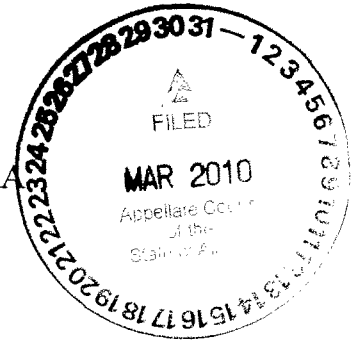
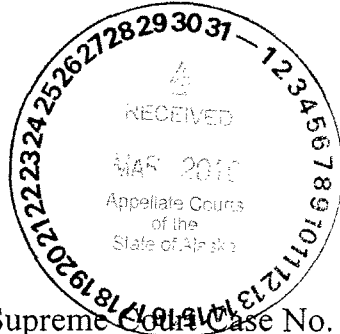


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IN THE SUPREME COURT FOR THE STATE OF ALASKA



RICHARD HELLER)
)
 Appellant,)
)
 v.)
)
 STATE OF ALASKA,)
 DEPARTMENT OF REVENUE)
)
 Appellee.)
 _____)



Supreme Court Case No. S-13551
Trial Court No. 4FA-08-1193 Civ

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

BRIEF OF APPELLEE

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FILED on the 18 day of March,
2010.

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AS 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; 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; and
 - (7) [Effective January 1, 2004.] 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- (b) [Repealed, § 18 ch 4 SLA 1992.]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.

(Applies to crimes after December 31, 1996)

- (e) [Repealed, § 64 ch 21 SLA 1991.]

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 issued under AS 47.10 or AS 47.12 and placed outside of the state by the Department of Health and Social Services for the 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.

AS 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, 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 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), or (16) 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) 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) 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) - (15) of this subsection but 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) - (15) of this subsection if the individual is claiming an absence under (4) - (15) of this subsection.
- (b) An individual may not claim an allowable absence under (a)(1) - (15) 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 the section. (Applies only to periods of absence beginning January 1, 1998, and thereafter)

- (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, grand-daughter, uncle, aunt, niece, nephew, or first cousin.

AS 43.23.025 Amount of dividend.

- (a) By October 1 of each year, the commissioner shall determine the value of each permanent fund dividend for that year by
 - (1) determining the total amount available for dividend payments, which equals
 - (A) the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 37.13.145(b) during the current year;
 - (B) plus the unexpended and unobligated balances of prior fiscal year appropriations that lapse into the dividend fund under AS 43.23.045(d);
 - (C) less the amount necessary to pay prior year dividends from the dividend fund in the current year under AS 43.23.005(h) and under AS 43.23.055(3) and (7);
 - (D) less the amount necessary to pay dividends from the dividend fund due to eligible applicants who, as determined by the department, filed for a previous year's dividend by the filing deadline but who were not included in a previous year's dividend computation;
 - (E) less appropriations from the dividend fund during the current year, including amounts to pay costs of administering the dividend program and the hold harmless provisions of AS 43.23.075;

- (2) determining the number of individuals eligible to receive a dividend payment for the current year and the number of estates and successors eligible to receive a dividend payment for the current year under AS 43.23.005(h); and
 - (3) dividing the amount determined under (1) of this subsection by the amount determined under (2) of this subsection.
- (b) *[Repealed, § 5 ch 68 SLA 1991.]*

ALASKA ADMINISTRATIVE CODES

15 AAC 23.143 Establishing and maintaining Alaska residency.

- (a) An individual's intent to establish residency, remain indefinitely in Alaska, or to return to Alaska and remain indefinitely is demonstrated through the establishment and maintenance of customary ties indicative of Alaska residency and the absence of those ties elsewhere. Acts that are required by law or contract or are routinely performed by temporary residents of Alaska are not by themselves evidence of residency. In evaluating whether an individual claiming Alaska residency has demonstrated an intent to remain indefinitely in Alaska, the department will consider whether or not an individual has:
- (1) taken steps to establish Alaska residency and sever residency in a previous state or country;
 - (2) ties to another state or country that indicate continued residency in the other state or country; and
 - (3) taken other action during or subsequent to the qualifying year that is inconsistent with an intent to remain in Alaska indefinitely.
- (b) An individual may not become a resident while absent from Alaska.
- (c) Physical presence in Alaska is not, by itself, sufficient to establish residency. Before January 1 of the qualifying year, an individual must have taken at least one step beyond physical presence in Alaska to establish residency. The department will not consider external indicators, including those listed in 15 AAC 23.173(g), established less than six months before December 31 of the qualifying year as evidence of the establishment of Alaska residency in time to qualify for the current year dividend.

