

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 00/2

9457 HOUSE STATE AFFAIRS

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

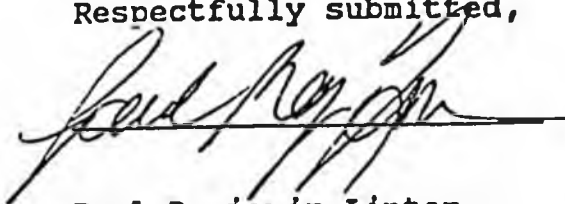
The lower court erred in compelling defendant hospital to make its facilities available for the performance of elective abortions, over the objections of the hospital and its governing board, and in violation of the rights of conscience specifically guaranteed by § 18.16.010(b). That injunction must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

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

Conclusion

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

Respectfully submitted,



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April 29, 1996

sed to repeal euthanasia law

ANCHORAGE
DAILY NEWS

2/03/97

tered gray laptop computer.

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

Dent's death last Sept. 22 and two

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

In confronting the issue, Australia

Please see Back Page, EUTHANASIA

Australia is poised to repeal assisted-suicide law

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

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

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

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

Switzerland also allows doctor-assisted suicide in carefully con-

trolled situations.

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

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

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

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

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

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

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

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

After 3 deaths, Australia poised to repeal euthanasia law

By SETH MYDANS
The New York Times

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

"I just about choked on my ham sandwich," the doctor said. "I was

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

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

tered gray laptop computer.

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

Dent's death last Sept. 22 and two

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

In confronting the issue, Australia

Please see Back Page, EUTHANASIA

ANCHORAGE
DAILY NEWS

2/03/97

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

Continued from Page A-1

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

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

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

Six senators had flown to Darwin

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

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

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

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

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

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

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

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 5

Revision Date	Dept. Affected
Title	Office of the Governor
Const. Amdt.: Relating to freedom of conscience	BRU
	Elective Operations
	Component
	General and Primary Elections
Sponsor	Representative Martin
Requester	House State Affairs
	Component Serial No.
	#22

Expenditures/Revenues

(Thousands of Dollars)

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES []						
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FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF		3.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	3.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: none

POSITIONS

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Full-time		0				
Part-time		0				
Temporary		0				

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

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

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

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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



December 2, 1997

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

Dear Representative James:

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

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

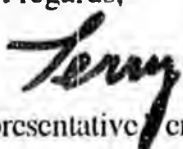
I have for many years held the view that our freedom of religion clause would not protect Alaskans who chose to exercise their freedom of conscience, because when the courts split hairs, the one is separate from the other. Now that we have the definitive answer from the Supreme Court, I believe our most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

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

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

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

Best regards,


Representative Terry Martin

enclosures



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

425 G STREET, SUITE 920
ANCHORAGE, ALASKA 99501-2140
TELEPHONE (907) 277-3333
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November 21, 1997

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

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

Dear Terry,

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

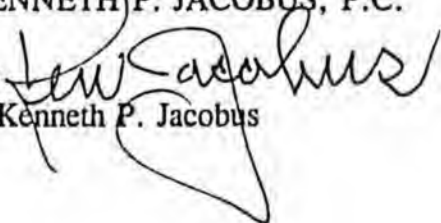
I was also very disappointed in the treatment given the constitutional right to free expression of religion. The Supreme Court of Alaska has not treated religious beliefs with much regard. A recent example is Swanner v. Anchorage Equal Rights Commission, 868 P.2d 301 (Alaska 1994), in which the Court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

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

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

Very truly yours,

KENNETH P. JACOBUS, P.C.

By 
Kenneth P. Jacobus

Sec. 18.16.010. Abortions. (a) An abortion may not be performed in this state unless (1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

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

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

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

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

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

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

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

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

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

Editor's notes. — For the constitutionality of statutes similar to this one, see *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), *Sendak v. Arnold*, 429 U.S. 968, 97 S. Ct. 476, 50 L. Ed. 2d 579 (1976), *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986), *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 926, 111 L. Ed. 2d 344 (1990), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See also 1 Am. Jur. 2d,

Abortion and Birth Control, § 3 and 1 C.J.S., *Abortion*, § 2.

