

FILE COPY

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 REPLY BRIEF

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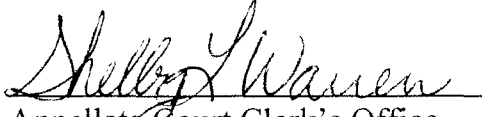
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CONSTITUTIONAL PROVISIONS AND STATUTES PRINCIPALLY RELIED UPON

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).

ARGUMENT

- I. Because Mr. Heller should have been allowed the combined benefit of allowable absences under both AS 43.23.008(a)(3) and AS 43.23.008(a)(17), he is entitled to a PFD for 1997.

The crux of the statutory interpretation issue is how to allow military personnel the combined benefit of an allowable absence under (a)(3) (which has a durational residency prerequisite) and an “any reason consistent” absence under (a)(17) (which does not). The State’s position on this point, while not completely indefensible, is ultimately incorrect.

- A. Allowable absences under AS 43.23.008(a)(17) are in addition to, and either preceding or following, any allowable absences under AS 43.23.008(a)(3).

The State’s argument posits that an allowable absence under (a)(3) is a *prerequisite* to one under (a)(17): “AS 43.23.008(a)([17]) 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). ... Mr. Heller could not claim an additional 180 days of absence under (a)([17])(A) because he was ineligible for an authorized absence under (a)(3),” Br. at 10.¹

This is incorrect. An individual is entitled to the “any reason consistent” (a)(17) absence even if s/he is not claiming a military absence under (a)(3).² Mr. Heller was thus entitled to initiate an “any reason consistent” absence as of 14 August 2005.

¹ The State’s brief continues to refer to former AS 43.23.008(a)(16), which is the numbering the statute had during the time frame relevant to Mr. Heller’s decision. Appellant’s opening brief refers to (a)(17), the current number of the “any reason consistent” provision, and this reply brief follows that same convention.

² Those claiming an allowable absence under other provisions, specifically (a)(1), (a)(2), or (a)(4) to (a)(16), are not entitled to the 180 days. The two groups allowed to claim 180

The State's position also seems to be that the phrase "in addition to" in (a)(17)(A), and Mr. Persilly's testimony that the amendment was intended to allow "military time plus 180 days" means that the (a)(3) military time must precede the (a)(17) 180 days.³

But addition is commutative; just as $1+2 = 2+1$, military time plus 180 days equals 180 days plus military time.⁴ Nothing in the statute's text or legislative history mandates a particular order in which the provisions must be applied to the periods of absence.

B. The legislature intended that an applicant receive a PFD if portions of his/her absence were permissible under (a)(17) and other portions were permissible under (a)(3), as long as all portions of the absence were permissible under one or the other.

The State's approach is to apply the two allowable absence tests separately to Mr. Heller's absence. It was not allowable under (a)(3) because it was not preceded by six months' duration of Alaska residency. It was not allowable under (a)(17) because it exceeded 180 days during 2006. It was therefore not allowable.

But the language and legislative history of the 2003 amendment⁵ indicate that the legislature wanted the two allowable absence provisions applied in combination with each other. The State's separate application of these two provisions, in the same way it applies them to Mr. Heller here, would continue to disqualify the unnamed constituent for whom the 2003 remedial amendment was made, who had been absent for ten months for

days of "any reason consistent" absence are those not claiming any other allowable absence and those claiming an allowable absence under (a)(3).

³ State Br. at 9-10.

⁴ "The commutative laws of mathematics cause the result to be the same, even if the multiplications are made in the reverse order." *Estate of Jung v. Commissioner*, 101 T.C. 412, 435 (U.S. Tax Court 1993).

⁵ SLA 2003, ch. 69.

military reasons and an additional seven weeks caring for a disabled brother.⁶ The military posting under (a)(3) justified only one portion, and the other portion exceeded the limit.⁷ Only by applying the (a)(3) military provision to one segment of the absence and the (a)(17) “any reason consistent” provision to a separate segment of the absence, would the legislature’s remedial intent be realized and the individual found eligible.

