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

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

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

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

'The Maryland Declaration of Rights in 1776 read: "No person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under color of religion, any man shall disturb the good order, peace or safety of the state, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights' (Maryland Constitution, Declaration of Rights, Art. XXXIII).

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

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

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

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

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THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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

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

COMPTON, Chief Justice.

I. INTRODUCTION

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

II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1960s, using $10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

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

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

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law. [Fn. 1] VHA permitted lawful abortion procedures at its facility from 1970 until 1992. [Fn. 2] In 1992 abortion opponents organized a campaign to enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion. [Fn. 3] Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary judgment [Fn. 4] and permanently enjoined VHA

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

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

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

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

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

III. DISCUSSION

A. Standard of Review

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

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

1. The United States Constitution

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

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

(a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65. 505 U.S. at 878-79.

2. The Alaska Constitution

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

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

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970)

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(extending the constitutional right to a jury trial). [Fn. 6] Thus, our articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court."). [Fn. 7]

Article I, section 22 of the Alaska Constitution provides:

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

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

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

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

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"--one's body is to terminate its organic life.

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

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state

interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational" privacy. [Fn. 9] To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

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

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

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

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

We previously have determined that a hospital may be a "quasi-public" institution. Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges." [Fn. 11] Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical facility is bound to protect constitutional rights affected by the administration of the hospital. [Fn. 12]

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

In order to determine whether the hospital operated by VHA is a quasi-public institution, we look to a number of factors, just as we did in Storrs. First, VHA has a special relationship with the State through the State's Certificate of Need program.

Under this program, the State must review and approve expenditures of one million dollars or more for construction or alteration of a health care facility. AS 18.07.031. The Department of Health and Social Services determines whether to grant a Certificate of Need based on health care demand and resources. AS 18.07.041. [Fn. 13] This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

Second, VHA has received construction funds, land, and operating funds from the State, local, and federal governments, [Fn. 14] including more than ten million dollars for construction from the State and a grant of five acres of public land from the City of Palmer. [Fn. 15] Money from the city and borough came from pass-through grants from the State legislature. [Fn. 16] VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

VHA argues that the Storrs quasi-public criteria are limited to determining whether a hospital must afford due process in staffing determinations and should not be extended to require hospitals to protect other constitutional rights. VHA relies on language in Kiester, which discusses limitations on judicial review to avoid intruding upon a hospital's recognized expertise in evaluating medical qualifications. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 (Alaska 1992). However, no medical qualification or decision is at issue here. Neither the issue whether the hospital is quasi-public, nor the issue whether the abortion policy is invalid on constitutional grounds, involves intruding on a medical decision that is within the hospital's expertise. Likewise, VHA has acknowledged that its abortion policy is not a medical policy, but one founded on "sincere moral conscience." The scope and application of the Alaska Constitution to this kind of policy presents a question of law that is within this court's expertise.

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

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

Since VHA is a quasi-public institution, its policies are subject to the limitations which the Alaska Constitution imposes on legislation and government regulations. Under Alaska's Constitution, there is a protected right to an abortion, and VHA's policy interferes with that right. Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest. Further, assuming the existence of such an interest, there also must be no less restrictive means by which the interest might be advanced. [Fn. 17] In re A.B., 791 P.2d 615, 621 (Alaska 1990) and Vogler v. Miller, 651 P.2d 1, 5 (Alaska 1981). VHA has not demonstrated a compelling state interest justifying its policy. It has not advanced any medical, safety, or other public-welfare interest to justify precluding elective abortions. VHA has stated unequivocally that its policy is a matter of conscience, and not a medical, safety, or economic issue. As VHA cannot raise a free exercise claim, [Fn. 18] this does not amount to a compelling state interest.

E. Alaska Statute 18.16.010(b) Is Unconstitutional to the

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Extent It Applies to Quasi-Public Institutions.

VHA argues that even if the Alaska Constitution encompasses the right to an abortion, and even if the hospital is a quasi-public institution, the legislature already has addressed the issue in AS 18.16.010(b), [Fn. 19] and has determined that a "hospital may decline to offer abortions for reasons of moral conscience." VHA argues that "[c]onsistent with its previous approach to the highly-sensitive question of abortion, this Court should defer to the considered judgment of the legislature." However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action. The issue before us includes the question whether AS 18.16.010(b) is a permissible limitation on a constitutional right.

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

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

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

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

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

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

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

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

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

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

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constitutional issues.

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

VHA also cannot assert its good faith reliance on AS 18.16.010(b). As discussed above, that statute cannot constitutionally be applied to a quasi-public hospital. SeePart III.D. Because VHA it cannot escape liability for attorney's fees by arguing that it relied in good faith on AS 18.16.010(b).

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

IV. CONCLUSION

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

FOOTNOTES

Footnote 1:

AS 18.16.010 provides:

(a) An abortion may not be performed in this state unless

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

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

. . . .

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

Footnote 2:

In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman can have a second trimester elective abortion.

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Footnote 3:

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

Footnote 4:

The superior court's order granting summary judgment was

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

(Citation omitted.)

Footnote 5:

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

Footnote 6:

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

Footnote 7:

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

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constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

Footnote 8:

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

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

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

Footnote 9:

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

Footnote 10:

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

Footnote 11:

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

Footnote 12:

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

Footnote 13:

AS 18.07.041 provides:

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

Footnote 14:

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

Footnote 15:

The Alaska State Hospital and Nursing Home Association argues that money received under the federal Hill-Burton Act cannot be used as a basis for requiring hospitals to perform abortions. 42 U.S.C. 300a-7(b). The record does not show that any Hill-Burton money was used when the facilities were rebuilt in the early 1980s.

Footnote 16:

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

Footnote 17:

http://www.alaska.net/~akctlib/sp4906.txt

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

Footnote 18:

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

Footnote 19:

AS 18.16.010(b) provides:

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

Footnote 20:

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

Footnote 21:

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

Footnote 22:

The Coalition argues that VHA did not challenge the superior court's determination that VHA is not a public interest litigant in its points on appeal and is barred from doing so now. Alaska Appellate Rule 204(e) provides that this court will consider only points included in the statement of points on appeal. See alsoKalenka v. Taylor, 89 where appellants failed to properly appeal a fee award and offered no mitigating circumstances to explain the failure, they cannot raise the issue). However, whether VHA is a public interest litigant is a legal issue that can be considered on the record before the court. See, e.g., Oceanview Homeowners Ass'n v. Quadrant Const., 680 P.2d 793, 797 (Alaska 1984). Additionally, although VHA's public interest status is not mentioned in the points on appeal, the issue of fees is raised. See Putnam v.

http://www.alaska.net/~akctlib/sp4906.txt

State, 629 P.2d 35, 39 n.2 (Alaska 1980). There is no prejudice to the Coalition in considering the issue on appeal.

House Finance Committee

DATE: 3/26/98

PLACE Cap 519

SUBJECT OF MEETING:

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
(6) E BETTY HALL	BLACK AMERICANS FOR LIFE	P.O. BOX 22933	99802	6-4058		Y	N	FREEDOM OF CONSCIENCE HJR 5
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House Finance Committee

DATE: 3/26/98

PLACE: Cap 519

SUBJECT OF MEETING:

	NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
(5)	SID HEIDERSDORF	ALASKANS FOR LIFE, Inc.	Box 020658, JUNEAU	99802	789-9858	—	(Y)	N	HJR-5
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	

House Finance Committee

DATE: 3/26/98

PLACE: Cap 5P

SUBJECT OF MEETING:

HB 81
SB 157
HJR 5
HB 252
HB 144
SB 221

	NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
(3)	Sarah Felix	Dept of Law	State of Alaska	99811		465-3600	(Y)	N	HJR 5
	~~Jim Bolton~~	"				"	(Y)	N	~~HB81~~
(4)	Juanita Hensley	ADMIN	DMV			465 5648	Y	N	Questions SB 157
	~~Personnel Commissioner~~	~~Dept Transp~~				274	(Y)	N	HB 81
(7)	Loraine Dees	ASHNHA	AK State Hospital Nursing Assn			586 1790	(Y)	N	HJR 5
(9)	Anne Carpenet	Law				465-3428	Y	N	Answer HB 252 Questions
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	

Page ___ of ___

R. Ryan's STAFF person

House Finance Committee

DATE: March 31, 98

PLACE: Cap 519

SUBJECT OF MEETING:
HB 462 7 HJR 5
HB 356

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Sarah Felix	Dept of Law	P.O. Box 110300 Juneau, AK	99811	465-3600		(Y)	N	HJR 5
Nanci Dahes	PFD	10th Floor SOB	99811		2323	Y	(N)	HB 462
Brad Piece	OMB	MS 0020			4677	(Y)	N	HB 462
Jeel Deatts	Mailing Office					Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

03/26/98 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
14:23:46 PARTICIPANT LIST (TESTIFIERS ONLY) BY:JNU
TCN:80556 SCHEDULED FOR:03/26/98 13:30 TO 16:00 FOR:ALL
PUBLIC HEARING HOUSE FINANCE

LOCATION:ANCHORAGE

(3)	HJR 5		JANET	OATES	PROV HOSP (Director - marketing)	TESTIFY
(4)	HJR 5		JENNIFER	RUDINGER	AKCLU	TESTIFY

LOCATION:DELTA JCT.

