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MEMORANDUM

January 27, 2016

SUBJECT: Constitutionality of HB 241 (29-LS1253\A)
(Work Order No. 29-LS1332)

TO: Representative Louise Stutes
Attn: Reid Harris

FROM: Alpheus Bullard *LAB*
Legislative Counsel

You asked about the constitutionality of HB 241, "[a]n Act relating to the surcharge for commercial fishing permits." The bill provides, for the purpose of assessing the surcharge¹ a nonresident might pay for the issuance or renewal of a limited entry or interim-use commercial fishing permit (permit), that a "nonresident" is an individual who is not eligible to receive a permanent fund dividend under AS 43.23.005(a)(2) - (7)."²

¹ Alaska courts have held that the state may "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *Carlson v. State (Carlson I)*, 798 P.2d 1269, 1274 - 75 (Alaska 1990) (quoting *Toomer v. Witsell*, 334 U.S. 385, 399 (1948) (internal quotation marks omitted) (emphasis in original omitted)).

² AS 43.23.005(a)(2) - (7) require an individual to be a lawful resident of the state, absent from the state only as allowed under AS 43.23.005, and compliant with military selective service registration requirements. AS 43.23.005(a)(2) - (7) provide that:

(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

[. . .]

(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;

The bill changes a residency requirement in AS 16.43.160 to what is, essentially, a durational residency requirement.³ Reid Harris clarified that you are interested in the constitutionality of the bill as it applies to a state resident (under AS 01.10.055) who would not qualify as a "resident" under the bill's durational residency requirements.⁴

(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.

³ The terms "resident" and "nonresident" are not defined for the purposes of AS 16.43.160. Accordingly, under AS 01.10.020, the definition of "residency" at AS 01.10.055 controls how the term "nonresident" in AS 16.45.160 is defined. That section provides:

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.

⁴ Telephone conversation of January 19, 2016.

Short answer

While the bill's durational residency requirements would likely be upheld by a court, the manner in which the nonresident surcharge (for the issuance or renewal of a commercial fishing permit to a "nonresident") is currently calculated may have to be changed (if the bill became law) to reflect the state's actual costs attributable to the bill's newly defined group of "nonresidents," which would include both actual nonresidents and state residents who do not meet the bill's new residency requirements. If the nonresident surcharge differential is not adjusted, the surcharge may be vulnerable to a substantive due process challenge.

Durational residency requirements

Under the state equal protection clause, a durational residency requirement will be evaluated on a sliding scale under which the goal of the legislation and the importance of the individual rights affected are considered.⁵ *State v. Anthony*, 810 P.2d 155 (1991). Whether the durational residency requirement will be upheld depends on the importance of the individual interest being affected, the importance of the state purpose asserted, and the closeness of the "fit" between the durational residency requirement and the achievement of the state's purpose. As the importance of the individual rights affected increases so does the burden on the state to demonstrate that its goal justifies the intrusion on the individual's interests in equal treatment and that the goal is rationally related to the means chosen to achieve it.

In the framework of state imposed durational residency requirements, needs-based programs like public assistance, general assistance, and emergency medical treatment provide "necessities of life" and will be assigned great importance by a court.⁶ If the right denied is a fundamental right, like the right to run for local public office, the right will also be assigned great importance by the court.⁷ A state program or benefit that is not

⁵ This memorandum examines an equal protection challenge only under the Constitution of the State of Alaska, because the state constitution's equal protection clause is more protective of individual rights than the federal constitution's equal protection clause, an analysis under the federal constitution is unnecessary. *See State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

⁶ The United States Supreme Court has made it clear that a program that provides "basic necessities of life" based upon need cannot be subject to a durational residency requirement of one year. *See Shapiro v. Thompson*, 394 U.S. 618 (1969) (involving state welfare benefits) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (involving medical benefits).

⁷ In *Pelozza v. Freas*, 871 P.2d 687 (Alaska 1994), the Alaska Supreme Court struck down a three-year durational residency requirement to stand for election to the Kenai Borough Assembly. The Court in *Pelozza* noted at page 691, footnote 8: "We are inclined to consider problematic any period longer than one year" (the Court had earlier upheld a

needs-based or that does not provide "necessities" will be assigned less importance by the court. Once the importance of the specific individual right asserted is determined by the court, it will evaluate the state's interest in having a durational residency requirement (in these situations, for the most part, the state usually asserts the importance of making sure the recipient of the benefit is a bona fide resident who plans to have ties to the state). In the final step of the court's evaluation, it will examine the "fit" between the state's purpose and the means used to achieve the purpose.

