HB

186

Alaska State Legislature

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Member
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Representative Mike Kelly

House District 7

Sponsor Statement – Blank CS for HB 186 ( )

"ALASKA FIREARMS FREEDOM ACT"

The United States Constitution gives Congress the authority to regulate Interstate Commerce between the states and 18 USC 922 makes it unlawful for any person not licensed as a manufacturer or dealer in firearms to engage in the business of manufacturing or dealing in firearms. Collectively, the Interstate Commerce Clause and 18 USC 922 are used by the federal government as a means to regulate firearms.

The Alaska Firearms Freedom Act addresses this by exempting firearms, firearm accessories, and ammunition manufactured and retained in the state from all federal firearm control laws including registration, as firearms that meet these criteria shouldn't be regulated by the federal government because they have not traveled in interstate commerce. Firearms exempt from this Act must have the words "Made in Alaska" clearly stamped on a central metallic part such as the receiver or frame.

This bill frees certain firearms from federal regulation as long as certain conditions are met. It frees the state of Alaska from restrictive federal firearm regulation and allows the state to take responsible firearm regulation into her own hands. The federal government has historically used the Interstate Commerce Clause to regulate firearms and has consistently pursued legislation that imposes its will on states. Outdoorsmen, hunters, and Alaskans defending their families and property will benefit from the passage of HB 186.

CS FOR HOUSE BILL NO. 186(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLY, Wilson, Lynn, Gatto

A BILL

FOR AN ACT ENTITLED

"An Act declaring that certain firearms and accessories are exempt from federal regulation."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS. The legislature finds that the authority for this Act is the following:

(1) the Tenth Amendment to the Constitution of the United States guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Alaska certain powers as they were intended at the time that Alaska was admitted to statehood in 1959; the guaranty of those powers is a matter of contract between the state and people of Alaska and the United States as of the time that the compact with the United States was agreed upon and adopted by Alaska and the United States in 1959;

(2) the Ninth Amendment to the Constitution of the United States guarantees

to the people rights not granted in the constitution and reserves to the people of Alaska certain rights as they were intended at the time that Alaska was admitted to statehood in 1959; the guaranty of those rights is a matter of contract between the state and people of Alaska and the United States as of the time that the compact with the United States was agreed upon and adopted by Alaska and the United States in 1959;

(3) the regulation of intrastate commerce is vested in the states under the Ninth and Tenth Amendments to the Constitution of the United States, particularly if not expressly preempted by federal law; the United States Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearm accessories, and ammunition;

(4) the Second Amendment to the Constitution of the United States reserves to the people the right to keep and bear arms as that right was intended at the time that Alaska was admitted to statehood in 1959, and the guaranty of the right is a matter of contract between the state and people of Alaska and the United States as of the time that the compact with the United States was agreed upon and adopted by Alaska and the United States in 1959;

(5) art. I, sec. 19, Constitution of the State of Alaska clearly secures to Alaska citizens and prohibits government interference with the right of individual Alaska citizens to keep and bear arms.

*** Sec. 2.** AS 44.99 is amended by adding a new section to read:

Article 5. Alaska Firearms Freedom Act.

Sec. 44.99.500. State policy, declarations, and requirements concerning certain firearms not in interstate commerce and not subject to federal regulation. (a) A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in this state and that remains in the state is not subject to federal law or federal regulation, including registration, under the authority of the United States Congress to regulate interstate commerce as those items have not traveled in interstate commerce.

(b) This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in this state from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer product applications are

not firearms, firearm accessories, or ammunition, and their importation into this state and incorporation into a firearm, a firearm accessory, or ammunition manufactured in this state does not subject the firearm, firearm accessory, or ammunition to federal regulation. Basic materials, such as unmachined steel and unshaped wood, are not firearms, firearm accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearm accessories, and ammunition under interstate commerce as if they were actually firearms, firearm accessories, or ammunition. The authority of the United States Congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearm accessories, and ammunition made in this state from those materials. Firearm accessories that are imported into this state from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in this state.

(c) A firearm manufactured or sold in this state and not subject to federal regulation under this section must have the words "Made in Alaska" clearly stamped on a central metallic part, such as the receiver or frame.

(d) In this section,

(1) "firearm accessory" means an item that is used in conjunction with or mounted on a firearm but is not essential to the basic function of a firearm, including a telescopic or laser sight, magazine, flash or sound suppressor, folding or aftermarket stock and grip, speedloader, ammunition carrier, and light for target illumination;

(2) "generic and insignificant parts" includes springs, screws, nuts, and pins;

(3) "manufactured" means a firearm, a firearm accessory, or ammunition that has been created from basic materials for functional usefulness, including forging, casting, machining, or other processes for working materials.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 44.99.500, added by sec. 2 of this Act, applies to firearms,

firearm accessories, and ammunition that are manufactured and retained in this state after October 1, 2009.

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

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Representative Carl Gatto
Representative Max Gruenberg
Representative Lindsey Holmes

State Capitol, Room 120
Juneau, Alaska 99801

Fax

To: Leg. Legal

Fax #: 465-2029 Number of pages including cover: 1

From: Jane W. Pierson

Date: April 6, 2009

Re: Go Final on HB186

This morning the House Judiciary Committee passed Hb186 from committee with the following amendment:

P.1, L. 10; P.2, L2; P. 2. L.12 change "understood" to "intended"

Please also check to make sure this does not appear elsewhere in the bill, since the amendment was to change "understood anywhere it appeared in this context.

Thank you.

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **HB186**
() Publish Date:

Identifier (file name): HB186-LAW-CRIM-4-3-09
Title: An Act exempting certain firearms from federal regulation
Sponsor: REPRESENTATIVE(s) KELLY, Wilson
Requester: JUDICIARY

Dept. Affected: Law
RDU: CRIMINAL
Component: CRIMINAL JUSTICE LITIGATION
Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2010**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2009) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

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

This bill attempts to declare that firearms that are made in Alaska are exempt from any federal law or regulation. The bill also requires the Attorney General for Alaska to pursue a declaratory judgment action in federal court upholding this declaration, and requires the Attorney General to defend any Alaska citizen prosecuted for violating federal law regarding firearms. The bill has significant constitutional issues. These issues would most likely arise in the context of a state citizen being charged with a crime in federal court and could result in significant litigation in both state and federal court. While such litigation is likely, it is difficult to estimate with any certainty the costs that might be incurred and they are therefore indeterminate at this point.

Prepared by: Robert Meiners, Deputy Director — Phone 465-3673
Division: Administrative Services — Date/Time 4/3/09 2:03 PM
Approved by: Wayne Anthony Ross, Attorney General — Date 4/3/2009
Department of Law

(Revised 9/10/2008 OMB)

26-LS0627\E
Luckhaupt
4/3/09

CS FOR HOUSE BILL NO. 186( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLY, Wilson

A BILL

FOR AN ACT ENTITLED

"An Act declaring that certain firearms and accessories are exempt from federal regulation."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS. The legislature finds that the authority for this Act is the following:

(1) the Tenth Amendment to the Constitution of the United States guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Alaska certain powers as they were understood at the time that Alaska was admitted to statehood in 1959; the guaranty of those powers is a matter of contract between the state and people of Alaska and the United States as of the time that the compact with the United States was agreed upon and adopted by Alaska and the United States in 1959;

(2) the Ninth Amendment to the Constitution of the United States guarantees

1823

to the people rights not granted in the constitution and reserves to the people of Alaska certain rights as they were understood at the time that Alaska was admitted to statehood in 1959; the guaranty of those rights is a matter of contract between the state and people of Alaska and the United States as of the time that the compact with the United States was agreed upon and adopted by Alaska and the United States in 1959;

(3) the regulation of intrastate commerce is vested in the states under the Ninth and Tenth Amendments to the Constitution of the United States, particularly if not expressly preempted by federal law; the United States Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearm accessories, and ammunition;

(4) the Second Amendment to the Constitution of the United States reserves to the people the right to keep and bear arms as that right was understood at the time that Alaska was admitted to statehood in 1959, and the guaranty of the right is a matter of contract between the state and people of Alaska and the United States as of the time that the compact with the United States was agreed upon and adopted by Alaska and the United States in 1959;

(5) art. I, sec. 19, Constitution of the State of Alaska clearly secures to Alaska citizens and prohibits government interference with the right of individual Alaska citizens to keep and bear arms.

*** Sec. 2.** AS 44.99 is amended by adding a new section to read:

Article 5. Alaska Firearms Freedom Act.

Sec. 44.99.500. State policy, declarations, and requirements concerning certain firearms not in interstate commerce and not subject to federal regulation. (a) A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in this state and that remains in the state is not subject to federal law or federal regulation, including registration, under the authority of the United States Congress to regulate interstate commerce as those items have not traveled in interstate commerce.

(b) This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in this state from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer product applications are

not firearms, firearm accessories, or ammunition, and their importation into this state and incorporation into a firearm, a firearm accessory, or ammunition manufactured in this state does not subject the firearm, firearm accessory, or ammunition to federal regulation. Basic materials, such as unmachined steel and unshaped wood, are not firearms, firearm accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearm accessories, and ammunition under interstate commerce as if they were actually firearms, firearm accessories, or ammunition. The authority of the United States Congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearm accessories, and ammunition made in this state from those materials. Firearm accessories that are imported into this state from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in this state.

(c) A firearm manufactured or sold in this state and not subject to federal regulation under this section must have the words "Made in Alaska" clearly stamped on a central metallic part, such as the receiver or frame.

(d) In this section,

(1) "firearm accessory" means an item that is used in conjunction with or mounted on a firearm but is not essential to the basic function of a firearm, including a telescopic or laser sight, magazine, flash or sound suppressor, folding or aftermarket stock and grip, speedloader, ammunition carrier, and light for target illumination;

(2) "generic and insignificant parts" includes springs, screws, nuts, and pins;

(3) "manufactured" means a firearm, a firearm accessory, or ammunition that has been created from basic materials for functional usefulness, including forging, casting, machining, or other processes for working materials.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 44.99.500, added by sec. 2 of this Act, applies to firearms,

firearm accessories, and ammunition that are manufactured and retained in this state after October 1, 2009.

Alaska State Legislature

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Member
House Finance Committee

Representative Mike Kelly

House District 7

MEMORANDUM

DATE: **April 6, 2009**

TO: **Representative Mike Kelly**

FROM: **Derek Miller**

RE: **Sectional Analysis for blank CS for HB 186( )**
(26-LS0627\E)

A sectional summary of a bill should not be considered an authoritative interpretation of the bill. The bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1.
Findings Section. The authority of this Act is the Second, Ninth, and Tenth Amendments to the Constitution of the United States. The Second Amendment reserves to the people the right to keep and bear arms, the Ninth Amendment guarantees to the people rights not granted in the constitution, and the Tenth Amendment guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution. The United States Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearm accessories, and ammunition. Article I, Section 19 of the Constitution of the State of Alaska secures to the citizens and prohibits government interference with the right of individual Alaska citizens to keep and bear arms.

