HJR

5

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 13, 1997

FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 1/29/98

The STATE AFFAIRS Committee considered: HJR 5

HOUSE JOINT RESOLUTION NO. 5 CONSTIT AMNDMNT: FREEDOM OF CONSCIENCE

Proposing an amendment to the Constitution of the State of Alaska relating to freedom of conscience.

recommends it be replaced with the following committee substitute _____ [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[✓] fiscal note(s) GOV

_____

[ ] zero fiscal note(s) _____

_____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

_____

[ ] zero fiscal note(s) _____

_____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Jeannette James	✓			
[illegible]		✓		
[illegible]	✓			
[illegible]	✓			
[illegible]	✓			
[illegible]	✓			

CHAIR'S SIGNATURE Jeannette James _____

State of Alaska

Alaska State Legislature

To: Rep. Jeannette James, Chair
State Affairs Committee Members

From: Rep. Terry Martin

Re: HJR 5

Date: January 27, 1998

In light of today's discussion of the pro's and con's of freedom of religion and conscience, I offer the following observations from Supreme Court Justice Sandra Day O'Connor:

"The principle of religious 'free exercise' and the notion that religious liberty deserved legal protection were by no means new concepts in 1791, when the Bill of Rights was ratified. To the contrary, these principles were first articulated in this country in the colonies of Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina in the mid-1600s. These colonies, though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups--although often limited to Christians--beyond their own. Thus, they encountered early on the conflicts that may arise in a society made up of a plurality of faiths.

"The term *free exercise* appeared in an American legal document as early as 1648, when Lord Baltimore extracted from the new Protestant governor of Maryland and his councilors a promise not to disturb Christians, particularly Roman Catholics, in the 'free exercise' of their religion. Soon after, in 1649, the Maryland Assembly enacted the first free exercise clause by passing the Act Concerning Religion: "No person . . . professing to believe in Jesus Christ shall from henceforth be any ways troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor in any

way [be] compelled to the belief or exercise of any other religion against his or her consent, so as they be not unfaithful to the Lord Proprietary, or molest or conspire against the civil government.'

Rhode Island's Charter of 1663 used the analogous term--'liberty of conscience.' It protected residents from being 'in any ways molested, punished, disquieted, or called into question, for any differences in opinion, in matters of religions and do not actually disturb the civil peace of our said colony.' The charter further provided that residents may 'freely, and fully have and enjoy his and their own judgments, and conscience in matters of religious concernments . . . ; they behaving themselves peaceably and quietly and not using this liberty to licentiousness and profaneness; nor to the civil injury, or outward disturbance of others.'

"The principles expounded in these early charters reemerged more than a century later in state constitutions that were adopted in the flurry of constitution drafting that followed the American Revolution. By 1789 every state but Connecticut had incorporated some version of a free exercise clause into its constitution. These state provisions, which were typically longer and more detailed than the federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all, it is reasonable to think that the states that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses. The precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests.

"For example, the New York Constitution of 1777 provided: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: provided that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.'

"Similarly, the New Hampshire Constitution of 1784 declared: 'Every individual has a natural and ualienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace, or disturb others, in their religious worship.'

"The Maryland Declaration of Rights in 1776 read: "No person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under color of

religion, any man shall disturb the good order, peace or safety of the state, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights' (Maryland Constitution, Declaration of Rights, Art. XXXIII).

"The New York Constitution [stated that] rights of conscience should not be 'construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] state.'

"Like the federal Free Exercise Clause, the Virginia religious liberty clause was simply silent on the subject, providing only that all men are equally entitled to the free exercise of religion, according to the dictates of conscience.'

"George Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples, writing in a letter to a group of Quakers: 'In my opinion, the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.'"

- U.S. Supreme Court Justice Sandra Day O'Connor, adapted from her dissent in Boerne vs. Flores

REPRESENTATIVE
TERRY MARTIN
VICE-CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

MAY 15 - JAN 15 258-8169
716 W. 4TH, SUITE 650
ANCHORAGE, AK 99504

JAN 15 - MAY 15 465-3783
STATE CAPITOL
JUNEAU, AK 99801-1182

MEMORANDUM

February 21, 1997

To: Representative Jeannette James, Chair
House Committee on State Affairs

From: Representative Terry Martin TM.

Subject: HJR 5 - "Freedom of Conscience"

Thank you for scheduling HJR 5 for a public hearing. I believe the debate in which your committee is about to engage is vitally important to the recognition and protection of our basic freedom--the freedom to follow our conscience.

The first objection you will likely hear to this proposed constitutional change is that it is not needed--that it does nothing. This argument hinges on the fact that the constitution already recognizes the freedom of religion, and that therefore the "wall of separation" has already been erected. This objection postulates that freedom of religion and freedom of conscience are the same thing, and that anyone who says they are not is splitting hairs.

Perhaps that is so. But because the court has been splitting hairs in the Valley Hospital case, we now find ourselves in this unbelievable situation: members of the staff of the hospital are forced (short of quitting their jobs) to participate indirectly in support of operations to which they conscientiously object. In other words, even though a nurse or housekeeper believes an abortion is a morally abhorrent murder, he or she is required by the court to clean up after the operations, dispose of fetal remains, etc.

Here, in brief, is the hair the court has attempted to split: The freedom of conscience to not participate in abortions is codified in the state law passed in 1970 that legalized abortion. A woman's "right to choose" an abortion is recognized by the courts as protected by the right to privacy clause, added to the constitution in 1972. The court decided in the Valley Hospital case that, because the hospital is a public facility, it must offer abortions, a constitutionally-protected right of women. And it decreed that the

Heard +
Held
1997

constitutional right overrides the statutory protection of the freedom of conscience.

It is clear to me that, inasmuch as the court does not recognize it within the freedom of religion clause, the freedom of conscience deserves the protection of its own clause within the constitution.

We should also bear in mind that many people who morally object to abortion, euthanasia and the death penalty, do not practice or profess any religion. They are simply following their conscience and object on moral grounds, not on religious grounds.

A second argument you will likely hear over the proposed language of the amendment is that it is too broad. What if someone uses it to challenge a state law, arguing, for instance, that he conscientiously objects to driving less than 80 miles an hour on the freeway, or to paying taxes because he doesn't agree with the uses to which the state puts the tax money?

Other states, such as Washington and Connecticut, have included in their freedom of conscience clauses a narrowing backstop, which your committee might also want to consider. The subsentence included in these two constitutions says, "but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state." Licentiousness is defined by Webster's as 1) morally undisciplined or sexually unrestrained, or 2) having no regard for accepted rules or standards.

I do not object if the committee decides such an addition would be in order.

HJR-5

WORDING OF BALLOT ISSUE

RIGHT OF PRIVACY -
RIGHT OF CONSCIENCE

REPRESENTATIVE
TERRY MARTIN
VICE-CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

MAY 15 - JAN 15 258-8169
716 W. 4TH, SUITE 650
ANCHORAGE, AK 99504

JAN 15 - MAY 15 465-3783
STATE CAPITOL
JUNEAU, AK 99801-1182

OK

MEMORANDUM

To: **Representative Jeannette James, Chair**
House Committee on State Affairs

From: **Representative Terry Martin** TM

Date: **January 16, 1997**

Subject: **Scheduling of HJR 5**

At your earliest convenience, please schedule a hearing for HJR 5, a proposed amendment to the Alaska Constitution protecting the individual's freedom of conscience.

Support information and backup materials are attached. If you have questions, please contact either myself or John Manly of my staff at 465-3783. Thank you for your expeditious attention to this request.

Sponsor Statement

HJR 5

Proposing an amendment to the Constitution of the State of Alaska relating to the freedom of conscience

What do we mean when we say "freedom of conscience?" The United States is a nation founded on the freedom of religion; it is fundamental to the many institutions we have grown up with and take for granted. That is to say, our freedom of religion is not Christian, Jewish, Islamic or any other specific sect, but recognizes the basic tenets of these and other religions as foundational to our society.

Yet, what is it to claim a freedom of religion if not to be able to act upon one's conscience when your religious beliefs collide with the secular world? The freedom to act in accordance with one's religious--or even non-religious, but moral--beliefs is a fundamental precept of freedom of religion.

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska and the US Constitutions. We have gone so far as to recognize in the state constitution the right to privacy. Perhaps the right to freedom of conscience has simply been taken for granted, as implied by the protection of the freedom of religion, or as codified in Alaska statutes

However, having the freedom of conscience in statute has not been sufficient, and a court challenge has sought to compel individual Alaskans to perform actions to which they personally objected as a matter of conscience. Specifically, providers of medical services, such as doctors and nurses, have been forced to perform or participate in certain medical procedures such as abortions, even though they are morally opposed to the killing of innocent human life. Today's new emphasis on assisted suicide could well become a public governmental policy, mandated by the courts or the legislature.

Any convoluted rationalization of a social policy that forces a person to participate in what he or she considers to be murder puts Alaska at the doorstep of Nazi Germany of the 1930s or of the several communist despotisms of the 30s, 40s and 50s.

By adding this new protection to the Alaska Constitution, we can make it crystal clear that Alaskans enjoy complete freedom of conscience, just as we now imagine we do.

Sectional Analysis

HJR 5

Proposing an amendment to the Constitution of the State of Alaska relating to freedom of conscience.

Section 1 amends Article 1 of the state constitution by adding a new section that reads: "Section 25. Freedom of Conscience. An individual may not be denied freedom of conscience and may not be compelled to act in a manner that violates the individual's conscientious objections to the act."

Section 2 directs that the proposed amendment be placed before the voters in the next general election in conformity with that section of the constitution that governs how the constitution may be amended. Article XIII, sec. 1 requires that the proposed amendment pass the legislature by a 2/3 vote of each house and be approved by more than half the voters in the election. When passed, the amendment takes effect 30 days after certification of the election by the Lt. Governor.

EIVED RECORDS
OCT 5 1995
CLERK

RECEIVED
NOV 06 1995
HUGHES, THORSNESS, GANTZ, POWELL & BRUNDIN

Filed in the Trial Courts
STATE OF ALASKA, THIRD DISTRICT
Clerk of the Trial Courts
NOV 7 1995
By _____ Deputy

SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

MAT-SU COALITION FOR CHOICE, DR. SUSAN LEMAGIE, and JANE DOES I-X,

Plaintiffs,

vs.

VALLEY HOSPITAL ASSOCIATION, INC., and JAMES G. WALSH, Valley Hospital Executive Director,

Defendants,

Case No. 3PA-92-01207 Civil

OCT 03 1995

FINAL JUDGMENT

In accordance with the Court's Order of September 20, 1995, granting plaintiffs' motion for summary judgment and a permanent injunction, Final Judgment is hereby entered in this case in plaintiffs' favor as follows:

IT IS HEREBY ADJUDGED and DECLARED that the policy adopted by the Operating Board of the defendant Valley Hospital Association, Inc. ("Valley Hospital") to restrict the performance of lawful elective abortion procedures at Valley Hospital violates the protections for the right of privacy provided by Article I, §22 of the Alaska Constitution. It is also adjudged and declared that Valley Hospital is a non-sectarian, quasi-public hospital which may not violate or abridge the fundamental rights of women, protected by the Alaska Constitution, to choose to terminate their pregnancies. For these reasons, and for the further reasons set

STEPHAN H. WILLIAMS
Attorney at Law
[illegible]

forth in the Court's Order granting plaintiffs' motion for a preliminary injunction, entered on February 9, 1993, it is thus adjudged and declared that the restrictive abortion policy adopted by Valley Hospital is unlawful and unenforceable.

IT IS FURTHER ADJUDGED AND DECLARED that Valley Hospital should be permanently enjoined from violating the rights of women under the Alaska Constitution, declared in this Final Judgment and the Court's prior Orders incorporated into this Final Judgment, by prohibiting or restricting the performance of lawful abortion procedures at Valley Hospital's facilities. Based on the evidence presented to the Court and for the reasons stated in the Court's Order granting plaintiffs' motion for a preliminary injunction, entered on February 9, 1993, the court has concluded, in the exercise of its equitable discretion, that a permanent injunction is necessary to secure the rights of women under the Alaska Constitution who may choose to undergo a lawful abortion procedure, to protect the physical and emotional health of such women, and to avoid the imposition of other hardships on such women.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Valley Hospital, its Operating Board, medical staff members, officers, agents, servants, and employees, any of their successors, and all persons acting in concert, participation, or cooperation with them or any of them, or at their direction or under their control, are hereby permanently enjoined and restrained as follows:

1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;

STEPHAN H. WELLIKER
Attorney At Law
500 L Street, Suite 600
Anchorage, Alaska 99501
(907) 276-9322

2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;

3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

Nothing in the permanent injunction granted as part of this Final Judgment shall require any member of the medical staff of Valley Hospital, or any officer, agent, servant, or employee of Valley Hospital, to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Valley Hospital shall pay to plaintiffs attorney's fees in the amount of $_____ and costs in the amount of $_____. Post-judgment interest at the statutory rate of 10.5 per cent a year shall accrue on the total amount of this Final Judgment from the date this Final Judgment is entered until fully paid.

ENTERED this 9th day of ~~October~~ November, 1995, at Anchorage, Alaska.

Dana Fabe
Superior Court Judge

STEPHAN K. WILLIAMS
ATTORNEY AT LAW
509 L Street, Suite 400
Anchorage, Alaska 99501
(907) 276-0337

BOPP, COLESON & BOSTROM
ATTORNEYS AT LAW

JAMES BOPP, JR.

ASSOCIATES:
RICHARD E. COLESON
BARRY A. BOSTROM
JOHN K. ABEGG

2 FOULKES SQUARE
401 OHIO STREET
P.O. BOX 5100
TERRE HAUTE, INDIANA 47808-5100

TELEPHONE
812/232-2434
FAX
812/235-3685

February 8, 1996

Senator Drue Pearce
President, Alaska Senate
Representative Gail Phillips
Speaker, Alaska House of
Representatives
State Capitol
Juneau, AK 99801-1182

Re: brief *amicus curiae* in *Mat-Su Coalition et al. v. Valley Hospital et al.*

BY FACSIMILE TRANSMISSION

Dear Mr. Pearce and Ms. Phillips:

Mr. James Bopp, Jr. and I are lead counsel for Valley Hospital in a case which is currently before the Alaska Supreme Court. Mr. Brian Brundin, of Hughes, Thorsness, Gantz, Powell & Brundin in Anchorage, is local counsel in this matter.

Valley Hospital is a small (thirty-six bed) private, non-profit, community hospital in the Matanuska-Valley. In the Fall of 1992, it adopted a policy to not offer abortions except in the case of rape or incest; when a life-threatening condition existed for the patient; or when the fetus had a condition which was incompatible with life. This policy was promulgated to protect the moral consciences of its employees, a majority of whom were opposed to offering elective abortions.

In enacting this policy, Valley Hospital relied, at least in part, on Alaska's conscience clause legislation, AS 18.16.010(b). This statute was passed in 1970 and expressly provides that no hospital or person shall be required to participate in an abortion, nor may they be held liable for refusing to do so. The legislative history clearly indicates that, in passing this statute, the legislature wanted to take a "hands-off" position on this sensitive issue. The Legislature recognized that people on both sides of the abortion debate have strong feelings concerning it, and it wanted to respect the beliefs of all persons on this issue. In short, it wanted to ensure that coercion would not be applied to any person or institution regarding this procedure.