	HJR 5	MRS.	DEBRA	JOSLIN		TESTIFY

LOCATION:MATSU

(1)	HJR 5	DR	GERALD	PHILLIPS		TESTIFY
(2)	HJR 5	DR	WILLIAM	RESINGER	Radiologist Valley Hospital	TESTIFY

HJR

36

0-LS0939\P
Glover
3/3/98

AS amended pg 4
adopted 3/3/98

CS FOR HOUSE JOINT RESOLUTION NO. 36(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GREEN, Martin, Mulder

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing obsolete language setting out the apportionment schedule used to elect the members of the first state legislature; and providing for an effective date.

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

* **Section 1.** Article VI, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. **House** **[ELECTION] Districts.** Members of the house of representatives shall be elected by the qualified voters of the respective **house** [ELECTION] districts. **The boundaries of the house districts shall be set under this article after each decennial census of the United States** [UNTIL REAPPORTIONMENT, ELECTION DISTRICTS AND THE NUMBER OF REPRESENTATIVES TO BE ELECTED FROM EACH DISTRICT SHALL BE AS SET FORTH IN SECTION 1 OF ARTICLE XIV].

* **Sec. 2.** Article VI, sec. 2, Constitution of the State of Alaska, is amended to read:

Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. **The boundaries of the senate**

districts shall be set under this article after each decennial census of the United States [SENATE DISTRICTS SHALL BE AS SET FORTH IN SECTION 2 OF ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

* **Sec. 3.** Article VI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Redistricting [REAPPORTIONMENT] of House and Senate. The governor shall **redistrict** [REAPPORTION] the house of representatives **and the senate** immediately following the official reporting of each decennial census of the United States. **Redistricting** [REAPPORTIONMENT] shall be based upon **the** [CIVILIAN] population within each **house and senate** [ELECTION] district as reported by the census.

* **Sec. 4.** Article VI, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Method of Redistricting. The governor shall establish forty single-member house districts, and the governor shall establish twenty single-member senate districts, each composed of two house districts [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE].

* **Sec. 5.** Article VI, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. District Boundaries [REDISTRICTING]. The governor **shall establish** [MAY FURTHER REDISTRICT BY CHANGING] the size and area of **house** [ELECTION] districts, subject to the limitations of this article. Each **house** [NEW] district [SO CREATED] shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population **as near as practicable** [AT LEAST EQUAL] to the quotient obtained by dividing the [TOTAL CIVILIAN] population **of the state** by forty. **Each senate district shall be composed as near as practicable of two contiguous house districts.** Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

* **Sec. 6.** Article VI, sec. 8, Constitution of the State of Alaska, is amended to read:

Section 8. **Redistricting** [REAPPORTIONMENT] **Board.** The governor shall appoint a [REAPPORTIONMENT] board to act in an advisory capacity to **the governor** [HIM]. It shall consist of five members, **all of whom shall be residents of the state and** none of whom may be public employees or officials **at the time of and during the tenure of appointment** [. AT LEAST ONE MEMBER EACH SHALL BE APPOINTED FROM THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS. APPOINTMENTS SHALL BE MADE WITHOUT REGARD TO POLITICAL AFFILIATION]. Board members shall be compensated.

* **Sec. 7.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. **Redistricting** **[REAPPORTIONMENT] Plan and Proclamation.** Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for [REAPPORTIONMENT AND] redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of [REAPPORTIONMENT AND] redistricting. An accompanying statement shall explain any change from the plan of the board. The **final plan shall set out boundaries of house and senate districts and** [REAPPORTIONMENT AND REDISTRICTING] shall be effective for the election of members of the legislature until **sixty days** after the **adoption and final adjudication of the succeeding redistricting plan and proclamation of redistricting** [OFFICIAL REPORTING OF THE NEXT DECENNIAL CENSUS].

* **Sec. 8.** Article VI, sec. 11, Constitution of the State of Alaska, is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** or to correct any error in redistricting [OR REAPPORTIONMENT]. Application to compel the governor to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting [OR REAPPORTIONMENT] must be filed within thirty days following the proclamation. Original jurisdiction in these matters

is [HEREBY] vested in the superior court. On appeal **from the superior court**, the cause shall be reviewed by the supreme court **on** [UPON] the law and the facts. **Notwithstanding Section 15 of Article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a final judicial decision that a plan is invalid, the matter shall be returned to the board for correction and development of a new plan under this article and subsequent action by the governor under section 10 of this article.**

*** Sec. 9.** Article XI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Petition. After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the **house** [ELECTION] districts of the State, it may be filed with the lieutenant governor.

*** Sec. 10.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 29. Effective Date and Applicability of Amendments Providing for Redistricting of the Legislature. (a) The 1998 amendments relating to redistricting of the legislature (art. VI and art. XIV) and relating to redistricting of the legislature (art. VI, sec. 3), take effect January 1, 2001. [2000]

(b) Notwithstanding Section 10 of Article VI, the proclamation of redistricting in effect on December 31, 2000, is effective for election of members of the legislature until sixty days after adoption and final adjudication of the succeeding redistricting plan and proclamation of redistricting under Article VI.

*** Sec. 11.** Article VI, secs. 5 and 7, and Article XIV, Constitution of the State of Alaska, are repealed.

*** Sec. 12.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: January 23, 1998 FURTHER REFERRALS:

Date of Committee Action: 3/5/98

The FINANCE Committee considered: HJR 36

HOUSE JOINT RESOLUTION NO. 36 REAPPORTIONMENT BOARD & REDISTRICTING

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing as obsolete language in the article setting out the apportionment schedule used to elect the members of the first state legislature.

recommends it be replaced with the following committee substitute CS HJR 36 (FIN) [ ] the same title [ ] a new title

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

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [✓] fiscal note(s) of. of Ht Gov 1/23/98

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
	Therriault	X			
	Hanley	X			
	Mulder	X			
	Minton	X			
	Kohring	X			
	J. Davies		X		
	Grussendorf		X		
	J Moses			X	
	G. Davis	X			
	J Kelly	✓			
	Foster	X			

CO CHAIR'S SIGNATURE Therriault Hanley

FISCAL NOTE

No: 1
Bill Version: CSHJR 36 (JUD)
(H) Publish Date: 1/23/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____ Dept. Affected Office of the Governor
Title Const. Amend: Reapportionment Board and Redistricting BRU Elective Operations
Component Elections
Sponsor Representative Green
Requester House Judiciary Committee Component Serial No. #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by Dana LaTour Phone 465-5347
Division Division of Elections Date 1/20/98
Approved by Lt. Governor Fran Ulmer Date 1/20/98
Agency Office of the Lieutenant Governor

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discussed
NOT moved

0-LS0939\P.1
Cook
3/4/98

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHJR 36(FIN), Draft Version "P"

Page 4, line 18:

Delete "**and Applicability**"

Page 4, line 19:

Delete "(a)"

Page 4, lines 20 - 21:

Delete all material.

Insert "of the legislature (art. VI and art. XIV), and relating to filing of initiative petitions (art. XI, sec. 3), take effect January 1, 2000."

Page 4, lines 22 - 25:

Delete all material.

Page 4, line 27, following "repealed":

Insert "January 1, 2000"

adopted

3/5/98 #2

AMENDMENT

OFFERED IN THE HOUSE
TO: CSHJR 36(FIN)
0-LS0939\P

Page 3, Line 19

After "legislature until"

Delete "**sixty days"**

Page 3, Lines 19 – 20

After "after the"

Delete "**adoption and final adjudication of the succeeding redistricting plan and proclamation of redistricting** ["

Page 3, Line 21

After "CENSUS"

Delete "]"

R. J. DAVIS

withdrawn

Amendment #3

p. 2 l. 10 after census

insert "The population for each House and Senate district may be adjusted by deducting non-resident military personnel and dependents."

Author: tim.storey@ncsl.org (Tim Storey) at CC2MHS1
Date: 3/4/98 3:59 PM
Priority: Normal
TO: Mike Tibbles at LAA_HTHR
Subject: Redistricting Language

Mike,

"Contiguity

The contiguity requirement-that no part of one district be completely separated from any other part of the same district-has been universally accepted and poses no enforcement problem or serious challenge to districting flexibility pursuit of other fair representation values.

Compactness

The requirement of compactness specifies that the boundaries of each district shall be as short as practicable. Although there is no federal constitutional requirement of compactness, such a requirement may present a certain restraint on gerrymandering and may seem innocuous on its face. Rigid adherence to a compactness, however, phrased, should be avoided. A district pattern of symmetrical squares, although conceivable, well can operate to submerge a significant element of the electorate. As a practical matter, absolute compactness (districts forming perfect circles that are even shorter lines than squares) is an impossibility. Furthermore, a benign gerrymander, in the sense of some asymmetrical districts, may well be required to assure representation of submerged elements within a larger area. Shape requirements focus on form rather than the substance of effective political representation."

