ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9222 HOUSE JUDICIARY

health of such women, and to avoid the imposition of other hardships on such women." However, that judgment also expressly provided that:

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

5. It is this Final Judgment and permanent injunction which the Alaska Supreme Court affirmed in its decision in the *Valley Hospital* case. The Supreme Court expressly noted, quoting the Final Judgment, that the injunction did not require "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.'" Opn. at 5.

6. The Hospital -- a non-sectarian hospital built with State funds -- did not and could not assert a religious basis for its restrictive abortion policy. *See* Opn. at 2, 20 n.20. The Supreme Court thus explicitly left open the question whether another "quasi-public" hospital might assert a religious exemption, based on constitutional religious freedom principles, to the general constitutional requirement that such hospitals must respect a woman's fundamental rights of privacy -- her rights of conscience, belief, and choice -- with respect to lawful abortion procedures. Opn. at 19 n.18.

7. Thus, both the Superior Court and the Supreme Court decisions respected and protected individual rights of conscience -- the right of a woman to make the difficult, often painful, choice whether to have a lawful abortion and the right of a hospital employee to choose, based on his or her conscience or beliefs, not to participate in an abortion procedure.

I hope this information is helpful. Please feel free to give me a call if you have any questions or would like additional information.

Steve Williams

FAX COVER PAGE

STEPHAN H. WILLIAMS
ATTORNEY AT LAW
500 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501

Telephone - (907) 276-6922
Fax - (907) 276-2109

To: Rep. Ethan Berkowitz, Alaska State Legislature **At: 1-907-465-2137**

Pages (including cover) being sent: 4 **Date: 01/20/98**

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

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

November 21, 1997

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

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

Dear Terry,

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

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

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

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

Very truly yours,

KENNETH P. JACOBUS, P.C.

By Kenneth P. Jacobus
Kenneth P. Jacobus

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THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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

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

COMPTON, Chief Justice.

I. INTRODUCTION

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

II. FACTS AND PROCEEDINGS

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

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

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

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

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

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[1] AS 18.16.010 provides:

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

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

(continued...)

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

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

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

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

judgment[4] and permanently enjoined VHA

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

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

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

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

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

(Citation omitted.)

III. DISCUSSION

A. Standard of Review

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

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

1. The United States Constitution

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

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

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

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

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

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

505 U.S. at 878-79.

2. The Alaska Constitution

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

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

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

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

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

Article I, section 22 of the Alaska Constitution provides:

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

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> security of information gathered under this section by the State.

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

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

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

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

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

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

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

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

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

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

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[13] AS 18.07.041 provides:

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19] AS 18.16.010(b) provides:

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

874 P.2d 274 SWANNER V. ANCHORAGE EQUAL RIGHTS COMM'N EX REL. B (S. Ct. 1994) 1994 Alas. Lexis 40

TOM SWANNER, d/b/a WHITEHALL PROPERTIES, Appellant,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel, JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE, Appellees.

No. 4081, SUPREME COURT NO. S-5362
SUPREME COURT OF ALASKA
874 P.2d 274, 1994 Alas. LEXIS 40
May 13, 1994, Decided

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge. Superior Court No. 3AN-91-1898 CI

This Opinion Substituted on Grant of Rehearing for Withdrawn Opinion of February 11, 1994, Previously Reported at: 868 P.2d 301.

COUNSEL

Stephen S. DeLisio, Staley DeLisio & Cook, Anchorage, for Appellant.
Constance E. Livsey, Faulkner, Banfield, Doogan & Holmes, Anchorage, for Appellees.

JUDGES

Before: Moore, Chief Justice, Rabinowitz, Matthews and Compton, Justices.
AUTHOR: PER CURIAM

OPINION

ORDER

On consideration of the petition for rehearing, filed on February 25, 1994, and the response, filed on March 14, 1994,

IT IS ORDERED

1. The petition for rehearing is GRANTED.

2. The majority opinion, Opinion No. 4049, published on February 11, 1994, is WITHDRAWN.

3. Opinion No. 4081 is issued on this date in its place.

4. The major modifications in the opinion follow:

(a) A new footnote 9, attached to "United States Constitution" on page 12 is added:

Shortly before the publication of this opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (1993). That Act replaced the **Smith** test with the compelling interest test. Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the anti-discrimination laws. The most effective tool the state has for combatting discrimination is to prohibit discrimination. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

(b) Former footnote 9 at pages 12-13 of the February 11, 1994, majority opinion is deleted.

(c) The modified majority opinion on rehearing will be issued as a Per Curiam opinion since former Justice Burke did not participate in the court's consideration of the petition for rehearing.

Entered by direction of the Court Anchorage, Alaska, on May 13, 1994.

PER CURIAM

Swanner, d/b/a Whitehall Properties, appealed the superior court's decision which affirmed the Anchorage Equal Rights Commission's (AERC) order that Swanner's policy against renting to unmarried couples constituted unlawful discrimination based on marital status. Swanner disputes the decision and contends that enforcing the applicable statute and municipal ordinance violates his constitutional right to free exercise of his religion under the United States and Alaska Constitutions. Swanner claims the AERC deprived him of due process by adopting the hearing examiner's recommended decision and proposed order without itself conducting an independent review of the case on its merits and by failing to notify him that it would do so.

We hold that Swanner discriminated against the potential tenants based on their marital status. We further hold that enforcing the fair housing laws does not deprive him of his right to free exercise of his religion. The proceedings of the AERC did not deprive Swanner of his right to due process of law. We affirm the AERC and superior court decisions.

I. FACTS AND PROCEEDINGS BELOW

Joseph Bowles, William F. Harper, and Dee Moose filed three separate complaints of marital status discrimination in the rental of real property in Anchorage. The complainants alleged that Tom Swanner. doing business as Whitehall Properties, violated municipal and state anti-discrimination laws, Anchorage Municipal Code (AMC) 5.20.020 and AS 18.80.240. Swanner refused to rent or allow inspection of residential properties after learning that each complainant intended to live with a member of the opposite sex to whom he or she was not married.

While Swanner did not specifically recall having conversations with Bowles, Harper, or Moose, he readily admitted having a policy of refusing to rent to any unmarried couple who intend to live together on the property. Swanner's refusal to rent or show property to unmarried

couples is based on his Christian religious beliefs. Under Swanner's religious beliefs, even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality. It is undisputed that Swanner rejected each complainant as a tenant because of this policy and for no other reason.

A. **Proceedings Before the Anchorage Equal Rights Commission**

The AERC consolidated the three cases for hearing and appointed Robert W. Landau as hearing examiner on April 6, 1990. Landau conducted a hearing on October 9 and 11, 1990 and issued a twenty-five page Recommended Decision and proposed order in favor of the complainants on January 7, 1991. He served the recommended decision to Swanner's counsel and the AERC on January 7, 1991.

Pursuant to the AERC's administrative rules of procedure in effect at the time, each party had ten days after receipt of the recommended decision to submit written objections. AMC 5.10.015(A). When the AERC receives objections, the regulations provide for its review of the record and modification of the recommended decision where appropriate. AMC 5.10.015(B). If the parties fail to object, the proposed decision automatically becomes final. AMC 5.10.015(A). Neither Swanner nor the AERC submitted written objections. On January 23, 1991, the AERC issued a memorandum stating that, pursuant to AMC 5.10.015(A), the parties' failure to object to the hearing examiner's recommended decision resulted in his proposed order becoming final on January 22, 1991. On January 31, 1991, Cheri C. Jacobus, AERC Chairperson, issued a Notice of Final Order which affirmed that the proposed order became final on January 22, 1991.

B. **Proceedings Before the Superior Court**

Swanner appealed to the superior court on March 8, 1991. Judge Karen L. Hunt heard oral argument on May 15, 1992 and issued a written decision and order on August 31, 1992. She affirmed the AERC's decision, holding that (a) Swanner's conduct constituted unlawful discrimination based upon marital status; (b) enforcement of the state and municipal anti-discrimination laws does not violate Swanner's constitutional rights, pursuant to the U.S. Supreme Court's decision in **Employment Division, Department of Human Resources v. Smith,** 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), and our decisions in **Frank v. State,** 604 P.2d 1068 (Alaska 1979) and **Seward Chapel, Inc. v. City of Seward,** 655 P.2d 1293 (Alaska 1982); and (c) the automatic finalization of the AERC's decision did not violate Swanner's due process rights.

C. **Proceedings Before This Court**

Swanner appealed to this court on September 18, 1992. He contends that the superior court erred in finding that he discriminated against the complainants on the basis of marital status. He

claims that he does not discriminate based on marital status, but even if he does, he is excused from compliance with the anti-discrimination laws because of his fundamental right to the free exercise of his religion, guaranteed by the Alaska and United States Constitutions. He also claims that the automatic finalization of the AERC's decision violates his due process rights under the Alaska and United States Constitutions.[1]

II. DISCUSSION

A. Swanner Violated AMC 5.20.020 and AS 18.80.240 by Discriminating Based on Marital Status

Swanner argues that he does not discriminate against individuals based on their marital status because he will rent to people who are single, married, widowed, divorced, or separated. However, he will not rent to those whom he expects will engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage. Swanner considers such cohabitation to be fornication and immoral.

The AERC responds that the laws at issue do not recognize a distinction between "marital status" and "cohabitation." The AERC claims the statutes' plain language demonstrates that "marital status" includes cohabitating couples.

In **Foreman v. Anchorage Equal Rights Comm'n,** 779 P.2d 1199, 1201-03 (Alaska 1989), we looked at the plain language of AS 18.80.240[2] and AMC 5.20.020[3] and reviewed the intent behind the anti-discrimination laws. In **Foreman,** a landlord who refused to rent to an unmarried couple argued that the laws did not protect the interests of unmarried couples. **Id.** at 1201. We held that the landlord's policy against renting to unmarried couples unlawfully discriminated on the basis of marital status. **Id.** at 1203. We reasoned that because the landlord would have rented to the prospective tenants had they been married, and he refused to rent the property only after learning the couple was not married, "this constitutes unlawful discrimination based on marital status." **Id.** The same reasoning applies here. Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.[4]

B. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the United States Constitution

Swanner contends that enforcement of AMC 5.20.020 and AS 18.80.240 against him has a coercive effect on the free exercise of his religious beliefs. He believes that compliance with these laws forces him to choose between his religious beliefs and his livelihood. He requests that we accommodate his religious beliefs by creating an exemption to the statute and ordinance. The AERC responds that "it is not Swanner's religious beliefs **per se** which run afoul of our

anti-discrimination laws, but rather his actions and conduct in a commercial setting."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I. The Free Exercise Clause applies to the states by its incorporation into the Fourteenth Amendment. **See Cantwell v. Connecticut,** 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). It grants absolute protection to freedom of belief and profession of faith, but only limited protection to conduct dictated by religious belief. **See Employment Div., Dep't of Human Resources v. Smith,** 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) (narrowing the scope of religious exemptions under the Free Exercise Clause by upholding a statute that criminalized peyote use, as applied to Native American religious ceremonies).