Just so, here, the first portion of Mr. Heller’s absence was permissible under (a)(17) notwithstanding the fact that his residency was only two months old when he was deployed, because (a)(17) does not require any durational residency period; and the subsequent portion of Mr. Heller’s absence was permissible under (a)(3) once his Alaska residency was at least six months old, notwithstanding the fact that it exceeded 180 days, because (a)(3) absences are not limited to 180 days. Denying him his PFD because he did not fulfill the durational residency requirement of (a)(3) deprives him of his rights to have departed when he did under (a)(17), and denying him his PFD because his absence exceeded 180 days deprives him of his rights to continue his military service as a six-month Alaska resident for periods exceeding 180 days.

C. Amending AS 43.23.008(b) was not required to allow Mr. Heller his PFD.

The State’s least weak argument is that the legislature in 2003 did not amend AS 43.23.008(b),⁸ and could have done so (State Br. at 7). But the attempt to give meaning

⁶ See Opening Brief at 11.

⁷ And the non-military portion exceeded the 45 days the pre-amendment statute allowed.

⁸ “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.”

to every word or section in a statute is a guideline only, and does not apply in all circumstances.⁹ One provision can have its scope of application limited by another provision, or its effect under particular circumstances abrogated or ameliorated under another provision. Here, the language makes it clear, by omission of (a)(17) from the explicit scope of subsection (b), that the durational residency requirement of AS 43.23.008(b) would not apply to absences of up to 180 days for “any reason consistent” under (a)(17). By expanding the group of those entitled to claim a 180-day absence for “any reason consistent” (formerly just those claiming no other allowable absence, now encompassing both those individuals and military absentee residents), the legislature did not need to amend subsection (b) to entitle Mr. Heller to initiate his extended absence starting with a 180-day “any reason consistent” absence in August 2005, notwithstanding the fact that his residency was two months old.

II. The statute, interpreted as the State suggests, deprives Mr. Heller of his constitutional rights.

A. The statute uses a durational residency requirement to make certain residents (as defined in the PFD statutes) ineligible for a PFD, rather than the allowable utilization of a durational residency requirement to make residents eligible and non-residents ineligible.

The State’s argument on the constitutional point is entirely undercut by the structure of the statute it defends. The statute here does not use this durational residency requirement to distinguish between bona fide residents and non-residents; instead, it uses this durational residency requirement to distinguish between two groups, both coming within the PFD definition of “resident,” but only one of which is eligible.

⁹ *Municipality of Anchorage v. Mjos*, 179 P.3d 941, 944 (Alaska 2008).

Mr. Heller met the PFD definition of resident, both when he applied (AS 43.23.005(a)(2)) and throughout the qualifying year (AS 43.23.005(a)(3)).¹⁰ But beyond residency, the statute imposes other eligibility requirements which a resident must meet:

- The resident cannot have been sentenced during the qualifying year for a felony, or incarcerated during the qualifying year as a result of a felony or misdemeanor under certain circumstances. (AS 43.23.005(d))
- The resident must have been in compliance with the military selective service requirements (AS 43.23.005(a)(7))
- The resident must have been at all times during the qualifying year physically present in the state or, if absent, absent only as allowed in AS 43.23.008. (AS 43.23.005(a)(6))
- The resident must be a United States citizen, or a non-citizen with the status of permanent resident in the United States, or refugee, or asylee (AS 43.23.005(a)(5))

¹⁰ Mr. Heller met the residency requirements, having been a resident when he applied in 2007 and a resident throughout the qualifying year of 2006. Under 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.”

AS 01.10.055 provides:

(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.

