

# LEGAL SERVICES

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## MEMORANDUM

February 8, 2019

**SUBJECT:** Constitutionality of SB 24; Durational Residency Requirements  
(Work Order No. 31-LS0472)

**TO:** Senator Scott Kawasaki  
Attn: Mercedes Colbert

**FROM:** Emily Nauman  
Deputy Director 

You asked if SB 24,<sup>1</sup> the bill proposed by the governor that provides additional structured "repayment" permanent fund dividend amounts over three years, violates the Equal Protection Clauses of the United States Constitution and the Constitution of the State of Alaska. As discussed below, a court would likely find SB 24 to be an unconstitutional durational residency requirement by discriminating against some state residents and by infringing on an individual's fundamental right to travel. Durational residency requirements are generally subject to heightened scrutiny, a standard that SB 24 is unlikely to overcome.

### Background

In 2016, the governor reduced by line item veto the appropriation for dividends from the full statutory amount of \$1,362,000,000 to \$695,650,000.<sup>2</sup> The legislature did not override the governor's veto. In both 2017 and 2018, the legislature appropriated an amount less than the statutory dividend formula. In 2017, the legislature appropriated an amount to pay a \$1,100 dividend,<sup>3</sup> and in 2018, the legislature appropriated an amount to pay a \$1,600 dividend.<sup>4</sup> Under SB 24, the governor proposes to "repay"<sup>5</sup> amounts reduced from the dividend in each of the three years, when compared to the statutory

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<sup>1</sup> SB 23 makes the appropriations necessary to execute the dividends described in SB 24. This memorandum's analysis will focus on SB 24, where the substantive requirements for the supplemental dividend payment are laid out.

<sup>2</sup> Sec. 10(b), ch. 3, 4SSLA 2016.

<sup>3</sup> Sec. 24(c), ch. 1, SSSLA 2017.

<sup>4</sup> Sec. 9(d), ch. 17, SLA 2018.

<sup>5</sup> As discussed later in this memorandum, it is questionable whether a court would view the supplemental dividend amounts as a "repayment" or "withholding" owed to residents.

dividend calculation.<sup>6</sup> Under the bill, to be eligible for the amount "reduced" from the 2016 dividend, an individual must have received a dividend in 2016 and be eligible for a 2019 dividend.<sup>7</sup> To be eligible for the amount from the 2017 dividend, an individual must have received a dividend in 2017 and be eligible for a 2020 dividend.<sup>8</sup> To be eligible for the amount from the 2018 dividend, an individual must have received a dividend in 2018 and be eligible for a 2021 dividend.<sup>9</sup>

#### Residency Requirements and Durational Residency Requirements

Historically, the United States Supreme Court has tested residency requirements for various state benefits against not only the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,<sup>10</sup> but also the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution,<sup>11</sup> and the fundamental right to travel.<sup>12</sup> The Alaska Supreme Court may examine a permanent fund dividend structure under any of the federal protections, in addition to the stricter Equal Protection Clause of the Constitution of the State of Alaska.

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<sup>6</sup> See Governor's transmittal letter for SB 24, dated January 16, 2019, Senate Journal, pages 0036 - 0037.

<sup>7</sup> SB 23, sec. 1(b).

<sup>8</sup> SB 23, sec. 1(c).

<sup>9</sup> SB 23, sec. 1(d).

<sup>10</sup> The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, sec. 1, cl. 2. The Equal Protection Clause addresses differences in treatment of similarly situated people.

<sup>11</sup> The Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution states, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Amend. XIV, sec. 1, cl. 2. In *Saenz v. Roe*, 526 U.S. 489 (1999), discussed at length *infra*, the United States Supreme Court for the first time held a state law an unconstitutional infringement of the right to travel under the protections guaranteed by the privileges and immunities clause.

<sup>12</sup> The right to travel between states is a fundamental right; it is not one explicitly guaranteed in the United States Constitution. The "constitutional right to travel from one State to another is embedded in [the nation's] jurisprudence." *Saenz* at 498, citing *United States v. Guest*, 383 U.S. 745, 757 (1966) (internal quotations omitted). (In *Guest*, Justice Harlan wrote, "[t]he right to unimpeded travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union.")

Relevant to your inquiry, in *Zobel v. Williams*, the United States Supreme Court examined a permanent fund dividend structure and declared it unconstitutional under the federal Equal Protection Clause.<sup>13</sup> In *Zobel*, Alaska residents challenged the constitutionality of a permanent fund distribution plan that assigned one dividend unit for each year of residency after 1959.<sup>14</sup> The dollar value of a dividend unit would be established each year by the legislature.<sup>15</sup> The United States Supreme Court struck down the scheme, noting the state "has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then."<sup>16</sup> In its holding, the Court observed the scheme created "fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents."<sup>17, 18</sup>

*Zobel* is one in a line of cases<sup>19</sup> in which the United States Supreme Court developed guidelines for analyzing the legality of using residency as a factor for an increased state benefit.<sup>20</sup> Under those cases, in general, a *durational residency requirement* will typically

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<sup>13</sup> 457 U.S. 55 (1982).