Swanner claims that we should apply the "compelling state interest" test set forth in **Sherbert v. Verner,** 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963), to determine whether the laws at issue violate his right to free exercise of religion under the United States Constitution.[5] However, in **Smith,** the United States Supreme Court expressly rejected applying the **Sherbert** test where the law being challenged is generally applicable, or, in other words, where the law is not directed at any particular religious practice or observance.[6] **Smith,** 494 U.S. at 885. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." **Church of Lukumi Babalu Aye v. City of Hialeah,** 124 L. Ed. 2d 472, 113 S. Ct. 2217, 2226 (1993) (citing **Smith,** 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)).[7] "Neutrality and general applicability are interrelated. . . . Failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." **Id.** at 2226.

The first step in determining whether a law is neutral is whether it discriminates on its face. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." **Id.** at 2227. Neither the ordinance nor the statute contain any language singling out any religious group or practice.

Even when a law is facially neutral, however, it may not be neutral if it is crafted to impede particular religious conduct. **Id.** These laws clear that hurdle as well. The purpose of AMC 5.20.020 and AS 18.80.240 is to prohibit discrimination in the rental housing market.[8] Swanner does not claim that the purpose of the laws is to discriminate against people based on religion; in fact, he contends that the laws do not even cover this kind of discrimination. Therefore, the laws satisfy the requirement of neutrality.

Additionally, these laws are generally applicable. They apply to all people involved in renting or selling property, and do not specify or imply applicability to a particular religious group. Therefore, at least under the general rule, no compelling state interest is necessary.

Smith provides one ground for judicial exemptions from compliance with neutral laws of general applicability. A court may exempt an individual from a law where the facts present a

hybrid situation where an additional constitutionally protected right is implicated. **Smith,** 494 U.S. at 881-82. Like the appellant in **Smith,** Swanner does not contend that the laws in question here infringe on any constitutional right other than his right to free exercise of religion. Consequently, this case does not present such a "hybrid" situation.

We conclude that enforcing AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the United States Constitution.[9]

C. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the Alaska Constitution

Swanner does not dispute that the ordinance and statute are generally applicable and neutral under **Smith,** but asserts that "this decision does not mandate use of a less restrictive standard by state courts in interpreting state constitutional protection."

Swanner is correct in asserting that a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution. See, **e.g., Roberts v. State,** 458 P.2d 340, 342 (Alaska 1969) ("We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."). Thus, even though the Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution, we are not required to adopt and apply the **Smith** test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution. We will apply **Frank v. State,** 604 P.2d 1068 (Alaska 1979), to determine whether the anti-discrimination laws violate Swanner's right to free exercise under the Alaska Constitution.[10]

In **Frank v. State,** we adopted the **Sherbert** test to determine whether the Free Exercise Clause of the Alaska Constitution requires an exemption to a facially neutral law.[11] 604 P.2d at 1070. We held that to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief. **Id.** at 1071 (citing **Wisconsin v. Yoder,** 406 U.S. 205, 215-16, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)). Once these three requirements are met, "religiously impelled actions can be forbidden only 'where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests 'of the highest order and . . . [are] not otherwise served. . . .'" **Seward Chapel, Inc. v. City of Seward,** 655 P.2d 1293, 1301 n.33 (Alaska 1982) (quoting **Frank,** 604 P.2d at 1070).

Swanner clearly satisfies the first and third requirements to invoke an exception to the laws under the Free Exercise Clause. No one disputes that a religion is involved here (Christianity), or that Swanner is sincere in his religious belief that cohabitation is a sin and by renting to

cohabitators, he is facilitating the sin. However, the superior court held that he did not meet the second requirement that his conduct was religiously based because "nothing in the record permits a finding that refusing to rent to cohabiting unmarried couples is a religious ritual, ceremony or practice deeply rooted in religious belief." Swanner's claim that the superior court misinterpreted **Frank v. State** as limiting free exercise rights only to ritual or ceremony has merit. In **Frank,** we determined that the action at issue was a practice deeply rooted in religion. 604 P.2d at 1072-73. However, we did not intend to limit free exercise rights only to actions rooted in religious rituals, ceremonies, or practices. To meet the second requirement, a party must demonstrate that the conduct in question is religiously based; this determination is not limited to actions resulting from religious rituals. Swanner's refusal to rent to unmarried couples is not without an arguable basis in some tenets of the diverse Christian faith, and therefore, his conduct is sufficiently religiously based to meet our constitutional test. Although Swanner meets the three preliminary requirements to invoke an exception to the anti-discrimination laws, the analysis does not end here.

As discussed previously, a religious exemption will not be granted if the religiously impelled action poses "some substantial threat to public safety, peace or order or where there are competing state interests of the highest order." **Frank,** 604 P.2d at 1070. The question is whether Swanner's conduct poses a threat to public safety, peace or order, or whether the governmental interest in abolishing improper discrimination in housing outweighs Swanner's interest in acting based on his religious beliefs.

In our view, the second part of the test adopted in **Frank** is applicable here. Under this part of the **Frank** test, we must determine whether "a competing state interest of the highest order exists." "The question is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." **Frank,** 604 P.2d at 1073. The government possesses two interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of discrimination based on irrelevant characteristics. Most free exercise cases, including **Frank,** involve "derivative" state interests. In other words, the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect. This can be contrasted with a "transactional" interest in which the State objects to the specific desired activity itself.

For example, in **Frank,** this court exempted a Central Alaska Athabascan Indian needing moose meat for a funeral potlatch from state hunting regulations. The State did not object to killing moose per se (indeed, it expressly allows moose hunting in season); the State's derivative interest was in maintaining healthy moose populations. In the instant case, the government's derivative interest is in providing access to housing for all. One could argue that if a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing.

We look to **Prince v. Commonwealth of Massachusetts,** 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1943), as an analogy. In **Prince,** the United States Supreme Court refused to grant an

exemption to child labor laws for children distributing religious literature. As in this case, the state had a transactional interest: preventing exploitation of children in employment. Thus, the state objected to child labor, the particular activity at issue, per se, not to an effect of that activity. The state legislature had prohibited children from working under certain conditions. Therefore, permitting any child to work under such conditions resulted in harming the government's transactional interest. This transactional government interest does not involve a numerical cutoff below which the harm is insignificant unlike in **Frank.**

Similarly, in the instant case, the legislature and municipal assembly determined that housing discrimination based on irrelevant characteristics should be eliminated. **See Hotel, Motel, Restaurant, Etc. Union Local 879 v. Thomas,** 551 P.2d 942, 945 (Alaska 1976) ("The statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the rental of real property."); **Loomis Electronic Protection, Inc. v. Schaefer,** 549 P.2d 1341, 1343 (Alaska 1976) (recognizing the Alaska Legislature's "strong statement of purpose in enacting AS 18.80, and its avowed determination to protect the civil rights of all Alaska citizens"); **see also** AS 18.80.200; AMC 5.10.010. The existence of this transactional interest distinguishes this case from **Frank** and most other free exercise cases where courts have granted exemptions. The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination, Under **Frank,** this interest will clearly "suffer if an exemption is granted to accommodate the religious practice at issue."

The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates based on marital status. However, those areas are easily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore, the other policies which allow marital status discrimination are irrelevant in determining whether the government's interest in eliminating marital status discrimination in housing is compelling.

In the examples the dissent cites, treating married couples differently from unmarried couples is arguably necessary to avoid fraudulent availment of benefits available only to spouses. The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds via a marriage document. That problem is not present in housing cases. as this case demonstrates, if anything, an unmarried couple who wish to live together are at a disadvantage if they claim to be romantically involved.

It is important to note that any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct affects his commercial activities. In **United States v. Lee,** 455 U.S. 252, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be super imposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

Swanner complains that applying the anti-discrimination laws to his business activities presents him with a "Hobson's choice"--to give up his economic livelihood or act in contradiction to his religious beliefs. A similar argument was advanced in **Seward Chapel,** where Seward Chapel argued that applying the city zoning ordinances to prohibit construction of a parochial school impermissibly burdened the chapel's free exercise rights. 655 P.2d at 1299. We concluded that "there has been no showing of a religious belief which requires members of Seward Chapel to locate in [a specific place]. . . . The inconvenience and economic burden of which Seward Chapel now complains is caused largely by the choice to build in [a specific place]. . ." **Id.** at 1302 (footnote omitted).

Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or "Hobson's choice," of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. **See** AS 18.80.240; AMC 5.20.020. Voluntary commercial activity does not receive the same status accorded to directly religious activity. **Cf. Frank v. State,** 604 P.2d at 1075 (exempting an Athabascan Indian from state hunting regulations "to permit the observance of the ancient traditions of the Athabascans").

"As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace." Michael W. McConnell, **Free Exercise Revisionism and the Smith Decision,** 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted). Because Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws. Therefore, we conclude that enforcement of AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the Alaska Constitution.

D. The AERC Did Not Deprive Swanner of Due Process of Law

1. AMCR 5.10.015(A) is Not an Unconstitutional Delegation by the AERC

Anchorage Municipal Code 5.10.040 authorizes the AERC: (a) to hold public hearings; (b) to administer oaths and issue subpoenas; (h) to delegate to its executive director all powers and duties except the power to hold hearings and issue orders; and (i) to adopt procedural and evidentiary rules necessary to fulfill the intent of Title 5. AMC 5.10.040. The AERC's power to "adopt procedural and evidentiary rules" is effectuated by promulgating municipal regulations.

Anchorage Municipal Code of Regulations (AMCR) provides the scope of the hearing examiner's recommendation.

> The hearing examiner . . . shall rule on the admissibility of evidence and other procedural matters. On any question which would be determinative of the jurisdiction of the commission or of the culpability of any party, the hearing examiner . . . may only make recommendations to the full commission.