Despite the very explicit protection which this statute conferred on Valley Hospital and its employees, and their conscientiously-held beliefs against performing elective abortions, Valley Hospital was sued in order to force it to offer all such procedures. Unfortunately, the trial court has ordered the Hospital to offer all abortions and has only exempted those persons who would have to *directly* participate in these procedures from being forced to do so. Such an order creates severe moral problems for members of the surgical and support staff who are now forced to indirectly participate in these procedures, e.g., by cleaning surgical instruments used in performing abortions, by cleaning the operating rooms following these procedures, by disposing of fetal remains, etc.

In *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979), the Alaska Supreme Court noted that forcing persons to engage in acts which violate their consciences "works an exceptional harm on them." In *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1081 (Alaska 1981), the Alaska Supreme Court analyzed AS 18.16.010 in a different context and expressly deferred to the legislative balancing on the issue of abortion (generally) which is embodied in this statute, holding that "the Alaska legislature is better suited to strike the balance [of competing interests on this issue] than is this court." In sum, Alaska's highest court has noted that it is important to protect the consciences of its citizens and has deferred to the balancing of competing interests struck by the Alaska Legislature on the issue of abortion.

However, the Alaska Supreme Court has never addressed the issue of whether a few persons may utilize the government, i.e., the judicial system, to force a great many more persons to engage in an activity which violates sincerely held beliefs of moral conscience. Based on the trial court's ruling in this case, there is the very real danger that despite the protection of conscience AS 18.16.010(b) provides on the issue of abortion, the Alaska Supreme Court may decide that a few persons may use their desire to obtain abortions as a means to force many more persons to engage in acts which are morally abhorrent to them. In short, it may decide that a persons's interest in obtaining an abortion automatically and totally overrides peoples' conscientiously-held beliefs against participating in this procedure, including, as in this case, completely *private* actors. Such a decision would render AS 18.16.010(b) unconstitutional and would, of course, present a Pandora's Box of dangers for all Alaskans.

To ensure that its beliefs on this issue are respected--and, by implication, the beliefs of all Alaskans--Valley Hospital is seeking your support and that of your colleagues. Specifically, it would like as many members of the Alaska House and Senate as possible to participate in an *amicus curiae* ("friend of the

court") brief before the Alaska Supreme Court. This brief would be limited in scope to advocating the continuing validity of AS 18.16.010(b). In this regard I have contacted members of both Houses who I have been advised would recognize the continuing importance of protecting moral beliefs on this issue.

As a brief submitted by members of a co-equal branch of government--the same branch which enacted the statute--Valley Hospital believes that the Alaska Supreme Court would (or at least should) give this brief particular attention. Participating in this fashion would not require you to devote either resources or time; it would be funded and written by an attorney with expertise in this area. It would only require you to, literally, "sign on" to it, i.e., allow your name to be included as "a friend of the court" who would be speaking to it on this issue. The brief would probably be filed in approximately thirty days.

In the interim, Valley Hospital would appreciate it if, as soon as possible, you would call a Republican caucus to discuss this matter and to encourage as many of your colleagues as possible to participate in such a project. The Hospital would then appreciate it if Mr. Brundin or I could be apprised of the results.

Valley Hospital enacted its policy not to coerce anyone, but, rather, to ensure that no coercion would be applied to it and its employees. By helping save AS 18.16.010(b) from invalidation, your assistance in this case will not only ensure that Valley Hospital and its employees will be allowed to follow their moral consciences, but it will go a long way to restoring respect to the beliefs of all persons on this issue.

Sincerely yours,

BOPP, COLESON & BOSTROM

John K. Abegg

John K. Abegg

cc:
Bob Byron
Brian Brundin
Republican Members of the Alaska Legislature

Supreme Court hears abortion appeal

ANCHORAGE – The Alaska Supreme Court on Wednesday heard arguments on an abortion case involving Valley Hospital in Palmer. The arguments came on the anniversary of the day the U.S. Supreme Court issued its landmark ruling that legalized abortion 24 years ago.

In the Valley Hospital case, an anti-abortion majority on the nonprofit hospital's board banned second-trimester abortions at the facility. A Palmer physician and a pro-abortion group filed a suit to overturn that decision.

Dana Fabe, now sitting on the Supreme Court, ruled from the Superior Court bench that the hospital was a quasi-public institution because of the millions in public funds used to build the facility. She ruled such a facility couldn't bar abortions because of the right to privacy set out in the state constitution.

Valley Hospital is the only hospital in the state where second-trimester abortions can be performed. The procedures are relatively rare. Most abortions occur in the first three months of pregnancy and can be done in a doctor's office or clinic.

Juneau Empire - Thurs. Jan 23 '97

IN THE
SUPREME COURT OF ALASKA

Valley Hospital Association, Inc., and James G. Walsh, Valley Hospital Executive Director,	)	Docket No. S 7417
Defendants-Appellants,	)	Superior Court for the State of Alaska Third Judicial District at Palmer
vs.	)	
Mat-Su Coalition for Choice, Dr. Susan Lemagie, and Jane Does I-IX,	)	Hon. Dana Fabe, Judge Presiding
Plaintiffs-Appellees.	)	Case No. 3 PA-92-1207 Civil

BRIEF AMICUS CURIAE OF MEMBERS OF THE ALASKA LEGISLATURE IN SUPPORT OF DEFENDANTS-APPELLANTS.

Paul Benjamin Linton
General Counsel
Americans United for Life
343 S. Dearborn Street
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

Kenneth P. Jacobus, P.C.
ABA # 6911036
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333

Counsel for the Amici

Filed in the Supreme Court
of the State of Alaska this
15th day of May, 1996

JAN HANSEN, CLERK

By: Tracy Cerra

Table of Contents

Table of Authorities

Cases:

List of Amici

Sen. Robin L. Taylor (Rep.)	"A" District
Sen. John Torgerson (Rep.)	"D" District
Sen. Loren Leman (Rep.)	"G" District
Sen. Rick Halford (Rep.)	"M" District
Sen. Lyda N. Green (Rep.)	"N" District
Sen. Michael W. Miller (Rep.)	"Q" District
Rep. Joe Green (Rep.)	10th District
Rep. Mark Hanley (Rep.)	12th District
Rep. Terry Martin (Rep.)	14th District
Rep. Sean Parnell (Rep.)	17th District
Rep. Jerry Sanders (Rep.)	19th District
Rep. Pete Kott (Rep.)	24th District
Rep. Vic Kohring (Rep.)	26th District
Rep. Scott Ogan (Rep.)	27th District
Rep. Al Vezey (Rep.)	32nd District
Rep. Don Long (Dem.)	37th District

Applicable Statute

Alaska Statutes, § 18.16.010(b):

Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

Statement of the Issue Presented for Review

Whether, assuming that the Alaska Constitution protects an independent right of abortion, a quasi-public hospital is required to make its facilities available for the performance of elective abortions over its objections and in violation of the state statute, Alaska Stat. § 18.16.010(b), which guarantees the institutional and individual rights of conscience of both public and private hospitals and their physicians, nurses and staff.[1]

Statement of the Interest of the Amici

Amici curiae are elected Members of the Alaska Legislature. Amici may not share a common view as to whether, and under what circumstances, abortion should be legal, but all are in agreement with and strongly support the institutional and individual rights of conscience embodied in § 18.16.010(b). Amici support Valley Hospital Association's right to rely on this statute and submit that the lower court seriously erred in ordering the hospital to allow elective abortions to be performed on its premises. The court's judgment has implications not only for other hospitals in Alaska that choose not to perform abortions, but also for the power of the State of Alaska, acting through its legislature, to determine whether and to what extent public facilities and funds should be made available for elective abortions. That authority may be called into question if the lower court's judgment is allowed to stand. Amici urge this Court to reverse.

---

[1] Amici assume for purposes of this Brief that defendant hospital is a "quasi-public" institution.

Statement of the Case

Amici curiae generally adopt the defendants-appellants' Statement of the Case.

Statement of the Standard of Review

The standard of review for the issue presented for review in this Brief is de novo.

SUMMARY OF ARGUMENT

The Alaska abortion statute provides, in pertinent part: "Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section." Alaska Stat. § 18.16.010(b). The rights of conscience secured by this statute are not limited to private or denominational hospitals, nor to persons employed by such facilities. Rather, the rights of conscience are guaranteed to all hospitals and persons, without exception. Defendant Valley Hospital seeks to avail itself of this right in resisting plaintiffs' claim that the hospital must open its doors to the performance of elective abortions in violation of the established policy of the hospital and the conscientious objections of its members, staff, and governing board.

The lower court's decision in this case is unprecedented. Although a few courts have erroneously held, on federal constitutional grounds (later rejected by the Supreme Court), that a public (or quasi-public) hospital may not refuse to perform elective abortions, no court has held that a state constitutional right to abortion overrides an otherwise applicable statutory right of conscience. The lower court's decision compelling defendants to allow elective abortions to be performed in its facilities over its conscientious objection is clearly wrong and must be reversed.

I. THE LOWER COURT ERRED IN FORCING VALLEY HOSPITAL ASSOCIATION TO MAKE ITS FACILITIES AVAILABLE FOR THE PERFORMANCE OF ELECTIVE ABORTIONS OVER ITS OBJECTIONS AND IN VIOLATION OF THE STATE STATUTE WHICH GUARANTEES THE INSTITUTIONAL AND INDIVIDUAL RIGHTS OF CONSCIENCE OF BOTH PUBLIC AND PRIVATE HOSPITALS, AND THEIR PHYSICIANS, NURSES AND STAFF.

The lower court determined that Valley Hospital was not entitled to rely on the conscience clause for three reasons. First, the clause was part of a "statute enacted in 1970, three years prior to Roe v. Wade, 410 U.S. 113 (1973), the U.S. Supreme Court decision which held that a woman's right to an abortion is a fundamental constitutional right." Order of February 9, 1993, granting preliminary injunctive relief, at 20. Second, the statute in which the clause appears "was also enacted prior to Alaska's adoption of an express constitutional right of privacy," and that, as a consequence, § 18.16.010(b) "may not be construed as immunizing quasi-public hospitals from violating Alaska's constitutional reproductive freedom rights." Id. at 20-21. Third, institutional conscience clause protection may not be claimed by public or quasi-public entities. Id. at 21-22. Not one of these reasons withstands scrutiny.

A. The Federal Constitutional Right To Abortion Recognized In Roe v. Wade Does Not Require Public Institutions To Make Their Facilities Available For Abortions.

The lower court suggested in its Order of February 9, 1993, that the United States Supreme Court's recognition of a federal constitutional right to abortion necessarily implies a right of access to public (or quasi-public) facilities for performance of abortions--therapeutic or elective. That implication is wrong.

Amici note that, notwithstanding the recognition of an

abortion right in Roe v. Wade, the Supreme Court has repeatedly held that the Constitution does not require either the United States or the States to pay for therapeutic or elective abortions, or to make their health care facilities available for the performance of either. See Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment restricting federal funding of abortion to instances in which the mother's life is endangered); Williams v. Zbaraz, 448 U.S. 358 (1980) (upholding state statute prohibiting public funding of abortion except to save the life of the mother); Maher v. Roe, 432 U.S. 464 (1977) (upholding state statute limiting public funding of abortion to those abortions which were "medically necessary"); Poelker v. Doe, 432 U.S. 519 (1977) (rejecting challenge to municipal policy allowing abortions to be performed in city hospitals only to save the mother's life or health); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (rejecting challenge to state statute forbidding abortions at state-run medical centers except to save the life of the mother). The latter two decisions are particularly instructive and merit this Court's close attention.

In Poelker, the Mayor of St. Louis issued a directive to the Director of Health and Hospitals prohibiting the performance of abortions at two city hospitals except when there was a threat of grave physiological injury or death to the mother. The Supreme Court, relying upon its decision in Maher v. Roe, 432 U.S. 464 (1977), decided the same day, upheld this directive. The Court agreed that "the constitutional question presented here is

identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth." Poelker, 432 U.S. at 521. The Court found "no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions," and held that "the Constitution does not forbid a State or city, pursuant to the democratic processes, from expressing a preference for normal childbirth as St. Louis has done." Id. The Court upheld this policy even though, as the dissent observed, "[p]ublic hospitals that do not permit the performance of elective abortions will frequently have physicians on their staffs who would willingly perform them," and notwithstanding the possibility that the Court's holding would "pose difficulties in small communities where the public hospital is the only nearby health facility." Id. at 523-24 (Brennan, J., dissenting).

In Webster v. Reproductive Health Services, the Supreme Court upheld a state statute prohibiting the performance of an abortion in any public facility except to save the life of the mother. Rejecting the argument that Missouri had created an obstacle to a woman's ability to exercise her right to choose an abortion, the Court stated:

> [T]he State's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacles in the path of a woman who chooses to terminate her pregnancy." McRae, 448 U.S. at 315 . . . . Just as Congress' refusal to fund abortions in McRae left "an indigent woman with at

> least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all, id., at 317 . . . , Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State has chosen not to operate any public hospitals at all.

492 U.S. at 509.

The Court explained that the Missouri's decision "only restrict[s] a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital," a "circumstance . . . more easily remedied, and thus considerably less burdensome, than indigency, which 'may make it difficult--and, in some cases, perhaps impossible--for some women to have abortions' without public funding." Webster, 492 U.S. at 509 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

> Having held that the State's refusal to fund abortions does not violate Roe v. Wade, it stains logic to reach a contrary result for the use of public facilities and employees. If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds," Maher, [432 U.S.] at 474 . . . , surely it may do so through the allocation of other public resources, such as hospitals and medical staff.

Id. at 509-10.

In language that is directly applicable to the lower court's first reason for refusing to give effect to the Alaska conscience clause in this case, i.e., that the clause was part of a statute enacted before Roe was decided, the Supreme Court held:

> Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of

abortions.

Id. at 510. The Court emphasized that there is no "right of access to public facilities for the performance of abortions," even where "the State recoup[s] all of its cost in performing abortions, and no state subsidy, direct or indirect, is available, ..." Id. Citing Maher, Poelker, and McRae, the Court stated that "the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so." Id. at 511. The Court noted that in Poelker, "the suit was filed by an indigent who could not afford to pay for an abortion, but the ban on the performance of nontherapeutic abortions in city-owned hospitals applied whether or not the pregnant woman could pay." Id.

The Supreme Court's decisions in Poelker and Webster leave no doubt that a public hospital is not required to make its facilities available for the performance of elective abortions, even where no expenditure of public funds is involved.[2] The Court reached these decisions, it must be noted, without relying

---

[2] From October 1, 1988, until January 22, 1993, the Department of Defense had a formal policy of prohibiting "pre-paid" (patient-funded) abortions at United States military bases overseas, even though no federal funds were at stake. See Memorandum for Secretaries of the Military Departments from William Mayer, M.D., Ass't Sec. of Defense, June 21, 1988. That policy was never challenged as being violative of the abortion right recognized in Roe v. Wade. More recently, Congress enacted two laws that prohibit abortions at military hospitals except to save the life of the mother, or in cases where the pregnancy resulted from an act of rape or incest. See Pub. L. 104-61, §§ 8119, 8119a (Dec. 1, 1995); Pub. L. 104-106, § 738 (Feb. 10, 1996). That legislation has not been challenged, either.

upon a federal or state statutory right of conscience.[3] The recognition by the Supreme Court of a right to abortion in Roe does not require federal or state hospitals to offer abortion services. Thus, the lower court's first reason for refusing to give effect to the Alaska institutional conscience clause--that it was part of a statute adopted before Roe was decided--must be rejected. Thus, even in the absence of an express conscience clause, nothing in the federal constitution requires public hospitals to make their facilities available for abortions.