I hope this is of some assistance.

Best Regards,
Tim Storey
NCSL staff

NATIONAL CONFERENCE OF STATE LEGISLATURES

TIM STOREY

SENIOR POLICY SPECIALIST
LEGISLATIVE MANAGEMENT

1560 BROADWAY SUITE 700 DENVER COLORADO 80202
303.830-2200 FAX 303-863-8003 tim.storey@ncsl.org

0-LS0939\H
Glover
2/7/98

CS FOR HOUSE JOINT RESOLUTION NO. 36(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GREEN, Martin, Mulder

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing as obsolete language in the article setting out the apportionment schedule used to elect the members of the first state legislature.

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

* **Section 1.** Article V, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. Qualified Voters. Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the **house** [ELECTION] district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions.

* **Sec. 2.** Article V, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Voting Precincts; Registration. The legislature may provide a

system of permanent registration of voters, and may establish voting precincts within **house** [ELECTION] districts.

*** Sec. 3.** Article VI, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. House [ELECTION] Districts. Members of the house of representatives shall be elected by the qualified voters of the respective **house** [ELECTION] districts. **The boundaries of the house districts shall be set under this article after each decennial census of the United States** [UNTIL REAPPORTIONMENT, ELECTION DISTRICTS AND THE NUMBER OF REPRESENTATIVES TO BE ELECTED FROM EACH DISTRICT SHALL BE AS SET FORTH IN SECTION 1 OF ARTICLE XIV].

*** Sec. 4.** Article VI, sec. 2, Constitution of the State of Alaska, is amended to read:

Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. **The boundaries of the senate districts shall be set under this article after each decennial census of the United States** [SENATE DISTRICTS SHALL BE AS SET FORTH IN SECTION 2 OF ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

*** Sec. 5.** Article VI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Redistricting [REAPPORTIONMENT] of House and Senate. The governor shall **redistrict** [REAPPORTION] the house of representatives **and the senate** immediately following the official reporting of each decennial census of the United States. **Redistricting** [REAPPORTIONMENT] shall be based upon [CIVILIAN] population within each **house and senate** [ELECTION] district as reported by the census.

*** Sec. 6.** Article VI, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Single-Member Districts [METHOD]. The governor shall establish forty single-member house districts, and shall establish twenty senate districts composed of two contiguous house districts, with each senate district to elect one senator. [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE.]

* **Sec. 7.** Article VI, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. **District Boundaries** **[REDISTRICTING].** **As nearly as practicable, each house district** [THE GOVERNOR MAY FURTHER REDISTRICT BY CHANGING THE SIZE AND AREA OF ELECTION DISTRICTS, SUBJECT TO THE LIMITATIONS OF THIS ARTICLE. EACH NEW DISTRICT SO CREATED] shall be formed of contiguous and compact territory containing [AS NEARLY AS PRACTICABLE] a relatively integrated socio-economic area. [EACH SHALL CONTAIN A POPULATION AT LEAST EQUAL TO THE QUOTIENT OBTAINED BY DIVIDING THE TOTAL CIVILIAN POPULATION BY FORTY.] Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

* **Sec. 8.** Article VI, sec. 8, Constitution of the State of Alaska, is amended to read:

Section 8. **Redistricting** **[REAPPORTIONMENT] Board.** The governor shall appoint a [REAPPORTIONMENT] board to act in an advisory capacity to **the governor** [HIM]. It shall consist of five members, none of whom may be public employees or officials. At least one **board** member [EACH] shall be appointed from **each judicial district established by law under Section 1 of Article IV** [THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS]. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

* **Sec. 9.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. **Redistricting** **[REAPPORTIONMENT] Plan and Proclamation.** Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for [REAPPORTIONMENT AND] redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of [REAPPORTIONMENT AND] redistricting. An accompanying statement shall explain any change from the plan of the board. The [REAPPORTIONMENT AND] redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

* **Sec. 10.** Article VI, sec. 11, Constitution of the State of Alaska, is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** or to correct any error in redistricting [OR REAPPORTIONMENT]. Application to compel the governor to perform **the** [HIS REAPPORTIONMENT] duties **assigned to the governor under this article** must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting [OR REAPPORTIONMENT] must be filed withir thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

*** Sec. 11.** Article XI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Petition. After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the **house** [ELECTION] districts of the State, it may be filed with the lieutenant governor.

*** Sec. 12.** Article VI, secs. 5 and 7, and Article XIV, Constitution of the State of Alaska, are repealed.

*** Sec. 13.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

waiting for new draft

0-LS0939\F

CS FOR HOUSE JOINT RESOLUTION NO. 36(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GREEN, Martin, Mulder

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to redistricting of the legislature, and repealing as obsolete language in the article setting out the apportionment schedule used to elect the members of the first state legislature.

2/6/98 adopted #1

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

*** Section 1.** Article VI, sec. 1, Constitution of the State of Alaska, is amended to read:

Section 1. ~~Election~~ House Districts. Members of the house of representatives shall be elected by the qualified voters of the respective election districts. **The boundaries of the ~~election~~ House districts shall be set under this article after each decennial census of the United States** [UNTIL REAPPORTIONMENT, ELECTION DISTRICTS AND THE NUMBER OF REPRESENTATIVES TO BE ELECTED FROM EACH DISTRICT SHALL BE AS SET FORTH IN SECTION 1 OF ARTICLE XIV].

Clear election districts and the House Districts

*** Sec. 2.** Article VI, sec. 2, Constitution of the State of Alaska, is amended to read:

#2 is also

Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. **The boundaries of the senate districts shall be set under this article after each decennial census of the United**

States [SENATE DISTRICTS SHALL BE AS SET FORTH IN SECTION 2 OF ARTICLE XIV, SUBJECT TO CHANGES AUTHORIZED IN THIS ARTICLE].

*** Sec. 3.** Article VI, sec. 3, Constitution of the State of Alaska, is amended to read:

Section 3. Redistricting [REAPPORTIONMENT] of House and Senate. The governor shall **redistrict** [REAPPORTION] the house of representatives **and the senate** immediately following the official reporting of each decennial census of the United States. **Redistricting** [REAPPORTIONMENT] shall be based upon [CIVILIAN] population within each election **and senate** district as reported by the census.

*** Sec. 4.** Article VI, sec. 4, Constitution of the State of Alaska, is amended to read:

Section 4. Single-member districts [METHOD]. The governor shall establish forty single-member ~~election~~ districts, and shall establish twenty senate districts composed of two contiguous ~~election~~ districts, with each senate district to elect one senator. [REAPPORTIONMENT SHALL BE BY THE METHOD OF EQUAL PROPORTIONS, EXCEPT THAT EACH ELECTION DISTRICT HAVING THE MAJOR FRACTION OF THE QUOTIENT OBTAINED BY DIVIDING TOTAL CIVILIAN POPULATION BY FORTY SHALL HAVE ONE REPRESENTATIVE.]

*** Sec. 5.** Article VI, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. District Boundaries [REDISTRICTING]. Election districts [THE GOVERNOR MAY FURTHER REDISTRICT BY CHANGING THE SIZE AND AREA OF ELECTION DISTRICTS, SUBJECT TO THE LIMITATIONS OF THIS ARTICLE. EACH NEW DISTRICT SO CREATED] shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. [EACH SHALL CONTAIN A POPULATION AT LEAST EQUAL TO THE QUOTIENT OBTAINED BY DIVIDING THE TOTAL CIVILIAN POPULATION BY FORTY.] Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

*** Sec. 6.** Article VI, sec. 8, Constitution of the State of Alaska, is amended to read:

Section 8. Redistricting [REAPPORTIONMENT] Board. The governor shall appoint a [REAPPORTIONMENT] board to act in an advisory capacity to **the**

governor [HIM]. It shall consist of five members, none of whom may be public employees or officials. At least one board member [EACH] shall be appointed from each judicial district established by law under Section 1 of Article IV [THE SOUTHEASTERN, SOUTHCENTRAL, CENTRAL, AND NORTHWESTERN SENATE DISTRICTS]. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

* **Sec. 7.** Article VI, sec. 10, Constitution of the State of Alaska, is amended to read:

Section 10. Redistricting [REAPPORTIONMENT] Plan and Proclamation. Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for [REAPPORTIONMENT AND] redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of [REAPPORTIONMENT AND] redistricting. An accompanying statement shall explain any change from the plan of the board. The [REAPPORTIONMENT AND] redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

* **Sec. 8.** Article VI, sec. 11, Constitution of the State of Alaska is amended to read:

Section 11. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform the [HIS REAPPORTIONMENT] duties assigned to the governor under this article or to correct any error in redistricting [OR REAPPORTIONMENT]. Application to compel the governor to perform the [HIS REAPPORTIONMENT] duties assigned to the governor under this article must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting [OR REAPPORTIONMENT] must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

* **Sec. 9.** Article VI, secs. 5 and 7, and Article XIV, Constitution of the State of Alaska, are repealed.