Section 2.
(a) A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in this state and that remains in the state is not subject to federal law or federal regulation including registration under the authority of the United States Congress to regulate intrastate commerce.

(b) This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in this state from basic materials without the inclusion of significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer applications are not firearms, firearm accessories, or ammunition and their incorporation into a firearm, firearm accessory, or ammunition manufactured in this state does not subject them to federal regulation. Basic materials, such as unmachined steel and unshaped wood are not firearms, firearm accessories, and ammunition and are not subject to federal regulation under intrastate commerce. Firearm accessories imported into this state from another state and are attached to or used in conjunction with a firearm in this state does not subject the firearm to federal regulation under intrastate commerce.

(c) A firearm manufactured or sold in this sate and not subject to federal regulation mush have the words "Made in Alaska" clearly stamped on a central metallic part, such as the receiver or frame.

(d) Definitions section.

"Firearm accessory" – an item that is used in conjunction with or mounted on a firearm but is not essential to the basic function of a firearm. This includes: a telescope or laser sight, magazine, flash or sound suppressor, folding or aftermarket stock and grip, speedloader, ammunition carrier, and light for target illumination.

"Generic and insignificant parts" – includes springs, screws, nuts, and pins.

"Manufactured" – means a firearm a firearm accessory, or ammunition that has been created from basic materials for functional usefulness, including forging, casting, machining, or other processes for working materials.

Section 3.
Applicability section. This Act applies to firearms, firearm accessories, and ammunition that are manufactured and retained in this state after October 1, 2009.

SENATE BILL 1644

By Beavers

AN ACT to amend Tennessee Code Annotated, Title 4, relative to exempting from regulation under the commerce clause of the Constitution of the United States a firearm, firearm accessory, or ammunition manufactured and retained in Tennessee.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 4, is amended by adding Sections 2 through 6 of this act as a new chapter thereto.

SECTION 2. This chapter shall be known and may be cited as the "Tennessee Firearms Freedom Act".

SECTION 3. The general assembly declares that the authority for this chapter is the following:

(1) The tenth amendment to the United States Constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the Constitution and reserves to the state and people of Tennessee certain powers as they were understood at the time that Tennessee was admitted to statehood. The guarantee of those powers is a matter of contract between the state and people of Tennessee and the United States as of the time that the compact with the United States was agreed upon and adopted by Tennessee and the United States;

(2) The ninth amendment to the United States Constitution guarantees to the people rights not granted in the Constitution and reserves to the people of Tennessee certain rights as they were understood at the time that Tennessee was admitted to statehood. The guarantee of those rights is a matter of contract between the state and

people of Tennessee and the United States as of the time that the compact with the United States was agreed upon and adopted by Tennessee and the United States.

(3) The regulation of intrastate commerce is vested in the states under the ninth and tenth amendments to the United States Constitution, particularly if not expressly preempted by federal law. Congress cannot preempt state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition;

(4) The second amendment to the United States Constitution reserves to the people the right to keep and bear arms as that right was understood at the time that Tennessee was admitted to statehood, and the guarantee of the right is a matter of contract between the state and people of Tennessee and the United States as of the time that the compact with the United States was agreed upon and adopted by Tennessee and the United States; and

(5) The Tennessee Constitution clearly secures to Tennessee citizens, and prohibits government interference with, the right of individual Tennessee citizens to keep and bear arms.

SECTION 4. As used in this chapter, unless the context otherwise requires:

(1) "Firearms accessories" means items that are used in conjunction with or mounted upon a firearm but are not essential to the basic function of a firearm, including but not limited to telescopic or laser sights, magazines, flash or sound suppressors, folding or aftermarket stocks and grips, speedloaders, ammunition carriers, and lights for target illumination;

(2) "Generic and insignificant parts" includes but is not limited to springs, screws, nuts, and pins; and

(3) "Manufactured" means creating a firearm, a firearm accessory, or ammunition from basic materials for functional usefulness, including but not limited to forging, casting, machining, or other processes for working materials.

SECTION 5. A firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Tennessee is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Tennessee from basic materials and that can be manufactured without the inclusion of any significant parts imported into this state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Tennessee and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Tennessee does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Tennessee from those materials. Firearms accessories that are imported into Tennessee from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Tennessee.

SECTION 6. A firearm manufactured or sold in Tennessee under this chapter must have the words "Made in Tennessee" clearly stamped on a central metallic part, such as the receiver or frame.

SECTION 7. This act shall take effect upon becoming a law, the public welfare requiring it.

LEGISLATIVE RESEARCH REPORT

APRIL 8, 2005

REPORT NUMBER 05.237

COSTS OF DEFENDING UNCONSTITUTIONAL LAWS

PREPARED FOR REPRESENTATIVE LES GARA

BY CHUCK BURNHAM, LEGISLATIVE ANALYST

BACKGROUND: LANDMARK ALASKA COURT RULINGS ON MARIJUANA POSSESSION 2

CHANGES TO POSSESSION LAWS PROPOSED IN HB 96 3

Table 1: Current and Proposed Crimes of Marijuana Possession 4

LEGAL COSTS OF DEFENDING CERTAIN LAWS DETERMINED TO BE UNCONSTITUTIONAL 4

Noy v. State of Alaska 5

Department of Health and Social Services, Karen Purdue Commissioner v. Planned Parenthood of Alaska, Inc., et al. 5

You asked for an analysis of HB 96, which relates to the use, possession, and criminality of marijuana in Alaska. Specifically, you wanted to know how this bill differs from the provision of AS 11.71.060(a)—regarding marijuana possession—that was recently found unconstitutional by the Alaska Court of Appeals. In addition, you asked about the costs to the state for mounting legal defenses for certain laws found to be unconstitutional. Specifically, you asked that we determine the costs for attorneys, support staff, and other significant expenses associated with defending the statutes and regulations that were found by the courts to be unconstitutional in the following cases:

- *Noy v. State of Alaska*; and
- *Department of Health and Social Services, Karen Purdue Commissioner v. Planned Parenthood of Alaska, Inc., et al.*

907-465-3991
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Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

SUMMARY

In 1975 and 2003 Alaska courts issued rulings that found the possession of small amounts of marijuana—under four ounces—to be protected by privacy provisions of the state constitution. Nonetheless, both bodies of the Alaska Legislature are currently considering bills that would decrease the marijuana possession thresholds for the criminal charges of misconduct involving a controlled substance in the fourth, fifth, and sixth degrees, respectively. To the extent that the governor's bills, HB 96 and SB 74, seek to criminalize the possession of less than four ounces of marijuana in private homes for personal use, the bills appear to contravene the rulings of Alaska's courts.

The significant measurable costs to the state of defending AS 11.71.060(a) in *Noy v. Alaska* were approximately **$7,600**. Because *Noy* began as a relatively routine misdemeanor case, the costs were relatively low. By contrast, the total costs to the state upon the 2001 final ruling in the civil case *Department of Health and Social Services, Karen Purdue Commissioner v. Planned Parenthood of Alaska, Inc., et al* were about **$452,000**.

In the remainder of this report we provide further information on state court rulings regarding marijuana possession, a brief analysis of HB 96, and details of the costs of defending the state's position in the *Noy* and *Planned Parenthood* cases.

BACKGROUND: LANDMARK ALASKA COURT RULINGS ON MARIJUANA POSSESSION

In 1975, the Alaska Supreme Court ruled in *Ravin v. State* that the privacy clause of the Alaska Constitution (Article 1, Section 22) protects the possession of marijuana in one's home for personal use. The court's decision is summarized in *Lexis* online as follows:

> The court held that privacy in the home was a fundamental right under both constitutions. However, the right had to yield when it interfered in a serious manner with the health, safety, or rights of others, or with the public welfare. The state had to meet a substantial burden of showing that proscription of possession of marijuana in the home was in the interest of public welfare. It did not meet that burden because the evidence presented did not prove that marijuana as presently used in the country was generally a danger to the user or others. The privacy of the home could not be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. However, possession at home of amounts of marijuana indicative of intent to sell rather than for personal use was unprotected.[1]

Following the *Ravin* decision, Alaska laws were changed to allow possession of less than four ounces of marijuana by adults in their homes. Fifteen years later, in the 1990 general election, however, Alaska voters approved Ballot Measure 2, which criminalized possession of marijuana in any amount.[2] The initiative amended AS 11.71.060(a) to read as follows:

---

[1] *Ravin v. State of Alaska*, No. 2135, Supreme Court of Alaska; 537 P.2d 494; 1975 Alas. LEXIS 334.

[2] Initiative No. 88MARI: Marijuana Law Amendments, appeared on the November 6, 1990, general election ballot.

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the sixth degree if the person

(1) uses or displays any amount of a schedule VIA [including marijuana] controlled substance or possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half pound containing a schedule VIA controlled substance; or

(2) refuses entry into a premise for an inspection authorized under AS 17.30.

The amended law effectively made possession of even very small amounts of marijuana a Class B misdemeanor punishable by up to ninety days in jail and a one-thousand dollar fine.[3]

In *Noy v. State of Alaska* (2003), however, the Alaska Court of Appeals, looking to the Supreme Court's decision in *Ravin*, determined neither the legislature *nor* the voters have the power to enact laws that criminalize possession of small amounts of marijuana. The court, therefore, found AS 11.71.060(a) to be unconstitutional to the extent that it prohibits possession of less than four ounces of marijuana in one's home for personal use.[4]

CHANGES TO POSSESSION LAWS PROPOSED IN HB 96

In the transmittal letter accompanying HB 96, Governor Murkowski identified the primary purposes of the bill as follows:

> This bill would provide a forum for the Legislature to hear expert testimony on the effects of marijuana and to make findings that the courts can rely on in cases where marijuana is an issue. In addition to educating the Legislature, courts, and the public about the harmful effects of marijuana, this bill would deter possession and use of marijuana by increasing criminal penalties for certain types of possession. It also would provide a fair and efficient process for determining the usable weight of live marijuana plants in criminal prosecutions.

Section 6 of the bill would amend AS 11.71.060(a)—the section found unconstitutional by the Alaska Court of Appeals—as follows (bolded, underlined text has been added; text in brackets is deleted):

> Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the sixth degree if the person
>
> (1) uses or displays any amount of a schedule VIA controlled substance**;**
>
> **(2)** [OR] possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than **one ounce** [ONE-HALF POUND] containing a schedule VIA controlled substance; [OR]
>
> **(3) manufactures, delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce containing a schedule VIA controlled substance;**
>
> **(4) possesses one or more preparations, compounds, mixtures, or substances containing a schedule VIA controlled substance while a passenger in a motor vehicle, aircraft, or motorized watercraft;**

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[3] Maximum fines for Class B misdemeanors were subsequently increased to $2,000.

[4] *Noy v. State*, 79 P.3d 1201, 2003 Alas. App. LEXIS 209 (Alaska Ct. App., 2003).