<sup>14</sup> *Zobel* at 57.

<sup>15</sup> The first year, the statute fixed the value of a dividend unit at \$50; a one year resident would receive \$50, a resident of the state since statehood (21 years) would receive \$1,050.

<sup>16</sup> *Id.* at 65.

<sup>17</sup> *Id.* at 59.

<sup>18</sup> An Alaska Attorney General Opinion includes a discussion on the procedural history of *Zobel* and the rules that may be drawn from it. The Opinion notes "[t]he Court, in its majority opinion, never reached the question of whether the rational basis test or the compelling state interest test was applicable to the dividend plan, since it concluded that the distinctions among residents made under the plan did not even satisfy the rational basis test." 1982 Op. Att'y Gen. No. 6 (July 14).

<sup>19</sup> See *United States v. Guest*, 383 U.S. 745 (1966), *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Starns v. Malkerson*, 401 U.S. 985 (1971), *Sturgis v. Washington*, 414 U.S. 1057 (1973), *Vlandis v. Kline*, 412 U.S. 441 (1973), *Sosna v. Iowa*, 419 U.S. 393, 407 (1975), *Rosario v. Rockefeller*, 410 U.S. 752 (1973), *Saenz v. Roe*, 526 U.S. 489 (1999), *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

<sup>20</sup> Lower courts have sometimes found it "difficult to draw direct guidance from the decisions . . . [The] decisions lack a clear statement of rule and have often been fractured, with several justices concluding the programs violated the Equal Protection Clause, several justices concluding the programs violated the right to travel, and several justices

be subject to strict scrutiny — requiring a compelling government interest applied through the means least burdensome on the constitutionally protected activity.<sup>21</sup> A *durational residency requirement* draws a distinction between long-time residents and newer ones based on the length of time an individual resides in a state. A *residency requirement*, on the other hand, is used to distinguish residents eligible for state benefits from nonresidents not eligible for state benefits; a *residency requirement* is designed to verify an individual's bona fide residency and intent to remain. In most cases, the Court has subjected *residency requirements* to a rational basis test: a state must merely show that the benefit meets a legitimate governmental purpose and the means used to accomplish that purpose are a rational way to accomplish that purpose.<sup>22</sup> Generally, "a state has much more authority to draw distinctions between residents and non-residents than between long- and short-term residents."<sup>23</sup>

In *Heller v. State*, the Alaska Supreme Court adopted the distinction between *durational residency requirements* and *residency requirements*. In *Heller*, the Alaska Supreme Court upheld the permanent fund dividend's one year test of state residency to be a *residency requirement* subject to the lesser, rational basis, level of scrutiny.<sup>24</sup> The Alaska Supreme Court noted, "the PFD is a highly portable cash benefit that can be spent anywhere; and the payment is administered on a one-time annual basis regardless of income limits, making it a particularly attractive target for abuse."<sup>25</sup> However, the Court specifically characterized the requirement in *Heller* as a *residency requirement*, designed to distinguish legitimate state residents from non-residents, and not a *durational residency requirement*, subject to additional scrutiny.<sup>26</sup>

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concluding the programs violated no constitutionally protected rights." *Harris v. Hahn*, 827 F.3d 359 (5th Cir. 2016).

<sup>21</sup> *Soto-Lopez* at 909; see also *Shapiro* at 637.

<sup>22</sup> The terms *durational residency requirement* and *residency requirement* are used inconsistently by both the United State Supreme Court and the Alaska Supreme Court. For purposes of this memorandum, I will refer to the requirements as described in this paragraph.

<sup>23</sup> *Heller v. State, Dept. of Revenue*, 314 P.3d 69 (2013) (citing *Williams v. Zobel*, 619 P.2d 448, 451 n. 7 (Alaska 1980)).