* **Sec. 10.** The amendments proposed by this resolution shall be placed before the voters

of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

#2029 2-6-98

#2 adopted

Conceptual amendment for new section 5

Wording would be changed to the following:

Section 6 **District Boundaries**. As nearly as practicable, House ~~a~~ each district shall be formed of contiguous and compact territory containing a relatively integrated socio-economic area. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

2-6-98

-withdrawn-

AMENDMENT #3

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 2, line 13:

Delete "**contiguous**" "adjacent" martin

Page 2, lines 19 and 20:

Delete "**and senate districts**"

2-6-98

-withdrawn- #4

AMENDMENT

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 3, line 2:

Delete "employees or"

2-6-98

AMENDMENT

#5

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 3, lines 1 and 2:

Delete "public employees or"

Insert "state employees or public officials"

2-6-98

- withdrawn -

AMENDMENT #6

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 2, beginning line 8:

Insert "civilian"

2-6-98

AMENDMENT

#7

OFFERED IN THE HOUSE BY REP. DAVIES

TO: CS FOR HJR 36 (JUD)

Page 2, line 1, following "States":

Insert: "and shall comprise two election districts"

Page 2, line 4:

Delete "House **and Senate**"

Insert "election districts"

Page 2, lines 5 and 6:

Delete "house of representatives and the senate"

Insert "election districts"

Page 2, line 8:

Delete "and senate"

was reaffirmed by *Burns v. Richardson*, which encapsulated *Fortson* with

> [w]here the requirements of *Reynolds v. Sims* are met, apportionment schemes including multimember districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[315]

A. MULTIMEMBER DISTRICTS DRAWN BY COURTS

In the 1970s, the Supreme Court first started to whittle away at the use of multimember districts by discouraging their use in court-drawn plans. In *Connor v. Johnson*, the Court said: "We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter."[316] And in *Chapman v. Meier*, it said: "The standards for evaluating the use of multimember districts thus clearly differ depending on whether a federal court or a state legislature has initiated the use. . . . Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State."[317]

B. APPLICATION OF THE EQUAL PROTECTION CLAUSE

In 1973, the Court in *White v. Regester* upheld a lower court finding that certain multimember legislative districts were in violation of the Equal Protection Clause.

> Plainly, under our cases, multi-member districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. [cites omitted] But we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups. [cites omitted] To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. [cites omitted][318]

The Supreme Court so held as to the black community in one Texas county and the Mexican-American community in another.

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[315] 384 U.S. 73, 88 (1966).

[316] 402 U.S. 690, 692 (1971).

[317] 420 U.S. 1, 18-19 (1975).

[318] 412 U.S. 755, 765-766 (1973).

946 P.2d 38 Hickel v. S.E. Conference
AK Supreme Ct

1. **Contiguity.**

Contiguous territory is territory which is bordering or touching. As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)." Grofman, **Criteria for Districting: A Social Science Perspective**, 33 UCLA L. Rev. 77, 84 (1985). Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.

2. **Compactness.**

" 'Compact' in the sense used here means having a small perimeter in relation to the area encompassed." **Carpenter**, 667 P.2d at 1218 (Matthews, J., concurring). Compact districting should not yield "bizarre designs." **Davenport v. Apportionment Comm'n of New Jersey**, 124 N.J. Super. 30, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973), **quoted in Carpenter**, 667 P.2d at 1218-19 (Matthews, J., concurring). We will look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact. **Carpenter**, 667 P.2d at 1218 (Matthews, J., concurring).

The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.

3. **Socio-economic Integration.**

In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.

> We should not lose sight of the fundamental principle involved in reapportionment -- truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.

Change in Multimember Legislative Districts from 1980s to 1990s

	State Senates						State Houses					
	Total Number of Districts		Number of Multimember Districts		Largest Number of Seats in a District		Total Number of Districts		Number of Multimember Districts		Largest Number of Seats in a District	
state	1980s	1990s	1980s	1990s	1980s	1990s	1980s	1990s	1980s	1990s	1980s	1990s
Alaska	14	20	6	0	2	1	27	40	13	0	2	1
Arizona							30	30	30	30	2	2
Arkansas							84	97	10	2	3	3
Georgia							156	180	15	0	5	1
Idaho	33	35	6	0	3	1	33	35	33	35	6	2
Indiana							77	100	16	0	3	1
Maryland							59	62	45	44	3	3
Nevada	14	16	7	5	2	2						
New Hampshire							175	132	103	74	10	36
New Jersey							40	40	40	40	2	2
North Carolina	35	42	13	8	3	2	72	98	30	17	4	3
North Dakota	53	49	2	0	2	1	53	49	53	49	2	2
South Dakota							35	35	35	35	2	2
Vermont	13	13	10	10	6	6		108		42		2
Washington							49	49	49	49	2	2
West Virginia	17	17	17	17	2	2	40	56	26	23	12	7
Wyoming	18	30	5	0	4	1	23	60	15	0	9	1

Source: National Conference of State Legislatures

Hickel et al v. Southeast Conference et al (12/29/92) sp-3911

Notice: This is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

WALTER J. HICKEL, Governor of Alaska, STATE OF ALASKA, TUCKERMAN BABCOCK, ALLEN VEZEY, MARY LYNNE WOOD, JOHN C. INGRAM, ROBERT PICKRELL, ORIE WILLIAMS, FISH AND GAME FUND,

Petitioners,

v.

SOUTHEAST CONFERENCE, a non-profit Alaska corporation, PEGGY ANN McCONNOCHIE, FRED E. REEDER; MATANUSKA-SUSITNA BOROUGH, STEVE CYPRA, TED SMITH, AL JORGENSEN, HAROLD NEWCOMB, JOHN STEIN, DUNCAN FRAZIER, GARY THURLOW, ELSIE O'BRYAN, RONDA L. KELLEY; OLIVER LEAVITT, JACOB ADAMS, GEORGE AHMAOGAK, WILLIAM LEAVITT, BENJAMIN NAGEAK, RONALD BROWER, MAX AHGEAK, CHARLES D.N. BROWER, CHARLES "CHUCK" GREENE, ROSWELL SCHAEFFER, MARIE GREENE, REGINALD CLEVELAND, CHARLES CURTIS,

Supreme Court
Nos. S-5093/5154

WILLIE GOODWIN, JR.; MITCHELL A. DEMIENTIEFF, JERRY ISAAC, LEO MORGAN, NICK JACKSON, CLYDE PETER; ALASKA DEMOCRATIC PARTY, LIDIA L. SELKREGG,

Respondents.

SOUTHEAST CONFERENCE, a non-profit Alaska corporation,

Petitioners,

v.

WALTER J. HICKEL, Governor of Alaska, STATE OF ALASKA,

Respondents.

Supreme Court File

No. S-5156

Superior Court No. 1JU 91-01608 Civil

O P I N I O N

[No. 3911 -]

[December 29, 1992]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau,

Larry R. Weeks, Judge.

Appearances: Virginia Ragle and Stephen C. Slotnick, Assistant Attorneys General, Juneau, Mary A. Lundquist, Assistant Attorney General, Anchorage, Charles Cole, Attorney General, Juneau, for Petitioners Walter J. Hickel, Governor of Alaska and State of Alaska. Thomas M. Daniel, Perkins Coie, Anchorage, for Petitioner Fish and Game Fund. Myra M. Munson, Sonosky, Chambers, Sachse, Miller & Munson, Juneau, Donald J. Simon, Sonosky, Chambers, Sachse & Enderson, Washington, D.C., for Respondents Southeast Conference, et al. and Mat-Su Borough, et al. David C. Crosby, Juneau, James Wickwire, Seattle, Wickwire, Greene, Crosby & Seward, for Respondents Leavitt, et al. Don Clocksin, Wagstaff, Pope & Clocksin, Anchorage, for Respondents Alaska Democratic Party, et al. Michael J. Walleri, Tanana Chiefs Conference, Inc., Fairbanks, for Respondents Demientieff, et al. Robert P. Blasco and Mary A. Nordale, Robertson, Monagle & Eastaugh, Juneau, for Amicus Curiae Fairbanks North Star Borough. Joel H. Bolger, Jamin, Ebell, Bolger & Gentry, Kodiak, for Amicus Curiae Kodiak Island Borough; Kenneth P. Jacobus, Anchorage, for Amicus Curiae Constance Zawacki and The Republican Party of Alaska. Michael W. Price, Groh, Eggers & Price, Anchorage, for Amicus Curiae Municipality of Anchorage. Bruce Boltar, Dillingham, Alaska, for Amicus Curiae Bristol Bay Native Association.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

COMPTON, Justice.

MOORE, Chief Justice, concurring, in part, and dissenting, in part.

BURKE, Justice, concurring, in part, and dissenting, in part.

At issue in this petition for review is the validity of the 1991 Proclamation of Reapportionment and Redistricting Plan (plan) issued by Governor Walter J. Hickel.