- The resident must have 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 (AS 43.23.005(a)(4))

These additional requirements are imposed on residents, and separate eligible residents from ineligible residents, rather than distinguishing residents from non-residents.¹¹ The imposition of an additional requirement above and beyond residency is not in and of itself necessarily fatal, but when these additional intra-residential categorizations incorporate a *durational* residency requirement, the statute is doing exactly that which the constitution and the cases interpreting it have forbidden; it is creating an eligibility distinction between one group of residents and another group of residents (both falling within the definition of resident as articulated in the PFD statutes) based on the length of the individual's residency.¹² This was the same infirmity which caused the United States Supreme Court to find unconstitutional the durational residency link in the *Zobel* case.¹³

All this Court's PFD rulings cited by the State involved examination of the PFD statutes as they existed prior to the 1998 amendment,¹⁴ when the "allowable absence"

¹¹ The statement that "a PFD is a cash payment unrelated to any condition other than residency," Br. at 10, is thus not a correct characterization of the statute at present.

¹² For example, if the felony disqualification provision turned on a durational residency requirement, such that a felony conviction had a differential impact on the eligibility of two residents based on how long those residents had resided in Alaska, e.g., felonies would disqualify those who had lived here less than X amount of time, but would not disqualify those who had lived here longer, it would clearly be unconstitutional. This would not mean that the legislature could not disqualify convicted felons, but only that it could not apply that criterion unequally to short- and long-term residents.

¹³ *Zobel v. Williams*, 457 U.S. 55 (1982).

¹⁴ *Schikora v. State*, 7 P.3d 938 (Alaska 2000) (PFD's for 1992, 1993 and 1994); *Church v. Dept of Revenue*, 973 P.2d 1125 (Alaska 1999) (PFD for 1993); *Eldridge v. Dept of Revenue*, 988 P.2d 101 (Alaska 1999) (PFD for 1995); *Brodigan v. Dept of*

provision was *part of the definition* of a resident for PFD purposes, upheld as segregating bona fide residents from non-residents:

PFD's ... are the kind of 'readily portable benefit' for which states may apply durational residency requirements to establish an applicant's 'bona fide' intent to be a state resident. *See Saenz*, 526 U.S. at 504-05. Similar situations are presented by residency requirements related to the receipt of in-state tuition benefits. 'The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, *bona fide* residents of the State, but have come there solely for educational purposes, cannot take advantage of the in-state rates.' *Vlandis v. Kline*, 412 U.S. 441, 453-54, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1973) (emphasis added). Alaska has a similar, legitimate interest in seeing that only permanent residents receive PFDs.¹⁵

The 1998 amendment made the allowable absence provisions separate from the definition of "resident,"¹⁶ so that the Department could deny a PFD to an applicant without "hav[ing] to tell them they're not a resident. What we can tell them, if this

Revenue, 900 P.2d 728 (Alaska 1995) (PFD for 1990); *State v. Anthony*, 810 P.2d 155 (Alaska 1991) (PFD for years before 1990); *Underwood v. State*, 881 P.2d 322 (Alaska 1994) (PFD for 1993); *Dept of Revenue v. Cosio*, 858 P.2d 621 (Alaska 1993) (PFD for 1985, 1986, and 1987).

Counsel has not found a case in which the Court addressed this durational residency requirement since the 1998 restructuring of that requirement. *Eagle v. Dept of Revenue*, 153 P.3d 976 (Alaska 2007) is not an exception; although it dealt with a 2003 PFD, the ground for denial was a regulatory presumption under 15 AAC 23.163(f) that Mr. Eagle's absence from Alaska for more than five years indicated an intent not to return, taking him outside the definition of a resident and thus ineligible. The court considered (and rejected) Mr. Eagle's argument that this violated the Soldiers and Sailors Civil Relief Act. The court did not reach any equal protection issues, holding that Mr. Eagle had waived those by failing to raise them below, *id.* at 981. Thus, although the case does consider the post-1998 PFD statutes, it does not examine durational residency requirements, it upheld Mr. Eagle's disqualification as a non-resident lacking the intent to return, and it does not consider any equal protection issues.

¹⁵ *Schikora v. State*, 7 P.3d 938, 946 n. 30 (Alaska 2000).

¹⁶ This is seen most clearly in the changes made to AS 43.23.095(8) by sec. 7 of SLA 1998 ch. 44, as laid out on page xv of the Tables section in this brief.

