H. 2, Feb. 9, 1998, Tape SFC-98 #24, testimony of Deborah Vogt (Dept. of Law). (This tape was cited to the superior court by counsel for the Department, who offered to supply it to both the court and counsel for appellant, R. 109, an offer counsel for appellant accepted, R. 70-71.).

[42] *Williams v. Zobel*, 619 P.2d 448, 451 n. 7 (Alaska 1981), reversed on other grounds, *Zobel v. Williams*, 457 U.S. 55 (1982). See also *Hicklin v. Orbeck*, 565 P.2d 159, 166

As such, Mr. Heller is not being discriminated against as a non-resident; he is being discriminated against *as a resident* whose allowable absence is not being recognized because of the recency of his residence, having failed to meet a durational residency requirement which (under the State's application of the statute to him) is a prerequisite to the allowability of that absence.

C. The denial of Mr. Heller's 2007 dividend violates his federal rights under the equal protection clause of the Fourteenth Amendment, the federal constitutional right to travel, and his Second Amendment right to keep and bear arms.

Besides the well-known *Zobel*[44] case that struck down Alaska's initial PFD

(Alaska 1977), rev'd on other grounds, 437 U.S. 518 (1978) ("A residency requirement does not penalize the right of interstate migration, unlike a durational residency requirement, because it does not burden those who have recently migrated interstate"). See also *Gilman v. Martin,* 662 P.2d 120, 125 (Alaska 1983 ("The right to interstate or intrastate travel is impinged upon only when a governmental entity creates distinctions between residents based upon the duration of their residency, and not when distinctions are created between residents and nonresidents").

[43] *Public Employees' Retirement System v. Gallant,* 153 P.3d 346, 349 (Alaska 2007).

[44] *Zobel v. Williams*, 457 U.S. 55 (1982). The distribution scheme in *Zobel* was not a durational residency requirement per se, but a durational residency link, under which the amount of the PFD would be determined by the applicant's years of residency since Statehood. The Alaska Supreme Court, announcing a departure from its prior decisions, upheld the program, 619 P.2d 448. Before the Supreme Court, the State argued that the program's distinctions created a financial incentive for individuals to establish and maintain state residence, encouraged prudent management of the fund, and apportioned benefits in recognition of undefined tangible and intangible contributions made by the citizens during their years of residency. The Court held that: (1) the first two state objectives were not rationally related to the distinctions the state sought to make between newer residents and those who had been in the state since 1959 (a conclusion the Alaska Supreme Court had reached as well); and (2) the past contributions argument (which the Alaska Supreme Court had accepted) did not present a legitimate state purpose, having been rejected by the Court before, and opening up the possibility of state citizens being treated different for many benefits.

distribution scheme, there are three United States Supreme Court rulings that need to be analyzed in assessing the federal constitutional questions presented here.

The first is *Hooper v. Bernalillo County Assessor*, decided in 1981.[45] New Mexico law allowed a veterans' property tax exemption of up to $2000, but only to veterans who had been state residents before May 8, 1976. The asserted goals were encouraging veterans to settle in the state and to reward "established" resident veterans for their military service. A Vietnam veteran and his wife, who had established residence in New Mexico in 1981, applied for a $ 2,000 veterans' property tax exemption for the 1983 tax year, which was denied because they had not been state residents before May 8, 1976. The county valuation board upheld the denial and the New Mexico Court of Appeals affirmed, holding that the statute was consistent with equal protection principles because it reflected legitimate state purposes and bore a reasonable relationship to those purposes.

The United States Supreme Court reversed. The majority[46] held that the statute violated the equal protection clause of the United States Constitution, under the "minimum rationality" test. The statute's distinction between different classes of resident veterans was not rationally related to the asserted goal of encouraging veterans to settle in

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The lesson of *Zobel* for this case should be clear: it is not a permissible state purpose to value the contributions of its residents (including, Mr. Heller submits, its resident soldiers) more highly based how long the resident has been a resident.

[45] *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

[46] Three justices dissented. Justice Powell did not participate. Justice Brennan, while concurring in the five-justice majority opinion, also relied on the concurring opinion he had written in *Zobel v. Williams*, 457 U.S. 55 (1982).

the state; further, even assuming the state could legitimately grant benefits on the basis of a coincidence between military service and past residence, the statute rewarded past residence regardless of whether that past residence had coincided with military service or not, and thus was not rationally related to that goal, legitimate or not.

The implication of the *Hooper* decision for this case is clear. The particular ruling in this case creates a durational residency distinction between two classes of Alaska military personnel – those who have been residents for six months prior to being deployed, and those who have not. But *Hooper* teaches that:

> The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976.[47]

Just so, arrival in Alaska after Feb. 19, 2005, cannot legitimately justify discrimination against those members of the Stryker Brigade who took steps, as Mr. Heller did, to establish bona fide residency within Alaska. [48] Mr. Heller, analogously to Mr. Hooper,

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[47] *Hooper*, 472 U.S. at 623.