- (d) An individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual
- (1) maintained the individual's principal home in another state or country, regardless of whether the individual spent a majority of time at that home, except while absent for a reason listed
 - (A) in AS 43.23.008(a)(1) - (3) or (9) - (11), or
 - (B) in AS 43.23.008(a)(13), if the eligible resident whom the individual accompanies is absent for a reason listed in (A) of this paragraph;
 - (2) claimed or maintained a claim of residency in another state or country in the individual's employment personnel records; if the individual claims an error or a delay was made in processing by the personnel office, the individual must submit
 - (A) from the personnel office, a certified copy of the individual's request to change the individual's state of legal residence; or
 - (B) a sworn statement from the personnel officer who has specific knowledge that the personnel office made an error, or caused a delay, in processing the individual's personnel records; the personnel officer must state the exact date the records show the original request was received and why the request was not processed timely;
 - (3) claimed, maintained a claim, or accepted an Alaska motor vehicle nonresident tax exemption on a vehicle owned or co-owned by the individual;
 - (4) accepted full-time, permanent employment in another state or country except while on an absence listed
 - (A) in AS 43.23.008(a)(1) - (3) or (9) - (11); or

- (B) in AS 43.23.008(a)(13), if the eligible resident whom the individual accompanies is absent for a reason listed in (A) of this paragraph;
- (5) filed a resident or part-year resident income, excise, or personal property tax return in another state or country and the claim of residency on the return is for any period of time beginning January 1 of the qualifying year through the date of application, unless the individual
 - (A) was required by the other state or country to file a return claiming resident tax status in that state or country even though the individual was a state resident as defined in AS 43.23.095; or
 - (B) files in the other state or country an amended return claiming nonresident tax status and provides proof to the department that the amended return was actually filed in the other state or country;
 - (6) claimed or maintained a claim of a homestead property tax exemption in another state or country;
 - (7) applied for or received an education loan from another state or country that required an individual to be a resident of that state or country;
 - (8) disclosed in a court proceeding or affidavit that the individual is a resident of another state or country;
 - (9) executed a will that described residency in another state or country;
 - (10) moved from Alaska,
 - (A) for a reason other than one listed
 - (i) in AS 43.23.008 (a)(1) - (3) or (9) - (11); or
 - (ii) in AS 43.23.008(a)(13), if the eligible resident whom the individual accompanies is absent for a reason listed in (i) of this subparagraph; and

- (B) claiming moving expenses as a deduction on the individual's federal income tax return, unless the individual
 - (i) files an amended federal income tax return deleting the claimed moving expenses as a deduction; and
 - (ii) provides proof from the Internal Revenue Service that the individual filed an amended return;
- (11) accepted admission under resident tuition provisions to a college or university in another state or country, unless
 - (A) there was no difference between resident and nonresident tuition;
 - (B) nonresident tuition was waived as part of an interstate exchange agreement such as the Western Interstate Commission for Higher Education (WICHE) student exchange program or the Washington Wyoming Alaska Montana Idaho (WWAMI) medical education program; or
 - (C) the individual was granted admission under resident tuition provisions for any other reason that did not require the individual to be a resident of the state or country in which the college or university is located;
- (12) registered to vote in another state or country, except if the individual
 - (A) registered to vote in another state within 30 days of a presidential election solely for the purpose of voting in that election and voted in no other election in another state than that for president of the United States; or
 - (B) registered to vote in another country for which the individual was not required to claim residency of the country in order to register to vote;
- (13) voted in another state's or country's state, country, or local election, except if the individual voted in an election described in this paragraph and the individual was not required to claim residency in order to vote;

- (14) purchased a resident hunting, fishing, or trapping license from another state or country;
 - (15) filed for divorce, dissolution, or legal separation in another state or country that required the individual to be a resident of that state or country in order to file the action;
 - (16) claimed to be unavailable for Alaska jury duty service because the individual was not a resident; or
 - (17) obtained any other benefit or benefits as a result of establishing or maintaining any claim of residency in another state or country or by disclaiming Alaska residency, except that the department will not deny a dividend to an individual solely because the individual received Medicaid benefits from another state if the individual's application for Medicaid was consistent with the intent to maintain residency in Alaska.
- (e) Regardless of alienage, a child born outside Alaska to an eligible resident on an allowable absence, adopted by an eligible resident, or whose adoption by an eligible resident is pending during the qualifying year, establishes Alaska residency in the child's own right immediately upon the child's arrival in Alaska if the child's custodial parent or guardian is an eligible resident at the time of the child's arrival in Alaska.
- (f) An individual absent from Alaska as a dependent of an eligible resident who as soon as reasonably possible, as determined by the department, after emancipation does not return to Alaska and establish Alaska residency as an adult is not eligible for a dividend. A newly emancipated individual who was absent from Alaska as a dependent of an eligible resident who returns to Alaska as soon as reasonably possible, as determined by the department, after emancipation and who establishes external indicators of Alaska residency as an individual is not subject to the six month physical presence requirements of 15 AAC 23.163(b).
- (g) A resident who marries a nonresident while physically present in Alaska is considered to have the intent to remain indefinitely in Alaska until the resident takes steps or actions to depart Alaska.
- (h) An individual who on the date of application knows the individual will be moving from Alaska at a specific time to a specific destination for a reason other than one allowed by AS 43.23.008(a) does not have the intent to remain indefinitely in Alaska and is not eligible for a dividend.

- (i) The eligibility of a resident who marries a nonresident while absent from Alaska is not changed by the marriage, so long as the resident is absent for the resident's own allowable reason.
- (j) The fact that an individual's spouse has not declared Alaska residency does not establish a presumption that an individual is not a resident.
- (k) Repealed 1/1/2000.

I. ISSUES PRESENTED FOR REVIEW

A. Alaska Statute 43.23.008(b) requires that permanent fund dividend applicants claiming an allowable absence under AS 43.23.008(a)(3) be a resident for six consecutive months before leaving the state. Mr. Heller lived in Alaska for only two months before leaving the state. He then attempted to claim an allowable absence. Was the State's determination that Mr. Heller was ineligible for a 2007 dividend because he was not a resident of the state for six consecutive months before leaving improper?