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."¹⁷

When a durational residency requirement is used to create sub-categories within the category of residents, it is on quite a different footing than one used to distinguish residents from non-residents. Alaska has a legitimate interest in seeing that only permanent residents received a PFD, and a reasonably brief durational residency requirement enacted as part of the definition of a resident, with the purpose of culling out non-residents, can be constitutionally permissible.¹⁸ But the particular durational residency requirement on which the State relies to disqualify Mr. Heller is not of this variety. His status as a resident during the relative time frames and under the relevant statutory definitions is uncontested. He was a resident, within the PFD definition of that term, denied a PFD under a separate requirement beyond residency, explicitly structured as such in the statute. He was culled out, not as a non-resident, but as a resident (within the PFD definition of that term) nonetheless ineligible for a PFD.

¹⁷ Tape SFC98 #24, testimony of Deborah Vogt (Dept of Law). See appellant's opening brief at 20 and fn. 41. See also Committee Minutes, Senate State Affairs, Feb. 20, 1997 ("Ms. Jones [Nanci Jones, Director, Permanent Fund Division] added their support for the first section of the bill which is separating the residency from the eligibility requirements by putting it into statute.")

http://www.legis.state.ak.us/basis/get_single_minute.asp?session=20&beg_line=0187&end_line=0488&time=1537&date=19970220&comm=STA&house=S

¹⁸ There is a general 30-day durational residency requirement in AS 01.10.055, incorporated into the PFD statute by the PFD definition of "resident" in AS 43.23.095(7).

This is the reason the State's repeated reliance¹⁹ on its rationale does not support this statute, under either the state or federal constitutions. This Court would have to rewrite the statute in order to characterize this particular durational residency requirement as one that distinguishes residents from non-residents. Only the legislature can do that.

B. The State's reliance on *Cruikshank* to nullify Mr. Heller's right to keep and bear arms is misplaced, not only because the State of Alaska recognizes that *Cruikshank* was wrongly decided, but also because Mr. Heller has a state constitutional right under Article I section 19 of the Alaska Constitution.

The State's sole basis for urging this Court to reject Mr. Heller's argument that some heightened level of scrutiny here is required by the Second Amendment is that *Cruikshank*²⁰ is still good law, Br. at 11. Admittedly Mr. Heller does not know how the Supreme Court will resolve *McDonald v. Chicago*.²¹ However, with that case having been argued on 2 March 2010, it is likely that a decision will be forthcoming before this case is decided. Mr. Heller would also note that (1) even if *McDonald* upholds *Cruikshank*, the Alaska Constitution protects the right to bear arms in Article I, sec. 19; and (2) the State has joined a states' amicus brief urging that *Cruikshank* be overruled,²² and tying the right to keep and bear arms to the right of interstate travel;²³ and Alaska's Attorney General has publicly predicted that *Cruikshank* will be overruled.²⁴

¹⁹ Appellee Br. at 10, 11, 12, 13, 14, 15, 16, 18, 19.

²⁰ *United States v. Cruikshank*, 92 U.S. 542 (1875); see Appellant's Opening Br. 28-29.

²¹ ___ U.S. ___, 174 L.Ed.2d 632 (2009) (certiorari granted).

²² The brief is available at http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1521_PetitionerAmCu38States.pdf.

²³ The amicus brief includes the following passage explaining the states' amici interests:

Assuming the Second Amendment does apply to the States, the important point here is that the “rational basis” standard was explicitly rejected for rights protected by the Second Amendment in the Supreme Court’s *Heller* opinion.²⁵ Assuming the Second Amendment does not apply to Alaska, Article I section 19 should mandate this same result; something more than “rational basis” should be required for legislation affecting

Enforcement of the Second Amendment right to keep and bear arms against state and local governments is especially important in an era of robust interstate travel and commerce. As the Court has observed, “the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). Indeed, the Court has described the right to interstate travel as “so important that it is ‘assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.’” *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)).