[48] Here, the magic date is February 19, 2005, six months prior to the deployment of the 172nd Stryker Brigade. Members of that who had been residents of in Alaska prior to that date could be eligible for 2007 dividends, whereas their fellow soldiers not stationed in Alaska until after that date could not be, at least not under the statute as applied to Mr. Heller here.

To look at it another way: had the military delayed in deploying Mr. Heller from Alaska to Iraq until December 2005, his durational residency in Alaska from June to December 2005 would have entitled him to a 2007 dividend. Also, had the military sent him back to Alaska prior to June 2006, rather than extending his deployment in Iraq until December 2006, then too he would have been eligible for a 2007 dividend.

became one of Alaska's 'own' in June 2005, and remained so after his deployment on 19 August 2005, and throughout 2006.

Further, the Alaska law disqualifying Mr. Heller imposes a past residence requirement, regardless of whether that coincides with military service or not, just as did the invalid statute in *Hooper*. It does not matter whether the soldier was a soldier for the six months prior to departure; it matters only whether s/he was in Alaska.

Mr. Hooper's case involved a tax exemption, whereas Mr. Heller's involves a PFD, but that distinction is irrelevant. Equal protection applies to PFD's as well as tax exemptions. Indeed, in Mr. Hooper's case, the Court relied extensively on its ruling in the *Zobel* PFD case:

> Stripped of its asserted justifications, the New Mexico statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*. [Footnote: In *Zobel* v. *Williams*, the Court held that an Alaska statute that used length of state residence to calculate distribution of dividends from the State's oil reserves violated the Equal Protection Clause. We made clear that the statute's only conceivable purpose -- "to reward citizens for past contributions" -- is "not a legitimate state purpose." 457 U.S., at 63; see id., at 68 (BRENNAN, J., concurring).] The New Mexico statute, by singling out previous residents for the tax exemption, rewards only those citizens for their "past contributions" toward our Nation's military effort in Vietnam. *Zobel* teaches that such an objective is "not a legitimate state purpose."

Hooper, 472 at 622-23 (footnote included in text; other citations omitted).

The second case, *Soto-Lopez*,[49] was decided the following year. A New York state constitutional provision granted a civil service employment preference, in the form of points added to examination scores, to New York residents who (1) were honorably discharged veterans of the United States Armed Forces, (2) served during time of war,

[49] *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

and (3) were residents of New York when they entered military service. Two veterans who had passed the New York City civil service examinations were denied the veterans' preference because they had been residents of Puerto Rico at the time they enlisted. The two veterans sued the city, alleging that the prior residence requirement violated the equal protection clause of the Fourteenth Amendment and the constitutionally protected right to travel. The federal district court dismissed the action, based upon a prior 1974 summary affirmance by the United States Supreme Court of a decision rejecting the same challenges to the same provision.[50] The Second Circuit reversed, expressing the view that the subsequent 1982 decision in *Zobel v Williams*[51] superseded the 1974 summary affirmance, and required a conclusion that the preference violated both the equal protection clause and the right to travel.

The United States Supreme Court affirmed the Second Circuit in invalidating the law. Four of the justices (including Justice Powell, who had not participated in the *Hooper* case), opined that the law's infringement on the constitutionally protected right to migrate required an intensified equal-protection scrutiny, and that none of the state's asserted interests were sufficiently compelling to justify the penalty imposed on those who had exercised their right to migrate. Two of the justices opined that the requirement violated the equal protection clause under the minimum rationality test. [52] Three justices

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[50] *August v Bronstein*, 417 U.S. 901 (1974).

[51] 457 U.S. 55 (1982).

[52] Justice White, concurring in the judgment, wrote that the right to travel was not sufficiently implicated in the case to require heightened scrutiny of the prior residence requirement, but that the requirement denied equal protection because the classification

dissented, opining that heightened scrutiny was not appropriate under the limited impact of the requirement, and the requirement could be rationally related to a legitimate state purpose of serving as an expression of gratitude to veterans who entered military service as New York residents.

The implications of the *Soto-Lopez* ruling for Mr. Heller's case are also clear. New York's program utilized a variable date scheme, which could be different for veteran to veteran, depending on when they enlisted, just as the date under scrutiny here is a sliding date, depending on the interval between the establishment of Alaska residency and the deployment. Under *Soto-Lopez*, the distinction to which Mr. Heller is being subjected violates equal protection under both the "rational basis" federal equal protection test and the "heightened scrutiny" federal equal protection test.

Third, and more recently, in *Saenz v. Roe* [53] in 1999, the Supreme Court struck down a California statute that limited new residents' welfare benefits to the amount receivable in the state of former residence – a scheme that had explicit Congressional authorization in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The Court held that the statute violated the interstate travel right, under the "citizenship clause" of §1 of the Fourteenth Amendment, of a newly arrived citizen of a state to the same privileges and immunities enjoyed by other citizens of the state, because the citizenship clause did not allow for degrees of citizenship based on length of

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was irrational. Chief Justice Burger, concurring in the judgment, wrote that since the law lacked a rational basis, the Supreme Court's inquiry should end there, without analyzing whether heightened scrutiny was necessary.