<sup>24</sup> *Id.* at 79.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 82. The dissent summarizes, "[a]s the court correctly states today, durational residency requirements are more susceptible to constitutional infirmity than laws that distinguish residents from nonresidents. If a durational residency requirement burdens the right to migrate, under federal constitutional analysis the State of Alaska is required to

When the right to travel is not in question, the Alaska Supreme Court has consistently applied only minimum scrutiny to the dividend program under the Equal Protection Clause of the Constitution of the State of Alaska<sup>27</sup> because the dividend represents an economic interest. Under that minimum level of scrutiny, "the state only needs to show that the challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a 'fair and substantial' relationship to the accomplishment of that objective."<sup>28</sup> The Alaska Supreme Court has found that a heightened level of scrutiny is not triggered under the United States Constitution when the "right to travel is not violated," and "[t]he objective of the challenged statutes and regulations is to ensure that only permanent residents receive dividends."<sup>29</sup>

However, the "instances in which the length of residence could provide a legitimate basis for distinguishing one citizen from another are rare."<sup>30</sup> As the Alaska Supreme Court found in *Heller*, a classification that provides a benefit to one state resident but not to another state resident, based on the duration of residency, is "more susceptible to constitutional infirmity than laws that distinguish residents from nonresidents."<sup>31, 32</sup>

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show that the law is necessary to further a compelling state interest." *Id.* at 84 (Winfrey, J., dissenting).

<sup>27</sup> Article I, sec. 1.

<sup>28</sup> *Church v. State, Dept. of Revenue*, 973 P.2d 1125, 1130 (1999).

<sup>29</sup> *Id.* In determining whether the right to travel was violated, the Court adopted the rule set out in *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264 (Alaska 1984), holding that challenges concerning residency requirements would be addressed using a test that "balance[s] the nature and extent of the infringement on this right caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification." *Id.* at 1131. Factors considered by the Court included "[t]he infringement on Church's right to travel," which the Court concluded was "relatively small and would not be likely to deter a person from traveling." *Id.* The Court also noted that Church "has no vested property right in a permanent fund dividend and should not expect to receive a dividend if he doesn't meet the qualifications." *Id.* Finally, the Court noted, "the regulations and statutes in question bear a fair and substantial relationship to the state's legitimate objective of efficiently awarding PFDs only to permanent residents." *Id.* See also *Schikora v. State, Dept. of Revenue*, 7 P.3d 938 (2000).

<sup>30</sup> *Zobel* at 70 (Brennan, J., concurring).

<sup>31</sup> *Heller* at 78.

SB 24 Analysis

Under SB 24, to receive an additional \$1,061 in 2019, a resident must have received the 2016 dividend and be eligible for the 2019 dividend. An individual not present in the state in 2019 would not receive the additional \$1,061.<sup>33</sup> The multi-year residency requirement for additional dividends in SB 24 would likely be viewed by a court as a *durational residency requirement* subject to strict scrutiny based on an infringement on the right to travel and the discrimination among state residents, favoring longer-term residents. There is some uncertainty in this conclusion though, given the complex nature of the United States Supreme Court holdings in this area and the unique nature of the permanent fund dividend.

Still, the multi-year residency requirement in SB 24 is reason for special concern. The requirement does not appear to operate as a bona fide *residency requirement*, since bona fide residency was established by the receipt of the 2016 dividend.<sup>34</sup> Rather, the requirement seems more akin to a "reward" to citizens for their "incremental[] . . . years of residence," the very classification disavowed in *Zobel*.<sup>35</sup> Exacerbating the issue, the repeated use of residency requirements over the three years of the dividend distributions seems to echo the "fixed, permanent,"<sup>36</sup> and "compound[ing]"<sup>37</sup> "classes of bona fide residents, based on how long they have been in the State"<sup>38</sup> that led to the downfall of the dividend structure in *Zobel*. As adopted and established in *Heller*, the requirement in SB 24 would likely be viewed by the Alaska Supreme Court to be a *durational residency requirement* subject to strict scrutiny.

It could be argued the additional dividend payment is not a state benefit being distributed to residents who stay in Alaska longer, but instead is akin to back-pay or withholdings owed to 2016, 2017, and 2018 residents, since the payout amounts are approximately equal to the difference between the statutory dividend calculation and the amount actually appropriated for the dividends. However, this argument is unlikely to be accepted by a

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<sup>32</sup> See also *Lindly v. Malone et al*, 3-AN-90-2586 and 3AN-90-2821 (3rd Dist. Alaska, July 1990) holding unconstitutional a two-year residency requirement for permanent fund and longevity bonus programs.

<sup>33</sup> A similar structure is used to make additional payments in fiscal years 2020 and 2021, based on dividend eligibility in 2017 and 2018, respectively.

<sup>34</sup> Or eligibility for the 2019 dividend.

<sup>35</sup> *Zobel* at 68 (Brennan, J., concurring).

<sup>36</sup> *Id.* at 59.

<sup>37</sup> *Id.* at 68 (Brennan, J., concurring). Emphasis in the original.

