THE STATE
of ALASKA
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March 12, 2019

The Honorable Mike Shower and
Members of the Senate State Affairs Committee
State Senate
State Capitol
Juneau, AK 99801
Via E-mail

Re: SB 23 and SB 24 permanent fund dividend payments

Dear Senator Shower and Committee Members:

This letter is in response to the Committee's request for analysis from the Department of Law regarding SB 23 and SB 24. This legislation seeks to accomplish a unique and limited objective – compensate Alaska residents who were qualified to receive permanent fund dividends (PFDs) for three specific years but did not receive the full payment as set forth in Alaska statute, as had been the practice for the over thirty-year history of the PFD program. As set forth below, we do not believe that the legislature is without means to accomplish this limited objective and believe that there is a reasonable legal basis to conclude that this temporary and narrowly tailored legislation would withstand legal review.

THE DIVIDEND PROGRAM

Alaska's PFD program is unique to the United States. It provides that Alaskans share a portion of the natural resource wealth of the state. The Alaska Constitution was amended in 1976 to create the permanent fund into which certain mineral revenues and royalties are placed for purposes of investment.[1] The dividend program was established in 1980 and under current statute provides for the payment of dividends to eligible Alaska

[1] Alaska Const., art. IX, sec. 15.

residents based on a formula linked to prior investment earnings of the permanent fund.[2] For over thirty years, until 2016, Alaskans received a yearly dividend based on the statute. For three years, 2016-2018, the payment of dividends did not follow the statute and eligible Alaska residents received a dividend that was less than the statutory calculation.[3]

The current statutory calculation for determining the amount of the dividend was enacted after the original PFD program was found unconstitutional by the U.S. Supreme Court. The original PFD program allocated payments to residents based on the length of their Alaska residency. Although the Alaska Supreme Court upheld the constitutionality of the program,[4] the United States Supreme Court ruled that the law violated the federal equal protection clause because the state did not have a valid interest that could rationally support the distinction made among people with differing lengths of state residency.[5] Unlike the original PFD program, the current statute provides for the payment of an equal amount to each Alaskan regardless of length of residency. The eligibility requirements for a PFD include being a state resident at the time of application for a PFD and during the entire qualifying year, along with other specified requirements.[6]

SB 23 and SB 24

This legislation seeks to address a unique circumstance in Alaska history in which for the first time in the over thirty-year history of the PFD program, Alaska residents

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2 Under AS 37.13.145(b), fifty percent of the "income available for distribution under AS 37.13.140" is transferred at the end of each fiscal year from the earnings reserve account to the dividend fund established under AS 43.23.045. The "income available for distribution" is defined in AS 37.13.140 as "21 percent of the net income of the fund for the last five fiscal years, including the fiscal year just ended, but may not exceed net income of the fund for the fiscal year just ended plus the balance in the earnings reserve account described in AS 37.13.145."

3 The legislature in 2017 and 2018 appropriated an amount for the payment of dividends that was less than the statutory formula and in 2016 the governor reduced the dividend below the statutory formula by veto, an action that was upheld by the Alaska Supreme Court in *Wielechowski v. State, Alaska Perm. Fund. Corp.* 403 P.3d 1141 (Alaska 2017).

4 *Williams v. Zobel*, 619 P.2d 448 (Alaska 1980).

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

6 AS 43.23.005.

received PFD payments that were less than the amount under the statutory calculation. The legislation is in the form of a temporary law with an appropriation to compensate Alaska residents for the underpayment. Because the legislation is intended to address the underpayment of dividends to Alaskans who were qualified and received PFDs in the three specific past years, it does not provide for such a payment to Alaska residents who did not qualify for and did not receive a PFD during the three subject years. The basic legal question is whether the legislature is able to address this unique situation or whether federal or state constitutional provisions would be interpreted in a manner so as to forbid the legislature from taking this action. In our view, there is a reasonable legal basis to conclude that the legislature is able to address this unusual circumstance by carefully tailored legislation such as SB 23 and SB 24.

Most likely, a court would review the one United States Supreme Court case that addressed Alaska's unique PFD program, *Zobel v. Williams*, and consider how this temporary law differs from the PFD program at issue in that case. The original PFD program reviewed by the Court in *Zobel* allocated payments to residents based on the length of their Alaska residency. Thus, under the original program, a life-long Alaskan was entitled to a dividend that was approximately twenty times the value of the dividend received by a new resident. The Supreme Court found that the original program was unconstitutional because it did not rationally serve any valid state interest and instead established "fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents."[7]

Significantly, the Court in *Zobel* applied the standard of review known as rational basis review to Alaska's statute, and if this standard of review is applied to this legislation, it makes it much more likely that a court would reject any legal challenge to the legislation. Under rational basis review of a state law, a court will uphold the law against constitutional challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[8] The current temporary legislation proposed here, in contrast to the original PFD program, does not establish permanent and fixed distinctions between an ever increasing number of classes of residents. Instead, the only difference between residents is directly linked to the unique and fact specific problem that the legislature seeks to remedy – some current residents were qualified for and received a PFD during three specific years, but the PFD was paid at less than the sum that an Alaska statute called for during those years. The legislation seeks to make a repayment to those individuals. The only residents excluded are those individuals who did not experience this underpayment because they were not qualified for and did not

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7 *Id.* at 59.