(5) being the driver or operator of a motor vehicle, aircraft, or motorized watercraft, knowingly permits a passenger to possess one or more preparations, compounds, mixtures, or substances containing a schedule VIA controlled substance; or

(6) [(2)] refuses entry into a premise for an inspection authorized under AS 17.30.[5]

As you can see, the second provision of this section decreases the amount of marijuana required to justify a charge of misconduct involving a controlled substance in the sixth degree—a Class B misdemeanor. Amendments proposed in Sections 4 and 5 of the bill also decrease possession thresholds for the charges of misconduct with a controlled substance in the fourth and fifth degree, respectively. It appears that in criminalizing the possession of less than four ounces of marijuana in the privacy of one's home, Sections 5 and 6 of HB 96 may contravene the Courts' decisions in *Ravin* and *Noy*. Table 1 shows current possession thresholds and those proposed by HB 96, the criminal charges for those levels of possession, and the maximum punishment allowed for each charge.

Table 1: Current Statutory Language and Proposed Crimes of Marijuana Possession

Statute / HB 96 Section	Level of Crime	Possession Threshold		Maximum Sentence	
		Current	Proposed: HB 96	Imprisonment	Fine
AS 11.71.040 / Section 4	Class C Felony	One pound or more	Four ounces or more	Five years	$50,000
AS 11.71.050 / Section 5	Class A Misdemeanor	One-half pound or more	One ounce or more	One year	$10,000
AS 11.71.060 / Section 6	Class B Misdemeanor	Less than one-half pound	Less than one ounce	Ninety days	$2,000

Notes: More serious charges involving marijuana are generally restricted to crimes involving selling the drug. In its ruling in *Ravin v. State*, the Alaska Supreme Court determined that selling marijuana, unlike possessing small amounts for personal use in the home, is not afforded constitutional protection.
Source: Alaska Statutes (2004), HB 96 (2005).

LEGAL COSTS OF DEFENDING CERTAIN LAWS DETERMINED TO BE UNCONSTITUTIONAL

Kathryn Daughhetee, Administrative Services Director, Alaska Department of Law provided cost figures including salaries for attorneys and other staff and fees awarded by the court, where applicable.[6] Other costs, such as witnesses' fees and travel costs, which Ms. Daughhetee estimated to be relatively minimal, are not included. It is important to note that the primary attorneys representing the state in both of the cases were Department of Law staff. The Department does not consider the salaries of these attorneys and their support staff to be strictly associated with these cases. That is, had the attorneys and staff not been working on the cases

[5] We include, as Attachment A, a copy of HB 96.

[6] Ms. Daughhetee can be reached at (907) 465-3673.

in question, they would have, nonetheless, been drawing the same salaries while working on other cases. Nonetheless, for the purposes of this report, Department of Law staff salaries are included in the state's costs for these cases.

NOY V. STATE OF ALASKA

As we mentioned, *Noy* was a criminal case involving a misdemeanor charge of marijuana possession. Following a two-day trial in the Fourth District Court in Fairbanks, the defendant was convicted. On appeal, the Alaska Court of Appeals found that Mr. Noy was entitled to a new trial because the trial judge had incorrectly instructed the jury on how to determine the weight of marijuana plants. The Court of Appeals held unconstitutional the marijuana possession statute under which Mr. Noy was convicted, AS 11.71.060(a), because the state did not show a sufficient governmental interest in limiting Alaskans' right to privacy under the state constitution by criminalizing marijuana possession.[7]

The Criminal Division of the Alaska Department of Law does not track attorney and staff time by case. Nonetheless, the Department estimates that a total of 77.5 "billable" hours were dedicated to the case at an average rate of $98 per hour for attorney and staff salaries. The total of these costs to the state, therefore, was approximately **$7,600**.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES, KAREN PURDUE COMMISSIONER V. PLANNED PARENTHOOD OF ALASKA, INC., ET AL.

In 1998, Planned Parenthood of Alaska and two private practice physicians brought this civil suit challenging 7 AAC 43.140, which relates to Medicaid funding for abortions. Under the regulation, Medicaid funds could be used for abortions only in cases where the life of the mother was in danger or where the pregnancy was the result of rape or incest. In 2001, the Third District Superior Court found, and the Alaska Supreme Court affirmed, that the state, having undertaken a program to provide health care for poor Alaskans, was required to adhere to neutral criteria in distributing that care. It could not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program. Moreover, the courts found that the regulation discriminatorily burdened the exercise of constitutional rights by poor Alaskan women by denying funding solely on political disapproval of a medically necessary procedure. In the view of the courts, this selective denial of medical benefits violated Alaska's constitutional guarantee of equal protection.[8]

The state was represented in the case by the Attorney General's office. In addition, the Legislature contracted with the Anchorage law firm of Brena, Bell & Clarkson to file an amicus brief in support of the regulation. Further substantial costs were incurred because, having

[7] We include, as Attachment B, a copy of the decision in *David S. Noy v State of Alaska*, Court of Appeals No. A-8327, No. 1906, November 14, 2003; 83 P.3d 545; 2003 Alas. App. LEXIS 234

[8] We include, as Attachment C, a copy of the decision in *Department of Health and Social Services, Karen Purdue Commissioner v. Planned Parenthood of Alaska, Inc., et al.*, Supreme Court No. S-9109, No. 5443; 28 P.3d 904; 2001 Alas. LEXIS 97.

prevailed against the state, the plaintiff was awarded full attorney's fees.[9] The total costs of attorneys, staff, fees, and the contracted amicus brief in this case was approximately **$452,000**. The components of this total amount are as follows:

- Department of Law costs $158,000
- Plaintiff's fees $269,000
- Contract for amicus brief $25,000

Please note, however, the Department of Law does not consider the costs for its attorneys and staff to have been incurred strictly due to this case because salaries for those positions would be paid regardless of the existence of this particular case.

If you would like a legal opinion of the chances of HB 96 or SB 74 passing constitutional muster, please contact Legal Services.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

[9] The criteria the court uses in weighing a plaintiff's private motivation against the extent of public interest involved appear among the annotations to Civil Rule 82 as follows: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?

Attachment A

HB 96 (2005)

HOUSE BILL NO. 96

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 1/21/05
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act making findings relating to marijuana use and possession; relating to marijuana and misconduct involving a controlled substance; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

PURPOSE. The purpose of this Act is to protect the health and safety of persons in this state, and to provide legislative findings concerning this Act regarding marijuana and its effects in this state.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS. The legislature finds that marijuana poses a threat to the public health that justifies prohibiting its use and possession in this state, even by adults in private. The legislature further finds that

(1) marijuana has been for many years and continues to be the most commonly used illegal controlled substance in the United States;

(2) marijuana has many adverse health and social effects, and there is evidence that it has addictive properties similar to heroin and other similar illegal controlled substances;

(3) in addition to concerns about marijuana use generally, the legislature is particularly concerned with the rates of use of marijuana by young people and Alaska Natives, which exceed national averages;

(4) early exposure of children to marijuana increases the likelihood of lifelong health and social problems, and makes it much more likely that the person will go on to use more potent illegal controlled substances;

(5) a high percentage of adults arrested in this state for domestic violence test positive for marijuana at the time of arrest;

(6) marijuana use by children is associated with an increased risk of attempting suicide;

(7) marijuana consists of over four hundred different chemicals and can affect almost every organ and system in the body, including the lymph system, the heart, and the lungs; marijuana can disrupt memory, attention, judgment, and other cognitive functions and can impair motor coordination, time perception, and balance, especially in children;

(8) marijuana smoke contains more carcinogenic hydrocarbons than tobacco smoke and a person who smokes several marijuana cigarettes a week may be taking in as many cancer-causing chemicals as someone who smokes a full pack of tobacco cigarettes every day;

(9) the potency of marijuana in the 1960s and 1970s was very low compared to the potency in 2005; the average amount of delta-9-tetrahydrocannabinol (THC), the main psychoactive ingredient, nationwide, was less than one percent in the 1960s and 1970s, but has increased steadily in the 1980s and especially the 1990s, and by 2003 was more than six times that level, at 6.4 percent; in addition, marijuana grown in this state is often more potent than national averages, and has been tested with THC levels of over 20 percent; marijuana of the potency generally available in 2005 is a strong hallucingenic drug that can command hundreds of dollars per ounce on the illegal market; the increasing potency of marijuana

corresponds to an increase in the number of persons seeking emergency medical care for marijuana-related incidents;

(10) several hundred adults and children in this state are admitted into treatment each year for marijuana abuse, with more than half of the admissions being children under the age of 18 and more than a third of the admissions being Alaska Natives; youth and Alaska Natives made up a disproportionate number of the total statewide treatment admissions for marijuana abuse in 2003;

(11) Alaska consistently ranks in the top 10 states, and occasionally in the top five states, nationwide, in the amount of marijuana illegally grown indoors, and large amounts of marijuana grown in this state are sold throughout the state and exported to other parts of the United States; the price of high-quality marijuana is hundreds of dollars per ounce and thousands of dollars per pound; testimony received by the legislature in 1999 and confirmed in 2005, shows that marijuana often sells for $500 or more per ounce;

(12) a large percentage of persons arrested in this state, including adults and juveniles who commit violent offenses, have marijuana in their system at the time of arrest;

(13) marijuana use by a parent has been, and will continue to be, a major contributing factor to children having easy access to and using marijuana;

(14) criminal penalties for marijuana possession and education efforts are effective in reducing marijuana use and limiting its access by children;

(15) possession of marijuana, even for personal, recreational use, has been, and continues to be, illegal under federal law;

(16) in Noy v. State, 83 P.3d 538 (Alaska App. 2003), the Alaska court of appeals adopted a statute enacted two decades ago that was repealed by the voters in 1990, and allows adults to possess up to four ounces as the constitutionally-protected amount of marijuana that each adult can have in their home; this decision usurped the legislature's and the voters' authority to change laws relating to health and safety;

(17) the Noy decision by the Alaska court of appeals also struck down the one-ounce possession limit in the medical marijuana law enacted in 1999, thus further usurping the legislature's and the voters' authority to change laws relating to health and safety;

(18) the Noy decision by the Alaska court of appeals also led this court in Crocker v. State, 97 P.3d 93 (Alaska App. 2004) to adopt unnecessary and unreasonable

requirements for search warrants to investigate marijuana-growing in this state that inhibit law enforcement efforts to reduce the amount of marijuana illegally grown indoors and illegally sold or exported; and

(19) the potency of marijuana today, the profit to be made growing marijuana today, and the consequences to the health of Alaskans, make it necessary for the legislature to reconfirm by this Act that it is illegal to possess any amount of marijuana anywhere in this state, and to reassess the legislative lines that have been drawn in the past that classify marijuana possession as either felony or misdemeanor conduct; in taking this legislative action, the legislature has taken into consideration its duty to implement the right to privacy in art. I, sec. 22, Constitution of the State of Alaska.