B. The six month residency requirement of AS 43.23.008(b) meets the state's legitimate goal of limiting dividends to permanent residents by ensuring that applicants who are absent from the state for a significant period of time are bona fide residents of the State of Alaska. Did the State's application of AS 43.23.008 violate Mr. Heller's state and federal constitutionally protected right to equal protection, right to travel, and right to keep and bear arms?

II. STATEMENT OF CASE

A. Introduction

At issue in this appeal is the proper interpretation of AS 43.23.008, a statute that allows individuals who are absent from the State of Alaska during the qualifying year for over 180 days on active military duty to remain eligible for a current year permanent fund dividend (PFD) provided that they were a resident of the state for at least six consecutive months immediately before leaving the state. Resolution of this issue turns on whether

the State of Alaska, Department of Revenue (the State) properly interpreted the statutory PFD eligibility provisions to deny Mr. Heller a 2007 PFD because he lived in Alaska for only two months before leaving the state to serve on active military duty. This appeal also asks whether AS 43.23.008(b) violates the United States and/or the Alaska Constitution.

B. Facts and Proceedings

The facts of this case are not in dispute. Richard Heller was assigned to the Headquarters Company of the 172d Stryker Brigade and arrived in Alaska on June 17, 2005. [Exc. 7-8] Upon arrival, Mr. Heller registered to vote, obtained an Alaska driver's license, and changed his military records to indicate he was a resident of Alaska. [*Id.* at 7] Less than two months later, in August 2005, Mr. Heller was deployed overseas on active duty in the armed forces. [Exc. 10] Mr. Heller returned to Alaska on December 11, 2006 and has lived in the state since that time. [*Id.*]

Mr. Heller applied for and was denied a 2007 PFD after the State determined that Mr. Heller was ineligible to qualify for an "allowable absence."¹ [Exc. 1] Alaska Statute 43.23.008(b) limits dividend applicants who may claim an allowable absence under AS 43.23.008(a)(1)-(15)² to individuals who were residents of the state for six

¹ Alaska Statute 43.23.005(a)(6) conditions dividend eligibility upon presence in the state during the qualifying year unless the applicant's absence is allowed under one of the provisions in AS 43.23.008(a).

² AS 43.23.008(a) was amended in 2008 and AS 43.23.008(a)(16) was renumbered AS 43.23.008(a)(17). For the purposes of determining Mr. Heller's eligibility for a 2007 dividend, the former version of the statute applied. While the language of the applicable subsection was identical in both versions, Mr. Heller and the superior court mistakenly cite to AS 43.23.008(16).

consecutive months prior to leaving.³ Because Mr. Heller had been absent from Alaska for more than 180 days during the 2006 qualifying year on active military duty, and because he had not been a resident for at least six months before he left Alaska in August 2005, the State determined that Mr. Heller failed to qualify for an allowable absence and was ineligible for a 2007 PFD. [Exc. 1, 10]

Mr. Heller filed an informal appeal on August 8, 2007. [*Id.* at 2-3] The dividend technician upheld the State's denial.⁴ [*Id.* at 4-5] Mr. Heller then requested a formal hearing, which was held before the Office of Administrative hearings on December 27, 2007. [*Id.* at 6-7, 10] The Administrative Law Judge upheld the State's denial of Mr. Heller's 2007 dividend. [Exc. at 10-12] The superior court agreed with the State's determination and affirmed the denial. [Exc. 15-32] Mr. Heller appeals and challenges the State's interpretation of AS 43.23.008 and the basis for its denial of his 2007 dividend.

III. STANDARD OF REVIEW

This Court gives no weight to the superior court's decision when the superior court is acting as an intermediate appellate court.⁵ Issues of statutory interpretation ordinarily raise questions of law that do not involve agency expertise, so the Court

³ AS 43.23.008(b) provides that "an individual may not claim an allowable absence under (a)(1) - (15) of this section unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state."

⁴ The dividend technician relied on additional facts that Mr. Heller successfully contested at the formal hearing. Those facts are not at issue in this appeal and do not change the fact that Mr. Heller was not qualified to claim an allowable absence under AS 43.23.008. [See Exc. at pp. 4-5]

⁵ *Anderson v. State, Dept. of Revenue*, 26 P.3d 1106, 1109 (Alaska 2001).

applies an independent judgment standard, seeking to “adopt the rule of law that is most persuasive in light of precedent, reason, and policy.”⁶ In recognition of the Court’s expertise in statutory construction, no deference generally is shown to the agency’s construction.⁷ However, when the agency’s interpretation is longstanding, the Court should “give weight to what the agency has done.”⁸ The Court reviews constitutional issues as questions of law, which are subject to independent review.⁹

IV. ARGUMENT

- A. **BECAUSE AS 43.23.008(b) ESTABLISHES THAT IN ORDER TO QUALIFY FOR AN ALLOWABLE MILITARY ABSENCE, AN INDIVIDUAL MUST RESIDE IN ALASKA FOR SIX CONSECUTIVE MONTHS BEFORE LEAVING THE STATE, AND BECAUSE MR. HELLER LIVED IN ALASKA FOR LESS THAN TWO MONTHS BEFORE LEAVING THE STATE TO SERVE ON ACTIVE DUTY, MR. HELLER WAS NOT QUALIFIED TO CLAIM AN ALLOWABLE ABSENCE AND THE STATE PROPERLY DENIED MR. HELLER A 2007 DIVIDEND.**