B. Assuming, Arguendo, That The State Constitution Protects A Right To Abortion Separate And Independent From The Federal Right To Abortion Recognized In Roe v. Wade, That Right Does Not Override The Institutional And Individual Rights Of Conscience Guaranteed By Alaska Stat. § 18.16.010(b).

The lower court also determined that the conscience clause is inapplicable because it was part of a statute enacted before the Alaska Constitution was amended to include a specific right of privacy upon which plaintiffs based their right of access. See Order of February 9, 1993, granting preliminary injunctive relief, at 20-21. Although the court's reasoning here is not

---

[3] Even before Poelker and Webster were decided, one federal circuit court strongly implied that a private, nondenominational hospital is not required to make its facilities available for the performance of elective abortions, even if the hospital is otherwise acting under color of state law, if its refusal is based on moral or religious grounds. In Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 642-44 & nn. 7, 11 (4th Cir. 1975), the court held that a federal "conscience clause" (42 U.S.C. § 300a-7(a)(2)(A)) for facilities constructed with Hill-Burton funds did not immunize a quasi-public hospital from suit where the hospital's refusal to make its facilities available for the performance of elective abortions was based on a pre-Roe statute prohibiting nontherapeutic abortions and not upon institutional religious or moral convictions.

entirely clear, the court appears to suggest that a statutory right of conscience may be raised only against one asserting a statutory, not a constitutional, right of access. Thus, before the Alaska Constitution was amended to include a right of privacy (and, arguendo, a right to abortion), a hospital might refuse, on the basis of § 18.16.010(b), to allow its facilities to be used for the performance of abortions made legal by the same statute. However, such refusal would be of no avail after the state constitution was amended to include a specific right of privacy and, by extension, a right to abortion.

Neither the court nor plaintiffs, however, cite cases from this Court or any other state court holding that a constitutional right to abortion overrides an otherwise applicable statutory conscience clause. To argue, as plaintiffs have (Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 58-60 & n.38), that a constitutional claim necessarily trumps a statutory defense simply begs the question before this Court and conceals the paucity of authority in support of their argument. No state court has held, on state as opposed to federal constitutional grounds, that public (or quasi-public) hospitals must make their facilities available for the performance of elective abortions.[4]

---

[4] In addition to the federal cases previously discussed in the text, the following federal courts held that a public hospital could not rely on a state "conscience clause" as the basis for its refusal to allow its facilities to be used for the performance of abortions because such a policy interfered with the right to abortion recognized in Roe v. Wade: Wolfe v. Schroering, 541 F.2d 523, 527-28 (6th Cir. 1976) (Kentucky);

At least twenty-eight States, in addition to Alaska, have conscience clauses that apply to public, as well as private, institutions.[5] Not one of these statutes has been struck down or limited in its application to private institutions on state constitutional grounds, even though court decisions in several of these States recognize abortion rights under their state constitutions.[6] The absence of such authorities indicates the unprecedented nature of the lower court's judgment.

It is evident that the legislature's intention in including a conscience clause in the Alaska abortion statute in 1970 was to protect the right of institutions and individuals not to participate in a procedure (i.e., abortion) that was being made

---

Hodgson v. Lawson, 542 F.2d 1350, 1356 (8th Cir. 1976) (Minnesota); Orr v. Koefoot, 377 F. Supp. 673, 683-84 (D. Neb. 1974) (Nebraska). These decisions, of course, are no longer valid in light of the Supreme Court's subsequent opinions in Poelker v. Doe and Webster v. Reproductive Health Services.

[5] Ark. Code Ann. § 20-16-601(b) (1991); Colo. Rev. Stat. § 18-6-104 (1990); Del. Code Ann. tit. 24, § 1791(b) (1987); Fla. Stat. Ann. § 390.001(8) (1993); Geo. Code Ann. § 16-12-142 (1994); Haw. Rev. Stat. § 453-16(d) (1985); Idaho Code § 18-612 (1987); Ill. Comp. Stat. ch. 745, §§ 30/1(b), 70/9 (1994); Ind. Stat. Ann. § 16-21-8-7 (Burns 1993); Kan. Stat. Ann. § 65-444 (1992); Ky. Rev. Stat. § 311.800(1) (1995); La. Rev. Stat. § 40:1299.33(C) (1992); Me. Rev. Stat. Ann. tit. 22, § 1591 (1992); Md. Ann. Code, Health-Gen. § 20-214(b) (1995 Supp.); Mich. Comp. Laws Ann. § 333.20181 (1992); Minn. Stat. Ann. § 145.414 (1989); Mo. Ann. Stat. § 197.032 (1983), see also § 188.215 (1996 Supp.); Neb. Rev. Stat. § 28-337 (1989); N.J. Stat. Ann. § 2A:65A-2 (1987); N.M. Stat. § 30-5-2 (1994); N.C. Gen. Stat. § 14-45.1(f) (1993); N.D. Cent. Code § 23-16-14 (1991); Ohio Rev. Code § 30-5-2 (1994); Pa. Cons. Stat. Ann. tit. 18, § 3215(a), -(b) (1983 & 1995 Supp.); S.D. Cod. Laws § 34-23A-14 (1994); Tenn. Code Ann. § 39-15-204 (1991); Va. Code § 18.2-75 (1988); Wis. Stat. Ann. § 253.09 (1995 Supp.).

[6] See, e.g., In re T.W., 551 So.2d 1186 (Fla. 1989); Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995).

legal.[7] That abortion may have been placed on a stronger legal foundation with the adoption of the privacy amendment in 1972 (which amici do not concede) does not make defendants' and others' reliance on the conscience clause any weaker. There is no support in the law for the lower court's unstated conclusion that recognition of a state right to abortion, in and of itself, overrides the rights of conscience--statutory or constitutional--of institutions and individuals.

C. Under Alaska Stat. § 18.16.010(b), A Quasi-Public Institution May Express A Conscientious Objection To Abortion.

The heart of the lower court's opinion may be found in its view that a quasi-public institution is not entitled to express a conscientious objection to abortion. See Order of February 9, 1993, granting preliminary injunctive relief, at 21-22. But this third reason for ignoring the Alaska conscience clause is no more persuasive than the first two. The court cites one Attorney General Opinion from 1978, 1978 Op. Att'y Gen. No. 8 (Formal), and one decision from the New Jersey Supreme Court, Doe v.

---

[7] The March 25, 1970, report by members of the Senate Judiciary Committee who voted to pass the bill noted that "the bill forces no woman to get an abortion, no doctor to perform an abortion and not hospital to permit an abortion." Report by Members of the Senate Judiciary Committee voting "do pass" in support of Judiciary Committee Substitute for Senate Bill 527, an Act relating to Abortions." Senate Journal Supp. No. 10, March 25, 1970, p. 2. The April 9, 1970, report of the House Judiciary Committee stated, in part, that "[t]he bill also provides that a hospital or person is not required to participate in an abortion and neither shall a hospital or person be held liable for refusing to participate in an abortion." Judiciary Committee Report on CS for Senate Bill 527 (HWE), House Journal Supp. No. 12, April 9, 1970, p. 3. The same Report reiterated that "[i]mmunity from liability is granted to a hospital or other person for refusing to participate in an abortion." Id.

Bridgeton Hosp. Ass'n, Inc., 366 A.2d 641 (N.J. 1976), cert. denied, 433 U.S. 914 (1977). Neither is persuasive.

The Attorney General Opinion was issued in response to a request to evaluate a proposed bill regulating abortion, not the existing law adopted in 1970. One provision of the proposed bill would have relieved all physicians, clinics, surgical centers, and their employees from any duty to perform an abortion over their objection in writing. The Attorney General expressed the view that an institutional right of conscience is limited to "sectarian" hospitals, and that "nonsectarian hospitals built or operating with public support would be foolish to rely on it." 1978 Op. Att'y Gen. No. 8 (Formal) at 13 (Feb. 10, 1978). The two lower federal court decisions cited in support of this conclusion--Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), appeal dismissed, 419 U.S. 91 (1974), and Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), cert. denied, 420 U.S. 907 (1975)--must be regarded as having been rejected by the Supreme Court's decisions in Poelker v. Doe, and Webster v. Reproductive Health Services.[8]

---

[8] After the Supreme Court's decision in Poelker, defendants in the Nyberg case sought to vacate the injunction that had been issued forbidding them from implementing a resolution prohibiting staff physicians from using the facilities of the local municipal hospital to perform abortions except to save the mother's life. The court of appeals, noting that the woman refused an abortion in Poelker was indigent, affirmed the district court's denial of relief, explaining that "there is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital." Nyberg v. City of Virginia, 667 F.2d 754, 758 (8th Cir. 1982), appeal dismissed, 462 U.S. 1125 (1983). In Webster, the Supreme Court, after citing and quoting this

In an Opinion issued seven weeks after the one cited by the lower court, the Alaska Attorney General "guess[ed]" that the Alaska Supreme Court would not follow the decision in Poelker because this Court "has provided greater protection for the individual as against governmental regulation and control under the state constitution than has the United States Supreme Court under the federal constitution." 1978 Op. Att'y Gen. No. 15 (Formal), at 2-3 (March 31, 1978). Whether the Attorney General's "guess" will prove to be correct is the precise issue to be decided. Moreover, as the defendants and other amici have argued, the conscience clause does protect the constitutional rights of individuals, acting through their institutions, not to participate in medical procedures they deem morally abhorrent.

> [E]xclusion of health care institutions from laws protecting conscience can not be reconciled with other legal doctrines protecting the rights of conscience. For example, to protect individual rights of conscience in the provision of health service but deny protection to collective (entity) forms of individual conduct is rather like arguing that the first amendment protects only individual speech (direct, person-to-person, natural, voice communication, or personally-written, personally-delivered letters) but not collective speech (for example, by corporations, or via television, books, or newspapers--which are collective, institutional efforts).

Lynn D. Wardle, "Protecting the Rights of Conscience of Health Care Providers," 14 J. Legal Med. 177, 187 (1993).

---

passage, 492 U.S. at 503, rejected this reasoning, stating, "If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' . . . surely it may do so through the allocation of other public resources, such as hospitals and medical staff." Id. at 510 (citation omitted).

In Bridgeton, the other authority cited by the lower court, the New Jersey Supreme Court initially held that a quasi-public hospital has an enforceable common law duty to make available the full range of medical services which it is qualified to provide, including elective abortions. Doe v. Bridgeton Hosp. Ass'n, Inc., 366 A.2d at 643-47. While the case was pending in the state supreme court, the New Jersey Legislature enacted a conscience clause intended to protect the rights of both public and private health care institutions. The New Jersey Supreme Court, citing the same two federal cases relied upon by the Alaska Attorney General in his 1978 Opinion, held that "[f]or the state to frustrate [the abortion] right by its action would be violative of the constitutional guarantee." Id. at 647. In view of the Supreme Court's rejection of the reasoning of Nyberg v. City of Virginia and Doe v. Hale Hospital[9] in Poelker v. Doe and Webster v. Reproductive Health Services, the lower court's reliance on Bridgeton was clearly misplaced. Moreover, the reasoning, if not the result, in Bridgeton was called into question by the New Jersey Supreme Court's later decision in Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).[10]

---

[9] It also must be noted that, unlike the Alaska conscience clause, which applies to any hospital, the Massachusetts conscience clause at issue in Doe v. Hale Hospital applies only to a "privately controlled hospital or other health facility." Mass. Gen. Laws Ann., ch. 272, § 21B (1990).

[10] After the Supreme Court decided Poelker, the New Jersey courts refused to grant the defendant hospital relief from the New Jersey Supreme Court's judgment in the mistaken belief that Poelker was a public funding, not a public access, case. See Doe v. Bridgeton Hosp. Ass'n, Inc., 389 A.2d 526 (N.J. Super. Ct. Law

In Right to Choose, the New Jersey Supreme Court held that New Jersey could not choose to fund childbirth but not "medically necessary" abortions for indigent women. Accordingly, the court construed a state statute limiting public funding of abortions to those necessary to save the life of the mother to include "all abortions that are medically necessary to preserve the mother's life or health." 450 A.2d at 941. The court, however, held that "the New Jersey Constitution does not require the funding of elective, nontherapeutic abortions," id. at 928, and that "the State may pursue its interest in potential life by excluding those abortions from the [state] Medicaid program." Id. at 937. Rejecting Justice Pashman's view that New Jersey was required to fund all abortions for indigent women, the court stated that "the flaw in his analysis is in failing to recognize that the right of the individual is freedom from undue governmental interference, not an assurance of government funding." Id. at 935 n.5. Clearly, the New Jersey Supreme Court's holding in Right to Choose, that New Jersey has no obligation under the state constitution to fund elective abortions for indigent women, strongly suggests that public (or quasi-public) hospitals have no obligation to make their facilities available for the performance of elective abortions for any women, indigent or otherwise.

Although not mentioned in the lower court's Opinion, plaintiffs argued below (and may be expected to argue on appeal) that a state statute cannot confer upon a public (or quasi-

---

Div. 1978), aff'd, 403 A.2d 965 (N.J. Super. Ct. App. Div. 1979).

public) hospital the right to assert a conscientious objection to abortion. Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 71-73. If, however, the State may mandate a policy forbidding the use of public facilities for performance of nontherapeutic abortions, it is difficult to understand why the State may not also permit the governing boards of public and quasi-public hospitals to adopt such policies as a matter of conscience. Contrary to plaintiffs' view, legislative deference in such matters would not constitute an Establishment Clause violation any more than a blanket state policy would. See Harris v. McRae, 448 U.S. 297, 318-20 (1980) (rejecting Establishment Clause claim against the Hyde Amendment).[11] This Court, too, has recognized that "the fact that sectarian beliefs may be entertained by those persons [acting on behalf of a public institution] does not bar [that institution] from achieving its valid secular goal[s] . . . ." Lien v. City of Ketchikan, 383 P.2d 721, 724 (Alaska 1963).

In Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974), the Ninth Circuit Court of Appeals rejected an Establishment Clause challenge to a federal statute which

---

[11] Significantly, in the Right to Choose decision, discussed supra, the New Jersey Supreme Court specifically rejected the argument that the state abortion funding ban violated a state constitutional provision forbidding establishment of one religious sect in preference to another. 450 A.2d at 938-39. The court observed, "Merely because a statute is consistent with one or more religions does not mea that its principal effect is religious." Id. at 938.

provides that receipt of federal Hill-Burton construction funds does not require the receiving entity "to make its facilities available for the performance of any sterilization procedure or abortion of the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." 42 U.S.C. § 300a-7(a)(2)(A). In enacting this statute, "Congress sought to retain its neutrality in the debate over the morality of voluntary sterilizations [and abortions] by preventing the reception of federal health program funds from being used as a basis for compelling a hospital to perform such surgery against the dictates of its religious or moral beliefs." 506 F.2d at 311. "Congress quite properly sought to protect the freedom of religion of those with religious or moral scruples against sterilizations and abortions." Id. at 312. Accord, Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975).[12]

The lower court erred in compelling defendant hospital to make its facilities available for the performance of elective abortions, over the objections of the hospital and its governing board, and in violation of the rights of conscience specifically guaranteed by § 18.16.010(b). That injunction must be reversed.