*** Sec. 3.** AS 11.71.030(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the third degree if the person

(1) under circumstances not proscribed under AS 11.71.020(a)(2) - (4), manufactures or delivers any amount of a schedule IIA or IIIA controlled substance or possesses any amount of a schedule IIA or IIIA controlled substance with intent to manufacture or deliver;

(2) delivers any amount of a schedule IVA, VA, or VIA controlled substance to a person under **21** [19] years of age [WHO IS AT LEAST THREE YEARS YOUNGER THAN THE PERSON DELIVERING THE SUBSTANCE]; or

(3) possesses any amount of a schedule IA or IIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center;

or

(B) on a school bus.

*** Sec. 4.** AS 11.71.040(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled

substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a schedule IA or IIA controlled substance;

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of three grams or more containing a schedule IIIA or IVA controlled substance;

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of **four ounces** [ONE POUND] or more containing a schedule VIA controlled substance; or

(G) 25 or more plants of the genus cannabis;

(4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center;

or

(B) on a school bus;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing which prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

(10) affixes a false or forged label to a package or other container containing any controlled substance.

*** Sec. 5.** AS 11.71.050(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fifth degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-half ounce or more containing a schedule VIA controlled substance;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce containing a schedule VIA controlled substance, for remuneration;

(3) possesses

(A) less than 25 tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(B) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than three grams containing a schedule IIIA or IVA controlled substance;

(C) less than 50 tablets, ampules, or syrettes containing a schedule VA controlled substance;

(D) one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than six grams containing a schedule VA controlled substance; or

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of **one ounce** [ONE-HALF POUND] or more containing a schedule VIA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances containing a schedule VIA controlled substance while driving or operating a motor vehicle, aircraft, or motorized watercraft; or

(4) fails to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under AS 17.30.

*** Sec. 6.** AS 11.71.060(a) is amended to read:

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the sixth degree if the person

(1) uses or displays any amount of a schedule VIA controlled substance**;**

(2) [OR] possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than **one ounce** [ONE-HALF POUND] containing a schedule VIA controlled substance; [OR]

(3) manufactures, delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce containing a schedule VIA controlled substance;

(4) possesses one or more preparations, compounds, mixtures, or substances containing a schedule VIA controlled substance while a passenger in a motor vehicle, aircraft, or motorized watercraft;

(5) being the driver or operator of a motor vehicle, aircraft, or motorized watercraft, knowingly permits a passenger to possess one or more preparations, compounds, mixtures, or substances containing a schedule VIA

controlled substance; or

(6) [(2)] refuses entry into a premise for an inspection authorized under AS 17.30.

*** Sec. 7.** AS 11.71.080 is amended to read:

Sec. 11.71.080. Aggregate weight of live marijuana plants. For purposes of calculating the aggregate weight of a live marijuana plant, the aggregate weight shall be **one-sixth of the measured weight of the marijuana plant after the roots of the marijuana plant have been removed** [THE WEIGHT OF THE MARIJUANA WHEN REDUCED TO ITS COMMONLY USED FORM].

*** Sec. 8.** This Act takes effect immediately under AS 01.10.070(c).

Attachment B

David S. Noy v. State of Alaska, Court of Appeals, No. A-8327, No. 1906, November 14, 2003; 83 P.3d 545; 2003 Alas. App. LEXIS 234

DAVID S. NOY, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-8327, No. 1906

COURT OF APPEALS OF ALASKA

83 P.3d 545; 2003 Alas. App. LEXIS 234

November 14, 2003, Decided

PRIOR HISTORY: **[**1]** Appeal from the District Court, Fourth Judicial District, Fairbanks, Jane F. Kauvar, Judge. Trial Court No. 4FA-01-3003 Cr.

Noy v. State, 79 P.3d 1201, 2003 Alas. App. LEXIS 209 (Alaska Ct. App., 2003).

DISPOSITION: Rehearing denied

LexisNexis(R) Headnotes

COUNSEL: Appearances: William R. Satterberg, Jr., Fairbanks, for the Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for the Appellee.

JUDGES: Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

OPINIONBY: MANNHEIMER

OPINION: **[*545]** ON REHEARING

MANNHEIMER, Judge.

In *Ravin v. State, 537 P.2d 494 (Alaska 1975)*, the Alaska Supreme Court held that the privacy clause of the Alaska Constitution (Article I, Section 22) protects the possession of marijuana in one's home for personal use. In 1990, the voters of Alaska enacted *AS 11.71.060(a)*, **[*546]** which purports to criminalize the possession of any amount of marijuana, even when the marijuana is possessed in one's home for personal use. In our initial opinion in this case **[**2]** -- *Noy v. State*, Alaska App. Opinion No. 1897 (August 29, 2003) n1 -- we held that this statute is unconstitutional because it conflicts with the right of privacy recognized in the *Ravin* decision. However, we concluded that the statute could be preserved to the extent that it prohibits possession of four ounces or more of marijuana.

n1 *80 P.3d 255, 2003 Alas. App. LEXIS 167, 2003 WL 22026345.*

The State now seeks rehearing. In its petition for rehearing, the State argues that this Court's initial opinion is flawed in some half-dozen ways, but most of the State's arguments ultimately rest on one underlying assertion: that we misunderstood the nature of the Alaska Supreme Court's decision in *Ravin*.

In our initial decision in this case, we read the *Ravin* opinion to say that the privacy clause of the Alaska Constitution restricts the legislature's (and the voters') authority to enact laws prohibiting the possession of marijuana in one's home for personal use. The State **[**3]** contends that this view of *Ravin* is fundamentally flawed -- that *Ravin* did not announce a constitutional restriction on the government's law-making power.

According to the State, *Ravin* did not hold that Article I, Section 22 of the Alaska Constitution restricts the government's authority to *enact* statutes that prohibit possession of marijuana in one's home for personal use. Rather, *Ravin* restricted the government's authority to *enforce* such statutes -- by creating an affirmative defense that individual defendants can raise if they are prosecuted for violating such a statute.

The State argues that this defense is similar to a claim of entrapment or selective prosecution, in that it does not rest on a claim that the defendant is innocent of wrongdoing, but rather on a claim that the government violated constitutional guarantees when it singled out this particular defendant as the target of prosecution.

According to the State, *Ravin* stands for the proposition that, in any prosecution for possession of marijuana in one's home, the defendant can assert that the possession was of a small amount for personal use. If the defendant raises such a claim, the matter **[**4]** is decided (before trial) by a judge, not a jury. To defeat the proposed defense, the State would have to prove either (1) that the marijuana was not for personal use, or (2) that the government had a sufficient interest in prohibiting the possession of that particular amount of marijuana under the specific circumstances of that defendant's case.

In other words, the State argues that *Ravin* created a system in which the constitutionality of marijuana prosecutions would be decided by trial judges on a case-by- case basis -- and that, in these case-specific hearings, the State would repeatedly try to convince numerous different judges that there is a sufficient government interest to justify imposing criminal penalties on people who possess varying amounts of marijuana.

The State's proposed interpretation of the *Ravin* decision would seemingly put us on the road to legal chaos. Under the State's proposal, dozens of judges across the state would be required to issue potentially inconsistent rulings as to whether, under the facts of a particular defendant's case, the State had sufficient justification to criminalize the defendant's possession of 3.0 ounces, or 2.2 ounces, or **[**5]** 1.4 ounces, or 0.6 ounces of marijuana.

However, our primary reason for rejecting the State's interpretation of *Ravin* is that the State's interpretation is inconsistent with *Ravin* itself.

The *Ravin* decision does not speak of an affirmative defense of the type proposed by the State in its petition for rehearing, nor does the *Ravin* opinion describe itself as establishing case-specific limits on the State's enforcement of marijuana statutes. Rather, in the opening sentence of *Ravin*, the Alaska Supreme Court described the issue before them as "the constitutionality of Alaska's statute prohibiting possession of marijuana". n2 **[*547]** Later in the opinion, after the supreme court held that Article I, Section 22 of our state constitution guarantees a right of privacy in one's home n3, the court declared that two major questions remained:

n2 *Ravin, 537 P.2d at 496.*

n3 *Id. at 504.*

Whether the State has demonstrated sufficient justification for **[**6]** the prohibition of possession of marijuana in general ... and ... whether the State has met the greater burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.

Ravin, 537 P.2d at 504.

The supreme court then proceeded to analyze the scientific data concerning the uses and effects of marijuana. The court did not attempt to analyze the particular facts of Irwin Ravin's case; rather, the court assessed the legislature's overall justification for regulating *any* person's possession of marijuana in their home. n4

n4 *See id., 537 P.2d at 504-511.*

And when the *Ravin* court announced its conclusion, the court did not frame that conclusion in terms of whether the State had an interest in prohibiting the possession of marijuana under the particular facts of the case before it. Instead, the court framed its conclusion as a general restriction on the government's authority **[**7]** to legislatively control this aspect of people's personal behavior:

We conclude that [the state has shown] no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home[.] The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.

The state has a legitimate concern with avoiding the spread of marijuana use to adolescents who may not be equipped with the maturity to handle the experience prudently, as well as a legitimate concern with the problem of driving under the influence of marijuana. Yet these interests are insufficient to justify intrusions into the rights of adults in the privacy of their own homes.

Ravin, 537 P.2d at 511.

In the years since *Ravin* was decided, there has been no suggestion (until now) that *Ravin* was something **[**8]** other than normal constitutional litigation in which the supreme court adjudicated the constitutionality of a particular category of criminal statute. For example, six months after *Ravin*, in *Belgarde v. State*, the supreme court referred to *Ravin* as "[a] case [in which] we held that the state may not prohibit possession of [marijuana] by an adult in [their] home for personal consumption".

n5 In 1978, in *State v. Erickson*, the supreme court again declared that *Ravin* represented a restriction on the state's power to legislate:

n5 *543 P.2d 206, 207 (Alaska 1975).*

In *Ravin v. State*, this court held that the state could not bar the personal use and possession of marijuana in the home. In view of the relative harmlessness of the drug, the individual's right to privacy under the Alaska Constitution was found to outweigh the state interest in regulation.

574 P.2d 1, 21 (Alaska 1978) (footnote omitted). And more recently, in *Luedtke v. Nabors Alaska Drilling,* **[**9]** *Inc.*, the supreme court declared that "*Ravin* addressed the issue of whether the state could prohibit the use of marijuana in the home. We held that it could not." n6

n6 *768 P.2d 1123, 1135 (Alaska 1989).*

Based on this analysis of the *Ravin* decision and the later supreme court decisions construing *Ravin*, we are convinced that the State's interpretation of *Ravin* is wrong. *Ravin* did not create an affirmative defense that defendants might raise, on a case-by-case basis, when they were prosecuted for possessing marijuana in their home for personal use. Instead, both in the *Ravin* opinion itself and in the supreme court's later descriptions of *Ravin*, the Alaska Supreme **[*548]** Court has repeatedly and consistently characterized the *Ravin* decision as announcing a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home.

Accordingly, we reject the State's suggestion that *Ravin* **[**10]** left Alaska's marijuana statutes intact but created an affirmative defense to be litigated in each individual case.