[53] *Saenz v. Roe,* 526 U.S. 489 (1999).

residence and because the state's legitimate interest in saving money provided no justification for discrimination among equally eligible citizens. The Court noted:

> [T]he "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. Indeed, ... the right is so important that it is "assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed to the Constitution to us all." ...
>
> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. ...
>
> Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. ...
>
> Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty. ...
>
> [T]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: "That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence."[54]

The facts of Mr. Heller's case are just too close to the facts of the *Hooper* and *Soto-Lopez* cases to distinguish them, and the language in *Saenz v. Roe* is too strong to set aside. There is little question but that the Supreme Court would rule that, where a soldier's entitlement to an "allowable absence" turns on a durational residency

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[54] *Saenz v. Roe*, 526 U.S. 489, 498, 503-04, 504-505, 506 (1999) (citations omitted).

requirement favoring one set of resident soldiers over another, the statutory scheme violates federal equal protection. This Court should so rule.[55]

As noted in the heading, Mr. Heller is also asserting his rights under the Second Amendment. Currently, the Second Amendment protects citizens' rights against Federal action only, not state action.[56] However, in the recent case that established the Second Amendment's application to an individual right to keep and bear arms, there is a hint that this holding may be revisited.[57] Now the United States Supreme Court has granted

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[55] Other state courts have been faced with similar statutory distinctions between similarly situated veterans and have, as difficult as it may have been, struck them down. Alaska's legislature, like that of New York, tends to favor long-term residents over more recent residents; the legislatures of some southern states preferred Confederate veterans over other veterans, and gave them certain prerogatives, which those States' courts, even though sympathetic with the sentiment, struck down:

> More specifically, it seems evident to my mind that the distinction necessarily implied by this exemption between Confederate veterans and Union veterans of the Civil War, to say nothing of veterans of other wars, is invidious, and peculiarly opposed to the spirit and letter of the fourteenth amendment. If a Confederate veteran and a Union veteran should be found pursuing side by side, without license, any one of the taxed vocations, and both should be prosecuted for not having a paid license from the state, I do not see how a court of this state could acquit the one upon proof that he is a Confederate veteran, and at the same time convict the other because he is only a Union veteran, without a palpable violation of the provision that guarantees to all the equal protection of the laws. It may be conceded that the unequal operation of this revenue law is concretely unimportant, and, sentimentally, most agreeable. But it none the less violates a principle, and great organic principles cannot be suspended in particular cases except at the peril of their ultimate destruction.

McLendon v. State, 60 So. 392 (Ala. 1912).

[56] *United States v. Cruikshank*, 92 U.S. 542 (1875).

[57] See *District of Columbia v. Heller*, __ U.S. __, ___ fn. 23, 128 S.Ct. 2783, 2813 fn. 23, 171 L.Ed.2d 637, 674 fn. 23 (2008).

certiorari in a case that presents exactly that issue;[58] predicting that the U.S. Supreme Court will overrule *Cruikshank*, Mr. Heller asserts that the Department's ruling violates his Second Amendment rights as well.

The Court in its 2008 *Heller* opinion (no relation) did not specify a level of scrutiny to be applied in the Second Amendment context, holding that the ban at issue there would fail constitutional muster "under any of the standards of scrutiny that we have applied to enumerated constitutional rights,"[59] but the opinion does explicitly reject application of the "rational basis" level of scrutiny.[60] The opinion acknowledges that the right under the Second Amendment is "not unlimited" and does not encompass "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"[61] but the examples the Court cites of likely permissible laws[62] do not encompass the type of regulation at issue here. Indeed, even without the 2008 *Heller* ruling, because (this) Mr. Heller's right to keep and bear arms as a military soldier was clearly encompassed within the prefatory clause, it would seem to be squarely within the scope of the Second Amendment, even in the views taken by the four dissenting Justices

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[58] *McDonald v. Chicago*, ___ U.S. ___, 174 L.Ed.2d 632 (2009) (certiorari granted).

[59] *Dist. of Columbia v. Heller*, 171 L.Ed.2d at 679.

[60] *Dist. of Columbia v. Heller*, 171 L.Ed.2d at 679 fn. 27.

[61] *Dist. of Columbia v. Heller*, 171 L.Ed.2d at 678.

[62] The Court mentioned prohibitions on carrying concealed weapons; prohibitions on felons and the mentally ill; forbidding firearms in sensitive places such as schools and government buildings; imposition of conditions and qualifications on commercial sales; and prohibitions on "dangerous and unusual" weapons. *Dist. of Columbia v. Heller*, 171 L.Ed.2d at 678. This was not intended to be "exhaustive," *id.*

in that case.[63] As such, the Second Amendment ramifications of this case take it out of the lowest level of "rational basis" scrutiny and, regardless of whether one assigns the case to a "fundamental right" strict scrutiny or a "quasi-suspect" classification for equal protection purposes, the durational residency requirement here, functioning to the detriment of recent Alaska residents fulfilling their military obligations and unable to fulfill the statute's durational residency requirement because of those obligations, is not consistent with federal constitutional standards.