AMCR 5.10.013(C)(2).[12] Additionally, "all recommendations of the hearing examiner . . . shall be consistent with commission decisions and regulations." AMCR 5.10.013(C)(4).

AMCR 5.10.015 (A) states:

> After a party . . . receives the hearing examiner's . . . proposed findings of fact, conclusions of law and proposed order, that person or his/her representative may, within 10 days or such other time fixed by the chair, present written objections to the commission. If no party files an objection within ten days, the proposal shall become final.

Swanner claims that AMCR 5.10.015(A) directly conflicts with AMCR 5.10.013(C)(2) because "[Section] 5.10.015 appears to permit the commission to adopt the hearing examiner's recommendations without ever considering its content, rationale or rectitude." He interprets AMCR 5.10.013(C)(2) as authorizing only "the full commission" to determine a question which is determinative of jurisdiction or of the culpability of a party; Swanner asserts that his culpability in housing discrimination was at issue. He contends that the AERC abdicated its responsibility by adopting the hearing examiner's recommendation, and, therefore, the AERC violated AMCR 5.10.013.

Swanner is correct that the hearing examiner did not have the authority to determine Swanner's culpability. Instead he had the authority to make a recommendation, which is exactly what he did. Hearing Examiner Landau made a recommendation to the AERC and the AERC decided to adopt it. Therefore, no conflict exists between AMCR 5.10.013(C)(2) and AMCR 5.10.015(A), and the AERC followed its own regulations in adopting the hearing examiner's recommendation.[13]

2. **The Regulations Do Not Require an Independent Review by the AERC**

Swanner finds fault with this process and complains that the AERC's regulations do not grant it authority to approve a hearing examiner's decision without conducting an independent review. No rule of procedure provides that the AERC must independently review the hearing examiner's recommendations. AMCR 15.10.015(B) expressly provides for the AERC's review of the hearing examiner's recommendations after a party timely files an objection. Swanner did not file an objection; therefore, the regulations required no independent review by the AERC.

3. Due Process Did Not Require That the AERC Personally Notify Swanner That It Would Adopt the Hearing Examiner's Recommendation Absent an Objection Within Ten Days

Swanner claims the AERC's adoption of the hearing examiner's recommendation violated his constitutional right to due process of law. Both the Alaska and United States Constitutions provide that a person shall not be deprived of "life, liberty, or property, without due process of law." Alaska Const., Art. 1, § 7; U.S. Const. amend. XIV, § 1. "Due process requires 'that deprivation of life, liberty or property by adjudication be proceeded by notice . . . appropriate to the nature of the case.'" **Wickersham v. State Com. Fisheries Entry Comm'n,** 680 P.2d 1135, 1144 (Alaska 1984) (quoting **Mullane v. Central Hanover Bank and Trust Co.,** 339 U.S. 306, 313 (1950)). This court held "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." **Aguchak v. Montgomery Ward Co., Inc.,** 520 P.2d 1352, 1356 (Alaska 1974) (adopting **Mullane** language for analysis under the Alaska Constitution).

Swanner states that he did not receive notice that his failure to object to the hearing examiner's recommended decision would result in the AERC making the decision final. He claims that he became aware of the AERC's intent to approve the hearing examiner's recommended decision the day after objections to the proposed order were due, when the AERC issued a memorandum stating the proposed order became final. Therefore, he claims he was not given "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action, as required by Alaska law."

Swanner cannot claim that he was unaware of the pendency of this action. The actual hearing in this matter occurred on October 9 and 11, 1990, and Swanner participated in seven months of formal pre-hearing procedures and discovery. Swanner was clearly aware of the "pendency of this action." Moreover, AMCR 5.10.015 was readily available to Swanner and the public from both the AERC and the State Law Library. Accordingly, the AERC did not deny Swanner due process.

III. CONCLUSION

We hold that Swanner impermissibly discriminated against Bowles, Harper, and Moose because he would not rent to them based on their marital status. The Free Exercise Clause of the

United States and Alaska Constitutions do not permit Swanner to disobey the state and municipal anti-discrimination laws by entitling him to an exemption. The AERC did not deny Swanner his right to due process by following its procedural regulations.

The AERC's final order and the superior court's opinion are AFFIRMED.

DISPOSITION

The AERC's final order and the superior court's opinion are AFFIRMED.

DISSENT

MOORE, Chief Justice, dissenting.

Article I, section 4 of the Alaska Constitution declares that "no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." As the majority correctly recognizes, this provision may provide greater protection of free exercise rights than is now provided under the United States Constitution. Opinion at 12-13. Accordingly, while the United States Supreme Court has adopted a new test to analyze free exercise claims such as the one at issue here,[1] the majority agrees that we will continue to apply the compelling interest test in interpreting the free exercise clause of the Alaska Constitution. Opinion at 13.

Our decision in **Frank v. State,** 604 P.2d 1068 (Alaska 1979), sets forth the framework from which we must determine whether AMC 5.20.020 and AS 18.80.240 violate Swanner's right to the free exercise of his religion. As we stated in **Frank,** "no value has a higher place in our constitutional system of government than that of religious freedom." 604 P.2d at 1070. For this reason, a facially neutral statute or ordinance which interferes with religious-based conduct must be justified by a compelling state interest. **Id.** Absent such an interest, our constitution requires an exemption from the laws at issue to accommodate religious practices. **Id.** at 1070-71.

The majority acknowledges that Swanner's actions fall within the ambit of the free exercise clause. Swanner has shown that his refusal to rent apartments to unmarried individuals who plan to live with a member of the opposite sex is based on his Christian faith, which strictly proscribes such cohabitation. No one questions the sincerity of his religious belief that he facilitates a sin by renting to unmarried individuals such as the complainants in this case. **See** Opinion at 15-16. For this reason, Swanner's religiously impelled conduct must be protected under Alaska law unless the AERC can show that the conduct poses "some substantial threat to public safety, peace or order," or that there exist competing governmental interests "of the highest order" which are not otherwise served without limiting Swanner's conduct. **Frank,** 604 P.2d at 1070 (citing **Wisconsin v. Yoder,** 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) and **Sherbert v. Verner,** 374 U.S. 398, 403, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963)); **Seward Chapel, Inc. v. City of Seward,** 655 P.2d 1293, 1301 n.33 (Alaska 1982). I do not believe the AERC has met its burden in this case. I would therefore grant Swanner an exemption to accommodate his religious beliefs.

First, I note that in determining that the governmental interest in this case is "of the highest

order," the majority announces an entirely new and unnecessary test examining the state's "transactional" and "derivative" interests. Opinion at 16-17. Under this analysis, the majority concludes that the state has a transactional, or **per se,** interest in preventing "individual acts of discrimination based on irrelevant characteristics" which overrides Swanner's free exercise rights in this case. Because the interest is "transactional," the majority concludes that no evidentiary basis is required to show that rental housing for unmarried couples has become scarce. However, before the court would enforce the state's "derivative" interest in "ensuring access to housing for everyone," the AERC apparently would have to make an evidentiary showing that cohabitating couples have experienced hardship in finding available housing, **i.e.,** that Swanner's conduct poses a "substantial threat to public safety, peace or order." **Frank,** 604 P.2d at 1070.

In my opinion, this amorphous analysis of the state's interests ultimately will prove to be useless in resolving future free exercise cases. Even in this case, I do not believe it provides a useful distinction of the interests at issue. For example, the majority determines that the state has a **per se** objection to marital status discrimination in housing which overcomes Swanner's free exercise rights. The majority defines this interest as that in "preventing acts of discrimination based on irrelevant characteristics." Opinion at 17. Such an articulation of the state's interest poses myriad questions. Who is to determine what is an "irrelevant" characteristic? Obviously, marital status is not "irrelevant" to Swanner. It is central to the question whether he will be committing a sin under the dictates of his religion. Is the legislative branch the final arbiter of relevancy or irrelevancy? Further, the discrimination at issue here is not based on innate "characteristics" but rather on the **conduct** of potential tenants. While this conduct is worthy of some protection, it does not warrant the same constitutional protection given to religiously compelled conduct. I am not willing to place the right to cohabitate on the same constitutional level as the right to freedom from discrimination based on either innate characteristics -- such as race or gender -- or constitutionally protected belief, such as freedom of religion.

In addition, it remains unclear to me how the state's "derivative" interests are to be identified. Here, that interest is defined with little explanation as being the state's interest in "providing access to housing for all." Opinion at 17. Does this mean the state has no **per se** objection to the fact that some individuals may have limited access to housing? In **Frank,** could it not be said that the state had a **per se** interest in enforcing its hunting regulations?

In **Frank,** this court set forth a workable and sufficient guide to determine whether a governmental interest is sufficiently compelling to overcome an individual's free exercise rights. 604 P.2d at 1070. It seems to me that the majority's effort to expand this analysis adds little to the actual analysis of interests at stake. To the contrary, I see the majority's expansion of **Frank** as little more than a strained effort to distinguish **Frank** from the present situation when such a distinction is not logically justified. In this effort, the majority totally ignores the record in this case, and it engages in a game where the "transactional" or "derivative" label attached to any given state interest predetermines the outcome of the case.

There is no governmental interest "of the highest order" to justify the burden on Swanner's fundamental rights.

Even applying the framework announced by the court in analyzing whether the state's interest is "of the highest order," I cannot agree with the court's reasoning and resulting decision. In essence, the majority's conclusion is that marital status discrimination constitutes such an affront to human dignity that the state has a **per se** obligation "of the highest order" to prevent it. Based on my analysis of free exercise jurisprudence and the issues surrounding marital status discrimination, I cannot conclude that eradication of marital status discrimination in the rental housing industry constitutes a governmental interest of such high order as to justify burdening Swanner's fundamental constitutional rights.[2]

There can be no question that the state has a compelling interest in eradicating discrimination against certain historically disadvantaged groups. **See, e.g, Bob Jones University v. United States,** 461 U.S. 574, 593-95, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983) (racial discrimination); **Roberts v. United States Jaycees,** 468 U.S. 609, 625, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) (gender discrimination). This compelling interest has been found to exist based on a determination that the discrimination at issue is so invidious to personal dignity and to our concept of fair treatment as to warrant strict protection. There is no question that Swanner's right to freely exercise his religion could and should be burdened if he engaged in such discrimination as a result of his religious beliefs.