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

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

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

NOTES TO DECISIONS

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

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

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

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

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

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

Sectional Analysis

HJR 5

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

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

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

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ANNOTATED LAWS OF MASSACHUSETTS
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*** THIS SECTION IS CURRENT THROUGH CHAPTER 34, APPROVED 6/2/95 ***

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

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

@ 12P. Observance of Civil Rights Week

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

HISTORY: 1952, 104.

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

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

Ga. Const. Art. I, @ 1, Para. III. (1995)

PARAGRAPH III. Freedom of conscience

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

NOTES:

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

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

LAW REVIEWS. --For article, "Freedoms of the First Amendment in Georgia," see 15 Ga. B. J. 405 (1953). For article, "Religious Liberty Law and the States," see 3 Ga. St. U. L. Rev. 19 (1987).

For note discussing compulsory medical attention in light of constitutional protection of freedom of religion, see 22 Ga. B. J. 558 (1960). For note, "Christmas Carols in School Assemblies May Be Constitutional," see 31 Mercer L. Rev. 627 (1980).

JUDICIAL DECISIONS

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

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

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8TH DOCUMENT of Level 1 printed in FULL format.

MINNESOTA STATUTES 1994

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

CONSTITUTION OF THE STATE OF MINNESOTA

Adopted October 13, 1857.

Generally Revised November 5, 1974

ARTICLE I BILL OF RIGHTS

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

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

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

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

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

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

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-3373.

THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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

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

COMPTON, Chief Justice.

I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; (4) AS 13.16.010(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.² VHA permitted lawful abortion procedures at its facility from 1970 until 1992.² In 1992 abortion opponents organized a campaign to

AS 13.16.010 provides:

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

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

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

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

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

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

judgment⁴ 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.

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. Branley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

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

1. The United States Constitution

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

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

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

federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 333, 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).⁵ Thus, our

⁵ 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. Messler v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy

⁶(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹ The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nators 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. YHA'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."²² Id. at 23. 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

²² One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.

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

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

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

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

based on health care demand and resources. AS 18.07.041.¹³ This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

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

¹³ AS 18.07.041 provides:

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

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

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

grants from the State legislature.¹⁵ VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

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

¹⁵(...continued)

Burton money was used when the facilities were rebuilt in the early 1980s.

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

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

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

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

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

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

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

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

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

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

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

¹⁹ AS 18.16.010(b) provides:

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

(continued...)

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

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

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

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

¹⁹(...continued)
under this section.

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

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

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

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

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

The superior court awarded full reasonable attorney's fees to the Coalition. The court based its decision on the factors articulated in Anchorage Daily News v. Anchorage School District, 303 P.2d 402, 404 (Alaska 1990). The superior court concluded that VHA was not a public interest litigant immune from having to pay an award of attorney's fees.²¹

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

STATE OF ALASKA
HOUSE OF REPRESENTATIVES

STATE AFFAIRS COMMITTEE
Representative Jeannette James, Chair



Room 102, Capitol Building, Juneau

Phone 465-3743, FAX 465-2381

CHANGE IN SCHEDULE

Thursday, February 27, 1997:

- 1. SJR 7 AK Nat'l Guard Youth Corps
Exchange Program
Senator Phillips**
- 2. HJR 5 Constitutional Amendment:
Freedom of Conscience
Representative Martin**
- 3. HJR 7 Voter Approval for New
Taxes
Representative Martin**

02/27/97

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PARTICIPANT LIST (ALL PARTICIPANTS)

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PUBLIC HEARING

HOUSE STATE AFFAIRS

LOCATION: ANCHORAGE

HJR 5

MARY

SHIELDS ✓

TESTIFY

HJR 5

KEN

JACOBUS ✓

TESTIFY

HJR 5

THEDA

PITTMAN ✓

TESTIFY

IN THE
SUPREME COURT OF ALASKA

Valley Hospital Association,)
Inc., and James G. Walsh,)
Valley Hospital)
Executive Director,)

Defendants-Appellants,)

vs.)

Mat-Su Coalition for Choice,)
Dr. Susan Lemagie, and)
Jane Does I-IX,)

Plaintiffs-Appellees.)

Docket No. S 7417

Superior Court for
the State of Alaska
Third Judicial District
at Palmer

Hon. Dana Fabe,
Judge Presiding

Case No. 3 PA-92-1207 Civil

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

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

JAN HANSEN, CLERK

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. List of Amici

Sen. Robin L. Taylor (Rep.)
Sen. John Torgerson (Rep.)
Sen. Loren Leman (Rep.)
Sen. Rick Halford (Rep.)
Sen. Lyda N. Green (Rep.)
Sen. Michael W. Miller (Rep.)