D. The denial of Mr. Heller's 2007 dividend violates his rights as an Alaskan under the Alaska Constitution's equal protection clause, right to travel, and right to keep and bear arms.

A separate analysis applies to Alaska's constitutional equal protection clause (Art. I, §1), which "protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause":[64]

> In analyzing a challenged law under Alaska's equal protection provision, we first determine what level of scrutiny to apply, using Alaska's "sliding scale" standard. The "weight [that] should be afforded the constitutional interest impaired by the challenged enactment" is "the most important variable in fixing the appropriate level of review."[65]

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[63] "The question presented by this case is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right. Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes." *Dist. of Columbia v. Heller*, 171 L.Ed.2d at 684 (Stevens, J., dissenting).

[64] *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 909 (Alaska 2001).

[65] *Id.*, 28 P.3d at 909.

This Court has occasionally made the observation that there may be only three "stops" on Alaska's sliding scale.[66] The lowest[67] level of scrutiny is used when the individual rights at stake lie "at the low end of the continuum of interests protected by the equal protection clause";[68] a more exacting or "close" scrutiny is used when the individual rights at stake are "important" albeit not "fundamental";[69] and the most exacting or "strict" scrutiny when the individual rights at stake are fundamental.

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[66] *Gonzales v. Safeway Stores*, 882 P.2d 389, 396 (Alaska 1994); *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268 (Alaska 2003). These opinions further seem to equate the middle "stop" with the level of scrutiny used for "quasi-suspect" classifications (gender, illegitimacy) under federal equal protection analysis, *Stanek*, 81 P.3d at 270 fn. 7. This seems to gloss over an important distinction. Federal mid-level scrutiny inquires "whether the enactment bears a substantial relationship to the accomplishment of its purpose," which is the "fit" required by Alaska's lowest level of scrutiny (whether "the classification bears a fair and substantial relationship to [the government's] reason)." It seems to inaccurately dilute Alaska's mid-level to characterize it as requiring only a "substantial relationship" fit; Alaska case law for intermediate scrutiny requires a "close nexus" between the enactment and the "important" interest it serves. See *State by Depts of Transp. & Labor v. Enserch Alaska Constr.*, 787 P.2d 624, 633 fn. 17 (Alaska 1989).

[67] This Court has noted that the requirement sometimes listed in equal protection cases that the enactment be "reasonable and not arbitrary" could be seen as a "fourth level of equal protection analysis," but that it need not be part of equal protection analysis at all, because it is a due process requirement, and "if an enactment requiring only the minimum level of scrutiny could ever be substantially related to a legitimate state interest and still be unreasonable or arbitrary, we would find that it denied due process, not equal protection." *State by Depts of Transp. & Labor v. Enserch Alaska Constr.*, 787 P.2d 624, 632 fn. 12 (Alaska 1989).

[68] *Premera Blue Cross v. State,* 171 P.3d 1110, 1112 (Alaska 2007). This Court has expressed a preference for this to be referred to as the "fair and substantial relationship" test, rather than the "legitimate reason" test, *Lot 04B & 5C, Block 83 Townsite v. Fairbanks N. Star Borough,* 208 P.3d 188, 192 fn. 16 (Alaska 2009).

[69] *Patrick v. Lynden Transport*, 765 P.2d 1375, 1379 (Alaska 1988) ("even though access to a court may not be a fundamental right, on Alaska's sliding equal protection scale the right is an important one. Statutory infringement upon that right is deserving of close scrutiny"). See also *State by Depts of Transp. & Labor v. Enserch Alaska Constr.*,

"Relaxed" scrutiny requires the government to show only a "legitimate" purpose, and the required means-to-ends fit is that the classification bear a "fair and substantial relationship" to that (legitimate) purpose.[70]

"Close" scrutiny, when the individual rights at stake are "important" albeit not "fundamental," requires a showing of an "important" legislative purpose, and the required fit is that "the nexus between the enactment and the important interest it serves be close."[71]

Strict scrutiny, where the individual rights at stake are "fundamental," requires a "compelling" purpose, and the fit required is that the classification must be the "least restrictive alternative" to achieving that compelling purpose.[72]

Assessing the constitutional right being impaired by the challenged enactment, the right of interstate migration is part of the Alaska Constitution.[73] Up until 1980, the

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787 P.2d 624, 632 (Alaska 1989) (right to earn a living is not a fundamental right under federal equal protection clause, but right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes).

[70] *Alaska Civil Liberties Union v. State,* 122 P.3d 781, 790 (Alaska 2005). Alaska's standard differs from the federal low-tier review standard in part because it requires the relationship to be "substantial" rather than merely "rational," *id.* at 791, and in part because the court is not to "hypothesize facts which will sustain otherwise questionable legislation," *Patrick v. Lynden Transport*, 765 P.2d 1375, 1377 (Alaska 1988).