This fact does not mean, however, that **every** form of discrimination is equally invidious or that the state's interest in preventing it necessarily outweighs fundamental constitutional rights. Rather, the cases which have upheld an imposition on free exercise have articulated certain specific reasons that some forms of discrimination are of particular governmental interest and deserving of heightened judicial scrutiny. In **Bob Jones University v. United States,** 461 U.S. 574, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983), for example, the Supreme Court refused to grant tax-exempt status to schools that maintained racially discriminatory policies under their interpretation of the Bible. In doing so, the Court discussed this nation's long history of officially sanctioned racial segregation and discrimination in education. It further noted that, since the late 1950s, every pronouncement of the Supreme Court and myriad Acts of Congress and Executive Orders attested to a national policy prohibiting such discrimination. **Id.** at 594-95, 604. It therefore concluded that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice." **Id.** at 592. Accordingly, the government's interest in eradicating racial discrimination in education was found to be compelling.

Similarly, in **Roberts v. United States Jaycees,** 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), the Supreme Court declared that the state's compelling interest in eradicating discrimination against its female citizens justified any minimal interference with an all-male organization's freedom of expressional association. In analyzing the weight of the state's interest, the Court discussed the invidious nature of gender bias, stating:

> Discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often

> bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Id. at 625 (citations omitted). The Court also observed that society generally had recognized the importance of removing "the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." **Id.** at 626. Based on these conclusions, it was no stretch to find that the state possessed a compelling interest in eradicating gender discrimination, and that this interest was sufficient to overcome the Jaycees' First Amendment claim. **Id.** at 626-29.

The majority today avoids engaging in any similar analysis of marital status discrimination to explain why or how it is so damaging to human dignity to become of such governmental import as to overcome a fundamental constitutional right.[3] This analysis is critical. The majority cites no evidence that marital status classifications have been associated with a history of unfair treatment that would warrant heightened governmental protection.[4] To the contrary, I believe the law is clear that marital status classifications have been accorded relatively low import on the scale of interests deserving governmental protection. For instance, the government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined. Alaska law explicitly sanctions such discrimination. **See, e.g.,** AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); **Serradell v. Hartford Accident & Indemn. Co.,** 843 P.2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy).

In addition, marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause of either the federal or the Alaska Constitutions. Disparate treatment of individuals based on classifications such as race, on the other hand, are reviewed under the highest scrutiny. **See, e.g., Korematsu v. United States,** 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944) (restrictions curtailing the civil rights of a single racial group are immediately suspect and deserve strict scrutiny analysis). Gender-based classifications are similarly analyzed under a heightened level of scrutiny at the federal level. **See, e.g., Wengler v. Druggists Mut. Ins. Co.,** 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980) (gender-based discrimination must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives). The sliding scale approach to equal protection analysis under the Alaska Constitution similarly applies a heightened level of scrutiny to laws burdening racial minorities or other suspect classifications. **See State v. Ostrosky,** 667 P.2d 1184, 1193 (Alaska 1983) ("Laws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized."); **State v. Erickson,** 574 P.2d 1, 11-12 (Alaska 1978) (where fundamental rights or suspect categories are involved, equal protection analysis under the Alaska

Constitution requires a compelling state interest).

At the federal level, the eradication of marital status discrimination in the housing context clearly has not been treated as a compelling interest.[5] Neither the Federal Fair Housing Act, 42 U.S.C. § 3604 (1988), nor the Federal Civil Rights Act, 42 U.S.C. §§ 1981 and 1982 (1988), would prohibit the precise form of marital status discrimination at issue here, unless it was being used as a pretext for a more egregious form of discrimination, such as that based on race. **See Marable v. H. Walker & Assocs.,** 644 F.2d 390, 397 (5th Cir. 1981) (finding a violation of the fair housing and civil rights statutes only after concluding that, although the landlord asserted that he refused to rent housing based on the applicant's marital status, this excuse was a mere pretext for racial discrimination); **see also** James A. Kushner, **The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing,** 42 Vand. L. Rev. 1049, 1106 (1989) (the Fair Housing Act does not protect unmarried couples from a landlord's refusal to rent unless a case can be made that the marital status discrimination is merely a pretext for racial, ethnic, religious or gender-based discrimination).

My research has not revealed a single instance in which the government's interest in eliminating marital status discrimination has been accorded substantial weight when balanced against other state interests, let alone fundamental constitutional rights. I find nothing to suggest that marital status discrimination is so invidious as to outweigh the fundamental right to free exercise of religion.

The majority comments that its result today is justified because Swanner's right to the free exercise of his religious beliefs must be accorded less weight since he has entered the commercial arena. Opinion at 19-21. As discussed above, it is well-accepted that an individual's right to religious freedom will not and cannot always override other interests. **See, e.g., United States v. Lee,** 455 U.S. 252, 261, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) (rejecting Amish employer's claim that imposition of social security taxes violated his free exercise rights). However, neither **Lee** nor any other case of which I am aware stands for the proposition that individuals like Swanner altogether waive their constitutional right to the free exercise of religion simply because a conflict between their religious faith and some legislation occurs in a commercial context. To the contrary, the **Lee** Court recognized that, even in a commercial setting, the state must justify its limitation on religious liberty by showing the limitation is "essential to accomplish an overriding governmental interest." **Id.** at 257-58. The AERC has simply failed to meet that burden here.

The majority suggests that Swanner's constitutional rights must be accorded lesser weight because he **voluntarily** engages in the property management industry, and his right to engage in that business is not entitled to judicial protection. Opinion at 20-21. However, this court has stated that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes." **State v. Enserch Alaska Constr., Inc.,** 787 P.2d 624, 632 (Alaska 1989) (citing **Commercial Fisheries Entry Comm'n v. Apokedak,** 606 P.2d 1255, 1266 (Alaska 1980)). The ability to participate in a particular industry, such as rental property management, is therefore entitled to more protection under our state constitution than the majority acknowledges.

The majority incorrectly relies on **Seward Chapel** to arrive at its contrary conclusion. Unlike the present case, **Seward Chapel** did not involve a forced decision between giving up one's livelihood or violating one's religious beliefs. In **Seward Chapel,** we merely found that no religious belief required an exception to city zoning laws prohibiting the location of a parochial school on a specific site. 655 P.2d at 1302. No activity was totally prohibited; only the place in which it could be conducted was being regulated. I believe that there is a significant difference between the inconvenience placed upon Seward Chapel and the total abrogation of Mr. Swanner's right to earn a living in his chosen profession while abiding by his sincerely held religious beliefs.

There is no basis in the record to conclude that an exemption in this case would create a substantial threat of harm.

In **Frank,** this court required that the state establish precisely how its interest would suffer if an exemption was granted to accommodate the religious conduct at issue. 604 P.2d at 1073. Thus, even accepting that the government has a strong interest in assuring available housing, the AERC must show how this interest will suffer in real terms if an exemption is granted to Swanner.

I see no evidence whatsoever in the record to suggest that Swanner's conduct poses a substantial threat to public safety, peace or order such that the burden on Swanner's rights is justified. For this reason, I fail to see why an exemption to accommodate Swanner's religious beliefs is not warranted. Mere speculation that housing for unmarried couples may become scarce if an exemption is granted is insufficient to establish a compelling governmental interest. In **Frank,** we specifically criticized the state for speculating, without any supporting data, that an exemption to moose hunting regulations for an Athabascan funeral potlatch would open the flood gates to widespread poaching. **Id.** at 1074. We stated: "'Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment.'" **Id.** (quoting **Teterud v. Burns,** 522 F.2d 357, 361-62 (8th Cir. 1975)). We further found that, since the state had not presented any evidence that so many moose would be taken for funeral potlatch ceremonies as to jeopardize appropriate population levels, it had not met its burden to justify curtailing the religious practice at issue. **Id.**[6]

As in **Frank,** the record here is completely devoid of any evidence to suggest that there are so many landlords or property managers in Anchorage whose religious beliefs are identical to Swanner's as to constitute a substantial threat to available housing. In a city the size of Anchorage, it is difficult to conclude based on intuition alone that housing availability for unmarried couples will become so scarce as to constitute a substantial threat to community welfare. If there were some persuasive evidence to support such a conclusion, I may well have arrived at a different conclusion today.

Conclusion

I believe Swanner has been presented with a Hobson's choice of either complying with the law or abandoning the precepts of his religion. Since the government's interest in this particular law

does not outweigh Swanner's fundamental religious rights, Swanner should be granted an exemption to accommodate his beliefs. The AERC relies on nothing more than a pure conclusion that the state has a compelling interest in preventing marital status discrimination in housing. It has not presented any evidence that an exemption in this case would result in a substantial threat to housing availability. Nor does it explain exactly what is so invidious about marital status discrimination as to make its proscription a governmental interest of the highest order, comparable with the state's interest in eradicating racial or gender discrimination. For these reasons, I fail to see how a limited exemption for Swanner and others similarly situated is not justified. In my opinion, the analysis and result set forth in this case will return to haunt this court in future decisions.

OPINION FOOTNOTES

1 Each issue involves the interpretation and construction of laws and regulations. On questions of law arising on appeal which do not involve particularized agency expertise, this court applies its independent judgment. **Kodiak Island Borough v. State of Alaska. Dep't of Labor,** 853 P.2d 1111, 1113 (Alaska 1993); **Alaska Transp. Comm'n v. Airpac, Inc.,** 685 P.2d 1248, 1252 (Alaska 1984). Thus, as the superior court found and both parties agree, the substitution of judgment standard is the appropriate standard of review on the issues Swanner has raised.

2 Alaska Statute 18.80.240 states:

Unlawful practices in the sale or rental of real property. It is unlawful . . .

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status,

. . . .

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status . . . of a person seeking to buy, lease or rent real property;

. . . .

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the . . . marital status, change in marital status . . . of that person . . . .

3 AMC 5.20.020 provides:

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful. . .

A. To refuse to . . . rent the real property to a person because of . . . marital status . . .;

. . .

C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

. . .

E. To represent to a person that real property is not available for inspection . . . [or] rental . . . when in

fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status of that person . . .;

4 Swanner agrees that the laws at issue forbid discrimination on the basis of marital status. However, he contends that he did not discriminate against anyone on the basis of his or her marital status. Instead, he asserts that he discriminates on the basis of conduct, which is not prohibited by the statutes.