Although this is not a factor in our interpretation of *Ravin*, we note that the Alaska Legislature took this same view of *Ravin* when they refashioned this state's drug laws twenty years ago. As we described in *Walker v. State* n7, the legislature responded to *Ravin* in 1982 by enacting a statute -- former *AS 11.71.060(a)(4)* -- that prohibited possession of four ounces or more of marijuana, even if the marijuana was possessed in one's home for personal use. In the commentary that accompanied this statute, the legislature declared:

N7 *991 P.2d 799 (Alaska App. 1999).*

This legislation is intended to clarify the law in Alaska concerning possession of marijuana, in light of the decision of the Supreme Court of Alaska in *Ravin v. State, 537 P.2d 494 (Alaska 1975). Ravin* held that Alaska's constitutional right to privacy protects the possession and use **[**11]** of marijuana by an adult, in the home, in amounts indicative of personal use in a purely personal, non-commercial context. The approach taken in this Act is to define, for purposes of the decision in *Ravin*, an amount which is indicative of personal use, and to provide a clear line of demarcation of four ounces, so that citizens of this state will know precisely what conduct is prohibited.

Commentary and Sectional Analysis for the 1982 Revision of Alaska's Controlled Substances Laws (CCSB 190), p. 19 (quoted in *Walker v. State, 991 P.2d at 802-03*).

Thus, not only is the State's suggested interpretation of *Ravin* at odds with the supreme court's statements on this question, but it is also at odds with the Alaska Legislature's announced policy aims in this area of the law: the aim of "defining, for purposes of ... *Ravin*, [a specific] amount which is indicative of personal use", and the aim of "providing a clear line of demarcation ..., so that citizens of this state will know precisely what conduct is prohibited".

We now address certain other aspects of the State's petition for rehearing.

In our original decision in this case, we stated that because **[**12]** the jury acquitted Noy of the charge of possessing eight ounces or more of marijuana, the State is barred from asserting, in any future litigation, that Noy did indeed possess eight ounces or more of marijuana. The State argues that this conclusion is mistaken for two reasons.

First, the State contends that the doctrine of collateral estoppel does not apply when the aggrieved party had no method of seeking appellate review of the adverse judgement. The State points out that the *double jeopardy clauses* of the federal and state constitutions preclude the State from seeking appellate review of a jury's verdict of acquittal. Thus, the State argues, the fact that Noy's jury acquitted him of possessing eight ounces or more of marijuana should not estop the State from continuing to assert that Noy possessed more marijuana than the jury found.

The problem with the State's argument is that it is directly contrary to the United States Supreme Court's holding in *Ashe v. Swenson, 397 U.S. 436, 445-46, 25 L. Ed. 2d 469, 90 S. Ct. 1189, 1195-96 (1970).*

Second, the State argues that the jury's acquittal should not be considered conclusive because the jury was misinstructed on **[**13]** how to calculate the weight of marijuana. The State asserts that, given the evidence presented at Noy's trial, it is obvious that Noy possessed at least eight ounces of marijuana, and therefore the jury's verdict of acquittal must have been the fruit of the flawed jury instruction.

But as we explained in our initial opinion, the State did not introduce the marijuana itself; instead, the State relied on photographs and testimony concerning the marijuana. The photographs showed that the marijuana contained stalks, not just leaves **[*549]** and buds. Even if the jury had been correctly instructed, they would have been told that stalks are not to be considered when assessing the weight of harvested marijuana. Although there may be a substantial possibility that the erroneous weight-calculation instruction influenced the jury's thinking when they assessed the weight of the marijuana, it is also possible that the jurors were not convinced beyond a reasonable doubt that the harvested marijuana, minus the stalks, weighed eight ounces or more. Thus, we must apply the collateral estoppel rule of *Ashe v. Swenson*. See our discussion of a related point in *State v. McDonald, 872 P.2d 627, 660 (Alaska App. 1994)* **[**14]** .

Moreover, even if we assume that the erroneous jury instruction played an instrumental role in the jury's decision to acquit Noy of possessing eight or more ounces of marijuana, the State would still be bound by the jury's verdict. The law on this point is summarized in Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* (2nd ed. 1999):

> If the jury reaches a verdict of acquittal or the judge grants a judgment of acquittal, double jeopardy bars a new trial even if it appears that the acquittal was based on an erroneous interpretation of the law.

Id., § 25.1(g), Vol. 5, p. 648. *See also id.*, § 25.3(b), Vol. 5, pp. 666-68.

This view of the *double jeopardy clause* is borne out in the case law. *See United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 51 L. Ed. 2d 642, 97 S. Ct. 1349, 1354 (1977); Livingston v. Murdaugh, 183 F.3d 300, 301-02 (4th Cir. 1999).*

Finally, the State argues for the first time that if we adjudicate the constitutionality of *AS 11.71.060(a)* in Noy's case, our decision will unfairly preclude the State from attempting to prove that *Ravin* should **[**15]** be overruled or limited -- *i.e.*, preclude the State from attempting to prove that there is sufficient justification for a criminal statute prohibiting any and all possession of marijuana, even possession of marijuana by adults in their home for personal use.

But our decision in this case merely implements the supreme court's constitutional ruling in *Ravin*. The State remains free in the future to challenge the continuing vitality of *Ravin*.

For all of these reasons, the State's petition for rehearing is DENIED.

Attachment C

Department of Health and Social Services, Karen Purdue Commissioner v. Planned Parenthood of Alaska, Inc., et al., Supreme Court No. S-9109, No. 5443; 28 P.3d 904; 2001 Alas. LEXIS 97

STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, KAREN PERDUE, Commissioner, Appellant, v. PLANNED PARENTHOOD OF ALASKA, INC., JAN WHITEFIELD, M.D., and SUSAN LEMAGIE, M.D., Appellees.

Supreme Court No. S-9109, No. 5443

SUPREME COURT OF ALASKA

28 P.3d 904; 2001 Alas. LEXIS 97

July 27, 2001, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sen K. Tan, Judge. Superior Court No. 3AN-98-7004 CI.

DISPOSITION: The manner in which the State allocates public benefits is subject to constitutional limitation under Alaska's equal protection provision. The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program. Moreover, the DHSS regulation in this case discriminatorily burdens the exercise of a constitutional right. Because we conclude that denial of Medicaid assistance to poor women who medically require abortions violates equal protection, we AFFIRM the decision of the superior court.

LexisNexis(R) Headnotes

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Susan Orlansky, Feldman & Orlansky, Anchorage, Karen E. Katzman, Sheila S. Boston, and Dina L. Bakst, Kaye Scholer Fierman Hays & Handler, LLP, New York, New York, and Martha F. Davis and Yolanda S. Wu, NOW Legal Defense and Education Fund, New York, New York, for Amicus Curiae NOW Legal Defense and Education Fund.

JUDGES: Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

OPINIONBY: FABE

OPINION: [*905]

FABE, Chief Justice.

I. INTRODUCTION

Alaska's Medicaid program funds virtually all necessary medical services for poor Alaskans -- "regardless of race, age, national origin, or economic standing" **n1** -- but it denies funding for medically necessary abortions. Alone among

Medicaid-eligible Alaskans, women whose health is endangered **[**3]** by pregnancy are denied health care based solely on political disapproval of the medically necessary procedure. This selective denial of medical benefits violates Alaska's constitutional guarantee of equal protection. Our conclusion is supported by the majority of jurisdictions that have considered comparable restrictions on state funding of medically necessary abortions: these state courts have concluded that, under their state constitutions, government health care programs that fund other medically necessary procedures may not deny assistance to eligible women whose health depends on obtaining abortions. **n2**

n1 *AS 47.07.010.*

n2 See *Committee to Defend Reprod. Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (Cal. 1981); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (Mass. 1981); Women of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (N.J. 1982); New Mexico Right to Choose/NARAL v. Johnson, 1999 NMSC 5, 975 P.2d 841, 126 N.M. 788 (N.M. 1998),* cert. denied, *526 U.S. 1020, 143 L. Ed. 2d 352 (1999); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 191 W. Va. 436, 446 S.E.2d 658 (W. Va. 1993);* but see *Renee B. v. Florida Agency for Health Care Admin., 790 So. 2d 1036, 2001 Fla. LEXIS 1396, 2001 WL 776533 (Fl. 2001); Doe v. Department of Soc. Servs., 439 Mich. 650, 487 N.W.2d 166 (Mich. 1992); Rosie J. v. North Carolina Dep't of Human Resources, 347 N.C. 247, 491 S.E.2d 535 (N.C. 1997); Hope v. Perales, 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (N.Y. 1994); Fischer v. Department of Pub. Welfare, 509 Pa. 293, 502 A.2d 114 (Pa. 1985).*

A number of lower state courts have also found that funding restrictions similar to those challenged today violated their state constitutions. See Simat Corp. v. Arizona Cost Containment System Admin., [slip op.], No. CV1999014614 (Ariz. Super. May 23, 2000); *Doe v. Maher, 40 Conn. Supp. 394, 515 A.2d 134 (Conn. Super. 1986);* Roe v. Harris, [slip op.], NO. 96977 (Idaho Dist. Feb. 1, 1994); Doe v. Wright, [slip op.], No. 91-CH-1958 (Ill. Cir. Dec. 2, 1994); Clinic for Women v. Humphreys, [slip op.], No. 49D12-9908-MI-1137 (Ind. Super. Oct. 18, 2000); Jeannette R. v. Ellery, [slip op.], No. BDV-94-811 (Mont. Dist. May 19, 1995); *Planned Parenthood Ass'n v. Department of Human Resources of Oregon 63 Ore. App. 41, 663 P.2d 1247 (Or. App. 1983),* aff'd on other grounds, *297 Ore. 562, 687 P.2d 785 (Or. 1984)* (declining to reach constitutional issue); *Low-Income Women of Texas v. Bost, 38 S.W.3d 689 (Tex. App. 2000);* Doe v. Celani, [slip op.], No. S81-84CnC (Vt. Super. May 23, 1986); but see Doe v. Childers, [slip op.], No. 94CI02183 (Ky. Cir. Aug. 7, 1995).

[4]**

This case concerns the State's denial of public assistance to eligible women whose health is in danger. It does not concern State payment for elective abortions; nor **[*906]** does it concern philosophical questions about abortion which we, as a court of law, cannot aspire to answer. We join the California Supreme Court in clarifying that "this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child." **n3** Indeed, as the California Supreme Court emphasized, "similar constitutional issues would arise if the Legislature . . . funded [Medicaid] abortions but refused to provide comparable medical care for poor women who choose childbirth." **n4** The constitutional issue in this case therefore "does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment." **n5** As the California court recognized, the issue presented is "not whether **[**5]** the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so." **n6** Rather, the issue is whether the State, having enacted a benefits program, may discriminate between recipients in the manner attempted by the Department of Health and Social Services (DHSS) today. We hold that it may not. Once the State undertakes to fund medically necessary services for poor Alaskans, it may not selectively exclude from that program women who medically require abortions.

n3 *Myers, 625 P.2d at 780.*

n4 Id.

n5 Id.

n6 Id.