8 *Heller v. Doe,* 509 U.S. 312, 320 (1993).

receive a PFD during 2016-2018. This narrowly focused legislation does not favor established residents over new residents in an irrational manner.

A recent decision of the United States Court of Appeals for the Fifth Circuit upholding a Texas law against a constitutional challenge offers further support for the conclusion that the rational basis review standard would likely apply to legislation such as proposed in this bill. In *Harris v. Hahn,*[9] a Texas law provided free tuition for resident veterans to attend state public universities if the resident had either enlisted in Texas or was a resident of Texas at the time the individual enlisted. The law was challenged by a Texas resident veteran who did not meet either criteria. The Appeals Court rejected the constitutional challenge "[b]ecause Texas has presented a rational basis for its residency-at-enlistment requirement."[10] The Fifth Circuit noted that Supreme Court decisions have held that the equal protection clause limits the ability of states to distinguish between new and long-time residents in providing state benefits citing to several cases including *Zobel.* But importantly, the Court identified the fact that "[i]n the three cases considering fixed-point residency requirements, the [Supreme] Court used rational basis review"[11] citing *Zobel* and two other decisions, and decided that rational basis review was the appropriate standard to apply to the Texas veteran residency law.[12]

The Court also considered whether the Texas law violated the constitutional right to travel and found that it did not because it imposed no penalty on new entrants to the state and, even if it could be argued that there was some impact on the right to travel, the residency requirement was lawful because "unlike the benefits considered in other right to travel cases, [the veteran tuition benefit] is a portable benefit that can be received in Texas and enjoyed long thereafter if the recipient chooses to immediately leave the state."[13] The Court also noted that unlike cases in which new residents would be placed in an inferior position regarding government benefits if they moved to a state rather than if

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9 827 F.3d 359 (5th Cir. 2016). This decision was cited by the Division of Legal and Research Services in its memorandum.

10 *Id.* at 361.

11 *Id.* at 364.

12 The Court of Appeals acknowledged that a fixed-point residency requirement has been considered suspect by the Supreme Court if the state's only objective is to reward past service. *Id.* at 369. The proposed legislation here is not focused on rewarding past service but is a limited temporary law to correct a past failure to follow a statute.

13 *Id.* at 370.

they had stayed in their home state, new residents in Texas did not lose anything by moving to the state because Texas was one of only two states to offer a tuition benefit to veteran residents.[14] Additionally, the Court found it significant that any minor burden on the right to travel was lessened because the Texas benefit was essentially a gratuity because there was no constitutional obligation on the part of the state to provide the education benefit to veterans.[15]

Based on the decision in *Zobel*, as well as the recent Fifth Circuit decision in *Harris v. Hahn*, it seems likely that a court would apply rational basis review to a federal constitutional challenge to this legislation. Here, restricting the PFD repayment only to those residents who actually received a PFD that was less than the statutory formula advances a legitimate legislative interest in compensating that limited group of residents, whereas providing the repayment to all residents would not advance the legitimate legislative interest. Moreover, the state has a financial interest in limiting the payment to only those residents who actually experienced an underpayment, which also would reasonably be considered a legitimate legislative interest.

Similarly, we think it is likely that an Alaska court would not find the legislation to violate the state equal protection clause or right to travel. The Alaska Supreme Court in *Heller v. State, Dept. of Revenue* rejected an argument that the PFD program violated the federal or state constitutions including the right to travel because the program's residency requirements were focused on confirming that an individual is a bona fide resident in order to receive the PFD benefit and because the payment of a PFD involves "readily portable benefits that are at high risk of abuse."[16] According to the Court:

> [t]he PFD program is particularly susceptible to passers-through establishing minimal ties to Alaska while intending to reside elsewhere. As the United States Supreme Court has recognized, the risk of distributing benefits to nonresidents grows if the benefits are readily portable. 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. [17]

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14 *Id.* at 371.

15 *Id.*

16 314 P.3d 69, 77 (Alaska 2013).

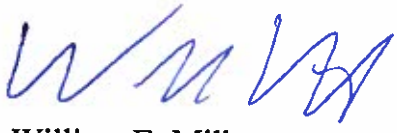
17 *Id.* at 79 (internal quotations omitted). The Alaska Supreme Court reviews state equal protection challenges on a sliding scale standard. *Id.* at 83.

This legislation faces the same risk of abuse as the regular PFD program. In some ways, it may be more susceptible to abuse if individuals can move to the state and obtain the additional repayment money without ever having been an Alaska resident who experienced the underpayment during the 2016-2018 years.

Ultimately, for the reasons set forth above, we believe that there is a reasonable basis to conclude that this legislation would be considered constitutional by a reviewing court. This conclusion is based on the unique nature of both this temporary law addressing a circumstance that had never occurred in the over thirty-year history of the PFD program (payments to residents not based on statute) and the unique nature of the PFD program itself. These unusual factors in our view make it more likely that a court would review the legislation on a rational basis standard of review and conclude that it is constitutional. Nevertheless, because this legislation involves a unique set of facts and the federal courts have been inconsistent in the application of standards of review for state benefit programs, we recognize it is possible that a court could apply the much more demanding strict scrutiny standard of review. Under that standard of review, most legislation is found unconstitutional. For the reasons stated above, we believe there is a good argument that rational basis review applies, and under that standard, we believe there is a reasonable basis to conclude that the legislation would survive constitutional scrutiny.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: 
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