The PFD program provides a yearly payment to Alaska residents if they meet certain eligibility requirements.¹⁰ The PFD program is designed, in part, to encourage the maintenance of Alaska residency and to reduce population turnover.¹¹ When the PFD was created, the Legislature intended to limit the payment of dividends to permanent

⁶ *State, Public Employees’ Retirement Bd. v. Morton*, 123 P.3d 986, 988 (Alaska 2005); *Chugach Electric Ass’n, Inc., v. Regulatory Com’n of Alaska*, 49 P.3d 246, 249 (Alaska 2002); *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

⁷ *State, Dep’t of Nat’l Res. v. Greenpeace, Inc.*, 96 P.3d 1056, 1061 n.10 (Alaska 2004).

⁸ *Chugach Electric Ass’n*, 49 P.3d at 250.

⁹ *Eagle v. State, Dept. of Revenue*, 153 P.3d 976, 978 (Alaska 2007), citing *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1023 (Alaska 2005).

¹⁰ See AS 43.23.005(a).

residents.¹² The Department of Revenue (“the Department”) is accorded broad authority in determining eligibility requirements and in administering the PFD program.¹³ After an individual applies for a dividend, the State must determine whether the applicant was a “state resident” for dividend eligibility purposes on the date of their dividend application and during the entire “qualifying year.”¹⁴ If the applicant was absent from the State during the qualifying year, the State must also determine if the applicant is eligible to claim an allowable absence under AS 43.23.008.¹⁵ Individuals who are otherwise qualified for a dividend but are absent from the state during the qualifying year for more than 180 days while serving on active duty as a member of the military may be eligible for an allowable absence under AS 43.23.008(a)(3).

¹¹ *State, Dep’t of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

¹² *State, Dep’t of Revenue v. Cosio*, 858 P.2d 621, 625 (Alaska 1993).

¹³ *Andrade*, 23 P.3d at 72.

¹⁴ Alaska Statute 43.23.005(a)(2), and (3) provide:

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

...

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

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

¹⁵ Alaska Statute 43.23.005(a)(6) provides

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

...

(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

In order to claim an allowable absence for any of the reasons included in AS 43.23.008(a)(1)-(15), AS 43.23.008(b) requires that an individual be “a resident of the state for at least six consecutive months immediately before leaving the state.” Alaska Statute 43.23.008(b) was enacted to verify that an applicant is a bona fide resident before awarding a dividend to an individual who was absent from the state for more than 180 days.¹⁶ Without this limitation, an individual could fly to Alaska, declare Alaska their residence, leave Alaska for any one of the fifteen allowable absences under AS 43.23.008(a), and still qualify to receive a dividend for up to ten years.¹⁷ [Exc. 27-28] The Alaska Legislature enacted AS 43.23.008(b) specifically to prevent this result.¹⁸ And this Court has consistently recognized the State’s authority to implement and apply the dividend eligibility requirements.¹⁹

The State properly interpreted AS 43.23.008(b) as a precondition to Mr. Heller’s qualification for an active duty military allowable absence under AS 43.23.008(a)(3) in denying Mr. Heller a 2007 PFD. Mr. Heller was a state resident in Alaska for less than two months before he left Alaska. [Exc. 10] Because Mr. Heller lived in Alaska for less than six consecutive months before leaving the state, he did not meet the requirements of AS 43.23.008(b) and was not eligible to claim an “allowable absence” for his active duty

¹⁶ See Senate Finance Committee Minutes, February 9, 1998, on House Bill No. 2, testimony Tom Williams, staff to the Senate Finance Committee.

¹⁷ See AS 43.23.008(c).

¹⁸ See Senate Finance Committee Minutes, February 9, 1998, on House Bill No. 2, testimony Tom Williams, staff to the Senate Finance Committee.

¹⁹ See *Church v. State Dep’t of Revenue*, 973 P.2d 1125, 1128 (Alaska 1999); *State, Dep’t of Revenue v. Bradley*, 896 P.2d 237, 239 (Alaska 1995).

related absence under AS 43.23.008(a)(3). The superior court aptly understood that AS 43.23.008(b) thus requires a “six months residence before the date on which the applicant left the state for an extended period,” a requirement, that was “intended to increase the likelihood that individuals claiming a PFD after leaving the state were bona fide residents.” [Exc. 22-23]

Mr. Heller does not claim that he literally satisfied AS 43.23.008(b). Rather, he argues that he should be entitled to claim the 180 day allowable absence found in subparagraph AS 43.23.008(a)(16), apply that provision towards his absence from the state beginning in August 2005, and thus receive credit for the six month requirement of AS.23.008(b). [Appellant’s Br. at pp. 7-8] Subsection (a)(16)(A) allows an individual to claim an allowable absence during the qualifying year if they are absent from the state for 180 days in addition to any period of active duty absence under (a)(3). Mr. Heller contends that (a)(16) should permit applicants like himself to satisfy AS 43.23.008(b), which requires an applicant be a “resident of the state for at least six consecutive months immediately before leaving the state,” even if the applicant leaves the state immediately after moving here. [Appellant’s Br. at p.4] This interpretation ignores the plain language of the statute, renders superfluous much of the language contained in the provision, and undermines the legislature’s legitimate and reasonable intent to limit the dividend to permanent residents.²⁰