Although the State argues that courts may not enjoin unconstitutional use of the legislative appropriations power, this proposition is unsupported by case law from any jurisdiction. The legislature's spending power does not create license to disregard citizens' constitutional rights. In rejecting this part of the State's argument, we concur with every state and federal court **[**6]** that has considered this issue.

II. FACTS AND PROCEEDINGS

Alaska provides medical services for poor Alaskans primarily through the Medicaid program. **n7** Medicaid is a comprehensive health care program designed to provide medical assistance for all eligible poor per **[*907]** sons in the state. **n8** But a DHSS regulation, 7 Alaska Administrative Code (AAC) 43.140, imposes a limit on the state's health care funding: It denies Medicaid assistance for medically necessary abortions unless a pregnant woman is at risk of dying or her pregnancy resulted from rape or incest. **n9** Because DHSS offers no other funding source for abortions, 7 AAC 43.140 ensures that a woman who medically requires an abortion will receive no assistance from the state.

n7 See AS 47.07; see also *42 U.S.C. § 1396*-1396v (1997).

A second program, Chronic and Acute Medical Assistance (CAMA) complements Medicaid by providing some medical care for Alaskans who are poor but ineligible for Medicaid. See *AS 47.08.150.* CAMA's predecessor, the General Relief Medical program (GRM), funded abortions for eligible women when the procedure was necessary to protect their health or when pregnancy resulted from sexual assault, sexual abuse of a minor, or incest. See 7 AAC 47.200(a)(4)(F) (2000); 7 AAC 47.290(8) (2000). In 1998, after nearly 30 years of government support for medically necessary abortions through GRM, the legislature stopped funding the program and enacted CAMA as a replacement. CAMA covers essentially the same services as GRM, except that it does not fund any abortions. Compare *AS 47.08.150* with 7 AAC 47.200. **[**7]**

n8 See *AS 47.07.010.* Medicaid relies on joint state-federal funding, with the federal government paying a portion of the state's costs. See *42 U.S.C. § § 1396b*(a), 1396d(b). The "Hyde Amendment" limits federal Medicaid contributions for abortions: Federal funding is available for abortions in cases of rape or incest or where the woman's life is in danger, but not for abortions necessary to protect a woman's health. See Pub. L. No. 106-554, § § 508-509, 114 Stat. 2763 (2000); *Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925, 928-29 (N.J. 1982)* (discussing history of Hyde Amendment).

n9 7 AAC 43.140 (2000) provides in part:

(a) Payment for an abortion will, in the department's discretion, be covered under Medicaid if the physician services invoice is accompanied by certification that the

(1) life of the mother would be endangered if the pregnancy were carried to term; or

(2) pregnancy is the result of an act of rape or incest.

The range of women whose access to medical care is restricted **[**8]** by the regulation is broad. According to medical evidence provided to the superior court, some women -- particularly those who suffer from pre-existing health problems -- face significant risks if they cannot obtain abortions. Women with diabetes risk kidney failure, blindness, and preeclampsia or eclampsia -- conditions characterized by simultaneous convulsions and comas -- when their disease is complicated by pregnancy. Women with renal disease may lose a kidney and face a lifetime of dialysis if they cannot obtain an abortion. And pregnancy in women with sickle cell anemia can accelerate the disease, leading to pneumonia, kidney infections, congestive heart failure, and pulmonary conditions such as embolus. Poor women who suffer from conditions such as epilepsy or bipolar disorder face a particularly brutal dilemma as a result of DHSS's regulation --

medication needed by the women to control their own seizures or other symptoms can be highly dangerous to a developing fetus. Without funding for medically necessary abortions, pregnant women with these conditions must choose either to seriously endanger their own health by forgoing medication, or to ensure their own safety but endanger **[**9]** the developing fetus by continuing medication. Finally, without state funding, Medicaid-eligible women may reach an advanced stage of pregnancy before they can gather enough money for an abortion; resulting late-term abortions pose far greater health risks than earlier procedures.

In June 1998 the plaintiffs -- two medical doctors and Planned Parenthood of Alaska -- filed a complaint against DHSS. They sought to enjoin enforcement of 7 AAC 43.140 and also sought a judgment declaring that the State's denial of funding for medically necessary abortions violates Alaska's Constitution. Superior Court Judge Sen K. Tan granted summary judgment in favor of Planned Parenthood. Based on this court's holding that "reproductive rights are fundamental . . . [and] include the right to an abortion," **n10** the superior court concluded that 7 AAC 43.140 impermissibly interferes with Medicaid-eligible women's constitutional rights to privacy. Because the State failed to articulate a compelling state interest for this interference, the superior court permanently enjoined DHSS from enforcing the regulation "so as to deny coverage for medically necessary abortions." The State now appeals. **n11** **[**10]**

n10 *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969 (Alaska 1997).*

n11 For part of the time that this appeal was pending, DHSS continued to withhold funding for medically necessary abortions, despite the superior court's injunction. On Planned Parenthood's motion, the superior court held a show cause hearing to determine whether the Department was in contempt of court. The court heard DHSS's claim that funding was unavailable, and determined, after a "struggle", not to hold the agency in contempt. However, the court issued a new injunction to reiterate the terms of the first injunction and explicitly direct that, while DHSS retained discretion over its use of resources, it should consider state Medicaid funds available to pay for medically necessary abortions. The parties on appeal presented records from these proceedings and additional related briefing.

[*908] III. STANDARD OF REVIEW

We review a grant of summary judgment de novo, exercising our independent **[**11]** judgment to "determine whether the parties genuinely dispute any material facts and, if not, whether the undisputed facts entitle the moving party to judgment as a matter of law." **n12** On questions of constitutional law, we also apply our independent judgment. **n13** We may affirm the superior court on any ground supported by the record. **n14**

n12 *M.C. v. Northern Ins. Co. of N.Y., 1 P.3d 673, 674-75 (Alaska 2000).*

n13 See *Rollins v. State, Dep't of Revenue, Alcoholic Beverage Control Bd., 991 P.2d 202, 206 (Alaska 1999).*

n14 See *James v. McCombs, 936 P.2d 520, 523 n.2 (Alaska 1997);* see also *Dixon v. Dixon, 747 P.2d 1169, 1175 n.5 (Alaska 1987).*

IV. DISCUSSION

A. The Challenged Regulation Violates Equal Protection.

By providing health care to all poor Alaskans except women who need abortions, the challenged regulation violates the state constitutional guarantee of "equal rights, opportunities, **[**12]** and protection under the law." **n15** The State, having established a health care program for the poor, may not selectively deny necessary care to eligible women merely because the threat to their health arises from pregnancy. Because we decide this case on state constitutional equal protection grounds, we do not review the superior court's privacy-based ruling. We do note, however, that our analysis today closely parallels that applied by many of the fifteen courts that have rejected similar restrictions. **n16** Although other courts' decisions have rested on a variety of state constitutional provisions, including equal protection, **n17** constitutional equal-rights-for-women clauses, **n18** due process, **n19** and privacy, **n20** the underlying logic has

been the same in decision after decision: "When state government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens." **n21** As the Massachusetts Supreme Judicial Court observed, the constitutional principle at issue is straightforward: **[**13]** "It is elementary that 'when a State decides to alleviate some of the hardships of poverty by **[*909]** providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.'" **n22** The State's spending discretion is limited by the constitution -- "while the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right." **n23**

n15 Alaska Const. art. I, § 1.

n16 See supra note 2.

n17 See, e.g., *Doe v. Maher, 40 Conn. Supp. 394, 515 A.2d 134, 157-59 (Conn. Super. 1986); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925, 934-37 (N.J. 1982); Planned Parenthood Ass'n v. Department of Human Resources of Oregon, 63 Ore. App. 41, 663 P.2d 1247, 1257-61 (Or. App. 1983),* aff'd on other grounds, *297 Ore. 562, 687 P.2d 785 (Or. 1984);* see also *Committee to Defend Reprod. Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (Cal. 1981).* **[**14]**

n18 See, e.g., *New Mexico Right to Choose/NARAL v. Johnson, 1999 NMSC 5, 975 P.2d 841, 850-57, 126 N.M. 788 (N.M. 1998); Doe v. Maher, 515 A.2d at 159-62.*

n19 See, e.g., *Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387, 398-99 (Mass. 1981); Doe v. Maher, 515 A.2d at 146-57.*

n20 See, e.g., *Women of Minnesota v. Gomez, 542 N.W.2d 17, 26-32 (Minn. 1995); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 191 W. Va. 436, 446 S.E.2d 658, 664-66 (W. Va. 1993).*

n21 *Panepinto, 446 S.E.2d at 667;* see also *Myers, 625 P.2d at 781* (addressing the narrow question "whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support" and holding that it may not); *Gomez, 542 N.W.2d at 28* (defining the "relevant inquiry" as "whether, having elected to participate in a medical assistance program, the state may selectively exclude from such benefits otherwise eligible persons solely because they make constitutionally protected health care decisions with which the state disagrees," and concluding that the state may not); *Byrne, 450 A.2d at 937* ("We hold that the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent."); *Johnson, 975 P.2d at 856* ("Courts very rarely require the government to fund its citizens' exercise of their constitutional rights. . . . But that is not to say that when the Department elects to provide medically necessary services to indigent persons, it can do so in a way that discriminates against some recipients on account of their gender."). **[**15]**

n22 *Moe, 417 N.E.2d at 401* (quoting *Maher v. Roe, 432 U.S. 464, 469-70, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977)).*

n23 Id.