---

[12] See also Gray by Gray v. Romeo, 697 F. Supp. 580, 590 (D. R.I. 1988) (dicta) (a public hospital may rely upon a statutory conscience clause to refuse to allow its facilities to be used for purposes inconsistent with the moral or religious values of the institution if the conscience clause covers the conduct to which the institution objects but refusing to allow hospital to rely on conscience clause which applied only to abortion and sterilization and not to euthanasia).

Conclusion

For the foregoing reasons, amici curiae, Members of the Alaska Legislature, respectfully request this Honorable Court to reverse the judgment of the superior court.

Respectfully submitted,

Paul Benjamin Linton
General Counsel
Americans United for Life
343 S. Dearborn Street
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

Counsel for the Amici

Kenneth P. Jacobus, P.C.
ABA # 6911036
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333

April 29, 1996

After 3 deaths, Australia poised to repeal euthanasia law

ANCHORAGE DAILY NEWS 2/03/97

By SETH MYDANS
The New York Times

DARWIN, Australia — The last meal of sandwiches and beer seems to have been more agonizing for Dr. Philip Nitschke than for the cancer-ridden patient whose life he was about to take.

"I just about choked on my ham sandwich," the doctor said. "I was very, very anxious to the point where I was sweating. He spent a lot of time trying to calm me down, and I thought: 'Great. You spend your last meal trying to pacify the doctor.'"

Then the 66-year-old patient, Robert Dent, said, "You've got a job to do; get on with it." And Nitschke inserted into Dent's arm an intravenous needle connected to the doctor's battered gray laptop computer.

Without another word, the doctor recalled, Dent punched in a series of commands, a lethal dose of barbiturates began flowing into his veins and moments later he was dead — the first person to die under a landmark law allowing doctors to kill patients who want to end their lives.

Dent's death last Sept. 22 and two more that followed in January are at the center of an emotional debate in Australia as Parliament appears bent on overturning the world's only voluntary euthanasia statute, which took effect last summer here in Australia's Northern Territory.

In confronting the issue, Australia

Please see Back Page, **EUTHANASIA**

EUTHANASIA: After 3 deaths, Australia is poised to repeal assisted-suicide law

Continued from Page A-1

has become a testing ground for other countries, including the United States, that are considering the tangled legal and moral issues raised by rapid medical advances that are prolonging both life and the process of dying.

In January, the U.S. Supreme Court heard arguments on whether the Constitution gives terminally ill people a right to doctor-assisted suicide — a slight step short of the death administered by doctors that is permitted here. This summer the court is expected to rule on whether to reinstate laws that were overturned in New York and Washington state banning doctor-assisted suicide.

"In 20 years' time, we will be able to keep virtually everyone alive indefinitely," said the author of the Northern Territory's law, Marshall Perron, at a Parliamentary hearing here in late January. "More and more, we are going to die when someone makes the decision that we are going to die."

Six senators had flown to Darwin to hear testimony about the law, and their generally hostile comments supported a growing sense that the national Parliament was likely to overturn it later this year.

The law has been vigorously opposed by religious groups and the country's conservative medical establishment. Aboriginal groups are also opposed, both on religious grounds and because of fears that have taken hold in their communities that their lives could be taken when they seek medical care.

The issue has aroused passions around the nation, and Parliament has received 14,000 written submissions from the public.

At an overcrowded public hearing the night before Perron, the former chief minister of the Northern Territory, addressed the senators, 51 people rose to speak, some sharing painful personal stories, some invoking religious principles, one man leading the audience in a chant of the word "choice."

"This law is not about the right to die," cried Terry Secker. "We all have the right to die. This law is about the right to kill!"

Rick Bawden, a photographer, countered: "Can someone tell me what's ethical about telling someone who wants to die: 'Nope. Sorry, mate'? This is torture!"

Charles Kerms disagreed, saying he was here at the urging of his wife, who had been bedridden and nearly blind for 15 years. "She told me: 'Go there tonight and tell them this: We are not animals. We are not an 'it.' Tell them we are made in the image and likeness of God.' "

The voluntary euthanasia law, which was enacted in 1995 and took effect last July, is the first anywhere that explicitly allows doctors to take their patients' lives. Though Nitschke rigged his computer to allow his patients to initiate their own deaths, he could have legally administered the injections himself.

In the Netherlands, with some of the most permissive laws on the subject, euthanasia remains illegal. But guidelines passed in 1993 allow doctors to help patients take their own lives under certain circumstances.

Switzerland also allows doctor-assisted suicide in carefully controlled situations.

Under the Northern Territory's Rights of the Terminally Ill Act, a patient must be over 18 and be mentally and physically competent to request his own death. The request must be supported by three doctors, including a specialist who confirms that the patient is terminally ill and a psychiatrist who certifies that he is not suffering from treatable depression. Once the paperwork is complete, a nine-day "cooling-off period" is required before the death can proceed.

With the deaths of Dent, 52-year-old cancer patient Janet Mills and an anonymous 69-year-old male cancer patient who died on Jan. 22. Nitschke, 49, has found himself something of an outcast among his peers. Many people have been shocked by what some call his "computer-driven death machine," a 3-year-old Toshiba laptop on which he also surfs the Internet and reads his e-mail. He connects the computer to a pump-driven syringe filled with three barbiturates, which he carries in an old gray suitcase.

Last September, after Dent, a carpenter who had been suffering fro prostate cancer for five years, , had eaten his ham sandwich, the doctor said he switched on his computer, which makes a loud buzzing noise, and the first black-and-white screen flickered on.

"Are you aware that if you go ahead to the last screen and press the 'yes' button, you will be given a lethal dose of medicine and die?" the computer asked in large, bold letters, displaying the options "Yes" and "No."

Dent pressed the key for "yes" and moved to the second screen, which reads, "Are you certain you understand that if you proceed and press the 'yes' button on the next screen, you will die?"

Dent hit the key again and faced the final message: "In 15 seconds you will be given a lethal injection." He pressed the key for "Yes" a final time, waited as the computer continued to buzz, and in 15 seconds, a rhythmic pumping sound emerged from the suitcase.

Moments later, the screen went black except for one word: "Exit."

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 5

Revision Date
Title: Const. Amdt.: Relating to freedom of conscience
Sponsor: Representative Martin
Requester: House State Affairs

Dept. Affected: Office of the Governor
BRU: Elective Operations
Component: General and Primary Elections
Component Serial No.: #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services						
Travel						
Contractual		3.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	3.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES [ ]						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		3.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	3.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: none

POSITIONS

Full-time		0				
Part-time		0				
Temporary		0				

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by: Dana LaTour — Phone: 465-5347
Division: Division of Elections — Date: 2/24/97
Approved by Co Agency: Lt. Governor Fran Ulmer — Date: 2/24/97
Office of the Lieutenant Governor

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information, call the Governor's Legislative Office

REPRESENTATIVE
TERRY MARTIN
VICE-CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

MAY 15 - JAN 15 258-8169
716 W. 4TH, SUITE 650
ANCHORAGE, AK 99501

JAN 15 - MAY 15 465-3783
STATE CAPITOL
JUNEAU, AK 99801-1182

December 2, 1997

Representative Jeannette James, Chair
House Committee on State Affairs
PO Box 56622
North Pole, Alaska 99705

Dear Representative James:

I am writing today to renew your interest in HJR 5, which proposes an amendment to the state constitution to guarantee Alaskans the individual freedom of conscience. The resolution is in the State Affairs committee and you were kind enough to have held a hearing on it last session.

I regret that during the hearing I was unsuccessful in fully explaining the gravity of the problem I see and which this amendment would rectify. However, now that the Alaska Supreme Court has made its decision regarding the Valley Hospital case, we see that in Alaska the constitutional right to privacy holds supremacy over the statutory freedom of conscience. Consequently, those who work at that hospital will have to choose between their conscience and their career when ordered to participate in an act they consider murder.

I have for many years held the view that our freedom of religion clause would not protect Alaskans who chose to exercise their freedom of conscience, because when the courts split hairs, the one i separate from the other. Now that we have the definitive answer from the Supreme Court, I believe our most effective course is to take the amendment to the people of Alaska. I do not see it as a pro-life vs. pro-abortion argument, but on this broader plain: It is the freedom of conscience that allows the freedom and exercise of the various religions, or the exercise of no religion, as a person's conscience dictates. Freedom of conscience is a fundamental right of all human beings. Our constitution should reflect that.

If Alaska's liberal court wins on this facet of the issue, will they next require hospitals, doctors, nurses and other state-licensed providers of medical services to participate in assisted suicides?

Please schedule HJR 5 for a second hearing in your committee after session convenes in January. I would appreciate it very much, and I know that many Alaskans, who have taken their freedom of conscience for granted for so long, would appreciate it, too.

I you would like to discuss this request with me, please feel free to call me at my office at 258-8169 or at home at 333-6990. Thank you. I look forward to seeing you in Juneau.

Best regards,

Terry

Representative Terry Martin

enclosures

LAW OFFICES OF
KENNETH P. JACOBUS, P.C.

425 G STREET, SUITE 920
ANCHORAGE, ALASKA 99501-2140
TELEPHONE (907) 277-3333
FAX (907) 278-4848

November 21, 1997

Representative Terry Martin
716 West Fourth Avenue, Suite 650
Anchorage AK 99501

Re: Mat-Su Coalition for Choice v. Valley Hospital, Ass'n.

Dear Terry,

Thank you very much for participating as an *amicus curiae* on the freedom of conscience issue in the Valley Hospital case. I have enclosed a copy of the opinion of the Alaska Supreme Court, released earlier today, for your information. By judicial decision, Alaska now has the strongest pro-abortion protections that exist in the United States. Freedom of conscience, that is, the right not to be forced to participate in abortions if a person or institution does not want to do so, is afforded no recognition.

I was also very disappointed in the treatment given the constitutional right to free expression of religion. The Supreme Court of Alaska has not treated religious beliefs with much regard. A recent example is Swanner v. Anchorage Equal Rights Commission, 868 P.2d 301 (Alaska 1994), in which the Court did not recognize a landlord's religiously compelled refusal to rent to unmarried couples. In Valley Hospital, the Court appears to have taken a more extreme anti-religious position. Footnote 18 on page 19 suggests that the State cannot protect the free exercise of religion as guaranteed by the Alaska and United States Constitutions because the protection of "free exercise" could be a violation of the "establishment" clause.

The Legislature must now realize that the Supreme Court of Alaska, as presently constituted, will protect abortion rights above all else. The only way that the pro-life position can be protected is through a pro-life amendment to the Alaska Constitution. At the very least, there should be a "freedom of conscience" constitutional amendment to balance the "right to privacy" clause. No one should be able to use the protections afforded to the individual by the right to privacy clause to force others to do things which are against their fundamental beliefs, as is now authorized by the Valley Hospital opinion.

Thank you again for participating as an *amicus curiae* in this case.

Very truly yours,

KENNETH P. JACOBUS, P.C.

By
Kenneth P. Jacobus

Sec. 18.16.010. Abortions. (a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) consent has been received from the parent or guardian of an unmarried woman less than 18 years of age; and

(4) the woman is domiciled or physically present in the state for 30 days before the abortion.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both.

(d) In this section, "abortion" means an operation or procedure to terminate the pregnancy of a nonviable fetus. (§ 65-4-6 ACLA 1949; am § 1 ch 103 SLA 1970; am § 22 ch 166 SLA 1978)

Revisor's notes. — Formerly AS 11.15.060. Renumbered in 1978.

In 1986, the section was reorganized to conform to the style of the Alaska Statutes. Subsection (b) was formerly the last sentence of (a); subsection (c) was formerly (b); and subsection (d) was formerly the second sentence of (a).

Cross references. — For power of the State Medical Board to regulate abortion procedures, see AS 08.64.105.

Editor's notes. — For the constitutionality of statutes similar to this one, see Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), Sendak v. Arnold, 429 U.S. 968, 97 S. Ct. 476, 50 L. Ed. 2d 579 (1976), Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986), Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (19), Hodgson v. Minnesota, 497 U.S. 417, 110 S. C. .926, 111 L. Ed. 2d 344 (1990), Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990), Planned Parenthood of Southeastern Pennsylvania v. Casey, U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See also 1 Am. Jur. 2d, Abortion and Birth Control, § 3 and 1 C.J.S., Abortion, § 2.

Legislative history reports. — For report on ch. 103, SLA 1970 (CSSB 527 (HWE)), see 1970 Senate Journal Supplement No. 10; 1970 Journal Supplements Nos. 12 and 13. Also refer to the following relevant reports on abortion bills: 1970 Senate Journal Supplements Nos. 1 and 4 (re SB 411); 1970 House Journal Supplement No. 11 (re CSHB 776).

Opinions of attorney general. — Separation of responsibilities in AS 18.16.010 is clear: the approval of facilities is granted to the Department of Health and Social Services; the ethical and professional responsibilities of medical doctors are committed to the supervision of the State Medical Board. No language in AS 08.64.105 vitiates any of the responsibilities granted in paragraph (a)(2) to the Department of Health and Social Services. October 7, 1974 Op. Att'y Gen.

Under the language of subsection (a) only paragraph (1) is clearly constitutional; paragraph (2) could be validated by limiting its effect to abortions performed after the end of the first trimester of pregnancy; paragraph (3) is clearly unconstitutional as written; and paragraph (4) is subject to constitutional challenge, as neither the Alaskan or U.S. Supreme Court has dealt with durational residency requirements in the context of abortion. October 21, 1976 Op. Att'y Gen.

NOTES TO DECISIONS

Quoted in Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981).

Cited in Bird v. Municipality of Anchorage, 787 P.2d 119 (Alaska Ct. App. 1990).

Collateral references. — 1 Am. Jur. 2d, Abortion and Birth Control, § 1 et seq.

1 C.J.S., Abortion, § 1 et seq.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 ALR2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 ALR2d 1393.

Validity of statute or ordinance forbidding or regulating sale or advertisement of contraceptives or abortives, or dissemination of birth control information. 96 ALR2d 955.

Sectional Analysis

HJR 5

Proposing an amendment to the Constitution of the State of Alaska relating to freedom of conscience.

Section 1 amends Article 1 of the state constitution by adding a new section that reads: "Section 25. Freedom of Conscience. An individual may not be denied freedom of conscience and may not be compelled to act in a manner that violates the individual's conscientious objections to the act."

Section 2 directs that the proposed amendment be placed before the voters in the next general election in conformity with that section of the constitution that governs how the constitution may be amended. Article XIII, sec. 1 requires that the proposed amendment pass the legislature by a 2/3 vote of each house and be approved by more than half the voters in the election. When passed, the amendment takes effect 30 days after certification of the election by the Lt. Governor.