I. FACTUAL AND PROCEDURAL BACKGROUND

Under the Alaska Constitution, the governor has the power and duty to reapportion the state legislature every ten years. Alaska Const. art. VI, 3; Wade v. Nolan, 414 P.2d 689, 700 (Alaska 1966). In December 1990, Governor Hickel appointed a five member advisory reapportionment board (Board), as is required by article VI, section 8 of the Alaska Constitution. The Board was required to prepare and submit to the Governor a plan for reapportionment and redistricting following the reporting of the decennial census.1

In January 1991, the Board held an organizational meeting, elected Allen Vezey as chair and appointed Tuckerman Babcock as director. In March it adopted the following policies to guide the development of redistricting plans:

* The population base is the 1990 population reported by the United States Census Bureau for the State of Alaska.

* The redistricting plan will be composed of single-member districts.

* One person, one vote: equal protection for all individuals will be realized by equal population among districts, with the least populated and most populated districts separated by a variance of no more than two percent.

* Federal Voting Rights Act: protect and enhance minority political voting strength by a non-retrogression policy and by considering individual linguistic and ethnic blocks.

* Alaska Constitution: compact, contiguous and relatively integrated socio-economic areas for House districts.

* Consider preservation of political subdivision boundaries.

* Consider public testimony, which will be incorporated into the record if received within 75 days after receipt of the United States Census PL94-171 data.

* Accept alternative plans submitted up to 60 days after receipt of the United States Census PL94-171 data for input into the state's computer system, if received in a form allowing direct input into the computer or on United States Geological Survey maps or United States Coast and Geodetic Survey maps.2

With the assistance of computer technology, which made possible more detailed analysis of potential redistricting than was previously available, the Board and its staff began forming a reapportionment plan based on the adopted policies. The Board received the decennial census report from the United States Bureau of the Census in March 1991. The Board held a number of public hearings and reviewed alternative redistricting plans submitted by various interest groups. In June 1991, the Board delivered its report and proposed plan to the Governor.

On September 5, 1991, Governor Hickel issued his Proclamation of Reapportionment and Redistricting and Accompanying Statement. The final plan3 included several relatively minor changes to the Board's proposed district boundaries. The proclamation directed the Attorney General to submit the plan to the United States Department of Justice for preclearance in accordance with section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (1988).4

Seven lawsuits were filed in superior court challenging the Governor's plan.5 Two cases were dismissed with prejudice pursuant to stipulations. Five cases were consolidated for trial before Superior Court Judge Larry R. Weeks.6

After a sixteen day bench trial, Judge Weeks concluded that the Governor's plan was invalid because it violated the Alaska Constitution. Specifically, Judge Weeks concluded that the plan was not in compliance with article VI, section 6 of the Alaska Constitution because two of the districts were not "compact" and eight of the districts did not comprise "as nearly as practicable a relatively socio-economically integrated area." He determined that the Board "needlessly nullified Alaska constitutional requirements" in its attempt to reach its various policy goals, including the creation of districts with no more than two percent population deviation from the ideal district size. He also concluded that the Board failed to give due consideration to the possibility of excluding non-resident military personnel from the population base, and that this failure was arbitrary and unreasonable. Judge Weeks held that the Board violated the Open Meetings Act, AS 44.62.310, but ruled that voiding the plan on the basis of this violation was not in the public interest. He also concluded that the Board violated the Public Records Act, AS 09.25.110-140, and the Procurement Code, AS 36.30.

Pursuant to Alaska Appellate Rule 402(a), Governor Hickel and the State of Alaska (State) petitioned this court for review, contending that Judge Weeks had erred: 1) in finding that the plan violated the equal protection clause of the Alaska Constitution; 2) in his interpretation of article VI, section 6 of the Alaska Constitution and in his

determination that the plan violated this section; 3) in concluding that the Open Meetings Act, AS 44.62.310, and the Public Records Act, AS 09.25, applied to and were violated by the Governor's Advisory Reapportionment Board; and 4) in substituting his judgment for that of the Board with regard to matters within the Board's discretion.

We granted the State's petition to review the decision, and expedited the proceedings. On May 28, 1992, we concluded that the Governor's plan violated the Alaska Constitution. See Appendix B. We affirmed the superior court's findings of fact and conclusions of law that House Districts 1, 2, 3, 6, 26, 28, 34 and 35 violate requirements of article VI, section 6 of the Alaska Constitution. We also affirmed its holdings that the Open Meetings Act and the Public Records Act apply to the Board. However, we reversed its holding that the Board's decision not to exclude non-resident military from the population base was arbitrary and unreasonable.

In a separate Order of Remand, later corrected, we directed the superior court to remand the case to the Board for formulation of a final plan. However, because of time constraints, we also directed the court to formulate an interim plan so that 1992 state elections might proceed in conformity with the requirements of the United States Constitution, the Alaska Constitution and the federal Voting Rights Act. Further, we authorized the court to employ experts or masters to assist in the formulation of an interim plan. See Appendix C.

Thereafter the superior court appointed three masters. After receiving instructions from the court7 and reviewing alternative plans proposed by the parties, the masters

presented a recommended interim plan to the court on June 14. In Orders dated June 18 and 19,8 the superior court accepted the Masters' recommendation, with several modifications including a redrawing of the Fairbanks House Districts. The parties cross-petitioned this court for review of the court's orders. On June 25, after considering oral and written arguments, we granted the petition and affirmed the court's interim plan with modifications required by our determination that the court had erred in redrawing the Fairbanks House Districts.9

II. LEGISLATIVE REAPPORTIONMENT

> Now the goal of all apportionment plans is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation. And in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.

3 Proceedings of the Constitutional Convention (PACC) 1835 (January 11, 1956).

Legislative reapportionment is subject to a variety of legal requirements. The Federal Constitution, the Federal Voting Rights Act, and the Alaska Constitution all contain commands which guide the formation of a reapportionment plan. It is the interaction of these diverse and often diverging guidelines which makes reapportionment a difficult process. Because these guidelines sometimes lead in different directions, it is important to understand how they fit together.

A. ARTICLE VI, SECTION 6 OF THE ALASKA CONSTITUTION.

The mandate for redistricting the election districts of the Alaska House of Representatives is found in article VI, section 6 of the Alaska Constitution:

> The governor may further redistrict by changing the size and area of election districts, subject to the limitations of this article. Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each area shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

Contiguity, compactness and relative socio-economic integration are constitutional requirements. See Kenai Peninsula Borough v. State, 743 P.2d 1352, 1360-61 (Alaska 1987) ("The state must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting."). A district lacking any one of these characteristics may not be constitutional under the Alaska Constitution.10

The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering. 3 PACC 1846 (January 11, 1956) ("[The requirements] prohibit[] gerrymandering which would have to take place were 40 districts arbitrarily set up by the governor. . . . [T]he Committee feels that gerrymandering is definitely prevented by these restrictive limits."). Gerrymandering is the dividing of an area into political units "in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others."11 Carpenter v. Hammond, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring).

The constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines.

1. Contiguity.

Contiguous territory is territory which is bordering or touching. As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)." Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 84 (1985). Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.

2. Compactness.

"`Compact' in the sense used here means having a small perimeter in relation to the area encompassed." Carpenter, 667 P.2d at 1218 (Matthews, J., concurring). Compact districting should not yield "bizarre designs." Davenport v. Apportionment Comm'n of New Jersey, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973), quoted in Carpenter, 667 P.2d at 1218-19 (Matthews, J., concurring). We will look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact. Carpenter, 667 P.2d at 1218 (Matthews, J., concurring).

The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.

3. Socio-economic Integration.

In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.

> [W]e should not lose sight of the fundamental principle involved in reapportionment -- truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.

Groh, 526 P.2d at 890 (Erwin, J., dissenting).

We have looked before to the Minutes of the Constitutional Convention for guidance in defining "relatively integrated socio-economic area." Kenai Peninsula Borough, 743 P.2d at 1360 n.11; Carpenter, 667 P.2d at 1215; Groh, 526 P.2d at 878. The delegates explained the "socio-economic principle" as follows:

> [W]here people live together and work together and earn their living together,

> where people do that, they should be logically grouped that way.

3 PACC 1836 (January 11, 1956). Accordingly, the delegates define an integrated socio-economic unit as:

> an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits.

3 PACC 1873 (January 12, 1956).

In order to satisfy this constitutional requirement, the Governor must provide "sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction and interconnectedness rather than mere homogeneity." Kenai Peninsula Borough, 743 P.2d at 1363. In areas where a common region is divided into several districts, significant socio-economic integration between communities within a district outside the region and the region in general "demonstrates the requisite interconnectedness and interaction," even though there may be little actual interaction between the areas joined in a district. Id. (declining to draw a fine distinction between the interaction of North Kenai with Anchorage and North Kenai with South Anchorage). "The sufficiency of the contacts between the communities involved here can be determined by way of comparison with districts which we have previously upheld." Id. A district will be held invalid if "[t]he record is simply devoid of significant social and economic interaction" among the communities within an election district. Carpenter, 667 P.2d at 1215.

In our previous reapportionment decisions we have identified several specific characteristics of socio-economic integration. In Kenai Peninsula Borough, we found that service by the state ferry system, daily local air taxi

service, a common major economic activity, shared fishing areas, a common interest in the management of state lands, the predominately Native character of the populace, and historical links evidenced socio-economic integration of Hoonah and Metlakatla with several other southeastern island communities.12 743 P.2d at 1361.