Discussion: durational residency requirement to avoid surcharge

A court will likely apply minimum scrutiny under the state equal protection clause to an individual's interest in receiving or renewing a commercial fishing permit at a price reserved for residents, because only the individual's economic interest is implicated, this interest is not "needs-based," and the durational residency requirement does not involve suspect or quasi-suspect classifications.⁸ The bill does not limit who may fish commercially,⁹ instead, it affects only non-residents' and certain residents' monetary interest in avoiding a surcharge for the issuance or renewal of a commercial fishing permit. Accordingly, a court is likely to address such a right in the same manner as the

one-year requirement to stand for election to local government (*Castner v. City of Homer*, 598 P.2d 953 (1979)).

⁸ The United States Supreme Court has held that there is no fundamental right or suspect class involved in an equal protection analysis of a resident preference. *Martinez v. Bynun*, 461 U.S. 321, 328, (1983).

⁹ If the bill serves to restrict who is allowed to commercially fish in the state, the bill would be subject to a higher level of scrutiny because Alaska courts have held that the right to engage in an economic endeavor within a particular industry is an important right for purposes of equal protection analysis. In order for such a classification to be valid under the state's equal protection test, it will be subjected to close scrutiny, and must have a close relation to an important governmental objective. *State, Dept. of Transportation v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 631 - 632 (Alaska 1990); *Matson v. State Commercial Fisheries Entry Comm.*, 785 P.2d 1200, 1205 (Alaska 1990); and *Malabed v. N. Slope Borough*, 70 P.3d 416 (Alaska 2003).

Similarly, a state law that is interpreted by a court to affect access to a fish and game user group in Alaska will be reviewed under art. VIII, sec. 2 of the Constitution of the State of Alaska. This "Uniform Application" section subjects a state law or action to "more stringent review . . . than standard equal protection [review] under article I, section 1." *Gilbert v. Department of Fish and Game*, 803 P.2d 391, 398 (Alaska 1990). "In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important [and the] means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values." *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989).

court has addressed the right of persons to receive a PFD. Alaska courts have held that the right to receive a PFD implicates only an economic interest and so an equal protection claim concerning the denial of a dividend should be reviewed under minimum scrutiny. *Underwood v. State*, 881 P.2d 322 (Alaska 1994); *State v. Anthony*, 810 P.2d 155, 158 (Alaska 1991).¹⁰

Because a monetary interest is a less important individual right for the purposes of an equal protection analysis, the state would need only to demonstrate that this bill's residency requirements address a legitimate governmental purpose and that the requirements have a fair and substantial relationship to accomplishing this purpose. While I do not know what the intended purpose of this legislation is, any legitimate state purpose that has a fair and substantial relationship to the bill's requirements will be sufficient for the court to uphold the bill.

Note

The Alaska Supreme Court has upheld a differential charge based on additional expenses related to nonresidents. In the *Carlson* cases the Alaska Supreme Court held that the state may "charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *State v. Carlson*, 65 P.3d 851, 855 quoting *Carlson v. State*, 798 P.2d 1269, 1274 - 1275 (Alaska 1990).¹¹ However, this bill would impose the surcharge on both nonresidents and those residents that do not satisfy the bill's residency requirements -- persons who may likely still pay "taxes which only residents pay." Accordingly, if the bill became law, the surcharge would need to be justified with a purpose that applies to these state residents, or it could be challenged as a violation of substantive due process by a resident who does not meet the bill's residency requirements.

The legal doctrine of substantive due process under art. I, sec. 7, Constitution of the State of Alaska, protects a person against unreasonable and arbitrary governmental action. The constitutional guarantee of substantive due process assures that legislation is not arbitrary, but is based on some rational policy. *Allam v. State*, 830 P.2d 435 (Alaska App. 1992).

¹⁰ See also *State v. Cosio*, 858 P.2d 612, 625 (1993); *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728 (Alaska 1995); *Church v. Department of Revenue*, 973 P.2d 1125 (Alaska 1999) (PFD residency requirements were not unreasonable and were a valid imposition of a bright line rule to ease the administrative burden on the state of determining residency); *Schikora v. State Department of Revenue*, 7 P.3d 938 (Alaska 2000) (no more than 180 days out of state upheld); *Ross v. State*, 286 P.3d 495 (Alaska 2012); and *Heller v. Dep't of Revenue*, 314 P.3d 69 (Alaska 2013).

¹¹ *Carlson I*, 798 P.2d at 1274 - 75, *id.* at footnote 1.

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Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people. The constitutional guarantee of substantive due process assures only that a legislative body's decision is not arbitrary but instead based upon some rational policy.

A court's inquiry into arbitrariness begins with the presumption that the action of the legislature is proper. The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. This burden is a heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification.

Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974).

If you have questions, please do not hesitate to contact me.

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