The superior court correctly rejected Mr. Heller's argument upon finding that:

nothing in the statute or legislative history indicates any intention to permit military individuals to use the 180 days allowed under [(a)(16)]²¹ to meet the residency requirement necessary to claim an allowable absence during the following year. ... Principles of statutory construction "militate against interpreting a statute in a manner that renders other provisions meaningless."²² [Exc. 23]

The requirements of AS 43.23.008 are unambiguous, and unambiguous statutory language is given its ordinary and common meaning.²³ In order to qualify for a military allowable absence, an applicant must be a resident for six consecutive months prior to leaving the state. Mr. Heller was not. If the Legislature had intended to allow applicants to claim an allowable absence if they were a resident of the state for six months before *claiming* the allowable absence, the Legislature could have done so.²⁴ Instead, the Legislature limited allowable absences to applicants who were residents for six months immediately before *leaving* the state, thus helping to ensure the applicant is a bona fide resident.²⁵

15 AAC 23.143(b), which provides that "[a]n individual may not become a resident while absent from Alaska," further undercuts Mr. Heller's strained interpretation

²⁰ *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 625 (Alaska 1993).

²¹ See footnote 8 *supra*.

²² The superior court quoted *Berg v. Popham*, 113 P.3d 604, 609 (Alaska 2005), quoting *Rollins v. State, Dep't of Revenue, Alcoholic Beverage Control Bd.*, 991 P.2d 202, 208 (Alaska 1999) (quoting *M.R.S. v. State*, 897 P.2d 63, 66 (Alaska 1995)).

²³ *City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1276 (Alaska 1994).

²⁴ See *In re A.S.*, 740 P.2d 432, 435 (Alaska 1987).

²⁵ AS 43.23.008(b) (emphasis added); See *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71-72 (Alaska 2001) (discussing the Department's broad authority to establish PFD eligibility requirements).

of the statute. Regardless of the laudable reasons for Mr. Heller's departure, there is simply no support for the proposition that he could leave Alaska after two months while simultaneously claiming that he had been a resident of the state for six months before leaving for the purposes of satisfying AS 43.23.008(b). Appellant's arguments obviate the clear language of the statute and strain any reasonable reading of the requirement that an individual be a resident for six consecutive months "*immediately before leaving the state.*"²⁶

A review of applicable legislative history further supports the State's interpretation of this provision. Even where, as here, a statute is unambiguous, the court may utilize legislative history as "a guide to construing a statute's words."²⁷ "The plainer the meaning of the statute, the more persuasive any legislative history to the contrary must be."²⁸ In enacting AS 43.23.008(b), the Legislature was clearly attempting to "prevent someone from coming into the state for a few days, declaring residency and then immediately claiming an allowable absence."²⁹ Under Mr. Heller's proposed interpretation, however, a person who moved to Alaska for only one day, six months prior to the commencement of the qualifying year, quickly established "paper ties," and then left the state for any of

²⁶ AS 43.23.008(b) (emphasis added).

²⁷ *CH2M Hill Northwest, Inc.*, 873 P.2d at 1276.

²⁸ *Id.* (citing *Peninsula Mktg. Ass'n v. State*, 817 P.2d 917, 922 (Alaska 1991)).

²⁹ See Minutes of the Senate Finance Committee, February 9, 1998, House Bill No. 2, comments of Tom Williams, staff to the Senate Finance Committee.

the reasons provided in AS 43.23.008(a) would be eligible for a dividend.³⁰ This is exactly what the legislature sought to avoid.

Mr. Heller erroneously relies on the 2003 amendment to AS 43.23.008(a)(16) that allows active duty military personnel the ability to claim an allowable absence for both their active duty time and up to an additional 180 days of time, as further support for his argument.³¹ As the superior court properly noted, AS 43.23.008(a)(16) was intended to allow residents to retain PFD eligibility when recalled unexpectedly to active military duty after they had been absent for another reason that was not inconsistent with residency. [See Exc. 22-23] Mr. Heller's reliance on this provision is misplaced because AS 43.23.008(a)(16) would only allow Mr. Heller to be absent for up to 180 days if he was eligible for the military allowable absence under (a)(3). The amended AS 43.23.008(a)(16)(A) provides that an applicant may be absent during the qualifying year

(16) 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 subsection³²

³⁰ See *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Wilder*, 929 P.2d 1280, 1282 (Alaska 1997) (The Court approved department's decision not to rely on "paper ties," including registering to vote, registering to obtain a vehicle, and obtaining a driver's license in determining intent to return and remain).

³¹ See Senate Finance Committee Minutes, May 17, 2003, Senate Bill No. 148, comments of Larry Persily, Deputy Commissioner, Department of Revenue, where Mr. Persily indicates the additional time allowed under subsection (a)(16) was in addition to the allowable absence.

³² AS 43.23.008(3) is the active duty military allowable absence.

Mr. Heller could not claim an additional 180 days of absence under (a)(16)(A) because he was ineligible for an authorized absence under (a)(3). Larry Persily, the then Deputy Commissioner of the Department of Revenue testified that the amendment was intended to change the requirement to “military time *plus* 180 days.”³³ Because AS 43.23.008(b) requires an applicant to have resided in Alaska for six months before leaving the state, and because Mr. Heller was a resident for only two months before leaving, the State properly denied Mr. Heller a 2007 dividend.