Alaska's constitutional equal protection clause mandates "equal treatment of those similarly situated;" **n24** it protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause. **n25** In analyzing a challenged law under Alaska's equal protection provision, we first determine what level of scrutiny to apply, using Alaska's "sliding scale" standard. **n26** The "weight [that] should be afforded the constitutional interest impaired by the challenged enactment" is "the most important variable in fixing the appropriate level of review." **n27**

Second, we examine the State's interests served by the challenged regulation. **n28** If the burden placed on constitutional rights by the regulation is minimal, then the State need only show that its objectives were legitimate for the regulation to survive an equal protection challenge. **n29** But if "the objective **[**16]** degree to which the challenged legislation tends to deter [exercise of constitutional rights]" **n30** is significant, the regulation cannot survive constitutional challenge unless it serves a compelling state interest. **n31** Finally, if the State shows that its interests justify burdening the rights of citizens, for the regulation to survive constitutional challenge the State must demonstrate that the means it has chosen to advance those goals are well-fitted to the ends, and that its goals could not be accomplished by less restrictive means. **n32**

n24 *Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 271 (Alaska 1984).*

n25 See *State v. Anthony, 810 P.2d 155, 157 (Alaska 1991).*

n26 See *Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 396 (Alaska 1997).*

n27 Id. (quoting *Alaska Pacific Assurance Co., 687 P.2d at 269).*

n28 See id.; *State v. Ostrosky, 667 P.2d 1184, 1192 (Alaska 1983).*

n29 See id.

n30 *Alaska Pacific Assurance Co., 687 P.2d at 271.* **[**17]**

n31 See *Matanuska-Susitna Borough Sch. Dist., 931 P.2d at 396* (quoting *Alaska Pacific Assurance Co., 687 P.2d at 269-70).*

n32 See *931 P.2d at 396-97.*

The regulation at issue in this case affects the exercise of a constitutional right, the right to reproductive freedom. **n33** Therefore, the regulation is subject to the most searching judicial scrutiny, often called "strict scrutiny." **n34** We have explained in the past that such scrutiny is appropriate where a challenged enactment affects "fundamental rights," including "the exercise of intimate personal choices." **n35** This court has specified that the right to reproductive freedom "may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest." **n36**

n33 See *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 968-69 (Alaska 1997).*

n34 See *State v. Ostrosky, 667 P.2d 1184, 1192 (Alaska 1983).* **[**18]**

n35 Id.

n36 *Valley Hosp., 948 P.2d at 969.*

Judicial scrutiny of state action is equally strict where the government, by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right. In Alaska Pacific Assurance Co. v. Brown, we held the State to a "very high" burden to justify a statute that reduced workers' compensation benefits paid to workers who exercised their constitutional right to leave the state. **n37** We concluded that the challenged regulation did not meet this high standard and thus violated equal protection. **n38** Like the regulation at issue today, **[*910]** the challenged statute in Alaska Pacific Assurance Co. did not forbid individual exercise of constitutional rights; rather, it limited the government benefits distributed to the class of individuals who exercised that right. **n39** As we explained in that case, we look to the real-world effects of government action to determine the appropriate level of equal protection

scrutiny: "The suspicion with which this court will [**19] view infringements upon [constitutional rights] depends upon . . . the objective degree to which the challenged legislation tends to deter [the exercise of those rights]." **n40**

n37 *687 P.2d at 273-74.*

n38 See id. We have since applied more relaxed scrutiny where "the infringement on [the] right to travel is relatively small and would not be likely to deter a person from traveling." *Church v. State, Dep't of Revenue, 973 P.2d 1125, 1131 (Alaska 1999).* In this case the likelihood of deterring exercise of the right is very high: The State's own statistics and the findings of the superior court indicate that, under the challenged regulation, some women "will have no choice but to go forward with the pregnancy." We therefore follow Alaska Pacific Assurance Co. in applying strict scrutiny.

n39 See *687 P.2d at 266-67.*

n40 *Id. at 271.*

We reached a similar conclusion in Alaska Gay Coalition v. Sullivan, [**20] holding that the Municipality of Anchorage could not constitutionally withhold a public benefit based on a potential recipient's beliefs and public expression. **n41** The municipality had undertaken to publish a guidebook to public and private organizations in Anchorage, but excluded the Alaska Gay Coalition from the book. **n42** We held that this exclusion violated the Coalition's constitutional rights to equal protection under the law. **n43** We explained:

n41 *578 P.2d 951, 960 (Alaska 1978).*

n42 Id.

n43 Id.

When the Municipality decided to publish a limited informational guide to public and private local resources, it did not thereby assume the obligation of providing space to every possible group. . . . Had the Municipality deleted groups at random or used criteria not related to the nature of the particular organizations, constitutional violations may not have resulted. In deleting the Alaska Gay Coalition . . . however, appellees denied that group [**21] access to a public forum based solely on the nature of its beliefs. In so doing, they violated appellant's constitutional rights to . . . equal protection under the law.[**n44**]

n44 Id.

Similarly, in the instant case, the State's obligations do not depend on whether the State has undertaken to provide limitless health care services to all poor Alaskans. Rather, DHSS is constitutionally bound to apply neutral criteria in allocating health care benefits, even if considerations of expense, medical feasibility, or the necessity of particular services otherwise limit the health care it provides to poor Alaskans.

The State argues in this case that it does not provide all necessary medical care to indigent Alaskans. For support, it cites 7 AAC 43.385, a regulation that excludes from Medicaid coverage such services as medically unnecessary inpatient treatment, **n45** beautifying cosmetic surgery, **n46** and transplants of organs other than kidney, cornea, skin, and bone marrow. **n47** This [**22] regulation has not been challenged, and the issue has not been thoroughly briefed by the parties, but the restrictions appear to relate to medical necessity, cost, and feasibility -- all politically neutral criteria. Such spending limits are irrelevant to the constitutional issue raised by the State's denial of coverage for medically necessary abortions. As the United States Supreme Court noted in Shapiro v. Thompson:

We recognize that the State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.**[n48]**

n45 7 AAC 43.385(2), (6), (9), (11) & (12).

n46 7 AAC 43.385(4).

n47 7 AAC 43.385(17).

n48 *394 U.S. 618, 633, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).*

[23]**

Like Alaska Pacific Assurance Co., Alaska Gay Coalition establishes that under Alaska's equal protection provision the government **[*911]** may not allocate state benefits so as to deter citizens' exercise of constitutional rights.

In this case, it is undisputed that 7 AAC 43.140 deters women from obtaining abortions. The State itself stated that eliminating public assistance for medically necessary abortions would cause about thirty-five percent of women who would otherwise have obtained abortions to instead carry their pregnancies to term, despite the associated threat to their health. Under Alaska Pacific Assurance Co., such a restriction warrants the highest degree of judicial scrutiny.

In the seminal Shapiro v. Thompson decision, the United States Supreme Court also strictly scrutinized -- and ultimately held unconstitutional -- state programs that denied benefits to citizens based on their exercise of constitutional rights. **n49** Shapiro invalidated state laws that denied welfare benefits to persons who had moved into the jurisdiction within the past year. **n50** The Court found that "the prohibition of benefits . . . creates a classification which constitutes **[**24]** an invidious discrimination denying [new residents] equal protection of the laws." **n51** The Court held that states could not constitutionally tailor their benefits programs to deter immigration from other states: "If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." **n52**

n49 *394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969),* partly rev'd on other grounds, *Edelman v. Jordan, 415 U.S. 651, 670-71, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).*

n50 See *394 U.S. at 621.*

n51 *Id. at 627.*

n52 *Id. at 631* (internal quotations omitted) (alteration in original) (quoting *United States v. Jackson, 390 U.S. 570, 581, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968)).* This precedent was not discussed in the U.S. Supreme Court's later decision, in Harris v. McRae, that the Hyde Amendment was permissible under the federal constitution. *448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).* But in Valley Hospital, we explained that Alaska's broader constitutional protection at times mandates parting ways with federal precedent. See *948 P.2d at 969.* In that case, we rejected the plurality opinion of *Planned Parenthood v. Casey, 505 U.S. 833, 877-78, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992),* in order to declare that a woman's right to an abortion is fundamental. See *Valley Hosp., 948 P.2d at 969.* We now join the majority of state courts in concluding that the federal Supreme Court's decision in McRae provides inadequate protection under our state constitution.

[25]**

Although Shapiro and Alaska Pacific Assurance Co. applied strict scrutiny to reject restrictions like the one at issue in this case, 7 AAC 43.140 would fail equal protection analysis under any standard. Under the regulation, the State grants needed health care to some Medicaid-eligible Alaskans, but denies it to others, based on criteria entirely

unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons of this state. **n53** Thus, even if 7 AAC 43.140 did not affect constitutional privacy rights and we applied our most deferential standard of review, the regulation still could not withstand equal protection challenge. Under Alaska's rational basis standard, **n54** differential treatment of similarly situated people is permissible only if the distinction between the persons "rests upon some ground of difference having a fair and substantial relation to the object of the legislation." **n55** DHSS provides necessary medical care to all Medicaid-eligible Alaskans except women who medically require abortions. This differential treatment lacks a fair and substantial relation to the object of the Medicaid program, **[**26]** and therefore violates equal protection. **n56**

n53 In the "Purpose" section of the Medicaid statute, the legislature "declares as a matter of public concern that the needy persons of this state receive uniform and high quality medical care, regardless of race, age, national origin, or economic standing." *AS 47.07.010.*

n54 See *Sonneman v. Knight, 790 P.2d 702, 705 (Alaska 1990)* (using term "rational basis" to describe lowest standard of review under Alaska's sliding scale).

n55 *Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)* (quoting *State v. Wylie, 516 P.2d 142, 145 (Alaska 1973)).* Isakson establishes that Alaska's rational basis review is more rigorous than that of the United States Supreme Court. Id.

n56 We note that the United States Supreme Court reached the opposite conclusion regarding the analogous federal regulation in *Harris v. McRae, 448 U.S. 297, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980).* However, as noted above, federal rational basis review is a less rigorous standard than Alaska's rational basis review. See *Isakson, 550 P.2d at 362.* We have explained that Alaska's broader constitutional protection at times mandates parting ways with federal precedent. See *Valley Hospital, 948 P.2d at 969.* The United States Supreme Court in Harris v. McRae did not consider the discriminatory allocation of government benefits cases, *Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)* and *United States Department of Agriculture v. Moreno, 413 U.S. 528, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973),* discussed in this opinion.

[27]**

[*912] The United States Supreme Court reached a similar conclusion in Shapiro: although the Court invalidated states' differential treatment of similarly situated welfare recipients under strict scrutiny, it also noted that the differentiation would be deemed "irrational and unconstitutional" even under federal rational basis review. **n57** In United States Department of Agriculture v. Moreno, the United States Supreme Court invalidated a similar restriction under rational basis scrutiny alone. **n58** The Court found no rational basis for a statute denying food stamps to unrelated persons who shared a household; it therefore concluded that the statute violated equal protection. **n59**

n57 *Shapiro, 394 U.S. at 638.*

n58 *413 U.S. at 538.*

n59 See id. The Court noted legislative history indicating congressional intent to exclude "so[-]called 'hippies' and 'hippie communes'" from the food stamp program. *Id. at 534.* But it concluded:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government

interest. As a result, [a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the [challenged] amendment.

Id. at 534-35 (internal quotations omitted, third alteration added).

[28]**

Lower court decisions have applied this principle to states' allocation of health care benefits, and concluded that "classification [among recipients] must be based upon some difference between the classes which is pertinent to the purpose for which the legislation is designed." **n60** A California court found that the state violated equal protection by paying for attendant services by spouses of elderly and blind aid recipients, but denying payment for the same services by the spouses of otherwise disabled aid recipients. **n61** And New York's highest court held that equal protection was violated by a statute that "effectively provided . . . that the aged, disabled, and blind are entitled to less public assistance than other needy persons." **n62**

n60 *Vincent v. State, 22 Cal. App. 3d 566, 572, 99 Cal. Rptr. 410 (Cal. App. 1971).*

n61 See id.

n62 *Lee v. Smith, 43 N.Y.2d 453, 373 N.E.2d 247, 248, 402 N.Y.S.2d 351 (N.Y. 1977);* see also *White v. Beal, 555 F.2d 1146, 1149-50 (3d Cir. 1977)* (finding equal protection issue sufficient to support jurisdiction, but not deciding on equal protection grounds, where remedial eye-care was available only if a person's visual impairment resulted from eye disease or pathology); *County of Orange v. Ivansco, 67 Cal. App. 4th 328, 337-38 (Cal. App. 1998)* (finding equal protection violation where parents supporting noncustodial children received different benefits depending on the children's eligibility for AFDC); but see *Moreno v. Draper, 70 Cal. App. 4th 886, 888-89 (Cal. App. 1999)* (analyzing same regulation as in County of Orange and finding no equal protection violation).