7TH DOCUMENT of Level 1 printed in FULL format.

ANNOTATED LAWS OF MASSACHUSETTS
Copyright (c) 1995, Lawyers Cooperative Publishing

*** THIS SECTION IS CURRENT THROUGH CHAPTER 34, APPROVED 6/2/95 ***

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
CHAPTER 6 The Governor, Lieutenant Governor and Council, Certain Officers Under the Governor and Council, and State Library

Mass. Ann. Laws ch. 6, @ 12P (1995)

@ 12P. Observance of Civil Rights Week

The governor shall annually issue a proclamation setting apart the week of December eighth through December fifteenth as civil rights week, and recommending that it be observed by the people with appropriate exercises in the schools and otherwise, for the protection and implementation of these four basic rights.--(1) the right to safety and security of person; (2) the right of citizenship and its privileges; (3) the right to freedom of conscience and expression; (4) the right to equality of opportunity; which have been the core of our democratic philosophy of government.

HISTORY: 1952, 104.

5TH DOCUMENT of Level 1 printed in FULL format.

OFFICIAL CODE OF GEORGIA ANNOTATED
Copyright (c) 1982-1995 by The State of Georgia
All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE 1995 SUPPLEMENT ***
*** (1995 EXTRAORDINARY SESSION OF THE GENERAL ASSEMBLY) ***

CONSTITUTION OF THE STATE OF GEORGIA
ARTICLE I. BILL OF RIGHTS
SECTION I. RIGHTS OF PERSONS

Ga. Const. Art. I, @ I, Para. III. (1995)

PARAGRAPH III. Freedom of conscience

Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience.

NOTES:
1976 CONSTITUTION. --Art. I, Sec. I, Para. II.

CROSS REFERENCES. --Generally, U.S. Const., Amend. 1. Declaration of Sunday as a religious holiday, @ 1-4-2. Common day of rest, @ 10-1-570 et seq. Prevention of diversion of church trust property from religious purpose, @ 14-5-45. Prohibition against exclusion of persons from University of Georgia on account of religious beliefs, @ 20-3-65. Freedom from religious discrimination in employment, @ 45-19-29. Right of employee of county board of health, county department of family and children services, etc., to refuse to accept duty of offering family-planning services on religious grounds, @ 49-7-6. Religion as proper subject for charitable trust, @ 53-12-110.

LAW REVIEWS. --For article, "Freedoms of the First Amendment in Georgia," see 15 Ga. B.J. 405 (1953). For article, "Religious Liberty Law and the States," see 3 Ga. St. U.L. Rev. 19 (1987).
For note discussing compulsory medical attention in light of constitutional protection of freedom of religion, see 22 Ga. B.J. 558 (1960). For note, "Christmas Carols in School Assemblies May Be Constitutional," see 31 Mercer L. Rev. 627 (1980).

JUDICIAL DECISIONS

RIGHT TO ADOPT, PROFESS, ENTERTAIN, OR ADVOCATE ANY RELIGIOUS VIEWS, OR TO FAIL OR REFUSE SO TO DO, IS UNLIMITED, and cannot be controlled by any law. There is no authority under the system of jurisprudence to alter, modify, or infringe upon this right. Jones v. City of Moultrie, 196 Ga. 526, 27 S.E.2d 39 (1943).

BUT ACTS INIMICAL TO SOCIETAL ORDER NOT ALLOWED. --While there is no power to control what a person may believe about religion or the type of religion he may adopt or profess, there is a power under the law to limit his acts, even though to do such acts may be part of his religious belief. The constitutional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society. Jones v. City of Moultrie, 196 Ga. 526, 27 S.E.2d 39 (1943); Ferguson v. City of Moultrie, 71

8TH DOCUMENT of Level 1 printed in FULL format.

MINNESOTA STATUTES 1994

*** CURRENT THROUGH THE 1994 SUPPLEMENT ***
*** (1994 REGULAR AND FIRST SPECIAL SESSIONS) ***

CONSTITUTION OF THE STATE OF MINNESOTA
Adopted October 13, 1857.
Generally Revised November 5, 1974
ARTICLE I BILL OF RIGHTS

Minn. Const., Art. I, @ 16 (1994)

Sec. 16. Freedom of conscience; no preference to be given to any religious establishment or mode of worship

The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

natural that those who wrote the constitution should write a report to the public about what they did and why they did it? Of course! Because they had a vested interest in seeing their constitution adopted. However, it would have been a different report and much more objective had a group indirectly involved been authorized to do an analysis of comparison with the U.S. Bill of Rights and the powers given to other state legislatures by the people.

Moving on to other sections of Alaska's Bill of Rights, Section 4 guarantees freedom of religion. In the past two centuries, it was always implied that religion was a state of consciousness and thus did not need to be spelled out. In the Russian Bill of Rights in the Soviet constitution, even under the communist government, it was explicit that the people had freedom of religion and freedom of conscience as separate natural rights. Why concern ourselves today with the differences? Certainly in America no elected body would deny the people freedom of their own conscience? I, too, used to believe this until a number of legislators in the first session of the 17th Legislature signed on as co-sponsors of a bill that prohibited medical providers of services to the public from using their conscientious objection to having to perform certain medical procedures that they did not feel were morally right. This reminded me of Germany under Hitler and his officials, where, backed by the law, the state murdered millions of children and adults because they did not fit the Aryan ideal of perfect genes.

Section 6 of Alaska's Bill of Rights guarantees the right of petition, and the government is not allowed to abridge that right. Many people can relate alarming stories of how they were stopped from pursuing their petitions on both the municipal and state level. Look at later Articles and see the limitations placed on citizens developing referendums and initiatives. Compare this to the freedoms of petition the people of California have.

279-8561
353-2000

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

VALLEY HOSPITAL ASSOCIATION, INC., and JAMES G. WALSH, Valley Hospital Executive Director, Appellants, v. MAT-SU COALITION FOR CHOICE, DR. SUSAN LEMAGIE, and JANE DOES I-X, Appellees.	Supreme Court No. S-7417 Superior Court No. 3PA-92-01207 CI O P I N I O N [No. 4906 - November 21, 1997]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc., Anchorage, and James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellants. Stephan H. Williams, Cooperating Attorney for the Alaska Civil Liberties Union, Anchorage, and Janet L. Crepps and Kathryn Kolbert, Center for Reproductive Law & Policy, New York, New York, for Appellees. Susan Wright Mason, Atkinson, Conway & Gagnon, Anchorage, for Amicus Curiae Alaska State Hospital and Nursing Home Association. Paul Benjamin Linton, Americans United for Life, Chicago, Illinois, and Kenneth P. Jacobus, Kenneth P. Jacobus, P.C., Anchorage, for Amici Curiae Members of the Alaska Legislature. Jeffrey M. Feldman and Susan Orlansky, Young, Sanders & Feldman, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Fabe, Justice, not participating.]

COMPTON, Chief Justice.

I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; (4) AS 18.16.010(b) is unconstitutional to the extent it applies to quasi-public institutions; and (5) the superior court's award of attorney's fees was not an abuse of discretion.

II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1980s, using $10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

VHA's Board of Directors is divided into two boards, the Association Board and the Operating Board. The Association Board raises money and acquires property for the hospital and elects the Operating Board. The Operating Board has all the other powers and

functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law.[1] VHA permitted lawful abortion procedures at its facility from 1970 until 1992.[2] In 1992 abortion opponents organized a campaign to

---

[1] AS 18.16.010 provides:

> (a) An abortion may not be performed in this state unless
>
> (1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;
>
> (2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;
>
> . . . .
>
> (b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

[2] In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman (continued...)

enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion.[3] Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary

---

[2](...continued)
can have a second trimester elective abortion.

[3] In its order granting the Coalition a preliminary injunction, the superior court determined that the Coalition had shown a clear probability of success in establishing the following propositions: (1) Valley Hospital is a quasi-public hospital; (2) the Alaska Constitution provides greater protection for individual rights than the United States Constitution; (3) the right to choose an abortion is a fundamental right guaranteed by article I, section 22 of the Alaska Constitution; (4) there is no compelling state interest in Valley Hospital's ban on abortions; and (5) AS 18.16.010(b) does not immunize Valley Hospital from violating Alaskans' constitutional right to reproductive choice, including abortions.

judgment[4] and permanently enjoined VHA

> 1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
>
> 2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
>
> 3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital "to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so."

The superior court granted full reasonable attorney's fees in the amount of $110,000 to the Coalition in a separate order. VHA appeals the injunction, the summary judgment, and the award of attorney's fees to the Coalition.

---

[4] The superior court's order granting summary judgment was

> based on the reasons articulated in the Court's earlier decision granting a preliminary injunction, the protections of the right to privacy contained in Article I, § 22 of the Alaska Constitution, and the fact that Valley Hospital is a non-sectarian, non-profit, quasi-public hospital.

(Citation omitted.)

III. DISCUSSION

A. Standard of Review

We apply our independent judgment in reviewing the questions of law presented in this appeal, adopting rules of law which are most persuasive in light of precedent, reason, and policy. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). We review the award of attorney's fees for abuse of discretion. Bromley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

B. The Alaska Constitution Protects Reproductive Autonomy, Including the Right to Abortion, More Broadly Than Does the United States Constitution.

1. The United States Constitution

The Supreme Court's articulation of the United States Constitution's protection of reproductive rights establishes the minimum protection provided to women in Alaska.[5] This protection includes the right to an abortion. Under Roe v. Wade, 410 U.S. 113, 155 (1973), this right could be limited only where required by a compelling state interest. Id. States could regulate abortions performed before a fetus became viable only when such regulation was necessary to ensure the life and health of the mother. Id. at 163.

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing

---

[5] See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

> (a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> (b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.
>
> (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a

> substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> (e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65.

505 U.S. at 878-79.

2. The Alaska Constitution

We sometimes have taken a broad view of our role in defining state constitutional rights:

> [W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (extending the constitutional right to a jury trial).[6] Thus, our

---

[6] VHA interprets this language as a two-prong test which must be met before we may find a constitutional right. We did not interpret this language from Baker as VHA now urges us to do when we decided either Breese v. Smith, 501 P.2d 159 (Alaska 1972) (holding that governmental control of personal appearance is antithetical to the concept of personal liberty), or Ravin v. State, 537 P.2d 494 (Alaska 1975) (holding that privacy in the home (continued...)

articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court.").[7]

Article I, section 22 of the Alaska Constitution provides:

> The right of the people to privacy is recognized and shall not be infringed.

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 87 (Alaska 1980) (balancing the individual right to personal autonomy

---

[6](...continued)
is a fundamental right), although we found a right to exist under the Alaska Constitution in each of those cases.

[7] Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy guarantee); American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. App. 1989) (upholding an injunction preventing implementation of restrictions on abortion rights of minors, requiring a compelling state interest before invasion of minors' privacy rights); In re T.W., 551 So. 2d 1186 (Fla. 1989) (reaffirming the right to choose to terminate a pregnancy as a fundamental state constitutional right and striking down legislation restricting abortion rights); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (applying a strict scrutiny standard for fundamental rights and determining that state failure to fund medically necessary abortions violated state constitution); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (extending state constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty." Baker, 471 P.2d at 401-02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language. "[D]ecisions whether to accomplish or prevent conception are among the most private and sensitive." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 n.42 (Alaska 1977) (holding that a physician who specialized in contraception and abortion could not be required to disclose the names of his patients); see also Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) (holding that abortion clinic protests cause patients to "suffer emotional distress as a result of appellants' invasion of their privacy during a particularly sensitive period"); Ravin, 537 P.2d at 502 (holding that decisions about contraception involve "significantly personal areas").

We stated in Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972), that "few things [are] more personal than one's body."[8] In Breese, a school policy regulating hair length was at issue; the regulation was held unconstitutional because the State failed to show a compelling interest that justified the policy. Id. at 170-72. Surely "few things are more personal" than a woman's control of her body, including the choice of whether and when to have children.

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to

---

[8] Breese was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Breese relied exclusively on the inherent rights provision found in article I, section 1 of the Alaska Constitution. The Coalition argues that article I, section 1 of the Alaska Constitution protects abortion as a fundamental right. Because we hold this right is grounded in the privacy provision of the constitution, we do not address whether the right could be based solely on article I, section 1. While Breese's discussion of personal autonomy remains instructive, we choose to analyze reproductive rights under the privacy provision of our constitution, as other states have done. See, e.g., In re T.W., 551 So. 2d at 1193.

The relationship between a woman and her doctor is threatened by VHA's abortion policy, and thus privacy rights are implicated in addition to the notions of personal autonomy that were at issue in Breese. The information exchange between a woman and her doctor about the woman's health and her reproductive choices is intensely private. The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to the approval of a hospital's board of directors, according to their own values.

Other privacy interests are also implicated. If a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel. The fact that a woman has visited a certain doctor can be intensely private, when the doctor is one who specializes in abortion services.

> become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"--one's body is to terminate its organic life.

Laurence H. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). We agree that "[t]he decision whether or not to have a child is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (citing Roe, 410 U.S. at 153).

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational"

privacy.[9] To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

The only informative legislative history consists of the privacy amendment as originally proposed.[10] The earliest form of the proposed amendment stated:

> Section 22. Right of Privacy. The right of the people to privacy in their opinions, persons, families, reputations and property is recognized and shall not be violated. Neither warrants nor writs of investigation in abrogation of privacy shall issue, except upon probable cause and upon a showing of a legitimate and pressing need, supported by oath or affirmation, particularly describing the information or data sought and the person whose privacy may be affected, and particularly setting forth the reasons for the search or investigation. The legislature shall provide for the prosecution and punishment of public officials and private parties who act in violation of this section, and shall provide civil remedies to redress and prevent such violations. The legislature shall provide for the protection and security of information available to the State to the extent necessary to protect the rights of the individual recognized in this section and shall further provide for the protection and

---

[9] The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

[10] The Alaska State Hospital and Nursing Home Association argues that a summary of a House Judiciary Committee meeting during which the proposed amendment was modified is evidence that the privacy clause was intended to apply only to informational privacy. The meeting summary is largely a debate over grammar and style and provides no information which alters our interpretation of article I, section 22. See H. Jud. Comm. minutes at 318-19, 7th Leg., 1st Sess. (May 30, 1972).

security of information gathered under this section by the State.

1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess. While the initial draft of the amendment attempted to specify privacy interests to be protected, the final constitutional amendment simply protected the right of the people to privacy. The plain language of article I, section 22 is a broad protection of privacy rights. The legislative history is insufficient to limit the general language of the privacy amendment.

C. VHA's Abortion Policy Is Subject to the Provisions of the Alaska Constitution.

We previously have determined that a hospital may be a "quasi-public" institution. Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges."[11] Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical

---

[11] One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.

facility is bound to protect constitutional rights affected by the administration of the hospital.[12]

The elements that led us to conclude that the hospital in Storrs was quasi-public show that the hospital in this case is quasi-public; thus, the conduct of VHA qualifies as "state action," meaning that it "may be fairly treated as [the action] of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), quoted in United States Jaycees v. Richardet, 666 P.2d 1008, 1013 (Alaska 1983).