B. BECAUSE THE STATE HAS A LEGITIMATE INTEREST IN ENSURING DIVIDENDS ARE AWARDED ONLY TO ALASKA RESIDENTS, AND BECAUSE AS 43.23.008(b) BEARS A FAIR AND SUBSTANTIAL RELATIONSHIP TOWARDS THAT OBJECTIVE AND DOES NOT IMPERMISSIBLY DISCRIMINATE AMONG RESIDENTS, AS 43.23.008(b) DOES NOT VIOLATE MR. HELLER’S FEDERAL OR STATE CONSTITUTIONAL RIGHTS.

This Court has consistently held that dividend residency requirements are constitutional because they are “borne equally by all applicants regardless of their recent previous state citizenship” and protects Alaska’s “legitimate interest in seeing that only permanent residents” receive the dividend.³⁴ Because a PFD is cash payment unrelated to any condition other than residency, this Court recognized that it is the type of “readily portable benefit for which states may apply durational residency requirements to establish

³³ House Finance Committee Minutes, May 17, 2003, Senate Bill 148, testimony of Larry Persily, Deputy Commissioner of Department of Revenue (emphasis added).

³⁴ *Schikora v. State, Dep’t of Revenue*, 7 P.3d 938, 946 n. 30 (Alaska 2000); *See also Church*, 973 P.2d 1125, 1129-32 (Alaska 1999); *Eldridge v. State, Dep’t of Revenue*, 988 P.2d 101, 104 (Alaska 1999).

an applicant's bona fide intent to be a state resident."³⁵ Residency requirements for the purpose of PFD eligibility may also differ from the definition of residency for other purposes.³⁶

1. AS 43.23.008(b) does not violate Mr. Heller's federal constitutional rights.

Mr. Heller raises three constitutional arguments regarding the six-month residency requirement of AS 43.23.008(b), all of which are meritless. Because AS 43.23.008(b)'s requirement that only applicants who have established residency six months prior to leaving the state qualify for an allowable absence rationally furthers a legitimate state purpose in ensuring that only bona fide residents receive dividends, AS 43.23.008(b) does not violate Mr. Heller's constitutional rights.

Mr. Heller first argues that the State's action violates his right to keep and bear arms. Because the United States Supreme Court held in *United States v. Cruikshank*³⁷ that the Second Amendment protects citizens against federal action, not state action, and because *Cruikshank* has not been overruled, Mr. Heller's argument on this issue should be flatly rejected.³⁸

Mr. Heller next contends that AS 43.23.008(b) violates his equal protection rights. Under the United States Constitution, a law will survive equal protection scrutiny "if the

³⁵ *Schikora*, 7 P.3d at 946 n. 30 (citing *Saenz v. Roe*, 526 U.S. 489 (1999) (internal citations omitted))

³⁶ *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728, 73 n.12 (Alaska 1995).

³⁷ 92 U.S. 542 (1875).

³⁸ *Id.*

distinction it makes rationally furthers a legitimate state purpose.”³⁹ It is well recognized that Alaska has a legitimate state purpose in limiting distribution of dividends to bona fide permanent residents.⁴⁰ In addition, the United States Supreme Court has indicated that where a benefit is readily portable across state lines, a state may adopt a durational residency requirement so long as it rationally furthers the legitimate purpose of benefitting bona fide residents as opposed to non-residents.⁴¹

The Alaska Legislature enacted AS 43.23.008(b) for two reasons: 1) to ensure that individuals who qualified for an allowable absence were bona fide residents, and 2) to prevent non-residents from “gaming” the system and receiving a dividend while absent from the state.⁴² As the superior court recognized, “there is substantial uncertainty and potential for abuse” where a PFD applicant leaves the state shortly after arriving and is then absent for the duration of the qualifying year.⁴³ [Exc. 23] For this reason, “the residency requirement for PFD eligibility may differ from other residency requirements.”⁴⁴

Mr. Heller next relies on three United States Supreme Court decisions to support his claim that AS 43. 23.008(b) violates both his federal equal protection rights and his

³⁹ *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

⁴⁰ *See, e.g., Church v. State, Dep't of Revenue*, 973 P.2d 1128, 1130-1131 (Alaska 1999).

⁴¹ *See Saenz v. Roe*, 526 U.S. 489, 505 (1999).

⁴² *See Senate Finance Committee Minutes, February 9, 1998, House Bill No. 2*, comments of Tom Williams, staff to the Senate Finance Committee.

⁴³ *Eldridge v. State, Dep't of Revenue*, 988 P.2d 101, 104 n.8 (Alaska 1999).

⁴⁴ *Church*, 973 P.2d at 1129.

right to travel.⁴⁵ [Appellant's Br. at pp. 21-28] This argument is wholly unfounded because none of the cases appellant cites prohibit a state's use of a residency requirement to verify that an individual is a bona fide resident, particularly where, as here, the subject concerns distribution of portable benefits to residents.