The definition of "cohabit" demonstrates that marital status and conduct are inextricably combined. "Cohabit" means "to live together in a sexual relationship when not legally married." **The American Heritage Dictionary** 259 (1980). Swanner cannot reasonably claim that he does not rent or show property to cohabitating couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his Opinion. The undisputed facts demonstrate that Swanner would have rented to the prospective tenants if they were married. Swanner's argument that he discriminated against the prospective tenants based on their conduct and not their marital status is without merit.

5 Under this balancing test, a law that incidentally burdens a religious practice must be justified by a compelling governmental interest. **See Sherbert,** 374 U.S. at 403, 406.

6 The Court stated:

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," -- contradicts both constitutional tradition and common sense.

494 U.S. at 885 (citations and footnote omitted).

7 In **Church of Lukumi Babalu Aye v. City of Hialeah,** 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993), the Court used the Free Exercise Clause to strike down city ordinances that regulated animal sacrifice, but effectively prohibited only sacrifice practices of the Santeria religion. The Court held the ordinances failed to satisfy the **Smith** requirements because they were not neutral, generally applicable, nor narrowly tailored, and did not advance compelling governmental interests.

8 Alaska Statute 18.80.200 states the purpose of the anti-discrimination laws:

(a) It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety and general welfare of the state and its inhabitants.

(b) Therefore, it is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in employment, in credit and financing practices, in places of public accommodation, in housing accommodations and in the sale, lease, or rental of real property because of race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

9 Shortly before the publication of this opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (1993). That act replaced the **Smith** test with the

compelling interest test. Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

10 Swanner notes that two jurisdictions have held that a landlord may refuse to rent to unmarried couples because of his/her religious beliefs. He cites to decisions from Minnesota and California for the proposition that enforcement of the anti-discrimination laws against him violates his right to free exercise. In **Minnesota v. French,** 460 N.W.2d 2 (Minn. 1990), the Minnesota Supreme Court held that a landlord's refusal to rent to an unmarried couple did not violate Minnesota's anti-discrimination laws and enforcing such laws would violate the landlord's free exercise right. However, in **French,** the anti-discrimination laws at issue did not define or otherwise explain the term "marital status." The court concluded that the Minnesota Legislature did not intend to include unmarried couples in the definition. **Cf. Foreman,** 779 P.2d at 1203 (holding unmarried couples are included within the state and municipal prohibitions against discrimination based on marital status). Moreover, the Minnesota court relied on the criminal anti-fornication statute then in effect. In contrast, Alaska's fornication provision was repealed well before the discriminatory conduct giving rise to this case occurred. **Compare French,** 460 N.W.2d at 10, **with Foreman,** 779 P.2d at 1202. Further, the **French** court relied on the Minnesota Constitution, article I, section 16, which contains very different language from the Alaska Constitution. **See French,** 460 N.W.2d at 9.

In **Donahue v. Fair Employment Housing Comm'm,** 2 Cal. Rptr. 2d 32 (Cal. App. 1991), **review granted and opinion superseded.** 825 P.2d 766 (Cal. 1992), **review dismissed as improvidently granted and remanded,** 859 P.2d 671 (Cal. 1993), the California Court of Appeal held that although the landlords' conduct did constitute prohibited marital status discrimination, the landlords were entitled to an exemption from the anti-discrimination laws because of their religious beliefs. The court based its decision "on independent state constitutional grounds." 2 Cal. Rptr. 2d at 40. However, the California Supreme Court depublished the court of appeal's opinion, thereby rendering the decision uncitable.

Neither case provides this court with meaningful guidance in interpreting the Free Exercise Clause of the Alaska Constitution.

11 In **Seward Chapel, Inc. v. City of Seward,** this court held, "Our ruling in **Frank** establishes that there are situations in which the Alaska Constitution requires the state or a municipality to except from a facially neutral law persons whose religious beliefs dictate that they not comply with the law." 655 P.2d 1293, 1301 (Alaska 1982) (footnote omitted).

12 On February 16, 1993, the AERC repealed AMCR 5.10.013 and 5.10.015. **See** AMCR 5.60.003(F), 5.60.012(C), (D) for the new regulations replacing these sections.

We apply the regulations as they existed when Swanner's case began at the agency level.

13 Where an agency interprets its own regulations, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue. **Rose v. Commercial Fisheries Entry Comm'n,** 647 P.2d 154, 161 (Alaska 1982) (citing Kenneth C. Davis, **Administrative Law Treatise** § 7.22, at 105-08 (2d ed. 1979)).

DISSENT FOOTNOTES

1 **See Employment Div., Dep't of Human Resources v. Smith,** 494 U.S. 872, 884-90, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990).

2 Significantly, the majority cites no cases to support the proposition that the state has a compelling interest in eradicating marital status discrimination, particularly when the discrimination at issue must be balanced against interests of constitutional magnitude. Both **Loomis Elec. Protection, Inc. v. Schaefer,** 549 P.2d 1341 (Alaska 1976), and **Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas,** 551 P.2d 942 (Alaska 1976), cite the general purpose statement of AS 18.80.200; however, neither case does so to establish the existence of a compelling state interest. Both cases involved gender discrimination, the eradication of which has been held to be a compelling interest, as I discuss **infra.** Neither case is applicable to the instant case, where marital status discrimination is involved and where the discriminating party is asserting a core constitutional freedom.

3 While the majority contends that its decision today affects only Swanner's conduct, not his religious beliefs, Opinion at 19-20, I do not believe that the Alaska Constitution distinguishes so clearly between religious belief and religious conduct. **See Frank,** 604 P.2d at 1070 (because of the close relationship between conduct and belief, and because of the high value we assign to religious beliefs, religiously impelled actions can be forbidden only where they are outweighed by a compelling governmental interest). **See also Wisconsin v. Yoder,** 406 U.S. 205, 220, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) ("Belief and action cannot be neatly confined in logic-tight compartments."); **Smith,** 494 U.S. at 893 (O'Connor, J., concurring) ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause."). I would hold that conduct that is motivated by sincere religious belief is presumptively protected by Article I, section 4.

4 The majority pronounces that "the government views acts of discrimination as independent social evils. . . ." Opinion at 18. This analysis ignores the specific issue here: discrimination in housing based on **marital status.** Had Swanner's religious beliefs compelled him to discriminate based on characteristics such as race or gender, I clearly would vote to deny an exemption. However, I am not convinced that marital status discrimination is or should be treated as comparable in any way to race or gender discrimination.

5 While I recognize that Alaska's antidiscrimination legislation is not substantially similar to comparable federal laws – **see, e.g., Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas,** 551 P.2d 942, 945 (Alaska 1976) – the majority's failure to cite any authority for a compelling interest at the state level in this case leads me to make this comparison for further guidance.

6 Our requirement of evidentiary support for the state's refusal to grant an exemption is well-supported by United States Supreme Court precedent. **See Thomas v. Review Bd. of Indiana Employment Sec. Div.,** 450 U.S. 707, 719, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981) (rejecting state's asserted reasons for refusing a religious exemption due to lack of evidence in the record); **Wisconsin v. Yoder,** 406 U.S. 205, 224-29, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) (rejecting state's argument concerning the dangers of a religious exemption as speculative and unsupported by the record); **Sherbert v. Verner,** 374 U.S. 398, 407, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) ("There is no proof whatever to warrant such fears . . . as those which the [state] now advances."); **see also Smith,** 494 U.S. at 911 (Blackmun, J., dissenting) (state's assertion that religious exemption for peyote use would harm health and safety of state citizens is unsupported and speculative).

MEMORANDUM

Date: 2/10/98

To: Joe Green

From: Kevin Jardell

Re: HJR 5 Freedom of Conscience

An individual may not be denied freedom of conscience and may not be compelled to act in a manner that violates the individual's conscientious objections to the act.

It is of great importance to make clear, on the record, the reasons for this resolution and the results you hope to achieve. A thorough record can go along way in narrowing the scope.

1) This resolution will not overturn the *Valley Hospital* case. The *Valley* case was decided based on the finding that the hospital was a state actor. As such it is subject to all constitutional prohibitions. That is the reason for the footnote, referenced in Rep. Martin's Sponsor Statement, that noted the Hospitals policy may even have violated the Establishment Clause. As a State Actor you can not establish or legitimize one religion over another.

2) Although the Ct. leads one to think it would not require an individual to participate in an abortion, it is unclear whether that would be the case. This provision would bolster an individual's argument that required participation violates both the constitutional right to the free exercise of religion and the constitutional right to freedom of conscience.

3) Problems: Most state courts have language qualifying the right: Arizona, "The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State;" Minnesota, " but the liberty of conscience hereby secured shall not be so construed as

to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state."

You will have people saying "I can't teach evolution," "I can't do …" In which case you would have to expect the court to narrowly construe the article.

There are quite a few "what ifs" that can't be answered without the ct. Other states continue to prosper with this language so there is no reason to expect we wouldn't. My bets would be that the Ct.s would adapt the current tests used for free exercise.

THE FREEDOM OF CONSCIENCE AND OF RELIGION

By His Holiness Pope John Paul II

September 1, 1980

1. Because of her religious mission, which is universal in nature, the Catholic Church feels deeply committed to assisting today's men and women in advancing the great cause of justice and peace so as to make our world ever more hospitable and human. These are noble ideals to which people eagerly aspire and for which governments carry a special responsibility. At the same time, because of the changing historical and social situation, their coming into effect--in order to be ever more adequately adapted--needs the continued contribution of new reflections and initiatives, the value of which will depend on the extent to which they proceed from multilateral and constructive dialogue. If one considers the many factors contributing to peace and justice in the world, one is struck by the ever increasing importance, under their particular aspect, of the widespread aspiration that all men and women be guaranteed equal dignity in sharing material goods, in effectively enjoying spiritual goods, and consequently in enjoying the corresponding inalienable rights. During these last decades the Catholic Church has reflected deeply on the theme of human rights, especially on freedom of conscience and of religion; in so doing, she has been stimulated by the daily life experience of the Church herself and of the faithful of all areas and social groups. The Church would like to submit a few special considerations on this theme to the distinguished authorities of the Helsinki Final Act's signatory countries, with a view to encouraging a serious examination of the present situation of this liberty so as to ensure that it is effectively guaranteed everywhere. In doing so, the Church feels she is acting in full accord with the joint commitment contained in the Final Act, namely, "to promote and encourage the effective exercise of civil, political, economic, social, cultural, and other liberties and rights, all deriving from the dignity inherent in the human person, and essential for his free and integral development"; she thus intends to make use of the criterion acknowledging "the universal importance of human rights and fundamental liberties, the respect of which is an essential factor of peace, justice, and welfare necessary to the development of friendly relationships and cooperation among them and among all States."