In order to determine whether the hospital operated by VHA is a quasi-public institution, we look to a number of factors, just as we did in Storrs. First, VHA has a special relationship with the State through the State's Certificate of Need program. Under this program, the State must review and approve expenditures of one million dollars or more for construction or alteration of a health care facility. AS 18.07.031. The Department of Health and Social Services determines whether to grant a Certificate of Need

---

[12] VHA argues that constitutional due process was never at issue in Storrs because the hospital stipulated that Dr. Storrs was entitled to due process. We have stated, however, that Storrs was a constitutional due process case. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992); see also Amerada Hess Pipeline Corp. v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1180 (Alaska 1986) (relying on Storrs to find the right to an impartial decision maker basic to a guarantee of due process). Furthermore, the Storrs court would not have needed to address whether Dr. Storrs received due process were he not entitled to it. The determination that due process applied was material to the holding.

based on health care demand and resources. AS 18.07.041.[13] This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

Second, VHA has received construction funds, land, and operating funds from the State, local, and federal governments,[14] including more than ten million dollars for construction from the State and a grant of five acres of public land from the City of Palmer.[15] Money from the city and borough came from pass-through

---

[13] AS 18.07.041 provides:

> The office shall grant a sponsor a certificate of need or modify a certificate of need if the availability and quality of existing health care resources or the accessibility to those resources is less than the current or projected requirement for health services required to maintain the good health of citizens of this state.

[14] VHA's assets totaled $31.7 million as of December 31, 1993. Between 1985 and 1993, VHA provided $37.5 million in unreimbursed care. In 1991, 14.71% and 5.98% of VHA's gross receipts were from Medicare and Medicaid respectively. VHA's April 1993 Certificate of Need application to the State showed that Medicare and Medicaid receipts total approximately $3.75 million to $5.1 million for the 1990, 1991, and 1992 fiscal years. This is approximately 25% of VHA's patient revenues for those three years.

[15] The Alaska State Hospital and Nursing Home Association argues that money received under the federal Hill-Burton Act cannot be used as a basis for requiring hospitals to perform abortions. 42 U.S.C. § 300a-7(b). The record does not show that any Hill-

(continued...)

grants from the State legislature.[16] VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

VHA argues that the Storrs quasi-public criteria are limited to determining whether a hospital must afford due process in staffing determinations and should not be extended to require hospitals to protect other constitutional rights. VHA relies on language in Kiester, which discusses limitations on judicial review to avoid intruding upon a hospital's recognized expertise in evaluating medical qualifications. Kiester v. Humana Hosp. Alaska,

---

[15](...continued)
Burton money was used when the facilities were rebuilt in the early 1980s.

[16] The statute allowing pass-through grants requires the municipality to agree that the facilities and services provided by the grant will be available for the use of the general public, and that the municipality will operate and maintain the facility for the practical life of the facility. AS 37.05.315(a) and (c). This is an additional indication that VHA is a quasi-public institution. See 1986 Informal Op. Att'y Gen. 1 (Apr. 8, 1982) (stating that municipality accepting funds for construction of a public facility must ensure the operation and maintenance of the facility, even if the facility will be owned and operated by a private non-profit organization); see also 1991 Informal Op. Att'y Gen. 19 (Sept. 22, 1986) (indicating that the State may have a cause of action against a city that allows a facility funded by pass-through grants to be converted to private use).

Inc., 843 P.2d 1219, 1223 (Alaska 1992). However, no medical qualification or decision is at issue here. Neither the issue whether the hospital is quasi-public, nor the issue whether the abortion policy is invalid on constitutional grounds, involves intruding on a medical decision that is within the hospital's expertise. Likewise, VHA has acknowledged that its abortion policy is not a medical policy, but one founded on "sincere moral conscience." The scope and application of the Alaska Constitution to this kind of policy presents a question of law that is within this court's expertise.

Considering all factors similar to those found persuasive in Storrs, we conclude that the hospital operated by VHA is a quasi-public hospital. Its policy concerning abortion must comply with the Alaska Constitution.

D. VHA Has Not Demonstrated a Compelling State Interest Justifying Its Abortion Policy.

Since VHA is a quasi-public institution, its policies are subject to the limitations which the Alaska Constitution imposes on legislation and government regulations. Under Alaska's Constitution, there is a protected right to an abortion, and VHA's policy interferes with that right. Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest. Further, assuming the existence of such an interest, there also must be no less restrictive means by which the interest might be advanced.[17] In re A.B., 791 P.2d 615,

---

[17] We have used both the compelling state interest/least (continued...)

621 (Alaska 1990) and Vogler v. Miller, 651 P.2d 1, 5 (Alaska 1981). VHA has not demonstrated a compelling state interest justifying its policy. It has not advanced any medical, safety, or other public-welfare interest to justify precluding elective abortions. VHA has stated unequivocally that its policy is a matter of conscience, and not a medical, safety, or economic issue. As VHA cannot raise a free exercise claim,[18] this does not amount to a compelling state interest.

E. Alaska Statute 18.16.010(b) Is Unconstitutional to the Extent It Applies to Quasi-Public Institutions.

VHA argues that even if the Alaska Constitution encompasses the right to an abortion, and even if the hospital is a quasi-public institution, the legislature already has addressed the issue in AS 18.16.010(b),[19] and has determined that a "hospital

---

[17](...continued)
restrictive means test and the legitimate state interest/close and substantial relationship test in the privacy context. See Jones v. Jennings, 788 P.2d 732, 737-38 (Alaska 1990); State v. Erickson, 574 P.2d 1 (Alaska 1978); Ravin, 537 P.2d at 504. However, "[w]here the right to privacy is manifested in terms of interests . . . squarely within personal autonomy," as here, we use the compelling state interest test. Erickson, 574 P.2d at 22, n.144.

[18] See infra note 20. Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as "compelling" could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it.

[19] AS 18.16.010(b) provides:

> Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion

(continued...)

may decline to offer abortions for reasons of moral conscience." VHA argues that "[c]onsistent with its previous approach to the highly-sensitive question of abortion, this Court should defer to the considered judgment of the legislature." However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action. The issue before us includes the question whether AS 18.16.010(b) is a permissible limitation on a constitutional right.

VHA has a "sincere moral belief" that elective abortion is wrong.[20] However, constitutional rights "cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 U.S. 294, 300 (1955).

The Alaska Attorney General has concluded that AS 18.16.010(b) is invalid, unless construed to be applicable only to sectarian facilities. 1978 Formal Op. Att'y Gen. No. 8 (February 10, 1978). The New Jersey Supreme Court struck down an almost identical statute:

> To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action . . . [f]or the state to frustrate [the constitutional right to a first trimester

---

[19](...continued)
under this section.

[20] VHA bases its argument in part on Frank v. State, 604 P.2d 1068 (Alaska 1979), a free exercise of religion case based on the First Amendment to the United States Constitution and article I, section 4 of the Alaska Constitution. See Frank, 604 P.2d at 1070 (killing of cow moose for funeral potlatch protected as free exercise of religion). VHA is not affiliated with any religion and cannot raise a free exercise claim.

> abortion] by its action would be violative of the constitutional guarantee.

Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976).

VHA argues that because the statute states that abortions may be performed only in certain situations, but that individuals and institutions may always refuse to participate in or provide them, "the legislature has determined that the ability to protect one's conscience outweighs the ability to procure an abortion." VHA has no constitutional right at issue; it has at most a statutory right. The legislature, however, may not balance statutory rights against constitutional ones, like the right to an abortion. Therefore, AS 18.16.010(b) is unconstitutional to the extent that it applies to VHA.

F. The Superior Court's Award of Attorney's Fees Was Not an Abuse of Discretion.

The superior court awarded full reasonable attorney's fees to the Coalition. The court based its decision on the factors articulated in Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). The superior court concluded that VHA was not a public interest litigant immune from having to pay an award of attorney's fees.[21]

---

[21] A party qualifies as a public interest litigant if (1) the case effectuates a strong public policy, (2) numerous people will benefit from the litigation, (3) only a private party could be expected to bring the action, and (4) the party would not have sufficient economic incentive to bring the lawsuit even if the action involved only narrow issues lacking general importance. Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 423 (Alaska 1995).

We review a trial court's determination of a litigant's public interest status under the abuse of discretion standard. Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162, 171 (Alaska 1991). "Such an abuse is regarded as present only where the trial court's decision appears to be manifestly unreasonable or motivated by an inappropriate purpose." Kenai Lumber Co., Inc. v. LeResche, 646 P.2d 215, 222 (Alaska 1982).

VHA asserts two arguments for challenging the fee award: (1) VHA is a public interest litigant;[22] and (2) VHA relied in good faith on a statute which authorized its policy.

A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees. Hunsicker v. Thompson, 717 P.2d 358, 359 (Alaska 1986). We have determined that "where both parties are individual, public interest litigants, neither should be made to bear the fees of the other, each should simply pay their own." McCormick v. Smith, 799 P.2d 287, 289 n.5 (Alaska 1990). However, VHA is not a public interest litigant. We

---

[22] The Coalition argues that VHA did not challenge the superior court's determination that VHA is not a public interest litigant in its points on appeal and is barred from doing so now. Alaska Appellate Rule 204(e) provides that this court will consider only points included in the statement of points on appeal. See also Kalenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995) (holding that where appellants failed to properly appeal a fee award and offered no mitigating circumstances to explain the failure, they cannot raise the issue). However, whether VHA is a public interest litigant is a legal issue that can be considered on the record before the court. See, e.g., Oceanview Homeowners Ass'n v. Quadrant Const., 680 P.2d 793, 797 (Alaska 1984). Additionally, although VHA's public interest status is not mentioned in the points on appeal, the issue of fees is raised. See Putnam v. State, 629 P.2d 35, 39 n.2 (Alaska 1980). There is no prejudice to the Coalition in considering the issue on appeal.

are not persuaded by VHA's assertion that its defense of its abortion policy is in the public interest simply because it raises constitutional issues.

We have decided one case where we determined that attorney's fees should not be awarded against a losing private party in public interest litigation, because an award might have the effect of deterring citizens from litigating issues of public concern. Whitson v. Anchorage, 632 P.2d 232, 233 (Alaska 1981). In Whitson, the defendant was an individual who had placed an initiative on the next municipal election ballot, and the plaintiff was the City of Anchorage, which had obtained a judgment finding the initiative illegal and ordering it removed from the ballot. We found it significant that Whitson would have been a traditional private party plaintiff seeking relief against the governmental entity had the city not "beat[en] him to the courthouse steps," making him the nominal defendant. Id. at 234. Had the city refused to place his initiative on the ballot, rather than doing so and then suing him to get it removed, Whitson would likely have sued the city and been the traditional private party plaintiff seeking relief against the governmental entity. Id. at 233-34. In this case VHA is not an individual raising a public interest defense against a governmental entity. Rather, VHA is a quasi-public institution whose policy has infringed a constitutional right.

VHA also cannot assert its good faith reliance on AS 18.16.010(b). As discussed above, that statute cannot

constitutionally be applied to a quasi-public hospital. See Part III.D. Because VHA is not a private defendant, as it asserts, it cannot escape liability for attorney's fees by arguing that it relied in good faith on AS 18.16.010(b).

The superior court did not abuse its discretion in awarding fees to the Coalition.

IV. CONCLUSION

The superior court's summary judgment and injunction are AFFIRMED. The superior court's award of attorney's fees was not an abuse of discretion and is AFFIRMED.

STATE OF ALASKA
HOUSE OF REPRESENTATIVES

STATE AFFAIRS COMMITTEE
Representative Jeannette James, Chair

Room 102, Capitol Building, Juneau

Phone 465-3743, FAX 465-2381

CHANGE IN SCHEDULE

Thursday, February 27, 1997:

1. SJR 7 AK Nat'l Guard Youth Corps Exchange Program
   Senator Phillips

2. HJR 5 Constitutional Amendment: Freedom of Conscience
   Representative Martin

3. HJR 7 Voter Approval for New Taxes
   Representative Martin

Official Business

COMMITTEE:
HOUSE STATE AFFAIRS

DATE: FEBRUARY 27, 1997

Subject of meeting:
HJR 5 - CONSTIT AMNDMNT: FREEDOM OF CONSCIENCE

SIGN-IN

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
A. Carpeneti	Rm 717 Ct Bldg	3428	Law	Yes

02/27/97 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

07:59:55 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC

TCN:70331 SCHEDULED FOR:02/27/97 08:00 TO 10:00 FOR:ANC

PUBLIC HEARING HOUSE STATE AFFAIRS

LOCATION:ANCHORAGE

HJR 5	MARY	SHIELDS ✓	TESTIFY
HJR 5	KEN	JACOBUS ✓	TESTIFY
HJR 5	THEDA	PITTMAN ✓	TESTIFY

IN THE
SUPREME COURT OF ALASKA

Valley Hospital Association, Inc., and James G. Walsh, Valley Hospital Executive Director,	)	Docket No. S 7417
Defendants-Appellants,	)	Superior Court for the State of Alaska Third Judicial District at Palmer
vs.	)	
Mat-Su Coalition for Choice, Dr. Susan Lemagie, and Jane Does I-IX,	)	Hon. Dana Fabe, Judge Presiding
Plaintiffs-Appellees.	)	Case No. 3 PA-92-1207 Civil

BRIEF AMICUS CURIAE OF MEMBERS OF THE ALASKA LEGISLATURE IN SUPPORT OF DEFENDANTS-APPELLANTS.

Paul Benjamin Linton
General Counsel
Americans United for Life
343 S. Dearborn Street
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

Kenneth P. Jacobus, P.C.
ABA # 6911036
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333

Counsel for the Amici

Filed in the Supreme Court
of the State of Alaska this
15th day of May, 1996

JAN HANSEN, CLERK

By: Tracy Cerra

Table of Contents

Table of Authorities

Cases:

List of Amici

Sen. Robin L. Taylor (Rep.)	"A" District
Sen. John Torgerson (Rep.)	"D" District
Sen. Loren Leman (Rep.)	"G" District
Sen. Rick Halford (Rep.)	"M" District
Sen. Lyda N. Green (Rep.)	"N" District
Sen. Michael W. Miller (Rep.)	"Q" District
Rep. Joe Green (Rep.)	10th District
Rep. Mark Hanley (Rep.)	12th District
Rep. Terry Martin (Rep.)	14th District
Rep. Sean Parnell (Rep.)	17th District
Rep. Jerry Sanders (Rep.)	19th District
Rep. Pete Kott (Rep.)	24th District
Rep. Vic Kohring (Rep.)	26th District
Rep. Scott Ogan (Rep.)	27th District
Rep. Al Vezey (Rep.)	32nd District
Rep. Don Long (Dem.)	37th District

Applicable Statute

Alaska Statutes, § 18.16.010(b):

Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

Statement of the Issue Presented for Review

Whether, assuming that the Alaska Constitution protects an independent right of abortion, a quasi-public hospital is required to make its facilities available for the performance of elective abortions over its objections and in violation of the state statute, Alaska Stat. § 18.16.010(b), which guarantees the institutional and individual rights of conscience of both public and private hospitals and their physicians, nurses and staff.[1]

Statement of the Interest of the Amici

Amici curiae are elected Members of the Alaska Legislature. Amici may not share a common view as to whether, and under what circumstances, abortion should be legal, but all are in agreement with and strongly support the institutional and individual rights of conscience embodied in § 18.16.010(b). Amici support Valley Hospital Association's right to rely on this statute and submit that the lower court seriously erred in ordering the hospital to allow elective abortions to be performed on its premises. The court's judgment has implications not only for other hospitals in Alaska that choose not to perform abortions, but also for the power of the State of Alaska, acting through its legislature, to determine whether and to what extent public facilities and funds should be made available for elective abortions. That authority may be called into question if the lower court's judgment is allowed to stand. Amici urge this Court to reverse.