[71] *Bridges v. Banner Health*, 201 P.3d 484, 493-94 (Alaska 2008) ("Under the sliding scale approach, burdening an important right must be justified by an important governmental objective, and there must be a close nexus between that objective and the means chosen to accomplish it").

[72] *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 266 (Alaska 2004) ("in order for the ordinance to survive strict scrutiny, the classification created must be narrowly tailored to promote a compelling governmental interest and be the least restrictive means available to vindicate that interest").

Alaska Supreme Court fairly consistently applied the "compelling state interest" test in reviewing durational residence requirements.[74] In the 1980 ruling in *Williams v. Zobel*, it was announced, "We will no longer regard all durational residency requirements as automatically triggering strict scrutiny and requiring a showing that such a classification is absolutely necessary to promote a compelling state interest. Instead, we will balance the nature and extent of the infringement on this right caused by a classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification."[75] The first application of that new test, in *Zobel* itself, led to the conclusion by this Court that the right to migrate into Alaska was not penalized in any respect by the legislative scheme at issue, and thus the lowest level of review should apply, under which the statute was upheld. The United States Supreme Court reversed, finding that the statute did not survive the federal equal protection clause. Thus, the new test clearly had its shortcomings.

More recently, the Alaska Supreme Court seems to be expressing some second thoughts, characterizing this approach to right-to-travel cases as "awkward" and "cumbersome."[76]

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[73] *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984).

[74] *Id* at 274.

[75] *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), reversed, *Zobel v. Williams*, 457 U.S. 55 (1982).

[76] "In order to determine the degree of scrutiny that should be applied in cases claiming an infringement of the right to travel, we balance the extent of the infringement against the purpose of the statute and the closeness of the relationship between the means employed by the statute to further that purpose and the purpose itself. There is an

But, notwithstanding this, the "balancing" test is still applicable to assessing the infringement of the state constitutional right to travel.

Thus, where the government, by selectively denying a benefit to those who exercise a constitutional right to travel, may effectively deter the exercise of that right, the burden on the state to justify the legislation is a very high one.[77] But in some settings the Court has held that it can apply more "relaxed" scrutiny where the infringement on the right to travel is relatively small and would not be likely to deter a person from traveling.[78] This Court's opinions have not laid out clear criteria for determining whether a burden on the right to travel should be regarded as slight or significant.

The *Zobel* era rulings of the Alaska Supreme Court held that an individual's interest in the PFD, in and of itself, was merely economic, entitled only to minimum protection under state equal protection analysis. In its 1980 decision in *Williams v. Zobel* itself, the Alaska Supreme Court held that the dividend was not a "basic necessity," and

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awkwardness to this approach. In order to determine what degree of scrutiny to employ, we must address the whole range of questions posed by our equal protection methodology. In other words, we have to quantify (a) the importance of the state's purpose, (b) the extent of the infringement on the right to travel, and (c) the closeness of the relationship between the means employed by the statute and its purpose. The answers to these questions determine both the degree of scrutiny that we should employ and whether the challenged statute violates the equal protection clause. [Footnote: Although this approach is cumbersome, we will continue to use it because it requires that we examine in some form the factors that should be examined in cases of this nature.]" *Public Employees Ret. Sys. v. Gallant*, 153 P.2d 346, 350 (Alaska 2007).

[77] *State v. Planned Parenthood of Alaska,* 28 P.3d 904, 909-10 (Alaska 2001), citing *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 231 (Alaska 1984).

[78] *State v. Planned Parenthood of Alaska,* 28 P.3d 904, 909 fn. 38 (Alaska 2001), citing *Church v. State Dept of Revenue*, 973 P.2d 1125, 1131 (Alaska 1999).

the right to receive it not a "fundamental right."[79] Although the status of the *Zobel* ruling might have been questionable in light of its reversal by the United States Supreme Court,[80] this Court later, in 1991, held again that an individual's interest in the PFD was "at the low end of our sliding scale," in *State v. Anthony*[81] (although that case dealt, not with interstate travel, but the ineligibility of incarcerated felons).[82] Recent developments may have called some of these pronouncements into question,[83] but this Court has not yet found that the PFD in and of itself triggers any heightened scrutiny.

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[79] *Williams v. Zobel,* 619 P.2d 448, 455, 457 (Alaska 1980).

[80] The United States Supreme Court, while reversing the decision, did not have to decide whether enhanced scrutiny was required, since it held that the statutory scheme was violative of equal protection under the rational basis standard. *Zobel v. Williams,* 457 U.S. 55 (1982).

[81] *State v. Anthony*, 810 P. 2d 155, 159 (Alaska 1991).

[82] This Court later used the minimal scrutiny test in a case in which the appellants tried to invoke a right to interstate travel, but the Court found "the issues in this case do not implicate the right to travel," *Underwood v. State,* 881 P.2d 322 (Alaska 1994). This predated the 1999 ruling in *Saenz v. Roe*, supra pages 22-24.