[29]**

DHSS's differential treatment of Medicaid-eligible Alaskans violates equal protection under rational basis review as surely as it does under strict scrutiny. Under any standard of review, "the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent." **n63**

n63 *Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925, 937 (N.J. 1982).*

Because 7 AAC 43.140 infringes on a constitutionally protected interest, the State bears a high burden to justify the regulation. **n64** Unless the State asserts a compelling state interest, the statute will necessarily fail constitutional scrutiny. **n65** The State has failed to demonstrate such an interest in this case. It primarily defends 7 AAC 43.140 on **[*913]** the grounds that "medical and public welfare interests . . . are served by the legislature's decision to fund childbirth." But the regulation does not relate to funding for **[**30]** childbirth, and the State's decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State's undisputed interest in providing health care to women who carry pregnancies to term has no effect on the State's interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.

n64 See *Matanuska-Susitna Borough School Dist., 931 P.2d 391, 396-97 (Alaska 1997)* (outlining State's burden for justifying regulations); *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 971 (Alaska 1997)* ("Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest.").

n65 See *Matanuska-Susitna Borough Sch. Dist., 931 P.2d at 396-97.*

[31]**

The State also asserts an interest in minimizing health risks to mother and child, and submits that these interests are often closely aligned. But those interests are not aligned in precisely the situation contemplated by 7 AAC 43.140's Medicaid exclusion: when pregnancy threatens a woman's health. Under the U.S. Supreme Court's analysis in Roe v. Wade, the State's interest in the life and health of the mother is paramount at every stage of pregnancy. **n66** And in Alaska, "the scope of the fundamental right to an abortion . . . is similar to that expressed in Roe v. Wade." **n67** Thus, although the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman. **n68**

n66 *410 U.S. 113, 163-64, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).*

n67 *Valley Hospital, 948 P.2d at 969.*

n68 Accord *Byrne, 450 A.2d at 935* (holding, based on Roe, that "at no point in pregnancy may [the state's interest in protection of potential life] outweigh the superior interest in the life and health of the mother").

[32]**

Because the State has not asserted an interest sufficiently compelling to justify denying medically necessary care to women who need abortions, we need not consider the means-ends fit of the challenged regulation. We conclude that 7 AAC 43.140 violates equal protection under the Alaska Constitution.

B. The Separation of Powers Doctrine Cannot Shield Unconstitutional Legislation.

The State argues that by holding the Medicaid program to constitutional standards, the superior court effected an appropriation of funds in violation of the separation of powers between branches of government. We disagree. Under Alaska's constitutional structure of government, "the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." **n69** The superior court had not only the power but the duty to strike the challenged restriction and any underlying legislation if it found them to violate constitutional rights; the same duty mandates our decision today.

n69 *Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982);* see also *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)* ("It is emphatically the province and duty of the judicial department to say what the law is.").

[33]**

The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution. **n70** In light of the separation **[*914]** of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature. **n71** But under the same doctrine, we "cannot defer to the legislature when infringement of a constitutional right results from legislative action"; legislative intent is not paramount when that intent conflicts with the constitution. **n72** And the mere fact that the legislature's appropriations power underlies Medicaid funding cannot insulate the program from constitutional review. As the California Supreme Court observed in rejecting nearly identical restrictions on abortion funding, the State's claim would remove all constitutional restraints from legislative exercise of the spending power:

n70 See *State v. Dupere, 709 P.2d 493, 496 (Alaska 1985),* modified, *721 P.2d 638 (Alaska 1986)* ("The separation of powers doctrine must be considered along with the complementary doctrine of checks and balances."); *Alaska State-Operated Sch. Sys. v. Mueller, 536 P.2d 99, 103 (Alaska 1976); Public Defender Agency v. Superior Court, 534 P.2d 947, 950 (Alaska 1975).*

> The United States Supreme Court recently discussed the division of powers within the federal system of government. See *United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).* It reiterated the duty of courts to limit acts of legislation when those acts conflict with rights guaranteed by the Constitution, explaining that the framers of the Constitution divided power among the three branches of government so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. It is thus a permanent and indispensable feature of our constitutional system that the . . . judiciary is supreme in the exposition of the law of the Constitution.
>
> *120 S. Ct. at 1753 n.7* (internal quotations and citations omitted). **[**34]**

n71 See *Abood v. League of Women Voters, 743 P.2d 333, 338 (Alaska 1987); Malone, 650 P.2d at 356-57.*

n72 *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 972 (Alaska 1997).*

There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper.**[n73]**

n73 *Committee to Defend Reprod. Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (Cal. 1981).*

Legislative exercise of the appropriations power has not in the past, and may not now, bar courts from upholding citizens' constitutional rights. Indeed, constitutional legal rulings commonly affect state programs and funding. Many of the most heralded constitutional decisions **[**35]** of the past century have, as a practical matter, effectively required state expenditures. In Green v. County School Board, the United States Supreme Court ordered effective desegregation of public schools; **n74** in Gideon v. Wainwright, it required funding of counsel for indigent criminal defendants; **n75** and in Shapiro v. Thompson, it required states to give newcomers to the jurisdiction equal welfare benefits. **n76** In each of these cases, a judicial decision upholding constitutional rights required state expenditures to support those rights. As appellee doctors and Planned Parenthood point out, the funding implications and separation of powers issue in this case would be identical if the State relied on other suspect criteria, such as race, to deny Medicaid benefits. Following the State's argument, the exclusion of one ethnic group -- or inclusion only of other specified groups -- within legislative Medicaid appropriations would be immunized from constitutional review, merely because the legislature had exercised its spending power. We emphatically reject such a claim. Like the Supreme Court decisions listed above, today's holding is squarely within the **[**36]** authority of the court, not in spite of, but because of, the judiciary's role within our divided system of government.

n74 *391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).*

n75 *372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).*

n76 *394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969),* partly rev'd on other grounds, *Edelman v. Jordan, 415 U.S. 651, 670-71, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).*

Our conclusion that the separation of powers doctrine supports today's decision is firmly supported by twenty-one other courts that have considered a state's exclusion of medically necessary abortions from state-funded health care programs. **n77** The State has not identified a single state or federal case holding that the separation of powers precludes a court from ordering the state to provide equal funding for women whose health is endangered by pregnancy. **n78** Courts that have explicitly considered separation of powers challenges to holdings like the one we reach today have dismissed the challenges in no uncertain **[**37]** terms. The Massachusetts Supreme Judicial Court, for example, wrote:

n77 See supra note 2.

n78 A single justice in a concurring opinion stated that the judiciary may not, under the equal protection clause of Michigan's constitution, require legislative funding for medically necessary abortion. *Doe v. Department of Soc. Servs., 439 Mich. 650, 487 N.W.2d 166, 182-83 (Mich. 1992)* (Levin, J., concurring). To our knowledge, his is the sole dissenting voice on this issue.

We have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review. [We reject] the **[*915]** argument that either the doctrine of separation of powers or the political question doctrine requires that result. Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have a duty, certainly since Marbury v. Madison, to adjudicate a claim that a **[**38]** law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution. "This," in the words of Mr. Chief Justice Marshall, "is of the very essence of judicial duty."**[n79]**

n79 *Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387, 395 (Mass. 1981)* (internal citations omitted); see also *Committee to Defend Reprod. Rights v. Cory, 132 Cal. App. 3d 852, 183 Cal. Rptr. 475, 478 (Cal. App. 1982)* ("When there is an unconstitutional restriction in an existing appropriation, it offends no constitutional principle to direct that the disputed payments be made from funds already appropriated for the same general purpose."); Clinic for Women, Inc. v. Humphreys, No. 49D12-9908-MI-1137, Slip Op. at 12 (Ind. Super., Oct. 18, 2000) ("If the challenged enactments violate the state Constitution, the Court can grant relief even if doing so means that state funds will be spent in a manner not explicitly approved by the Legislature. The Court has the power to shape appropriate remedies and the Legislature has a duty to appropriate funds to meet its constitutional obligations."); *Low-Income Women v. Bost, 38 S.W.3d 689, 702 (Tex. App. 2000)* ("The relief sought by Low-Income Women -- funding medically necessary abortions -- cannot be characterized as a new appropriation. They do not ask for a new appropriation of funds to the Medical Assistance Program. Rather, they seek declaratory and injunctive relief against unconstitutional restrictions placed on the use of funds already appropriated pursuant to a pre-existing law authorizing funds to be used for health care under the program.").

[39]**

We agree with this articulation of the court's fundamental powers and duties.

A federal case, State of Georgia v. Heckler, also directly supports our conclusion. **n80** In that case, the state of Georgia sought reimbursement from the federal Department of Health and Human Services (HHS) for money spent by the state to fund medically necessary abortions. Although the Court of Appeals for the Eleventh Circuit ultimately denied Georgia's claim, it emphatically rejected HHS's argument that because Congress had not appropriated money for medically necessary abortions, a district court could not compel HSS to pay the claims. **n81** As the Eleventh Circuit court noted, the statute could preclude payment only if an interpreting court so determined. **n82** "There is no doubt," the Heckler court concluded, "that if this Court decided that these payments were legally required, HHS would be authorized to make them." **n83**

n80 *768 F.2d 1293 (11th Cir. 1985).*

n81 See *id. at 1295-96.*

n82 See *id. at 1296.* **[**40]**

n83 Id.

We agree with the Eleventh Circuit: It is legally indisputable that a trial court order requiring state compliance with constitutional standards does not violate the separation of powers doctrine.

V. CONCLUSION

The manner in which the State allocates public benefits is subject to constitutional limitation under Alaska's equal protection provision. The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program. Moreover, the DHSS regulation in this case discriminatorily burdens the exercise of a constitutional right. Because we conclude that denial of Medicaid assistance to poor women who medically require abortions violates equal protection, we AFFIRM the decision of the superior court.

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: March 12, 2009 **FURTHER REFERRALS: Finance**

Date of Committee Action: 4/6/09

The JUDICIARY Committee considered: **HOUSE BILL NO. 186**

"An Act declaring that certain firearms and accessories are exempt from federal regulation."

HB 186 AK FIREARMS EXEMPT FROM FED. REGULATION

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* HB186 **(JUD)**
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW	1		✓	

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Stoltze			–	
	Coghill	✓			
	Holmes			X	
	Gatto	X			
Chair:	RAMRAS	✓			
Chair:					