In the same case, we found it persuasive that North Kenai and South Anchorage were geographically proximate, were linked by daily airline flights, shared recreational and commercial fishing areas, and were both strongly dependent on Anchorage for transportation, entertainment, news and professional services. Id. at 1362-63.

In Groh, we stated that "patterns of housing, income levels and minority residences" in an urban area "may form a basis for districting, [although] they lack the necessary significance to justify" large population variances. 526 P.2d at 879. We identified transportation ties, namely ferry and daily air service, geographical similarities and historical economic links as more significant factors. Id. (holding that a district in southeast Alaska comprising the mainland communities of Juneau, Haines and Skagway was sufficiently integrated, considering that the rest of Southeast was island oriented).

The Alaska Constitution requires districts comprising "relatively integrated" areas. Alaska Const. art. VI, 6. Petitioners argue that the term "relatively" diminishes the degree of socio-economic integration required within an election district. We are urged to compare all proposed districts with a hypothetical completely unintegrated area, as if a district including both Quinhagak and Los Angeles had been proposed. We decline to adopt petitioners'

interpretation of this provision.

"Relatively" means that we compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient. "Relatively" does not mean "minimally," and it does not weaken the constitutional requirement of integration.

B. EQUAL PROTECTION.

"In the context of voting rights in redistricting and reapportionment litigation, there are two principles of equal protection, namely that of `one person, one vote' -- the right to an equally weighted vote -- and of `fair and effective representation' -- the right to group effectiveness or an equally powerful vote." Kenai Peninsula Borough, 743 P.2d at 1366. The former is quantitative, or purely numerical, in nature; the latter is qualitative. Id. at 1366-67.

The equal protection clause of the Alaska Constitution13 has been interpreted along lines which resemble but do not precisely parallel the interpretation given the federal clause.14 While the first part, "one person, one vote," has mirrored the federal requirement, see, e.g., Groh, 526 P.2d at 875, the second part, "fair and effective representation," has been interpreted more strictly than the analogous federal provision.

1. One Person, One Vote.

"[A] State [must] make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964), quoted in Kenai Peninsula Borough, 743 P.2d at 1358. "Whatever the means of

accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." Reynolds, 377 U.S. at 579.

We discussed the Supreme Court's equal population requirement of "substantial equality" in Kenai Peninsula Borough:

> Under a "one person, one vote" theory, "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." . . . [A]s a general matter an apportionment plan containing a maximum population deviation under 10% falls within the category of minor deviations. The state must provide justification for any greater deviation.

743 P.2d at 1366 (quoting Gaffney v. Cummings, 412 U.S. 735, 745 (1973)) (citations omitted).15 Thus, we have recognized that the effectuation of the article VI, section 6 requirements will justify population deviations greater than 10 percent. Id. at 1360. Accordingly, as a matter of federal constitutional law the Governor may in good faith declare election districts with a maximum population deviation greater than 10 percent, if such deviations are a result of the creation of contiguous, compact and relatively socio-economically integrated areas.16

We have identified several other state policies which may also justify a population deviation greater than 10 percent. We noted that a state's desire to maintain political boundaries is sufficient justification provided this principle is consistently applied. Kenai Peninsula Borough, 743 P.2d at 1360. Similarly, we implied that adherence to

Native corporation boundaries might also provide justification, as long as the boundaries were adhered to consistently. Groh, 526 P.2d at 877-78 (holding that the utilization of a portion of the Calista corporate boundary as a district boundary was not an adequate justification where the Calista region was otherwise fractionated by the reapportionment plan).17

On the other hand, we have rejected several policies as inadequate justifications for population deviation. We held that the "mining potential in the [Nome] area and the need for a 'common port facility'" did not justify a 15 percent overrepresentation where "the makeup of the population both to the north and the east [did] not vary significantly from that of the adjoining villages within the Nome [election district] boundaries." Groh, 526 P.2d at 877.

2. Fair and Effective Representation.

In addition to the guarantee of substantial mathematical equality, the Equal Protection Clause of the United States Constitution provides for the more nebulous guarantee of fair representation. Under this qualitative principle, certain mathematically palatable apportionment schemes will be overturned because they systematically circumscribe the voting impact of specific population groups. This principle recognizes the danger that racial and political groups will be fenced out of the political process and their voting strength invidiously minimized." Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

A plurality of the United States Supreme Court has indicated that a mere lack of proportional representation will be insufficient to support a finding of unconstitutional vote dilution. Plaintiffs must prove both intentional

discrimination against a group and a discriminatory effect on that group.18 Davis v. Bandemer, 478 U.S. 109, 127 (1986). In addition, the plurality opinion requires a showing of a pattern of discrimination:

> In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Id. at 133, quoted in Kenai Peninsula Borough, 743 P.2d at 1369. Thus, under the qualitative principle of federal equal protection, fair representation is denied where there is "proof that the group has been consistently and substantially excluded from the political process [and] denied political effectiveness over a period of more than one election." Kenai Peninsula Borough, 743 P.2d at 1369.

The equal protection clause of the Alaska Constitution imposes a more strict standard than its federal counterpart. Kenai Peninsula Borough, 743 P.2d at 1371; Isakson v. Rickey, 550 P.2d 359, 362-63 (Alaska 1976) (requiring a more flexible and demanding standard and noting that the court "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard"). In the context of reapportionment, we have held that upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation. Kenai Peninsula Borough, 743 P.2d at 1372. Because of the more strict standard, we do not require a showing of a pattern of discrimination, and do not consider any effect of disproportionality de minimis when determining the legitimacy of the Board's purpose. Id.

C. VOTING RIGHTS ACT.

The Federal Voting Rights Act, 42 U.S.C. 1973 (1988), also plays a significant role in the reapportionment of state election districts. The purpose of this Act is to protect the voting power of racial minorities: "Under section 5 of the Act, a reapportionment plan is invalid if it 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Kenai Peninsula Borough, 743 P.2d at 1361 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)); 42. U.S.C. 1973c (1988). We have noted that compliance with section 5 is a legitimate goal of a Reapportionment Board: "A state may constitutionally reapportion districts to enhance the voting strength of minorities in order to facilitate compliance with the Voting Rights Act." Kenai Peninsula Borough, 743 P.2d at 1361.

Section 2 of the Act, as amended in 1986, creates a cause of action to remedy the use of certain electoral laws or practices which, when interacting with social and historical conditions, create an inequality in the opportunities enjoyed by voters to elect their preferred representatives. Thornburg v. Gingles, 478 U.S. 30, 47 (1986). Plaintiffs may have a redistricting plan or an election invalidated if they can prove that 1) under the totality of the circumstances, the redistricting results in unequal access to the electoral process; and 2) racially polarized bloc voting exists. "[T]he conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation." Id. at 46.

In each of our previous reapportionment decisions we have

noted the difficulty in drawing election districts in Alaska. We have emphasized the need to preserve flexibility in the redistricting process so that all constitutional requirements may be satisfied as nearly as practicable.

> At the outset we recognize the difficulty of creating districts of equal population while also conforming to the Alaska constitutional mandate that the districts "be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area." When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.
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> . . . .
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> When confronted with conditions so different from those of any other single state in the continental United States, it is readily apparent that it becomes well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states.

Egan v. Hammond, 502 P.2d 856, 865-66 (Alaska 1972) (footnotes omitted) (quoting Alaska Const. art VI, 6), quoted in Groh, 526 P.2d at 875 and Kenai Peninsula Borough, 743 P.2d at 1359.

Thus, although the Board and the Governor are free to pursue their own policies and goals in recommending and declaring redistricting and reapportionment, such policies may not be pursued at the expense of the federal and Alaska constitutional and statutory mandates.

III. REGIONAL APPLICATIONS

A. SOUTHEAST ALASKA.

Under the Governor's reapportionment plan, southeast Alaska (Southeast) was divided into five election districts, designated 1 through 5.19 Respondent Southeast Conference contends that Districts 1, 2 and 3 violate article VI, section 6 of the Alaska Constitution. The trial court agreed, finding specifically that "The districts of Southeast are not socio-economically integrated and they easily could have been." We affirm this conclusion.

District 1 includes most of the Ketchikan Gateway Borough, the City of Wrangell and the eastern half of Prince of Wales Island. District 2 includes most of Sitka and the cities of Haines and Petersburg. District 3 includes the downtown portions of Sitka and Ketchikan, the City of Saxman, the communities of Annette, Metlakatla, Hydaburg, Craig, Point Baker, Port Armstrong, Pelican and Yakutat. As such, it includes parts of Chichagof, Baranof, Admiralty, Kupreanof, Prince of Wales and Revillagigedo Islands. District 3 stretches almost the entire length of Southeast from Annette to Yakutat.

The districts created by the Governor's plan do not take into account several local municipal boundaries. The plan separates the downtowns of two major cities from the rest of the cities (Sitka and Ketchikan). It also splits two closely interrelated cities, Ketchikan and Saxman. Further, the plan ignores natural geographic boundaries by splitting all of the major islands of the Alexander Archipelago.