In *Hooper v. Bernalillo County Assessor*⁴⁶ the United States Supreme Court held that a property tax exemption that was limited to veterans who were residents of the state by 1976 was unconstitutional because the statute's distinction between different resident classes of veterans was not rationally related to the state's asserted goal of encouraging veterans to live in the state.⁴⁷ In *Attorney General of New York v. Soto-Lopez*⁴⁸ the Court struck down a New York state civil service hiring preference for veterans that were residents of the state when they joined the military.⁴⁹ Plaintiffs were veterans who were denied benefits because they had been residents of Puerto Rico at the time they enlisted.⁵⁰ *Soto-Lopez* held that the law failed to pass equal-protection scrutiny and infringed on the plaintiffs' right to migrate.⁵¹ Contrary to Mr. Heller's contention, neither of these cases support the proposition that durational residency requirements are unconstitutional. Nor do they indicate that the residency requirement of AS 43.23.008(b) is a mechanism

⁴⁵ *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (commenting that "the right to travel analysis refers to little more than a particular application of equal protection analysis").

⁴⁶ 472 U.S. 612 (1985).

⁴⁷ *Id.*

⁴⁸ 476 U.S. 898 (1986)..

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 900.

that unconstitutionally favors established residents over new residents.

[Appellant's Br. at 23-25]

Most important, neither case prohibits the use of bona fide residency requirements to differentiate between residents and non-residents. Indeed, *Soto-Lopez* acknowledged that "a bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents" and "[s]uch a requirement...[generally] does not burden or penalize the constitutional right of interstate travel."⁵² AS 43.23.008(b) uniformly applies to all dividend applicants, not just military members. In addition, the laws at issue in *Hooper* and *Soto-Lopez* "established a permanent distinction between citizens based on past residence; those who did not qualify for the benefit program could do nothing to become qualified"⁵³ [Exc. 25] Alaska Statute 43.23.008(b), on the other hand, does not bar Mr. Heller from receiving a dividend permanently. And, this Court affirmed in both *Brodigan v. Alaska Dep't of Revenue*⁵⁴ and *Church v. State, Dep't of Revenue*⁵⁵ that the state's interest in limiting dividends to permanent residents outweighs any minor infringement upon an applicant's right to travel.⁵⁶

⁵² *Soto-Lopez*, 476 U.S. at 903, n. 3, (quoting *Martinez v. Bynum*, 461 U.S. 321, 329, (1983)). See also *Church v. State, Dep't of Revenue*, 973 P.2d 1128, 1130-1131 (Alaska 1999) (noting dividend eligibility requirements were bona fide residency requirements as described by *Soto-Lopez*).

⁵³ *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); *Soto-Lopez*, 476 U.S. at 909.

⁵⁴ 900 P.2d 728 (Alaska 1995).

⁵⁵ *Church*, 973 P.2d 1128.

⁵⁶ *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728, 732 (Alaska 1995); *Church*, 973 P.2d at 1130-1131.

The third United States Supreme Court case Mr. Heller relies on is *Saenz v. Roe*.⁵⁷ *Saenz* struck down a California statute limiting new residents' welfare benefits for the first year in California to the benefits they were eligible for in the state from which they migrated.⁵⁸ The Court held that the provision impermissibly treated new California residents less favorably during their first year of residence. But in reaching this holding, *Saenz* made clear that it was not prohibiting the use of bona fide residency requirements, including a durational residency period, aimed at distinguishing between residents and non-residents, particularly when the benefits involved are portable.⁵⁹ This Court considered *Saenz* in *Schikora v. State, Dep't of Revenue*⁶⁰ when it indicated that Alaska's 185 day dividend residency requirement was constitutionally permissible because the dividend is a portable benefit and Alaska has a "legitimate interest in seeing that only permanent residents receive PFDs."⁶¹

Thus, none of the cases Mr. Heller cites stand for the proposition that a state is prohibited from using a bona fide residency requirement to limit distribution of portable state benefits to its residents. On the contrary, each case makes clear that a state has a legitimate interest in utilizing bona fide residency requirements for the very reasons the Alaska legislature enacted AS 43.23.008(b).⁶² Both the plain language and legislative history of AS 43.23.008(b) reveal that it is intended to verify that PFD recipients are bona

⁵⁷ 526 U.S. 489 (1999).

⁵⁸ *Id.*

⁵⁹ *Id.* at 505.

⁶⁰ 7 P.3d 938 (Alaska 2000).

⁶¹ *Id.* at 946, n.30.

fide residents, rather than temporary visitors hoping to qualify for a PFD. Because this is a legitimate government purpose that bears a fair and substantial relationship to ensuring that the dividend goes only to permanent residents, Mr. Heller fails to establish that AS 43.23.008(b) violates his federal constitutional rights.⁶³

2. The residency requirement of AS 43.23.008(b) does not violate Mr. Heller's state constitutional rights.

Mr. Heller also claims that AS 43.23.008(b) denies him rights guaranteed under the Alaska Constitution and further contends that his claim should be subject to heightened scrutiny because the State's denial of a 2007 dividend affected his right to engage in an economic endeavor, his right to travel, and his right to keep and bear arms. [Appellant's Br. at pp 33-38] But contrary to Mr. Heller's arguments, a dividend is an economic interest that is entitled to only minimum scrutiny under Alaska's equal protection test.⁶⁴

Under Alaska's equal protection analysis the court must first determine "what weight should be afforded to the constitutional interest impaired."⁶⁵ Next, the court must examine "the purpose served by the challenged statute."⁶⁶ Third, the court

⁶² *Id.* See also *Soto-Lopez*, 476 U.S. at 903, n. 3, (quoting *Martinez v. Bynum*, 461 U.S. 321, 329, (1983)).

⁶³ *Church v. State, Dep't of Revenue*, 973 P.2d 1128, 1130-31 (Alaska 1999).