[83] In 2008, as part of a package of energy assistance legislation to help Alaskans cope with skyrocketing energy costs (ch. 2, 4SSLA 2008), the legislature chose to increase each PFD by $1200, bringing it closer to the concept of a "basic necessity." The PFD has a pronounced and vital effect in rural Alaska. "Another important economic effect of the PFD is the stable flow of cash it provides for rural Alaska where per capita money incomes are among the lowest in the U.S. and non-government sources of income are variable and uncertain. In some Census Areas, the PFD now directly accounts for more than 10 percent of personal income." S. Goldsmith, "The Alaska Permanent Fund Dividend Program," (University of Alberta, Edmonton, September 2001), available at: http://www.iser.uaa.alaska.edu/iser/people/scott/Reports/The%20Alaska%20Permanent%20Fund%20Dividend%20Program.pdf. Although not means-based, the PFD has significance for the poor: "The dividend has had a dramatic effect making the distribution of income in Alaska among the most equitable in the entire United States. This is suggested by data reported by the Economic Policy Institute showing that in the last 10 years the income of the poorest fifth of Alaska families increased 28 percent compared to a 7 percent increase for the richest fifth. In contrast for the entire United States over the

But that does not mean that every PFD equal protection case is relegated to the minimum scrutiny test; particular cases may entail other rights that require a higher level of scrutiny. For example, in *Dept. of Revenue v. Andrade*[84] in 2001, various legal immigrant aliens were denied PFD's on the ground that they could not legally form the intent to remain in Alaska indefinitely, based on the particular category of their immigrant status. They attacked the constitutionality of the statute and regulation requiring this conclusion, as a matter of equal protection, arguing in part that alienage was a suspect class. After the case was commenced, the Department repealed its regulation and enacted another emergency regulation, interpreting the statute in a way that avoided the constitutional problem. In a complex and lengthy ruling, the Alaska Supreme Court found that the statute itself was not unconstitutional because it could be interpreted to conform to constitutional requirements, but it did find that the repealed regulation had violated equal protection. Thus, the fact that the lawsuit involved Permanent Fund Dividends did not prevent this Court from applying heightened scrutiny,[85] and invalidating the prior regulation, based on the gravity of the other rights

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same period the increase for the poorest fifth was 12 percent compared to 26 percent for the richest fifth." S. Goldsmith, "The Alaska Permanent Fund Dividend: An Experiment in Wealth Distribution," 9th Congress of Basic Income European Network, Geneva, Switzerland, available at http://www.iser.uaa.alaska.edu/Publications/BIEN--Permanent%20Fund%20Dividend%20Paper.doc.

[84] *Dept. of Revenue v. Andrade*, 23 P.2d 58 (Alaska 2001).

[85] An additional example appears in *Dept of Rev. v. Cosio*, 858 P.3d 621, 628 (Alaska 1993), where this Court mentioned that the original PFD program excluded children, but after three Alaska Supreme Court justices had expressed doubts concerning the constitutionality of that exclusion, the legislature amended the statute. Similarly, the

entailed in the case.[86]

There are other rights entailed in Mr. Heller's case as well, including the right to engage in an economic endeavor within a particular field, the right to be free from penalization of short-term residents, and the right to keep and bear arms.

The right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes.[87] Accordingly, close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state's interest underlying the enactment be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close.[88] The endeavor Mr. Heller had chosen to engage in during this time frame, an economic

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Court mentioned that exclusion of aliens with legal resident status could raise serious constitutional questions.

[86] Some guidance can also be gleaned from *Public Employees Retirement System v. Gallant,* 153 P.3d 346 (Alaska 2007). In that case, out-of-state retirees challenged a cost of living adjustment (COLA) given to retired state employees living in Alaska under the state's retirements systems. Gallant argued, citing *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (striking down durational residency requirements for indigent medical care), that strict scrutiny should apply under federal equal protection. In rejecting that argument, this Court held "[t]he statutory system at issue in this case does not impose a durational residency requirement and treats all residents equally. We thus reject Gallant's argument that the federal constitution requires that the system under review be reviewed under a strict scrutiny standard." Thus, it would seem that a statute that does impose a durational residency requirement, and that does not treat all residents equally, is one that merits a higher degree of scrutiny.

[87] *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980).

[88] *State by Depts of Transp. & Labor v. Enserch Alaska Constr.*, 787 P.2d 624, 633 (Alaska 1989). See also *Carlson v. CFEC*, 919 P.2d 1337, 1341 fn. 10 (Alaska 1996) (Privileges and Immunities clause prevents a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State, citing *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)).

endeavor as well as a patriotic one, was service in the military. This endeavor should be treated with at least as much respect under Alaska's equal protection analysis, if not more, than the economic endeavors found entitled to heightened equal protection scrutiny in *Apokedak* and *Enserch*.[89]