INTERNATIONAL COMMUNITY'S INTEREST

2. It is noted with satisfaction that during the last decades the international community has shown interest in the safeguarding of human rights and fundamental liberties and has carefully concerned itself with respect for freedom of conscience and of religion in well-known documents such as: a) the UN Universal Declaration on Human Rights of December 10, 1948 (article 18); b) the International Covenant on Civil and Political Rights by the United Nations on December 16, 1966 (article 18); c) the Final Act of the Conference on European Security and Cooperation, signed on August 1, 1975 ("Questions related to security in Europe, 1, a. Declaration on the principles governing mutual relationships among participating states: VIII. Respect for human rights and fundamental liberties, including freedom of thought, conscience, religion or conviction"). Furthermore, the Final Act's section on cooperation regarding "contacts among persons" has a paragraph wherein the participating states "confirm that religious cults, and religious institutions and organizations acting within the constitutional framework of a particular state, and their representatives, may, within the field of activity, have contacts among themselves, hold meetings and exchange information." Moreover, these international documents reflect an ever growing worldwide conviction resulting from a progressive evolution of the question of human rights in the legal doctrine and public opinion of various countries. Thus today most state constitutions recognize the principle of respect for freedom of conscience and religion in its fundamental formulation as well as the principle of equality among citizens. On the basis of all the formulations found in the foregoing national and international legal instruments, it is possible to point out the elements providing a framework and

dimension suitable for the full exercise of religious freedom. First, it is clear that the starting point for acknowledging and respect that freedom is the dignity of the human person, who experiences the inner and indestructible exigency of acting freely "according to the imperatives of his own conscience" (cf. text of the Final Act under (c) above). On the basis of his personal convictions, man is led to recognize and follow a religious or metaphysical concepts involving his whole life with regard to fundamental choices and attitudes. This inner reflection, even if it does not result in an explicit and positive assertion of faith in God, cannot but be respected in the name of the dignity of each one's conscience, whose hidden searching may not be judged by others. Thus, on the one hand, each individual has the right and duty to seek the truth, and, on the other hand, other persons as well as civil society have the corresponding duty to respect the free spiritual development of each person. This concrete liberty has its foundation in man's very nature, the characteristic of which is to be free, and it continues to exist--as stated in the Second Vatican Council's declaration--"even in those who do not live up to their obligation of seeking the truth and adhering to it; the exercise of this right is not to be impeded, provided that the just requirements of public order are observed" (DIGNITATIS HUMANAE, no. 2). A second and no less fundamental element is the fact that religious freedom is expressed not only by internal and exclusively individual acts, since human beings think, act and communicate in relationship with others; "professing" and "practicing" a religious faith is expressed through a series of visible acts, whether individual or collective, private or public, producing communion with persons of the same faith, and establishing a bond through which the believer belongs to an organic religious community; that bond may have different degrees or intensities according to the nature and the precepts of the faith or conviction one holds.

CHURCH'S THINKING ON THE SUBJECT

3. The Catholic Church has synthesized her thinking on this subject in the Second Vatican Council's Declaration, DIGNITATIS HUMANAE, promulgated on December 7, 1965, a document which places the Apostolic See under a special obligation. This declaration had been preceded by Pope John XXIII's Encyclical, PACEM IN TERRIS, dated April 11, 1963, which solemnly emphasized the fact that everyone has "the right to be able to worship God in accordance with the right dictates of his conscience." The same declaration of the Second Vatican Council was then taken up again in various documents of Pope Paul VI, in the 1974 Synod of Bishops' message, and more recently in the message to the United Nations Organization during the papal visit on October 2, 1979, which repeats it essentially: "In accordance with their dignity, all human beings, because they are persons, that is, beings endowed with reason and free will and, therefore, bearing a personal responsibility, are both impelled by their nature and bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth once they come to know it and to direct their whole lives in accordance with its demands" (DIGNITATIS HUMANAE, no. 2). "The practice of religion by its very nature consists primarily of those voluntary and free internal acts by which a human being directly sets his course towards God. No merely human power can either command or prohibit acts of this kind. But man's social nature itself requires that he give external expression to his internal acts of religion, that he communicate with others in religious matters and that he profess his religion in community" (DIGNITATIS HUMANAE, no. 3). "These words," the UN address added, "touch the very substance of the question. They also show how even the confrontation between the religious view and the agnostic or even atheistic view of the world, which is one of the 'signs of the times' of the present age, could preserve honest and respectful human dimensions without violating the essential rights of conscience of any man or woman living on earth" (Address to the 34th General Assembly of the United Nations, no. 20). On the same occasion, the conviction was expressed that "respect for the dignity of the human person would seem to demand that, when the exact tenor of the exercise of religious freedom is being discussed or determined with a view to national laws or international conventions, the institutions that are by their nature at the service of religion should also be brought in." This is because, when religious freedom is to be given substance, if the participation of those most concerned in it and who have special experience of it and

responsibility for it is omitted, there is a danger of setting arbitrary norms of application and of "imposing, in so intimate a field of man's life, rules or restrictions that are opposed to his true religious needs" (Address to the UN 34th General Assembly, no. 20).

ON THE PERSONAL AND COMMUNITY LEVELS

4. In the light of the foregoing premises and principles, the Holy See sees it as its right and duty to envisage an analysis of the specific elements corresponding to the concept of "religious freedom" and of which they are the application insofar as they follow from the requirements of individuals and communities, or insofar as they are necessary for enabling them to carry out their concrete activities. In fact, in the expression and practice of religious freedom, one notices the presence of closely interrelated individual and community aspects, private and public, so that enjoying religious freedom includes connected and complementary dimensions. a) AT THE PERSONAL LEVEL, the following have to be taken into account: --freedom to hold or not to hold a particular faith and to join the corresponding confessional community; --freedom to perform acts of prayer and worship, individually and collectively, in private or in public, and to have churches or places of worship according to the needs of the believers; --freedom for parents to educate their children in the religious convictions that inspire their own life, and to have them attend catechetical and religious instruction as provided by their faith community; --freedom for families to choose the schools or other means which provide this sort of education for their children, without having to sustain directly or indirectly extra charges which would in fact deny them this freedom; --freedom for individuals to receive religious assistance wherever they are, especially in public health institutions (clinics and hospitals), in military establishments, during compulsory public service, and in places of detention; --freedom, at personal, civic or social levels, from any form of coercion to perform acts contrary to one's faith, or to receive an education or to join groups or associations with principles opposed to one's religious convictions; --freedom not to be subjected, on religious grounds, to forms of restriction and discrimination, vis-a-vis one's fellow citizens, in all aspects of life (in all matters concerning one's career, including study, employment or profession; one's participation in civic and social responsibilities, etc.). b) AT THE COMMUNITY LEVEL, account has to be taken of the fact that religious denominations, in bringing together believers of a given faith, exist and act as social bodies organized according to their own doctrinal principles and institutional purposes. The Church as such, and confessional communities in general need to enjoy specific liberties the following are to be mentioned specifically: --freedom to have their own internal hierarchy or equivalent ministers freely chosen by the communities according to their constitutional norms; --freedom for religious authorities (notably, in the Catholic Church, for bishops and other ecclesiastical superiors) to exercise their ministry freely, ordain priests or ministers, appoint to ecclesiastical offices, communicate and have contacts with those belonging to their religious denominations; --freedom to have their own institutions for religious training and theological studies, where candidates for priesthood and religious consecration can be freely admitted; --freedom to receive and publish religious books related to faith and worship, and to have free use of them; --freedom to proclaim and communicate the teaching of the faith, whether by the spoken or the written word, inside as well as outside places of worship, and to make known their moral teaching on human activities and on the organization of society: this being in accordance with the commitment, included in the Helsinki Final Act, to facilitate the spreading of information, of culture, of exchange of knowledge and experiences in the field of education; which corresponds, moreover, in the religious field to the Church's mission of evangelization; --freedom to use the media of social communication (press, radio, television) for the same purpose; --freedom to carry out educational, charitable, and social activities so as to put into practice the religious precept of love for neighbor, particularly for those most in need. Furthermore: --With regard to religious communities which, like the Catholic Church, have a supreme authority responsible at world level (in line with the directives of their faith) for the unity of communion that binds together all pastors and believers in the same confession (a responsibility exercised through Magisterium and jurisdiction): freedom to maintain mutual relations of communication between

that authority and the local pastors and religious communities; freedom to make known the documents and texts of the Magisterium (encyclicals, instructions, etc.); --at the international level: freedom of free exchange in the field of communication, cooperation, religious solidarity, and more particularly the possibility of holding multinational or international meetings; --also at the international level, freedom for religious communities to exchange information and other contributions of a theological or religious nature.

PERSON'S PRIMARY RIGHT

5. As was said earlier, freedom of conscience and of religion, including the aforementioned elements, is a primary and inalienable right of the human person; what is more, insofar as it touches the innermost sphere of the spirit, one can even say that it upholds the justification, deeply rooted in each individual, of all other liberties. Of course, such freedom can only be exercised in a responsible way, that is, in accordance with ethical principles and by respecting equality and justice, which in turn can be strengthened, as mentioned before, through dialogue with those institutions whose nature is to serve religion.

NO GEOGRAPHICAL BORDERS

6. The Catholic Church is not confined to a particular territory and she has no geographical borders; her members are men and women of all regions of the world. She knows, from many centuries of experience, that suppression, violation or restriction of religious freedom have caused suffering and bitterness, moral and material hardship, and that even today there are millions of people enduring these evils. By contrast, the recognition, guarantee and respect of religious freedom bring serenity to individuals and peace to the social community; they also represent an important factor in strengthening a nation's moral cohesion, in improving people's common welfare, and in enriching the cooperation among nations in an atmosphere of mutual trust. In addition, the wholesome implementation of the principle of religious freedom will contribute to the formation of citizens who, in full recognition of the moral order, "will be obedient to lawful authority and be lovers of true freedom; people in other words, who will come to decisions on their own judgment, and, in the light of truth, govern their activities with a sense of responsibility, and strive after what is true and right, willing always to join with others in cooperative effort" (DIGNITATIS HUMANAE, no. 8). Moreover, if it is properly understood, religious freedom will help to ensure the order and common welfare of each nation, of each society, for, when individuals know that their fundamental rights are protected, they are better prepared to work for the common welfare. Respect for this principle of religious freedom will also contribute to strengthening international peace which, on the contrary, is threatened by any violation of human rights, as pointed out in the aforementioned UN address, and especially by unjust distribution of material goods and violation of the objective rights of the spirit, of human conscience and creativity, including man's relation to God. Only the effective protection of the fullness of rights for every individual without discrimination can guarantee peace down to its very foundations.