⁶⁴ *State v. Anthony*, 810 P.2d 155, 158 (Alaska 1991).

⁶⁵ *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984) (citing *State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983)).

⁶⁶ *Id.*

must evaluate the “state’s interest in the particular means employed to further its goals.”⁶⁷ Equal protection claims are reviewed under a sliding scale of review.⁶⁸ The standard of review is “determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.”⁶⁹

Because the State’s interpretation of AS 43.23.008(b) affects only Mr. Heller’s right to a 2007 dividend, it is subject to only minimal scrutiny. The right to bear arms and right to engage in an economic endeavor are far removed from the denial of a dividend, and the cases on which Mr. Heller relies in support of his claim that heightened scrutiny applies concern a commercial fishing permit denial and hiring preferences, both of which are inapposite to the facts and interest at issue here.⁷⁰ This Court has held that “[a] dividend is merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis,”⁷¹ and further concluded that “even though an equal protection claim to a PFD involved the right to travel, it did not necessarily trigger heightened scrutiny.”⁷²

Thus the State is only required to show that the six month residency requirement was designed to achieve a legitimate governmental objective and that it bears a fair and

⁶⁷ *Id.*

⁶⁸ *State v. Anthony*, 810 P.2d 155, 157-58 (Alaska 1991).

⁶⁹ *Ostrosky*, 667 P.2d at 1192-93.

⁷⁰ *See Commercial Fisheries Entry Comm’n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980), and *State by Depts of Transp. & Labor v. Enserch Alaska Constr.*, 787 P.2d 624, 633 (Alaska 1989).

⁷¹ 810 P.2d 155, 158 (Alaska 1991) (citing *Williams v. Zobel*, 619 P.2d 448, 459 (Alaska 1980)).

⁷² *Church v. State, Dep’t of Revenue*, 973 P.2d 1128, 1130-31 (Alaska 1999) (citing *Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 734 n.13 (Alaska 1995)).

substantial relationship to accomplishing that objective.⁷³ This Court has reviewed the purpose and means served by dividend eligibility schemes in a number of cases.⁷⁴ Most notably, in *Church v. State, Dep't of Revenue*, the Court held that a dividend residency requirement did not violate Church's right to travel because the measure ensured that only permanent residents receive dividends and "allowing enumerated excusable absences" only when "a person has been in the state more than half a year bears a fair and substantial relationship to ensuring that the dividend goes only to permanent residents."⁷⁵ *Church* concluded that the PFD residency requirement at issue had the legitimate purpose of awarding dividends only to permanent residents and that any infringement on Church's right to travel was relatively small.⁷⁶

Alaska Statute 43.23.008(b) similarly limits allowable absences to individuals who were residents for a half a year prior to leaving the state, thereby ensuring that only permanent residents receive dividends. And, as in *Church*, the state's legitimate purpose in awarding PFD's to bona fide residents outweighs any small or incidental infringement on Mr. Heller's right to interstate travel.

Mr. Heller acknowledges that the state has a legitimate state interest in utilizing a residency requirement to differentiate between residents and non-residents. [Appellant's Br. at p. 4] Consequently, he suggests that AS 43.23.008(b) should be read

⁷³ See *Schikora v. State, Dep't of Revenue*, 7 P.3d 938, 944-45 (Alaska 2000). *Underwood v. State*, 881 P.2d 322, 325 (Alaska 1994) (citing *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 629 (Alaska 1993)).

⁷⁴ See *Church*, 973 P.2d at 1125, *Brodigan*, 900 P.2d at 728, *Schikora*, 7 P.3d at 938.

⁷⁵ *Church*, 973 P.2d at 1130-1131.

⁷⁶ *Id.* at 1131.

to only impose a 30-day residency requirement when applied to military personnel deployed overseas. [*Id.*] But reading AS 43.23.008(b) to carve out an exception for military personnel deployed overseas defies the plain language of the statute and usurps the legislature's role.

While sympathetic to the circumstances of individuals like Mr. Heller and his laudable commitment to serving in the armed forces, this Court is not tasked with determining, nor can the State be expected to craft, eligibility schemes that are "perfectly fair to every individual to whom it is applied" under minimum scrutiny.⁷⁷ Alaska Statute 43.23.008(b) applies to all applicants that want to qualify for a dividend while absent from the state for more than 180 days during the qualifying year. Nowhere does the statute draw the impermissible distinctions that Mr. Heller's arguments suggest. Because the provision is designed to ensure that dividend recipients are legitimate state residents and to prevent fraud and bears a fair and substantial relationship to that objective, Mr. Heller fails to establish that AS 43.23.008(b) is unconstitutional.

V. CONCLUSION

The state owes a debt of gratitude to Mr. Heller for his commendable service to this country. But there is no dispute that Mr. Heller was not a resident of Alaska for six months before he left the state. As a result, Mr. Heller was ineligible to claim an allowable absence under AS 43.23.008(a)(3) and to receive a 2007 dividend. The state has a legitimate interest in ensuring that only bona fide residents are eligible for a dividend and the six month residency provision in AS 43.23.008(b) bears a fair and

substantial relationship to that interest. The State respectfully requests this Court affirm the State's dividend denial in this case.

DATED this 11th day of March, 2010.

DANIEL S. SULLIVAN
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By:



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⁷⁷ *Eldridge v. State, Dep't of Revenue*, 988 P.2d 101, 104 (Alaska 1999).