Another reason for heightened scrutiny here is that the suspicion with which this Court views the infringements upon the right to travel depends upon the degree to which the challenged law can be said to penalize exercise of the right.[90] During the legislative consideration of the 2003 amendment, "Senator Cowdery commented that the existing statute appears to *penalize* those called to active duty and he was sure that was unintended."[91] "The suspicion with which this court will view infringements upon the right to travel depends upon the degree to which the challenged law can be said to penalize exercise of the right. ... This in turn depends upon the objective degree to

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[89] The issue of whether the right to engage in military service should require the state to show a weightier interest and a closer fit than the "rational basis" test would appear to be one of first impression. Counsel has found three Alaska Supreme Court cases involving PFD eligibility of military personnel. *Eagle v. State*, 153 P.3d 976 (Alaska 2007); *Anderson v. State*, 2 P.3d 1106 (Alaska 2001); and *State v. Wilder*, 929 P.2d 1280 (Alaska 1997). None of the three involved the six-month durational residency requirement at issue in this case; all three entailed the separate requirement that absences from Alaska exceeding five years result in presumptive eligibility, and their inability to rebut that presumption. More fundamentally, none of the three involved equal protection analysis. Wilder and Anderson raised no equal protection argument; and Eagle, although he tried to raise an equal protection argument before this Court, was held to have waived it for failure to raise it below.

[90] *Williams v. Zobel*, 619 P.2d 448, 458 & n.32 (Alaska 1980), overruled on other grounds, *Zobel v. Williams*, 457 U.S. 55 (1982).

[91] Minutes of the Senate State Affairs Committee, April 8, 2003, on Senate Bill 148, comment of Sen. Cowdery (emphasis added), available at: http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00993&end_line=01118&time=1540&date=20030408&comm=STA&house=S,

which the challenged legislation tends to deter interstate migration. [But] there is no requirement to demonstrate actual deterrence of the right to travel in state or federal law. The relevant criteria are the fact and the severity of the restriction."[92] Where, as here, the legislature itself acknowledged the inadvertent penalization its statute visited upon military personnel prior to the 2003 amendment, it is a logical conclusion that Mr. Heller (assuming he is not being given the benefit of that 2003 amendment as he argues in section I he should be) is being similarly penalized here.

Last, there is another right of Mr. Heller's involved in this case, protected by Alaska Constitution, Art. 1, sec. 19,[93] that being the right to keep and bear arms, both individually and as a part of a "well-regulated militia." That too supports a heightened level of equal protection scrutiny; Mr. Heller by going to Iraq was exercising his right under this provision to be part of the well-regulated militia, and this state action that infringes on his exercise of that right should be scrutinized more closely because of that.

Thus, this statute (as interpreted by the Department), because it burdens Mr. Heller's right to engage in an economic endeavor within a particular industry, because it penalizes him for his fulfillment of his military obligations, and because it infringes on his explicit constitutional right to keep and bear arms, should be subject to heightened scrutiny under the Alaska Equal Protection Clause.

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[92] *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984).

[93] "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."

The second step is an examination of the purposes served by the challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest, or, in between, that its objectives addressed an "important" state interest.

Here, what is being challenged is a fairly narrow aspect of the PFD statutes and regulations, i.e., the conclusion that Mr. Heller's absence from Alaska while he was in Iraq during qualifying year 2006 was not an "allowable absence" because of a durational residency requirement applied to his Alaska residency during 2005.

The State has not defended this particular provision of its statutes or regulations in the reported cases, but it has put forward justifications for other provisions in the PFD statutes[94] that have been discussed in other cases.

The purposes of the overall dividend program are to distribute equitably a portion of the state's wealth to Alaskans, to encourage people to stay in Alaska, and to increase citizen involvement in the management of the fund.[95] These are legitimate, but not "important" and certainly not "compelling," and more importantly, none of them are substantially related to denying Mr. Heller his 2007 dividend.

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[94] *Schikora v. State,* 7 P.3d 938, 945 (Alaska 2000); *Brodigan v. Dept of Revenue*, 900 P.2d 728, 732 (Alaska 1995); *Church v. State,* 973 P.2d 1125, 1131-32 (Alaska 1999).

[95] *Dept of Revenue v. Cosio,* 858 P.2d 621, 627 (Alaska 1993).

The state has a legitimate objective insofar as it puts requirements in place to ensure that benefits provided for residents are enjoyed only by residents.[96] The legitimacy of this objective is limited to sorting out bona fide residents from non-residents, not on sorting out those eligible for a PFD from those ineligible for a PFD under the very rules being challenged; an objective "to preserve the distribution of state benefits to those properly entitled to receive them," taken alone, is nothing more than a tautology.[97] It is correct that the legislature need not define residency for PFD purposes to be identical to residency under other provisions of law, but here, the legislature has defined residency and Mr. Heller was *not denied his PFD on the basis that he was not a resident.* He undisputedly was a "resident" for PFD purposes. But he was a resident who did not qualify for an allowable absence, and the basis for refusing him an allowable absence was a durational residency requirement, discriminating, not against non-residents, but against short-term residents as distinguished from more long-standing residents. The legitimate purpose of distinguishing residents from non-residents avails the defense of the statute nothing here, because that is not what the statute does.