TO SERVE THE CAUSE OF PEACE

7. In this perspective, through the above presentation the Holy See intends to serve the cause of peace, in the hope it may contribute to the improvement of such an important sector of human and social life, and thus of international life also. It goes without saying that the Apostolic See has no thought or intention of failing to give due respect to the sovereign prerogatives of any state. On the contrary, the Church has a deep concern for the dignity and rights of every nation; she has the desire to contribute to the welfare of each one and she commits herself to do so. Thus the Holy See wishes to stimulate reflection, so that the civil authorities of the various countries may see to what extent the above considerations deserve

thorough examination. If such reflection can lead to recognizing the possibility of improving the present situation, the Holy See declares itself fully available to open a fruitful dialogue to that end, in a spirit of sincerity and openness. From the Vatican, September 1, 1980.

 CIN  St. Gabriel  E-Mail

`Abdu'l-Baha on Freedom of Conscience and Speech

Translated by

Juan R.I. Cole

Department of History

University of Michigan

`Abdu'l-Baha on Freedom of Conscience and Speech in the Baha'i Faith

Palo Alto, California, 9 October 1912: Before `Abdu'l-Baha left Palo Alto, a group again had the honor of gathering in the most holy court. Among his blessed utterances was an explanation of religious conflicts, especially those of the Christians. "Some said Christ was God, and some said he was the Word, while others called him a prophet. Because of these differences, conflicts arose among them, such that in the community there was enmity instead of spirituality, and estrangement rather than unity. But Baha'u'llah has closed the door on such differences. By arranging for interpretation to be carried out by an authoritative Interpreter of the Book, by establishing the Universal House of Justice--or in other words the Parliament of the [Baha'i] community--and by commanding that there be no interference in beliefs or conscience, He blocked such breaches from occurring. He even said that if two persons discussing some matter develope a dispute, such that it leads to a polarization, both are wrong and discredited."

(Mahmúd Zarqání, Kitáb-i Badá'i` al-Athár, 2 vols. (Hofheim-Langenhain: Bahá'í-Verlag, 1982), 1:294.)

The Three Types of Liberty

A Talk of 'Abdu'l-Baha given in 7 April 1913 in Budapest

He is God.

Liberty is of three sorts. One is the divine freedom, that is confined to the essence of the Creator. He is autonomous and absolute. No one can compel Him with regard to anything at all.

Another form of liberty is that of the Europeans, which holds that human beings may do as they please on the condition that they not harm one another. This is the liberty of nature, and its highest degree is found in the animal world. This is the estate of the animal. Look at these birds, in what liberty they live. Whatever human beings might do, they can never be as free as animals. Rather, order stands in the way of freedom.

As for the third sort of liberty, it is under the divine laws and ordinances. This is the liberty of the human world, which severs the heart's relationship with all things. It soothes all hardships and sorrow. The more the consciences of human beings progress, the more free their hearts become, and the more glad their spirits become.

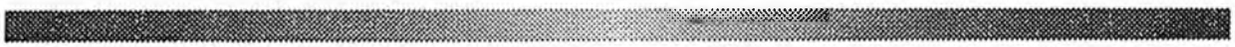
In the religion of God there is freedom of thought, for no one can rule over the [individual's] conscience save God. But [freedom of thought] exists only to the extent that it is not expressed in terms that depart from politeness.

In the religion of God there is no freedom of deeds. No one can transgress the divine law, even if in so doing he harms no one. For by the divine law is intended the training of oneself and others. For to God, harming oneself or harming others are the same, and both are reprehensible. In hearts there must be the fear of God, and human beings must not commit blameworthy deeds. Therefore, the freedom of deeds that exists in civil law does not exist in religion. As for freedom of thought, it must not transgress the bounds of politeness. And deeds are also linked to fear of God and the divine good-pleasure.

'Abdu'l-Hamid Ishráq-Khávarí, ed., Má'idih-yi Asmání, 9 vols. (Tehran: Bahá'í Publishing Trust, 1973) 5:17-18.

- To Translation Page
- To Scholarly Papers on the Baha'i Faith

- To Baha'i Studies
- To Talisman
- J. Cole Home Page



Last Updated 10-9-96
WebMaster: Juan R.I. Cole
jrcole@umich.edu

Minnesota

Sec. 16. **FREEDOM OF CONSCIENCE; NO PREFERENCE TO BE GIVEN TO ANY RELIGIOUS ESTABLISHMENT OR MODE OF WORSHIP.** The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Next Section
Previous Section
Previous Article
Next Article
Preamble

ALIS Online ARIZONA

12. Liberty of **conscience**; appropriations for religious purposes prohibited; religious **freedom**

Section 12. The liberty of **conscience** secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

Click here to return the A.L.I.S. Home Page

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

Alaska State Legislature

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

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

HOME 333-6990
355 DONNA DRIVE, #11
ANCHORAGE, AK 99504

MEMORANDUM

February 2, 1998

To: Representative Joe Green, Chairman
House Judiciary Committee

From: Representative Terry Martin TM.

Subject: HJR 5

At your earliest convince, and as your committee workload allows, please schedule HJR 5 for a hearing in the Judiciary Committee.

Attached are background materials relating to HJR 5, which proposes an amendment to the state constitution to protect the individual's freedom of conscience.

As you will recall, the Alaska Supreme Court recently ruled that a person's or an institution's moral objection to participating in an abortion is outweighed by the constitutional right to privacy, which in the court's view underpins a woman's "right" to an abortion. While many Alaskans assume that the freedom of religion clause in our constitution protects an individual's freedom of conscience, the court has decided in the contrary.

When considering the most essential natural rights of men or women, the Alaska Bill of Rights remains in a medieval era. Yes, we the "residents" (indeed, the term "citizens" was not used) are guaranteed freedom of religion. However, one wonders why the framers of the Alaska constitution did not include other guarantees to complement that provision, since we are sometimes prohibited the free exercise of religion.

Recently, I inquired of a few of the remaining constitution members still living in Alaska as to why the "freedom of conscience" was not inserted into Article I, the Declaration of Rights. The general response was that "it was never discussed... no one brought up the issue."

The absence of such a crucial, unalienable right may have to do partly with the original skeleton model of a constitution, which was designed by the American Municipal Association. This model, which the convention members used as a starting point, was never questioned in many areas, nor

were scholarly comparisons made to other state constitutions. The delegates, working in the middle of a very cold Fairbanks winter, directly preceding the Christmas holiday season, were pushed to finish their task in a short period of time.

The delegates--and the general public at the time--were under the impression that this was only a temporary "model and modern" framework for a state constitution that would be adjusted at a constitutional convention after statehood was realized. The temporary document was to be used to help push the people into statehood--"a vote for the constitution" was "a vote for statehood." Despite the addition of numerous amendments in the years that followed, no Alaska state constitutional convention has ever been called.

Before we became a state, 46 of the 48 states specifically guaranteed freedom to exercise religion and freedom of conscience, in addition to the freedom of religion. Colorado's bill of rights, for example, says that citizens, "shall forever hereafter be guaranteed the free exercise and enjoyment of religious profession and worship, without discrimination." Other states, such as Alabama, Arizona, Virginia and West Virginia, use the broader term, "freedom of conscience."

It is time to correct this glaring deficit in our constitution, and I believe Alaskan voters will support such a change if given the opportunity at this year's general election.

I appreciate your expeditious attention to my request for a hearing. If you need additional background material relating to this fundamental right, please contact me or my staff at 465-3783. Thank you.

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

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Sponsor Statement

HJR 5 - Proposing an amendment to the Constitution of the State of Alaska relating to the freedom of conscience

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

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

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska and the US Constitutions. In 1972, we added to the state constitution the right to privacy. Perhaps the right to freedom of conscience has simply been taken for granted, as implied by the protection of the freedom of religion, or as codified in Alaska statutes

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

Any convoluted rationalization of a social policy that forces a person to participate in what he or she considers to be murder puts Alaska at the doorstep of Nazi Germany of the 1930s or of the several communist despotisms of the 30s, 40s and 50s, up to and including the 70s, 80s and 90s.

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

Sectional Analysis

HJR 5

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

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

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

REPRESENTATIVE
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STATE CAPITOL
JUNEAU, AK 99801-1182

HOME 333-6990
355 DONNA DRIVE, #11
ANCHORAGE, AK 99504

To: Rep. Joe Green, Chair
House Judiciary Committee Members

From: Rep. Terry Martin

Re: HJR 5

Date: February 2, 1998

In light of a discussion in House State Affairs Committee of the pro's and con's of freedom of religion and conscience, I offer the following observations from Supreme Court Justice Sandra Day O'Connor:

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

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

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

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

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

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

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

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

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

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

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Alaska's Constitution

A CITIZEN'S GUIDE

Third Edition • 1992

Alaska Legislative Research Agency • Gordon S. Harrison

Section 22. Right of Privacy

> **The right of privacy is recognized and shall not be infringed. The legislature shall implement this section.**

This section was added to the constitution by amendment in 1972. It was prompted by the fear of the potential for misuse of computerized information systems, which were then in their infancy. Delegates to the constitutional convention 16 years earlier had also been concerned about the potential for technological intrusion in the lives of ordinary citizens, but then the fear was electronic surveillance and wiretapping. They considered, but ultimately rejected, inclusion of the following language in the section dealing with unreasonable searches and seizures: "The right of privacy of the individual shall not be invaded by use of any electronic or other scientific transmitting, listening or sound recording device for the purpose of gathering incriminating evidence. Evidence so obtained shall not be admissible in judicial or legislative hearings."

In the early 1970s, the Alaska Department of Public Safety was developing the Alaska Justice Information System, a computerized database of information on the criminal history of individuals. Fearful that such a system was the precursor of a "Big Brother" government information bureaucracy, legislators responded with this constitutional amendment, which was handily ratified by the voters.