²⁴ From <http://gov.alaska.gov/parnell/press-room/full-press-release.html?pr=5181>), announcing Alaska’s joining in the amici brief:

“*We expect the gun owners to prevail in the case,*” said Attorney General [Dan] Sullivan. “The Supreme Court consistently has found that the individual rights in the Bill of Rights must be recognized by state and local governments, thanks to the ‘due process’ clause of the Fourteenth Amendment. As Alaskans, whose way of life is dependent to such a large degree on the right to bear arms, it’s important that we stand up for this principle.” [emphasis added].

²⁵ *Dist. of Columbia v. Heller*, 128 S.Ct. at 2817 & fn. 27, 171 L.Ed.2d at 679 & fn. 27. Since the Supreme Court’s *Heller* opinion, lower federal courts have struggled in deciding what standard of review to apply. The recent opinion in *Heller v. District of Columbia*, 2010 U.S. Dist. Lexis 29063 (D.D.C. 2010) (upholding the new firearm ordinance enacted by the District of Columbia following the Supreme Court opinion) noted five approaches used by various cases: (1) some courts have avoided the standard of review issue by concluding that the challenged provision falls within the presumptively lawful regulatory measures identified in the Supreme Court *Heller* opinion; (2) some courts (a minority) have applied “strict scrutiny” because the Second Amendment is “fundamental,” requiring that the law be narrowly tailored to serve a compelling governmental interest; (3) some courts (the emerging majority) have adopted “intermediate scrutiny,” requiring that the law be substantially related to an important governmental interest; (4) some courts have borrowed elements of the “undue burden” text from the abortion context; and (5) some courts have formulated hybrid approaches. The opinion settles on the intermediate scrutiny approach.

increase the number of dividends to which s/he was entitled, capped only by the individual's longevity. This was not even a durational residency requirement; it was a durational residency link between the length of the individual's residency and the number of dividends the individual could receive. Nonetheless, the fact that it could be ameliorated with time did not make it constitutional.

The "time heals all wounds" rationale proves too much and could be used to justify the most blatant of unconstitutional durational residency requirements.

D. The State's arguments under the Alaska Constitution fail because other rights entailed in a particular PFD case may trigger a level of scrutiny beyond the minimum, and because the durational residency requirement does not purport to segregate bona fide residents from non-residents, but rather eligible residents from ineligible residents.

The State's brief again relies solely on a minimum scrutiny analysis, applicable in the State's view because a dividend is only an economic interest. Again, this overlooks the possibility that a single case can involve more than one set of rights. For example, would minimal scrutiny apply if PFD's were only available to those willing to waive their Free Exercise rights under Article I section 4 of the Alaska Constitution (and their corresponding First Amendment rights)? Mr. Heller thinks not. Neither should minimal scrutiny apply as to Mr. Heller's unwillingness to waive his Article I section 19 right (and his corresponding Second Amendment right) to bear arms in defense of his country.

And the State's brief again relies on the legitimate purpose of awarding PFD's to bona fide residents,³³ not countering the above point that, where the statute itself defines Mr. Heller as having been a resident, use of a durational residency requirement to create

³³ State Br. at 18.

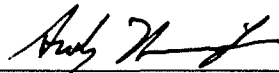
subgroups among statutorily-defined residents, as distinguished from using the durational residency requirement to separate residents from non-residents, explicitly contravenes the rationale based upon which this Court has permitted durational residency requirements in past cases where such requirements were part of the definition of “residents.”

CONCLUSION

The more logical interpretation of the applicable statutes, applying the (a)(3) and (a)(17) allowable absence provisions to permit different segments of Mr. Heller’s absence, should prevail and result in Mr. Heller’s eligibility. Otherwise, the fact that the durational residency requirement segregates two sets of residents for PFD purposes means that the statute (as applied to Mr. Heller, in derogation of his rights to equal protection, to interstate travel and to bear arms) is unconstitutional.

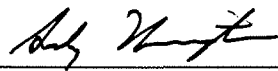
Respectfully submitted this 27th day of April, 2010.

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This brief has been prepared in 13-pt, proportionally-spaced typeface.



Andy Harrington