---

[1] Amici assume for purposes of this Brief that defendant hospital is a "quasi-public" institution.

Statement of the Case

Amici curiae generally adopt the defendants-appellants' Statement of the Case.

Statement of the Standard of Review

The standard of review for the issue presented for review in this Brief is de novo.

SUMMARY OF ARGUMENT

The Alaska abortion statute provides, in pertinent part: "Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section." Alaska Stat. § 18.16.010(b). The rights of conscience secured by this statute are not limited to private or denominational hospitals, nor to persons employed by such facilities. Rather, the rights of conscience are guaranteed to all hospitals and persons, without exception. Defendant Valley Hospital seeks to avail itself of this right in resisting plaintiffs' claim that the hospital must open its doors to the performance of elective abortions in violation of the established policy of the hospital and the conscientious objections of its members, staff, and governing board.

The lower court's decision in this case is unprecedented. Although a few courts have erroneously held, on federal constitutional grounds (later rejected by the Supreme Court), that a public (or quasi-public) hospital may not refuse to perform elective abortions, no court has held that a state constitutional right to abortion overrides an otherwise applicable statutory right of conscience. The lower court's decision compelling defendants to allow elective abortions to be performed in its facilities over its conscientious objection is clearly wrong and must be reversed.

I. THE LOWER COURT ERRED IN FORCING VALLEY HOSPITAL ASSOCIATION TO MAKE ITS FACILITIES AVAILABLE FOR THE PERFORMANCE OF ELECTIVE ABORTIONS OVER ITS OBJECTIONS AND IN VIOLATION OF THE STATE STATUTE WHICH GUARANTEES THE INSTITUTIONAL AND INDIVIDUAL RIGHTS OF CONSCIENCE OF BOTH PUBLIC AND PRIVATE HOSPITALS, AND THEIR PHYSICIANS, NURSES AND STAFF.

The lower court determined that Valley Hospital was not entitled to rely on the conscience clause for three reasons. First, the clause was part of a "statute enacted in 1970, three years prior to Roe v. Wade, 410 U.S. 113 (1973), the U.S. Supreme Court decision which held that a woman's right to an abortion is a fundamental constitutional right." Order of February 9, 1993, granting preliminary injunctive relief, at 20. Second, the statute in which the clause appears "was also enacted prior to Alaska's adoption of an express constitutional right of privacy," and that, as a consequence, § 18.16.010(b) "may not be construed as immunizing quasi-public hospitals from violating Alaska's constitutional reproductive freedom rights." Id. at 20-21. Third, institutional conscience clause protection may not be claimed by public or quasi-public entities. Id. at 21-22. Not one of these reasons withstands scrutiny.

A. The Federal Constitutional Right To Abortion Recognized In Roe v. Wade Does Not Require Public Institutions To Make Their Facilities Available For Abortions.

The lower court suggested in its Order of February 9, 1993, that the United States Supreme Court's recognition of a federal constitutional right to abortion necessarily implies a right of access to public (or quasi-public) facilities for performance of abortions--therapeutic or elective. That implication is wrong.

Amici note that, notwithstanding the recognition of an

abortion right in Roe v. Wade, the Supreme Court has repeatedly held that the Constitution does not require either the United States or the States to pay for therapeutic or elective abortions, or to make their health care facilities available for the performance of either. See Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment restricting federal funding of abortion to instances in which the mother's life is endangered); Williams v. Zbaraz, 448 U.S. 358 (1980) (upholding state statute prohibiting public funding of abortion except to save the life of the mother); Maher v. Roe, 432 U.S. 464 (1977) (upholding state statute limiting public funding of abortion to those abortions which were "medically necessary"); Poelker v. Doe, 432 U.S. 519 (1977) (rejecting challenge to municipal policy allowing abortions to be performed in city hospitals only to save the mother's life or health); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (rejecting challenge to state statute forbidding abortions at state-run medical centers except to save the life of the mother). The latter two decisions are particularly instructive and merit this Court's close attention.

In Poelker, the Mayor of St. Louis issued a directive to the Director of Health and Hospitals prohibiting the performance of abortions at two city hospitals except when there was a threat of grave physiological injury or death to the mother. The Supreme Court, relying upon its decision in Maher v. Roe, 432 U.S. 464 (1977), decided the same day, upheld this directive. The Court agreed that "the constitutional question presented here is

identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth." Poelker, 432 U.S. at 521. The Court found "no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions," and held that "the Constitution does not forbid a State or city, pursuant to the democratic processes, from expressing a preference for normal childbirth as St. Louis has done." Id. The Court upheld this policy even though, as the dissent observed, "[p]ublic hospitals that do not permit the performance of elective abortions will frequently have physicians on their staffs who would willingly perform them," and notwithstanding the possibility that the Court's holding would "pose difficulties in small communities where the public hospital is the only nearby health facility." Id. at 523-24 (Brennan, J., dissenting).

In Webster v. Reproductive Health Services, the Supreme Court upheld a state statute prohibiting the performance of an abortion in any public facility except to save the life of the mother. Rejecting the argument that Missouri had created an obstacle to a woman's ability to exercise her right to choose an abortion, the Court stated:

> [T]he State's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacles in the path of a woman who chooses to terminate her pregnancy." McRae, 448 U.S. at 315 . . . . Just as Congress' refusal to fund abortions in McRae left "an indigent woman with at

> least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all, id., at 317 . . . , Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State has chosen not to operate any public hospitals at all.

492 U.S. at 509.

The Court explained that the Missouri's decision "only restrict[s] a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital," a "circumstance . . . more easily remedied, and thus considerably less burdensome, than indigency, which 'may make it difficult--and, in some cases, perhaps impossible--for some women to have abortions' without public funding." Webster, 492 U.S. at 509 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

> Having held that the State's refusal to fund abortions does not violate Roe v. Wade, it stains logic to reach a contrary result for the use of public facilities and employees. If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds," Maher, [432 U.S.] at 474 . . . , surely it may do so through the allocation of other public resources, such as hospitals and medical staff.

Id. at 509-10.

In language that is directly applicable to the lower court's first reason for refusing to give effect to the Alaska conscience clause in this case, i.e., that the clause was part of a statute enacted before Roe was decided, the Supreme Court held:

> Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of

abortions.

Id. at 510. The Court emphasized that there is no "right of access to public facilities for the performance of abortions," even where "the State recoup[s] all of its cost in performing abortions, and no state subsidy, direct or indirect, is available, ..." Id. Citing Maher, Poelker, and McRae, the Court stated that "the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so." Id. at 511. The Court noted that in Poelker, "the suit was filed by an indigent who could not afford to pay for an abortion, but the ban on the performance of nontherapeutic abortions in city-owned hospitals applied whether or not the pregnant woman could pay." Id.

The Supreme Court's decisions in Poelker and Webster leave no doubt that a public hospital is not required to make its facilities available for the performance of elective abortions, even where no expenditure of public funds is involved.[2] The Court reached these decisions, it must be noted, without relying

---

[2] From October 1, 1988, until January 22, 1993, the Department of Defense had a formal policy of prohibiting "pre-paid" (patient-funded) abortions at United States military bases overseas, even though no federal funds were at stake. See Memorandum for Secretaries of the Military Departments from William Mayer, M.D., Ass't Sec. of Defense, June 21, 1988. That policy was never challenged as being violative of the abortion right recognized in Roe v. Wade. More recently, Congress enacted two laws that prohibit abortions at military hospitals except to save the life of the mother, or in cases where the pregnancy resulted from an act of rape or incest. See Pub. L. 104-61, §§ 8119, 8119a (Dec. 1, 1995); Pub. L. 104-106, § 738 (Feb. 10, 1996). That legislation has not been challenged, either.

upon a federal or state statutory right of conscience.[3] The recognition by the Supreme Court of a right to abortion in Roe does not require federal or state hospitals to offer abortion services. Thus, the lower court's first reason for refusing to give effect to the Alaska institutional conscience clause--that it was part of a statute adopted before Roe was decided--must be rejected. Thus, even in the absence of an express conscience clause, nothing in the federal constitution requires public hospitals to make their facilities available for abortions.

B. Assuming, Arguendo, That The State Constitution Protects A Right To Abortion Separate And Independent From The Federal Right To Abortion Recognized In Roe v. Wade, That Right Does Not Override The Institutional And Individual Rights Of Conscience Guaranteed By Alaska Stat. § 18.16.010(b).

The lower court also determined that the conscience clause is inapplicable because it was part of a statute enacted before the Alaska Constitution was amended to include a specific right of privacy upon which plaintiffs based their right of access. See Order of February 9, 1993, granting preliminary injunctive relief, at 20-21. Although the court's reasoning here is not

---

[3] Even before Poelker and Webster were decided, one federal circuit court strongly implied that a private, nondenominational hospital is not required to make its facilities available for the performance of elective abortions, even if the hospital is otherwise acting under color of state law, if its refusal is based on moral or religious grounds. In Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 642-44 & nn. 7, 11 (4th Cir. 1975), the court held that a federal "conscience clause" (42 U.S.C. § 300a-7(a)(2)(A)) for facilities constructed with Hill-Burton funds did not immunize a quasi-public hospital from suit where the hospital's refusal to make its facilities available for the performance of elective abortions was based on a pre-Roe statute prohibiting nontherapeutic abortions and not upon institutional religious or moral convictions.

entirely clear, the court appears to suggest that a statutory right of conscience may be raised only against one asserting a statutory, not a constitutional, right of access. Thus, before the Alaska Constitution was amended to include a right of privacy (and, arguendo, a right to abortion), a hospital might refuse, on the basis of § 18.16.010(b), to allow its facilities to be used for the performance of abortions made legal by the same statute. However, such refusal would be of no avail after the state constitution was amended to include a specific right of privacy and, by extension, a right to abortion.

Neither the court nor plaintiffs, however, cite cases from this Court or any other state court holding that a constitutional right to abortion overrides an otherwise applicable statutory conscience clause. To argue, as plaintiffs have (Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 58-60 & n.38), that a constitutional claim necessarily trumps a statutory defense simply begs the question before this Court and conceals the paucity of authority in support of their argument. No state court has held, on state as opposed to federal constitutional grounds, that public (or quasi-public) hospitals must make their facilities available for the performance of elective abortions.[4]

---

[4] In addition to the federal cases previously discussed in the text, the following federal courts held that a public hospital could not rely on a state "conscience clause" as the basis for its refusal to allow its facilities to be used for the performance of abortions because such a policy interfered with the right to abortion recognized in Roe v. Wade: Wolfe v. Schroering, 541 F.2d 523, 527-28 (6th Cir. 1976) (Kentucky);

At least twenty-eight States, in addition to Alaska, have conscience clauses that apply to public, as well as private, institutions.[5] Not one of these statutes has been struck down or limited in its application to private institutions on state constitutional grounds, even though court decisions in several of these States recognize abortion rights under their state constitutions.[6] The absence of such authorities indicates the unprecedented nature of the lower court's judgment.

It is evident that the legislature's intention in including a conscience clause in the Alaska abortion statute in 1970 was to protect the right of institutions and individuals not to participate in a procedure (i.e., abortion) that was being made

---

Hodgson v. Lawson, 542 F.2d 1350, 1356 (8th Cir. 1976) (Minnesota); Orr v. Koefoot, 377 F. Supp. 673, 683-84 (D. Neb. 1974) (Nebraska). These decisions, of course, are no longer valid in light of the Supreme Court's subsequent opinions in Poelker v. Doe and Webster v. Reproductive Health Services.

[5] Ark. Code Ann. § 20-16-601(b) (1991); Colo. Rev. Stat. § 18-6-104 (1990); Del. Code Ann. tit. 24, § 1791(b) (1987); Fla. Stat. Ann. § 390.001(8) (1993); Geo. Code Ann. § 16-12-142 (1994); Haw. Rev. Stat. § 453-16(d) (1985); Idaho Code § 18-612 (1987); Ill. Comp. Stat. ch. 745, §§ 30/1(b), 70/9 (1994); Ind. Stat. Ann. § 16-21-8-7 (Burns 1993); Kan. Stat. Ann. § 65-444 (1992); Ky. Rev. Stat. § 311.800(1) (1995); La. Rev. Stat. § 40:1299.33(C) (1992); Me. Rev. Stat. Ann. tit. 22, § 1591 (1992); Md. Ann. Code, Health-Gen. § 20-214(b) (1995 Supp.); Mich. Comp. Laws Ann. § 333.20181 (1992); Minn. Stat. Ann. § 145.414 (1989); Mo. Ann. Stat. § 197.032 (1983), see also § 188.215 (1996 Supp.); Neb. Rev. Stat. § 28-337 (1989); N.J. Stat. Ann. § 2A:65A-2 (1987); N.M. Stat. § 30-5-2 (1994); N.C. Gen. Stat. § 14-45.1(f) (1993); N.D. Cent. Code § 23-16-14 (1991); Ohio Rev. Code § 30-5-2 (1994); Pa. Cons. Stat. Ann. tit. 18, § 3215(a), -(b) (1983 & 1995 Supp.); S.D. Cod. Laws § 34-23A-14 (1994); Tenn. Code Ann. § 39-15-204 (1991); Va. Code § 18.2-75 (1988); Wis. Stat. Ann. § 253.09 (1995 Supp.).

[6] See, e.g., In re T.W., 551 So.2d 1186 (Fla. 1989); Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995).

legal.[7] That abortion may have been placed on a stronger legal foundation with the adoption of the privacy amendment in 1972 (which amici do not concede) does not make defendants' and others' reliance on the conscience clause any weaker. There is no support in the law for the lower court's unstated conclusion that recognition of a state right to abortion, in and of itself, overrides the rights of conscience--statutory or constitutional--of institutions and individuals.

C. Under Alaska Stat. § 18.16.010(b), A Quasi-Public Institution May Express A Conscientious Objection To Abortion.

The heart of the lower court's opinion may be found in its view that a quasi-public institution is not entitled to express a conscientious objection to abortion. See Order of February 9, 1993, granting preliminary injunctive relief, at 21-22. But this third reason for ignoring the Alaska conscience clause is no more persuasive than the first two. The court cites one Attorney General Opinion from 1978, 1978 Op. Att'y Gen. No. 8 (Formal), and one decision from the New Jersey Supreme Court, Doe v.

---

[7] The March 25, 1970, report by members of the Senate Judiciary Committee who voted to pass the bill noted that "the bill forces no woman to get an abortion, no doctor to perform an abortion and not hospital to permit an abortion." Report by Members of the Senate Judiciary Committee voting "do pass" in support of Judiciary Committee Substitute for Senate Bill 527, an Act relating to Abortions." Senate Journal Supp. No. 10, March 25, 1970, p. 2. The April 9, 1970, report of the House Judiciary Committee stated, in part, that "[t]he bill also provides that a hospital or person is not required to participate in an abortion and neither shall a hospital or person be held liable for refusing to participate in an abortion." Judiciary Committee Report on CS for Senate Bill 527 (HWE), House Journal Supp. No. 12, April 9, 1970, p. 3. The same Report reiterated that "[i]mmunity from liability is granted to a hospital or other person for refusing to participate in an abortion." Id.