Alaska is one of a small group of states with a constitutional right of privacy: similar provisions can be found in the constitutions of Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington (some were added by amendment at approximately the same time as Alaska's). The U.S. Constitution does not contain an explicit right of privacy. However, in recent years the U.S. Supreme Court has ruled that basic privacy rights are inferred from the First, Third, Fourth, Fifth and Ninth Amendments.

REPRESENTATIVE
TERRY MARTIN
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MEMORANDUM

February 2, 1998

To: Representative Joe Green, Chairman
House Judiciary Committee

From: Representative Terry Martin

Subject: HJR 5

At your earliest convince, and as your committee workload allows, please schedule HJR 5 for a hearing in the Judiciary Committee.

Attached are background materials relating to HJR 5, which proposes an amendment to the state constitution to protect the individual's freedom of conscience.

As you will recall, the Alaska Supreme Court recently ruled that a person's or an institution's moral objection to participating in an abortion is outweighed by the constitutional right to privacy, which in the court's view underpins a woman's "right" to an abortion. While many Alaskans assume that the freedom of religion clause in our constitution protects an individual's freedom of conscience, the court has decided in the contrary.

When considering the most essential natural rights of men or women, the Alaska Bill of Rights remains in a medieval era. Yes, we the "residents" (indeed, the term "citizens" was not used) are guaranteed freedom of religion. However, one wonders why the framers of the Alaska constitution did not include other guarantees to complement that provision, since we are sometimes prohibited the free exercise of religion.

Recently, I inquired of a few of the remaining constitution members still living in Alaska as to why the "freedom of conscience" was not inserted into Article I, the Declaration of Rights. The general response was that "it was never discussed... no one brought up the issue."

The absence of such a crucial, unalienable right may have to do partly with the original skeleton model of a constitution, which was designed by the American Municipal Association. This model, which the convention members used as a starting point, was never questioned in many areas, nor

were scholarly comparisons made to other state constitutions. The delegates, working in the middle of a very cold Fairbanks winter, directly preceding the Christmas holiday season, were pushed to finish their task in a short period of time.

The delegates--and the general public at the time--were under the impression that this was only a temporary "model and modern" framework for a state constitution that would be adjusted at a constitutional convention after statehood was realized. The temporary document was to be used to help push the people into statehood--"a vote for the constitution" was "a vote for statehood." Despite the addition of numerous amendments in the years that followed, no Alaska state constitutional convention has ever been called.

Before we became a state, 46 of the 48 states specifically guaranteed freedom to exercise religion and freedom of conscience, in addition to the freedom of religion. Colorado's bill of rights, for example, says that citizens, "shall forever hereafter be guaranteed the free exercise and enjoyment of religious profession and worship, without discrimination." Other states, such as Alabama, Arizona, Virginia and West Virginia, use the broader term, "freedom of conscience."

It is time to correct this glaring deficit in our constitution, and I believe Alaskan voters will support such a change if given the opportunity at this year's general election.

I appreciate your expeditious attention to my request for a hearing. If you need additional background material relating to this fundamental right, please contact me or my staff at 465-3783. Thank you.

Exerpt on Sec. 22 - "Right to Privacy"
Alaska's Constitution - A Citizen's Guide
by Gordon S. Harrison
pp 44-46

Like other basic constitutional rights, the right of privacy is not absolute. Reasonable interferences with privacy are tolerated, as are, for example, reasonable restraints on the right of free speech. To judge the acceptability of government interference with citizens' privacy, the courts use the same balancing test applied in other cases where it is alleged that the state has trampled a person's rights: the more significant the right involved, the more important the state's interest must be in adopting the restrictive law or regulation.

The first major judicial interpretation of the new constitutional right of privacy in Alaska arose from a case not involving electronic intrusion, but the use of marijuana in the home. In this landmark case that overturned a state law making it illegal to possess marijuana under any circumstances, the Alaska Supreme Court regarded privacy in the home to be the highest importance and the most deserving of constitutional protection, and found the state's case for regulating the personal use of small amounts of marijuana to be less than compelling (*Ravin v. State,* 537 P.2d 494, 1975). In subsequent cases, however, the court upheld the state laws against the possession of small amounts of marijuana in public (saying the right of personal privacy in public places is of lesser constitutional significance; *Belgarde v. State*, 543 P.2d 206, 1975) and against the possession of small amounts of cocaine in the home (saying the harmful societal effects of cocaine are serious enough to justify the state's regulation of the substance, even in the home; *State v. Erickson*, 574 P.2d 1, 1978).

Many privacy cases in Alaska have arisen in the context of searches and seizures. Of these, the leading case is *State v. Glass* (583 P.2d 872, 1978), in which the Alaska Supreme Court ruled the state could not use as evidence a recording, made without a warrant, of a conversation between the defendant and an informant who possessed a wireless transmitter. Although the U.S. Supreme Court had ruled that recordings of this type were admissible evidence, the Alaska Supreme Court found Alaska's constitutional guarantee protection broader than the inferred right of privacy from the federal constitution: "Were that not the case, there would have been no need to amend the constitution."

According to other decisions of the court, however, not all warrantless recordings of conversation are illegal. Recordings made by a police officer in the normal course of duty may be used as evidence at trial (see, for example, *City of Juneau v. Quinto,* 684 P.2d 127, 1984). Students do not have constitutional protection from searches by school authorities (*D.R.C. v. State,* 646 P.2d 252, Court of Appeals, 1982), nor do fishermen have a reasonable expectation that catches stored in the holds of their vessels will be protected from warrantless searches (*Dye v. State*, 650 P.2d 418, Ct. of Appeals, 1982).

The legislature has not provided the statutory implementation that is expected from the second sentence of this section.

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

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

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

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

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

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

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

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

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

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

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

Editor's notes. — For the constitutionality of statutes similar to this one, see Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), Sendak v. Arnold, 429 U.S. 968, 97 S. Ct. 476, 50 L. Ed. 2d 579 (1976), Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986), Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990), Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990), Planned Parenthood of Southeastern Pennsylvania v. Casey, U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See also 1 Am. Jur. 2d, Abortion and Birth Control, § 3 and 1 C.J.S., Abortion, § 2.

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

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

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

NOTES TO DECISIONS

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

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

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

1 C.J.S., Abortion, § 1 et seq.

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

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

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

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

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

November 21, 1997

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

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

Dear Terry,

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

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

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

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

Very truly yours,

KENNETH P. JACOBUS, P.C.

By Kenneth P. Jacobus
Kenneth P. Jacobus

Thomas Jefferson

on

Freedom of Conscience

THOMAS JEFFERSON.

"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrranical." - 1777

"It is inconsistent with the spirit of our laws and Constitution to force tender *consciences*." - 1781

"But our rulers can have authority over such natural rights only as we have submitted to them. The *rights of conscience* we never submitted, we could not submit. We are answerable for them to God." - 1782

"The freedom of opinion and the reasonable maintenance of it is not a crime and ought not to occasion injury." - 1801

"We are bound, you, I, and every one, to make common cause, even with error itself, to maintain the common *right of freedom of conscience*." - 1803

"It behooves every man who values *liberty of conscience* for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become their own. It behooves him, too, in his own case, to give no example of concession, betraying the common right of independent opinion, by answering questions of faith, which the laws have left between God and himself." - 1803

"No provision in our Constitution ought to be dearer to man than that which protects the *rights of conscience* against the enterprises of the civil authority." - 1809

"This country which has given to the world the example of physical liberty owes it that of *moral emancipation* also." - 1821

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Sponsor Statement

HJR 5 - Proposing an amendment to the Constitution of the State of Alaska relating to the freedom of conscience

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

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

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska and the US Constitutions. In 1972, we added to the state constitution the right to privacy. Perhaps the right to freedom of conscience has simply been taken for granted, as implied by the protection of the freedom of religion, or as codified in Alaska statutes

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

Any convoluted rationalization of a social policy that forces a person to participate in what he or she considers to be murder puts Alaska at the doorstep of Nazi Germany of the 1930s or of the several communist despotisms of the 30s, 40s and 50s, up to and including the 70s, 80s and 90s.

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

Sectional Analysis

HJR 5

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

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

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

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

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

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

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

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

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

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

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

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

Editor's notes. — For the constitutionality of statutes similar to this one, see Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), Sendak v. Arnold, 429 U.S. 968, 97 S. Ct. 476, 50 L. Ed. 2d 579 (1976), Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986), Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990), Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990), Planned Parenthood of Southeastern Pennsylvania v. Casey, U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See also 1 Am. Jur. 2d, Abortion and Birth Control, § 3 and 1 C.J.S., Abortion, § 2.

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

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

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

NOTES TO DECISIONS

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

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

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

1 C.J.S., Abortion, § 1 et seq.

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

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

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

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

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

November 21, 1997

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

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

Dear Terry,

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

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

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

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

Very truly yours,

KENNETH P. JACOBUS, P.C.

By Kenneth P. Jacobus
Kenneth P. Jacobus

Thomas Jefferson

on

Freedom of Conscience

THOMAS JEFFERSON.

"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrranical." - 1777

"It is inconsistent with the spirit of our laws and Constitution to force tender *consciences*." - 1781

"But our rulers can have authority over such natural rights only as we have submitted to them. The *rights of conscience* we never submitted, we could not submit. We are answerable for them to God." - 1782

"The freedom of opinion and the reasonable maintenance of it is not a crime and ought not to occasion injury." - 1801

"We are bound, you, I, and every one, to make common cause, even with error itself, to maintain the common *right of freedom of conscience*." - 1803

"It behooves every man who values *liberty of conscience* for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become their own. It behooves him, too, in his own case, to give no example of concession, betraying the common right of independent opinion, by answering questions of faith, which the laws have left between God and himself." - 1803

"No provision in our Constitution ought to be dearer to man than that which protects the *rights of conscience* against the enterprises of the civil authority." - 1809

"This country which has given to the world the example of physical liberty owes it that of *moral emancipation* also." - 1821

HOUSE JOINT RESOLUTION NO. 5

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE MARTIN

Introduced: 1/13/97
Referred: State Affairs, Judiciary, Finance

A RESOLUTION

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

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

*** Section 1.** Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 25. Freedom of Conscience. An individual may not be denied freedom of conscience and may not be compelled to act in a manner that violates the individual's conscientious objections to the act.

*** Sec. 2.** The amendment 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.