<sup>38</sup> *Id.* at 59.

court. While the statutory calculation may have resulted in a greater dividend in 2016, 2017, and 2018, the Constitution of the State of Alaska permits the legislature and the governor to legally deviate from the statutory calculation under the authority of the Constitution of the State of Alaska.<sup>39</sup> Under this understanding of the dividend, residents were not *owed* any amount of dividend, making a theory that the additional dividend amount is a "withholding" or "repayment" a fiction.

Alternatively, it could be argued that the 2019, 2020, and 2021 residency requirements do not serve to establish the duration of residency, but rather are an administrative convenience in locating residents for payment. This argument might pass the rational basis test, however, as discussed above, it is more likely the stricter compelling interest standard will apply. Even if a court found that the state has a "compelling state interest" in paying 2016, 2017, and 2018 residents additional dividend amounts, it is unlikely to find the state is doing so by the least burdensome means; for example, the state could simply start an online submittal process for all individuals, including those who have left the state, rather than tying the amount to the 2019, 2020, and 2021 dividends.

It is difficult to be absolutely sure of the result of a challenge to the dividend structure in SB 24.<sup>40</sup> As noted by the Alaska Supreme Court, the permanent fund dividend program is unique to the state<sup>41</sup> and is a portable economic benefit<sup>42</sup> subject to examination under the rational basis test for purposes of reviewing a bona fide residency requirement;<sup>43</sup> the

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<sup>39</sup> *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017). ("The plain language of the 1976 constitutional amendment creating the Permanent Fund does not exempt Permanent Fund income from the constraints of the anti-dedication clause. . . . [T]he conclusion that a revenue transfer from the earnings reserve to the dividend fund requires an appropriation and must survive a gubernatorial veto flows naturally from our decision. Absent another constitutional amendment, the Permanent Fund dividend program must compete for annual legislative funding just as other state programs.")

<sup>40</sup> As noted in footnote 17, discerning concrete rules from the United States Supreme Court decisions related to the Fourteenth Amendment and right to travel can be challenging, largely due to the fractured concurrences and dissents of the opinions.

<sup>41</sup> *Heller* at 79. ("By establishing a new state of residency for the purposes of voting or welfare benefits, a person gives up the right to vote or collect welfare benefits in the prior state of residence. But individuals who come to Alaska to collect a PFD do not give up a permanent-fund cash payment from another state." *Id.* The United States Supreme Court has not reaffirmed the validity of this argument.)

<sup>42</sup> *Id.* Similar to the residency requirements upheld by the United State Supreme Court for in-state tuition in *Starns* or for a divorce in *Sosna*.

<sup>43</sup> As opposed to a necessity of life, which is more often subject to strict scrutiny by the United States Supreme Court. *See Shapiro* at 627.

Alaska Supreme Court has yet to apply strict scrutiny to a permanent fund dividend residency requirement.

Despite the uncertainty in how a court might treat the supplemental dividend payments proposed in SB 24, there is reason to be wary of an argument that the scheme would be subject to, or pass, a rational basis test. Notably, in *Heller*, the Alaska Supreme Court definitively adopted the distinction between *durational residency requirements* and *residency requirements*. The payment structure in SB 24 distinguishes residents residing in the state for multiple years as eligible for benefits not available to other, shorter-term, but bona fide, residents. This is the type of *durational residency requirement* identified by the Court in *Heller* that is subject to strict scrutiny. Further, a similar durational requirement failed a modified rational basis test in *Zobel*.

#### Resolving the Suspected Infirmity

To the extent an infirmity exists with the bill, there are two solutions that would resolve the issue. The first would be to issue the supplemental dividend payment to all individuals that received a dividend in 2016, 2017, or 2018, regardless of whether the individuals are still state residents in 2019, 2020, or 2021. Alternatively, the supplemental payment could be made to all 2019, 2020, or 2021 dividend recipients, regardless of their residency in 2016, 2017, or 2018. Because these proposed payout methods treat each current resident equally, and do not penalize an individual for traveling between states, either of these options should pass scrutiny under the Fourteenth Amendment of the United States Constitution, the fundamental right to travel, or the Equal Protection Clause of the Constitution of the State of Alaska.

If the legislature proceeds with the structure proposed in SB 24, the legislative testimony regarding the intent and the means used to accomplish that intent could be essential to the outcome of a decision on the issue.<sup>44</sup> We advise the legislature to build a record of its intent sufficient to overcome a challenge evaluated under either rational basis or strict scrutiny standard.

If we may be of further assistance, please advise.

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<sup>44</sup> Note that several justifications for durational residency requirements have repeatedly been struck down by the United States Supreme Court, including a State's "fiscal policy." *Saenz* at 505 - 506.