Bridgeton Hosp. Ass'n, Inc., 366 A.2d 641 (N.J. 1976), cert. denied, 433 U.S. 914 (1977). Neither is persuasive.

The Attorney General Opinion was issued in response to a request to evaluate a proposed bill regulating abortion, not the existing law adopted in 1970. One provision of the proposed bill would have relieved all physicians, clinics, surgical centers, and their employees from any duty to perform an abortion over their objection in writing. The Attorney General expressed the view that an institutional right of conscience is limited to "sectarian" hospitals, and that "nonsectarian hospitals built or operating with public support would be foolish to rely on it." 1978 Op. Att'y Gen. No. 8 (Formal) at 13 (Feb. 10, 1978). The two lower federal court decisions cited in support of this conclusion--Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), appeal dismissed, 419 U.S. 91 (1974), and Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), cert. denied, 420 U.S. 907 (1975)--must be regarded as having been rejected by the Supreme Court's decisions in Poelker v. Doe, and Webster v. Reproductive Health Services.[8]

---

[8] After the Supreme Court's decision in Poelker, defendants in the Nyberg case sought to vacate the injunction that had been issued forbidding them from implementing a resolution prohibiting staff physicians from using the facilities of the local municipal hospital to perform abortions except to save the mother's life. The court of appeals, noting that the woman refused an abortion in Poelker was indigent, affirmed the district court's denial of relief, explaining that "there is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital." Nyberg v. City of Virginia, 667 F.2d 754, 758 (8th Cir. 1982), appeal dismissed, 462 U.S. 1125 (1983). In Webster, the Supreme Court, after citing and quoting this

In an Opinion issued seven weeks after the one cited by the lower court, the Alaska Attorney General "guess[ed]" that the Alaska Supreme Court would not follow the decision in Poelker because this Court "has provided greater protection for the individual as against governmental regulation and control under the state constitution than has the United States Supreme Court under the federal constitution." 1978 Op. Att'y Gen. No. 15 (Formal), at 2-3 (March 31, 1978). Whether the Attorney General's "guess" will prove to be correct is the precise issue to be decided. Moreover, as the defendants and other amici have argued, the conscience clause does protect the constitutional rights of individuals, acting through their institutions, not to participate in medical procedures they deem morally abhorrent.

> [E]xclusion of health care institutions from laws protecting conscience can not be reconciled with other legal doctrines protecting the rights of conscience. For example, to protect individual rights of conscience in the provision of health service but deny protection to collective (entity) forms of individual conduct is rather like arguing that the first amendment protects only individual speech (direct, person-to-person, natural, voice communication, or personally-written, personally-delivered letters) but not collective speech (for example, by corporations, or via television, books, or newspapers--which are collective, institutional efforts).

Lynn D. Wardle, "Protecting the Rights of Conscience of Health Care Providers," 14 J. Legal Med. 177, 187 (1993).

---

passage, 492 U.S. at 503, rejected this reasoning, stating, "If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' . . . surely it may do so through the allocation of other public resources, such as hospitals and medical staff." Id. at 510 (citation omitted).

In Bridgeton, the other authority cited by the lower court, the New Jersey Supreme Court initially held that a quasi-public hospital has an enforceable common law duty to make available the full range of medical services which it is qualified to provide, including elective abortions. Doe v. Bridgeton Hosp. Ass'n, Inc., 366 A.2d at 643-47. While the case was pending in the state supreme court, the New Jersey Legislature enacted a conscience clause intended to protect the rights of both public and private health care institutions. The New Jersey Supreme Court, citing the same two federal cases relied upon by the Alaska Attorney General in his 1978 Opinion, held that "[f]or the state to frustrate [the abortion] right by its action would be violative of the constitutional guarantee." Id. at 647. In view of the Supreme Court's rejection of the reasoning of Nyberg v. City of Virginia and Doe v. Hale Hospital[9] in Poelker v. Doe and Webster v. Reproductive Health Services, the lower court's reliance on Bridgeton was clearly misplaced. Moreover, the reasoning, if not the result, in Bridgeton was called into question by the New Jersey Supreme Court's later decision in Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).[10]

---

[9] It also must be noted that, unlike the Alaska conscience clause, which applies to any hospital, the Massachusetts conscience clause at issue in Doe v. Hale Hospital applies only to a "privately controlled hospital or other health facility." Mass. Gen. Laws Ann., ch. 272, § 21B (1990).

[10] After the Supreme Court decided Poelker, the New Jersey courts refused to grant the defendant hospital relief from the New Jersey Supreme Court's judgment in the mistaken belief that Poelker was a public funding, not a public access, case. See Doe v. Bridgeton Hosp. Ass'n, Inc., 389 A.2d 526 (N.J. Super. Ct. Law

In Right to Choose, the New Jersey Supreme Court held that New Jersey could not choose to fund childbirth but not "medically necessary" abortions for indigent women. Accordingly, the court construed a state statute limiting public funding of abortions to those necessary to save the life of the mother to include "all abortions that are medically necessary to preserve the mother's life or health." 450 A.2d at 941. The court, however, held that "the New Jersey Constitution does not require the funding of elective, nontherapeutic abortions," id. at 928, and that "the State may pursue its interest in potential life by excluding those abortions from the [state] Medicaid program." Id. at 937. Rejecting Justice Pashman's view that New Jersey was required to fund all abortions for indigent women, the court stated that "the flaw in his analysis is in failing to recognize that the right of the individual is freedom from undue governmental interference, not an assurance of government funding." Id. at 935 n.5. Clearly, the New Jersey Supreme Court's holding in Right to Choose, that New Jersey has no obligation under the state constitution to fund elective abortions for indigent women, strongly suggests that public (or quasi-public) hospitals have no obligation to make their facilities available for the performance of elective abortions for any women, indigent or otherwise.

Although not mentioned in the lower court's Opinion, plaintiffs argued below (and may be expected to argue on appeal) that a state statute cannot confer upon a public (or quasi-

---

Div. 1978), aff'd, 403 A.2d 965 (N.J. Super. Ct. App. Div. 1979).

public) hospital the right to assert a conscientious objection to abortion. Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 71-73. If, however, the State may mandate a policy forbidding the use of public facilities for performance of nontherapeutic abortions, it is difficult to understand why the State may not also permit the governing boards of public and quasi-public hospitals to adopt such policies as a matter of conscience. Contrary to plaintiffs' view, legislative deference in such matters would not constitute an Establishment Clause violation any more than a blanket state policy would. See Harris v. McRae, 448 U.S. 297, 318-20 (1980) (rejecting Establishment Clause claim against the Hyde Amendment).[11] This Court, too, has recognized that "the fact that sectarian beliefs may be entertained by those persons [acting on behalf of a public institution] does not bar [that institution] from achieving its valid secular goal[s] . . . ." Lien v. City of Ketchikan, 383 P.2d 721, 724 (Alaska 1963).

In Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974), the Ninth Circuit Court of Appeals rejected an Establishment Clause challenge to a federal statute which

---

[11] Significantly, in the Right to Choose decision, discussed supra, the New Jersey Supreme Court specifically rejected the argument that the state abortion funding ban violated a state constitutional provision forbidding establishment of one religious sect in preference to another. 450 A.2d at 938-39. The court observed, "Merely because a statute is consistent with one or more religions does not mean that its principal effect is religious." Id. at 938.

provides that receipt of federal Hill-Burton construction funds does not require the receiving entity "to make its facilities available for the performance of any sterilization procedure or abortion of the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." 42 U.S.C. § 300a-7(a)(2)(A). In enacting this statute, "Congress sought to retain its neutrality in the debate over the morality of voluntary sterilizations [and abortions] by preventing the reception of federal health program funds from being used as a basis for compelling a hospital to perform such surgery against the dictates of its religious or moral beliefs." 506 F.2d at 311. "Congress quite properly sought to protect the freedom of religion of those with religious or moral scruples against sterilizations and abortions." Id. at 312. Accord, Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975).[12]

The lower court erred in compelling defendant hospital to make its facilities available for the performance of elective abortions, over the objections of the hospital and its governing board, and in violation of the rights of conscience specifically guaranteed by § 18.16.010(b). That injunction must be reversed.

---

[12] See also Gray by Gray v. Romeo, 697 F. Supp. 580, 590 (D. R.I. 1988) (dicta) (a public hospital may rely upon a statutory conscience clause to refuse to allow its facilities to be used for purposes inconsistent with the moral or religious values of the institution if the conscience clause covers the conduct to which the institution objects but refusing to allow hospital to rely on conscience clause which applied only to abortion and sterilization and not to euthanasia).

Conclusion

For the foregoing reasons, amici curiae, Members of the Alaska Legislature, respectfully request this Honorable Court to reverse the judgment of the superior court.

Respectfully submitted,

Paul Benjamin Linton
General Counsel
Americans United for Life
343 S. Dearborn Street
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

Kenneth P. Jacobus, P.C.
ABA # 6911036
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333

Counsel for the Amici

April 29, 1996

After 3 deaths, Australia poised to repeal euthanasia law

ANCHORAGE DAILY NEWS 2/03/97

By SETH MYDANS
The New York Times

DARWIN, Australia — The last meal of sandwiches and beer seems to have been more agonizing for Dr. Philip Nitschke than for the cancer-ridden patient whose life he was about to take.

"I just about choked on my ham sandwich," the doctor said. "I was very, very anxious to the point where I was sweating. He spent a lot of time trying to calm me down, and I thought: 'Great. You spend your last meal trying to pacify the doctor.'"

Then the 66-year-old patient, Robert Dent, said, "You've got a job to do; get on with it." And Nitschke inserted into Dent's arm an intravenous needle connected to the doctor's battered gray laptop computer.

Without another word, the doctor recalled, Dent punched in a series of commands, a lethal dose of barbiturates began flowing into his veins and moments later he was dead — the first person to die under a landmark law allowing doctors to kill patients who want to end their lives.

Dent's death last Sept. 22 and two more that followed in January are at the center of an emotional debate in Australia as Parliament appears bent on overturning the world's only voluntary euthanasia statute, which took effect last summer here in Australia's Northern Territory.

In confronting the issue, Australia

Please see Back Page, EUTHANASIA

EUTHANASIA: After 3 deaths, Australia is poised to repeal assisted-suicide law

Continued from Page A-1

has become a testing ground for other countries, including the United States, that are considering the tangled legal and moral issues raised by rapid medical advances that are prolonging both life and the process of dying.

In January, the U.S. Supreme Court heard arguments on whether the Constitution gives terminally ill people a right to doctor-assisted suicide — a slight step short of the death administered by doctors that is permitted here. This summer the court is expected to rule on whether to reinstate laws that were overturned in New York and Washington state banning doctor-assisted suicide.

"In 20 years' time, we will be able to keep virtually everyone alive indefinitely," said the author of the Northern Territory's law, Marshall Perron, at a Parliamentary hearing here in late January. "More and more, we are going to die when someone makes the decision that we are going to die."

Six senators had flown to Darwin to hear testimony about the law, and their generally hostile comments supported a growing sense that the national Parliament was likely to overturn it later this year.

The law has been vigorously opposed by religious groups and the country's conservative medical establishment. Aboriginal groups are also opposed, both on religious grounds and because of fears that have taken hold in their communities that their lives could be taken when they seek medical care.

The issue has aroused passions around the nation, and Parliament has received 14,000 written submissions from the public.

At an overcrowded public hearing the night before Perron, the former chief minister of the Northern Territory, addressed the senators, 51 people rose to speak, some sharing painful personal stories, some invoking religious principles, one man leading the audience in a chant of the word "choice."

"This law is not about the right to die," cried Terry Secker. "We all have the right to die. This law is about the right to kill!"

Rick Bawden, a photographer, countered: "Can someone tell me what's ethical about telling someone who wants to die: 'Nope. Sorry, mate'? This is torture!"

Charles Kerms disagreed, saying he was here at the urging of his wife, who had been bedridden and nearly blind for 15 years. "She told me: 'Go there tonight and tell them this: We are not animals. We are not an 'it.' Tell them we are made in the image and likeness of God.' "

The voluntary euthanasia law, which was enacted in 1995 and took effect last July, is the first anywhere that explicitly allows doctors to take their patients' lives. Though Nitschke rigged his computer to allow his patients to initiate their own deaths, he could have legally administered the injections himself.

In the Netherlands, with some of the most permissive laws on the subject, euthanasia remains illegal. But guidelines passed in 1993 allow doctors to help patients take their own lives under certain circumstances.

Switzerland also allows doctor-assisted suicide in carefully controlled situations.

Under the Northern Territory's Rights of the Terminally Ill Act, a patient must be over 18 and be mentally and physically competent to request his own death. The request must be supported by three doctors, including a specialist who confirms that the patient is terminally ill and a psychiatrist who certifies that he is not suffering from treatable depression. Once the paperwork is complete, a nine-day "cooling-off period" is required before the death can proceed.

With the deaths of Dent, 52-year-old cancer patient Janet Mills and an anonymous 69-year-old male cancer patient who died on Jan. 22, Nitschke, 49, has found himself something of an outcast among his peers. Many people have been shocked by what some call his "computer-driven death machine," a 3-year-old Toshiba laptop on which he also surfs the Internet and reads his e-mail. He connects the computer to a pump-driven syringe filled with three barbiturates, which he carries in an old gray suitcase.

Last September, after Dent, a carpenter who had been suffering fro prostate cancer for five years, , had eaten his ham sandwich, the doctor said he switched on his computer, which makes a loud buzzing noise, and the first black-and-white screen flickered on.

"Are you aware that if you go ahead to the last screen and press the 'yes' button, you will be given a lethal dose of medicine and die?" the computer asked in large, bold letters, displaying the options "Yes" and "No."

Dent pressed the key for "yes" and moved to the second screen, which reads, "Are you certain you understand that if you proceed and press the 'yes' button on the next screen, you will die?"

Dent hit the key again and faced the final message: "In 15 seconds you will be given a lethal injection." He pressed the key for "Yes" a final time, waited as the computer continued to buzz, and in 15 seconds, a rhythmic pumping sound emerged from the suitcase.

Moments later, the screen went black except for one word: "Exit."

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 5

Revision Date
Title: Const. Amdt.: Relating to freedom of conscience
Sponsor: Representative Martin
Requester: House State Affairs

Dept. Affected: Office of the Governor
BRU: Elective Operations
Component: General and Primary Elections
Component Serial No.: #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services						
Travel						
Contractual		3.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	3.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES [ ]						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		3.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	3.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: none

POSITIONS

Full-time		0				
Part-time		0				
Temporary		0				

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by: Dana LaTour — Phone: 465-5347
Division: Division of Elections — Date: 2/24/97
Approved by Co Agency: Lt. Governor Fran Ulmer — Date: 2/24/97
Office of the Lieutenant Governor

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information, call the Governor's Legislative Office