Article VI, section 6 does not require that districts be drawn along municipal boundaries. Rather, the provision states only that "[c]onsideration may be given to local government boundaries." Alaska Const. art. VI, 6. However, local boundaries are significant in determining

whether an area is relatively socio-economically integrated. By statute, a borough must have a population which "is interrelated and integrated as to its social, cultural, and economic activities." AS 29.05.031.20

Divisions of Ketchikan and Sitka are not permissible unless the resulting districts evidence a pattern of relative socio-economic integration. The resulting District 3 is not composed of relatively integrated socio-economic areas. District 3 mixes the small, rural, Native communities with the urban areas of Ketchikan and Sitka. These rural and urban communities have different social concerns and political needs. Logical and natural boundaries cannot be ignored without raising the specter of gerrymandering.

The Ketchikan Gateway Borough has a population of 13,828, only 71 people above the ideal district size. Saxman, part of the Borough, is more socio-economically integrated with the City of Ketchikan than it is with other Native communities of the Southeast islands.21 Prince of Wales Island is likewise more socio-economically integrated as a whole than it is relative to the rest of District 3 in which the western half of the island was placed.

The Board cited the Voting Rights Act as its justification in creating District 3. District 3 was meant to be a Native influence district. The proposed configuration of District 3 raised the Native percentage of the district two percentage points compared to the old "Islands District." However, such an awkward reapportionment of the Southeast Native population was not necessary for compliance with the Voting Rights Act.22 An "Island" District can be configured which satisfies the requirements of the Voting Rights Act and which is more compact and better integrated socially.23

Thus, Districts 1, 2 and 3 all violate article VI, section 6 of the Alaska Constitution. These districts do not contain, as nearly as practicable, relatively integrated socio-economic areas, identified with due regard for local governmental and geographic boundaries. Although these boundaries need not necessarily be followed in creating election districts, they must be considered by the Board in so far as they indicate the true socio-economic integration of several areas.

B. MATANUSKA-SUSITNA BOROUGH.

The Matanuska-Susitna (Mat-Su) Borough was divided among five house districts, designated 6, 26, 27, 28 and 34.24 Only District 27 is wholly composed of land within the Mat-Su Borough. District 6 groups Palmer with Prince William Sound. District 26 groups the residential neighborhoods between Palmer and Wasilla with Chugiak and the northern communities of the Municipality of Anchorage. District 28, stretching to the Canadian border, comprises interior Ahtna areas and parts of the Gulkana and Copper River valleys. It includes Glennallen, Tok and Delta Junction. It also includes a narrow corridor which reaches into the Mat-Su Borough, and encompasses the outskirts of Palmer and Wasilla.25 District 34 combines Willow, Talkeetna and a large portion of the rural northern part of the Mat-Su Borough with a majority of the Denali Borough and a part of the Fairbanks North Star Borough that includes the communities of North Pole, Salcha and Eielson Air Force Base.

As noted above, a borough is by definition socio-economically integrated. It is axiomatic that a district composed wholly of land belonging to a single borough is

adequately integrated. Thus, District 27 complies with that requirement.

We recognize that it may be necessary to divide a borough so that its excess population is allocated to a district situated elsewhere. However, where possible, all of a municipality's excess population should go to one other district in order to maximize effective representation of the excess group.26 This result is compelled not only by the article VI, section 6 requirements, but also by the state equal protection clause which guarantees the right to proportional geographic representation. See Kenai Peninsula Borough v. State, 743 P.2d 1352, 1369, 1372-73 (Alaska 1987) (stating that a primary indication of intentional discrimination against a geographic region was a lack of adherence to established political subdivision boundaries).

In this case, the Mat-Su Borough population is allocated between five districts. With the exception of District 27, the resulting districts have serious shortcomings in their resulting relative socio-economic integration.

District 6 merges Palmer with the Prince William Sound communities. Palmer is the governmental center of the Mat-Su Borough, an established agricultural area. In contrast, the Prince William Sound communities are oriented toward commercial fishing and maritime activities. Further, Palmer is part of an organized borough whereas Prince William Sound is not. The interests of Palmer residents may be adverse to those of the residents of an unorganized borough on issues such as property taxes and state funding of programs such as education.

There is evidence of some socio-economic integration between

the Mat-Su Borough areas and the Anchorage areas of District 26. However, considerable testimony indicated that the Mat-Su residents were more naturally linked to Palmer and Wasilla than they were to Anchorage. Moreover, we find it significant that Palmer, Wasilla and the area between them were placed in three separate districts despite the fact that these communities share most of their public facilities.

District 28 also does not contain relatively socio-economically integrated areas. It too combines a region of Mat-Su with an unorganized borough. It also includes part of the primarily rural Denali Borough. Moreover, District 28 fails for its lack of compactness. The corridor which extends into the Mat-Su Borough was prompted by a desire to attain mathematical equality among legislative districts. However, we have previously noted that population deviations up to 10 percent require no justification and that the Board may use larger deviations in order to effectuate the requirements of article VI, section 6. Kenai Peninsula Borough v. State, 743 P.2d 1352, 1260 (Alaska 1987). The Board's failure to create a compact district is not justified by rigid adherence to mathematical equality.

District 34 also fails for its lack of relative socio-economic integration. This district links two areas with almost no socio-economic integration. The Mat-Su Borough communities in this district are rural and thus share few common interests with the suburban Fairbanks and military areas of the Fairbanks North Star Borough.

We thus hold that the configuration dividing the Mat-Su Borough among five districts is invalid. The Governor's plan unfairly dilutes the proportional representation the

residents of the Mat-Su Borough are guaranteed. A municipality should not be made to contribute so much of its population to districts centered elsewhere that it is deprived of representation which is justified by its population. The plan also results in four districts which are not relatively socio-economically integrated and one district which is not sufficiently compact.

C. ELECTION DISTRICT 35.

Under the Board's plan, District 35 encompasses a vast portion of interior and northern Alaska.27 Its boundaries extend from Point Hope on the northwest coast to the border of Alaska and Canada on the east, and from Barrow in the north to Tyonek in the south. Thus constructed, District 35 also includes the area between the Brooks Range and the Arctic Ocean, which is commonly referred to as the North Slope, and traditionally inhabited by the Inupiaq Eskimo. To the south, District 35 extends across the Brooks Range to include much of the sparsely populated river drainages of interior Alaska28 traditionally inhabited by the Athabaskan Indians.

Judge Weeks described the joining of the North Slope Inupiaq and the Interior Athabaskan areas into one district as "probably the single worst combination that could be selected if a board were trying to maximize socio-economic integration in Alaska." The linkage of these geographically divided and culturally distinct areas has been described as a "worst case scenario."

The record indicates that the Board formed the boundaries of District 35 with little consideration of the relative socio-economic integration of the people who live there. Board Chair Vezey testified that he placed little reliance on a

socio-economic study of the area. Mr. Vezey also noted that there was no testimony from Inupiaq or Athabaskan witnesses favoring linkage of the areas. Further, Board member Pickrell recalled no discussion by the Board regarding joining the Inupiaq and Athabaskan areas. The record also demonstrates minimal past and present socio-economic integration between the Inupiaq and Athabaskan cultures. Brenda Itta-Lee, an Inupiaq community leader from Barrow, and Georgianna Lincoln, a representative in the state legislature and Athabaskan community leader from Rampart, both testified regarding the physical separation of the two cultures and the historical, linguistic and economic differences between the cultures. Evidence introduced at trial indicates that the average annual per capita resident income on the North Slope exceeds $26,000 while in the Doyon Athabaskan region the average is less than $6000. Social scientists who testified at trial described the actual socio-economic integration between the Inupiaq and Athabaskan as insignificant.

Based on the record, we conclude that District 35 violates article VI, section 6 of the Alaska Constitution because it does not encompass, as nearly as practicable, a relatively integrated socio-economic area.

D. THE ALEUTIAN ISLANDS.

The Board's plan divides the Aleutian Islands between two districts.29 The eastern Aleutians are in District 39, and the western Aleutians in District 37. On its face this severance violates the contiguous territory requirement of article VI, section six of the Alaska Constitution.30 Although the parties did not raise this issue, the separation of the Aleutian Islands is so plainly erroneous

that we address the issue sua sponte. Thus, in exercise of our authority under article IV, section two of the Alaska Constitution, we hold that the separation of the Aleutian Islands into two districts violates article VI, section six of the Alaska Constitution.

IV. POPULATION BASE

The Board used the 1990 census as its population base. However, the Board did not subtract from the census data military personnel who were stationed in Alaska at the time the census was taken, but who did not consider themselves Alaska residents. The Governor did not vary the population base from the Board's recommendation.

Previously we held that the exclusion of non-resident military personnel (NRMP) from the population base is constitutionally permissible. However, we have never decided whether exclusion was constitutionally required. We have not addressed this issue before because NRMP have been excluded from the population base in every previous district reapportionment, with the exception of the interim plan we devised for the 1972 elections following Egan v. Hammond, 502 P.2d 856, 870 (Alaska 1972).