The regulations can also have a legitimate function of "easing the administrative burdens of determining eligibility,"[98] but "[a]lthough reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved

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[96] *Church v. Department of Revenue*, 973 P.2d 1125, 1131 (Alaska 1999). *Schikora v. State,* 7 P.3d 938, 945 (Alaska 2000); *Brodigan v. Dept of Revenue*, 900 P.2d 728, 732 (Alaska 1995).

[97] *Dept of Revenue v. Cosio,* 858 P.2d 621, 627 fn. 4 (Alaska 1993).

[98] *Church v. Department of Revenue*, 973 P.2d 1125, 1129 (Alaska 1999).

by excluding a class of persons from benefits they would otherwise receive, [and] such economizing is justifiable only when effected through independently legitimate distinctions."[99]

Are these state purposes sufficiently "compelling" (assuming this Court agrees that Mr. Heller has demonstrated that fundamental rights are entailed in this case aside from his entitlement to a PFD) or "important" (if Mr. Heller's rights are not "fundamental" but still "important") or "legitimate" (if this Court concludes that the lowest level of scrutiny is appropriate) to justify the State's ruling here?

Mr. Heller contends that making the allowability of his absence during 2006 turn on the fact that his six months of Alaska residency during 2005 were composed of roughly two months in the State and four months in Iraq is not legitimate. There is nothing that makes his service to his country less cognizable, or his residency in Alaska less real, due to the fact that he embarked to Iraq after two months as an established resident in Alaska; and there is nothing in the fact that he fulfilled his overseas duties starting in August 2005 rather than in December 2005 that makes him any less a bona fide Alaska resident who should be entitled to recognition that his absence during 2006 was for legitimate military purposes. (And if the State's purpose underlying this provision is not legitimate, it certainly does not reach the higher thresholds of being either "important" or "compelling.") If the court agrees that the purpose is not "legitimate," then that would seem to end the inquiry; but if it does not, then resolution of the third step does.

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[99] *Alaska Pac. Assurance Co. v. Brown,* 687 P.2d 264, 272 (Alaska 1984).

How close is the fit between the 180-day durational residency requirement here and the purposes the state can legitimately pursue? Is it a "substantial relationship" (to a "legitimate" purpose), or is it a "close nexus" (to an "important" purpose), or is it the "least restrictive means" (to achieve a "compelling" state purpose)?

A 180-day durational residency requirement is none of the above. For most purposes, Alaska uses a durational residency requirement of 30 days, under the general provision of AS 01.10.055.[100] And the basic definition of resident for PFD purposes[101] explicitly refers to AS 01.10.055. Thirty days was also the period specified by this Court, in striking down a one-year durational residency requirement for employment preference purposes, as representing a valid period to determine bona fide residency *vel non* for that preference.[102] Thirty days was also the period of time specified by this Court as constitutionally permissible, when it struck down a statutory 75-day durational residence requirement for voting:

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[100] Sec. 01.10.055. Residency
(a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.
(b) A person demonstrates the intent required under (a) of this section
(1) by maintaining a principal place of abode in the state for at least 30 days or for a longer period if a longer period is required by law or regulation; and
(2) by providing other proof of intent as may be required by law or regulation, which may include proof that the person is not claiming residency outside the state or obtaining benefits under a claim of residency outside the state.

[101] AS 43.23.095(7): " 'state resident' means an individual who is physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055."

[102] *Hicklin v. Orbeck*, 565 P.2d 159, 170, 171 (Alaska 1977), rev'd on other grounds, 437 U.S. 518 (1978).

> Fixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud - and a year, or three months, too much.[103]

These authorities support the proposition that a 180-day durational residency requirement as a prerequisite to an allowable military absence is excessive and excludes too many recent residents to be constitutional, and that a 30-day durational residency requirement should be sufficient for the State's legitimate purposes.

Again, it must be born in mind what the precise nature of the durational residency requirement is here. Mr. Heller is not arguing that everyone who has been in Alaska for 30 days is thereby entitled to a dividend. He is arguing that, for military personnel who are shipped overseas to engage in combat, who would otherwise qualify for an allowable military absence under Alaska law, a durational residency requirement of 180 days prior to the overseas deployment is unnecessary and unreasonable, and a durational residency of 30 days suffices to address every legitimate purpose the state has for imposing such a requirement at the outset.

CONCLUSION

Under a proper reading of the statute, combining Mr. Heller's allowable absences under (a)(17) and (a)(3) of AS 43.23.008, as amended in 2003, his absence during 2006 was allowable and he should have been eligible for a 2007 dividend.

If the statute is interpreted to deny him that dividend, then this Court should hold that, as applied to Mr. Heller, imposition of a 180-day durational residency requirement

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[103] *State v. Van Dort*, 502 P.2d 453, 455 (Alaska 1972) (quoting from *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972).

during 2005 as a precondition to his allowable absence in Iraq during 2006 violates his rights under the Alaska and United States Constitutions.

Dated and respectfully submitted this 4th day of December, 2009.

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