The state argues that the inclusion of NRMP was a policy choice it was allowed to make, and that we should defer to that choice. The state argues further that inclusion of NRMP is permissible because it is impossible to accurately estimate the number of military personnel who are not residents. It notes that this question is different with this reapportionment because the United States Army and Air Force no longer make personnel data available to the state. The state maintains that in light of this, it acted within

its discretion by including all military personnel in the population base.31

The respondents argue that exclusion is constitutionally required since inclusion would violate the reapportionment provisions and the equal protection clause of the Alaska Constitution. They argue that the effect of the inclusion is the dilution of the voting power of residents of areas of Alaska without large military populations.

In Egan, we implemented an interim plan without a NRMP exclusion because "it was not possible to compile sufficiently accurate data to provide a reasonable basis for excluding any number of military from the population base." 502 P.2d at 870. However, we also recognized "the need for a permanent plan which achieves a level of accuracy of [the military population's] voting participation which is closer than either including or excluding all military as a class."32 502 P.2d at 870. "[T]he challenge is to arrive at the best approximation of the population to be counted without losing sight of the fact that the right of equal representation is also an individual and personal right." Egan, 502 P.2d at 869.

We therefore hold that exclusion is not constitutionally required if it is not possible to accurately identify those military personnel who are non-residents.33 However, it is necessary to consider alternative plans for obtaining a sufficiently accurate plan for estimating the number of NRMP. Id. (noting that it was "incumbent upon [this court] to discuss alternative plans which may be available to handle the problem"). See also Groh v. Egan, 526 P.2d 863, 868 (Alaska 1974) (finding that the Board's careful examination of alternatives supported the conclusion that

the state's choice of population base was rational).

The key determination is whether the Board's efforts in "discussing the alternatives" were sufficient to support its conclusion that compiling accurate data was impossible. The trial court found that a "hard look" was required. The hard look requirement is consistent with our previous acknowledgment that the state has a compelling interest in attempting to exclude NRMP. Carpenter, 667 P.2d at 1213 (identifying the "compelling state interest" as "the prevention of the dilution of its residents' voting strength"). See also Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

Judge Weeks identified six "legitimate reasons" for including the NRMP. He also found that although the extent of non-residency among the military was determinable, it was unclear whether it was possible to make a reliable determination of the enumeration districts in which non-resident, off-base military personnel lived. Despite these findings, he concluded that the Board did not take a "hard look" at this issue. The inclusion of all military personnel in the population base was thus not justifiable.

Judge Weeks apparently believed that the reasons stated by the Board for including NRMP were post hoc justifications. Also he found it significant that the Board's legal advisor advised strongly to exclude NRMP.

At its March 4, 1991 meeting, the Board adopted the policy that the population base for the reapportionment would be the 1990 census data. The Board decided that it would not

adjust the census data to account for NRMP.

In its Report and Proposed Plan, the Board discussed several methods for determining the appropriate adjustment to be made. The Board discussed the method used by the 1973 Board whereby the number of Alaska residents on a military base was determined by multiplying the number of registered voters on the base by the statewide person-counted/registered-voter ratio. The number of "residents" obtained was then divided by the number of adults living on the base to derive a percentage of residents. When the same method was applied to the 1990 data, all the military bases showed a greater than one hundred percent resident percentage.

The Board explained that other available survey methods were not adequate. It indicated that it had received expert advice that the survey method used in the Department of Labor study made that study inadequate to serve as a basis for making an adjustment. The Board also stated that it had solicited surveys from two political pollsters in Alaska and had been rejected.34 The Board explained that "a poll taken a significant period of time after the Census enumeration 'would be a sampling of a different set of people with possibly changed attitudes.'" (quoting Egan, 502 P.2d at 887). Finally, the Board eliminated Permanent Fund Dividend applications, Military Leave and Earning statements, and registered voter data bases as reliable sources of information about residency.35

The Board attempted to discover what other alternatives existed. As noted, the Board received expert opinion that an accurate survey was methodologically impossible. Even when the Board was told that a statewide survey was

possible, it was told that identifying the NRMP in each district would be impossible.36 The Board discussed the expert opinion at its March 4 meeting and agreed with the proposal of director Babcock that, at least as an initial guideline, the survey could not be performed. Additionally the Board determined that the inclusion of NRMP would not result in a rural/urban bias. The Board thus concluded that its original guideline of using the census data as its population base was proper.

Based on what we have previously required of reapportionment boards, we conclude that the Board's "look" was "hard" enough. It is not necessary to attempt a survey or statistical analysis when a thorough examination reveals that such a survey is not possible. Groh, 526 P.2d at 868-69. Rather, we need only be assured that the Governor's authority was "exercised in a rational as opposed to an arbitrary manner." Id. at 868. Although we have found a "thorough and exemplary exploration" to be persuasive in proving that the Board's decision was rational, we have not required it. Groh, 526 P.2d at 868. The Board's consideration of alternatives and expert advice was sufficient examination.

V. PROCEDURAL DEFECTS (OPEN MEETINGS AND PUBLIC RECORD ACTS)

Judge Weeks concluded that the Board violated the Open Meetings Act37 and the Public Records Act38 as it formulated its reapportionment plan. However, he also determined that "[b]ecause of the other decisions in this case, the public interest is better served by not voiding the plan on the basis of Open Meetings Act violations." He did not grant relief on the basis of the Open Meetings Act or the Public

Records Act.

We agree with Judge Weeks that these Acts generally apply to the activities of the Reapportionment Board. However, since he did not grant relief on the basis of either Act, we decline to determine the extent of their application to specific activities. Similarly, we decline to determine whether an independent constitutional basis exists for ensuring public access to the Board's meetings. Accordingly, we affirm only the trial court's determination that the Open Meetings Act and Public Records Act apply generally to the activities of the Reapportionment Board.

VI. CONCLUSION

We AFFIRM the superior court's conclusion that the plan's formulation of Districts 1, 2 and 3 violates article VI, section 6 of the Alaska Constitution, because the districts are not "socio-economically integrated and they easily could have been." We also AFFIRM its conclusion that the configuration which divides the Mat-Su Borough among five districts (designated 6, 26, 27, 28 and 34) is invalid, since it unfairly dilutes the proportional representation guaranteed to the Mat-Su Borough's residents. Further, we AFFIRM its conclusion that District 35, which joins the North Slope Inupiaq and the Interior Athabaskan areas, violates article VI, section 6 of the Alaska Constitution because it does not encompass a relatively integrated socio-economic area.

We conclude independently that the separation of the Aleutian Islands into two districts violates the contiguous territory requirement of article VI, section 6 of the Alaska Constitution.

We AFFIRM the superior court's conclusion that the Open Meetings Act and Public Records Act apply to the Board. We decline to address its conclusion that the public interest would not be served by voiding the plan on the basis of Open Meetings Act violations.

We REVERSE the superior court's conclusion that the Board failed to make a reliable determination regarding the inclusion or exclusion of non-resident military personnel. The Board's consideration of various alternatives and expert advice was a sufficient "hard look" at this issue.

The case has been remanded to the superior court with directions to remand the 1991 Proclamation of Reapportionment and Redistricting Plan to the Board for reformulation consistent with
our Order of June 8, 1992, and this opinion.

MOORE, Chief Justice, concurring, in part, and dissenting, in part.

To the extent indicated in the attachment to today's opinion marked "APPENDIX C," I continue to dissent. Otherwise, I concur in the action that we have taken in this case, and in the opinion of the court.

BURKE, Justice, concurring, in part, and dissenting, in part.

To the extent indicated in the attachments to today's opinion marked "APPENDIX B" and "APPENDIX C," I continue to dissent. Otherwise, I concur in the action that we have taken in this case, and in the opinion of the court.

INDEX TO APPENDICES

APPENDIX A: Governor Hickel's 1991 Reapportionment Plan (Final Plan)

APPENDIX B: Order, May 28, 1992, Alaska Supreme Court

APPENDIX C: Corrected Order of Remand, June 8, 1992, Alaska Supreme Court

APPENDIX D: Order, June 11, 1992, Alaska Supreme Court

APPENDIX E: Memorandum and Order, June 18, 1992, Superior Court Judge Larry Weeks

APPENDIX F: Memorandum and Order, June 19, 1992, Superior Court Judge Larry Weeks

APPENDIX G: Order, June 25, 1992, Alaska Supreme Court

APPENDIX H: 1992 Interim Reapportionment Plan, June 25, 1992

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1. Article 2, section 10 of the Alaska Constitution provides as follows:

> Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for reapportionment and redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of reapportionment and redistricting. An accompanying statement shall explain any change from the plan of the board. The reapportionment and redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

2. The Board later modified its policy regarding equal population among districts. It adopted a motion which directed the staff to:

> use up to a 10 percent variance in preparing the final three statewide alternative scenarios, for the purposes of compliance with the federal Voting Rights Act. Any other variance from the Board's two percent guideline must be justified by the need to comply with the Alaska Constitutional requirement that each district contain as nearly as possible a relatively integrated socio-economic area, or by limitations in the technology or data bases used by staff in preparing the statewide alternatives.

3. The final plan which was reviewed in this case is attached as Appendix A. It contains detail maps of the Southeast and Matanuska-Susitna Borough Districts, as well as a statewide map.