"A" District
"D" District
"G" District
"M" District
"N" District
"Q" District

Rep. Joe Green (Rep.)
Rep. Mark Hanley (Rep.)
Rep. Terry Martin (Rep.)
Rep. Sean Parnell (Rep.)
Rep. Jerry Sanders (Rep.)
Rep. Pete Kott (Rep.)
Rep. Vic Kohring (Rep.)
Rep. Scott Ogan (Rep.)
Rep. Al Vezey (Rep.)
Rep. Don Long (Dem.)

10th District
12th District
14th District
17th District
19th District
24th District
26th District
27th District
32nd District
37th District

Applicable Statute

Alaska Statutes, § 18.16.010(b):

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

Statement of the Issue Presented for Review

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

Statement of the Interest of the Amici

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

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

Statement of the Case

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

Statement of the Standard of Review

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

Amici note that, notwithstanding the recognition of an

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

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

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

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

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

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

492 U.S. at 509.

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

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

Id. at 509-10.

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

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

abortions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In Bridgeton, the other authority cited by the lower court, the New Jersey Supreme Court initially held that a quasi-public hospital has an enforceable common law duty to make available the full range of medical services which it is qualified to provide, including elective abortions. Doe v. Bridgeton Hosp, Ass'n, Inc., 366 A.2d at 643-47. While the case was pending in the state supreme court, the New Jersey Legislature enacted a conscience clause intended to protect the rights of both public and private health care institutions. The New Jersey Supreme Court, citing the same two federal cases relied upon by the Alaska Attorney General in his 1978 Opinion, held that "[f]or the state to frustrate [the abortion] right by its action would be violative of the constitutional guarantee." Id. at 647. In view of the Supreme Court's rejection of the reasoning of Nyberg v. City of Virginia and Doe v. Hale Hospital⁹ in Poelker v. Doe and Webster v. Reproductive Health Services, the lower court's reliance on Bridgeton was clearly misplaced. Moreover, the reasoning, if not the result, in Bridgeton was called into question by the New Jersey Supreme Court's later decision in Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).¹⁰

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

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

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

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

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

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

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

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

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

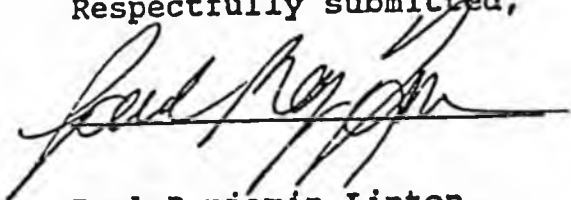
The lower court erred in compelling defendant hospital to make its facilities available for the performance of elective abortions, over the objections of the hospital and its governing board, and in violation of the rights of conscience specifically guaranteed by § 18.16.010(b). That injunction must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

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

Conclusion

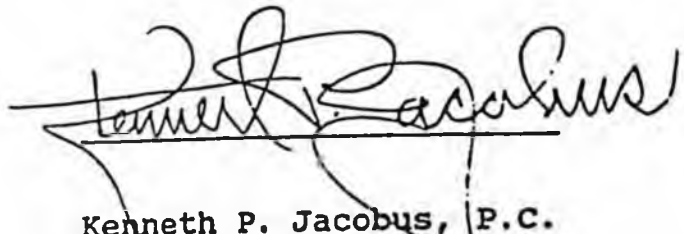
For the foregoing reasons, amici curiae, Members of the Alaska Legislature, respectfully request this Honorable Court to reverse the judgment of the superior court.

Respectfully submitted,



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April 29, 1996

After 3 deaths, Australia poised to repeal euthanasia law

ANCHORAGE
DAILY NEWS
2/03/97

By SETH MYDANS
The New York Times

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

"I just about choked on my ham sandwich," the doctor said. "I was

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

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

tered gray laptop computer.

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

Dent's death last Sept. 22 and two

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

In confronting the issue, Australia

Please see Back Page, EUTHANASIA

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

Continued from Page A-1

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

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

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

Six senators had flown to Darwin

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

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

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

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

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

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

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

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

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

Switzerland also allows doctor-assisted suicide in carefully con-

trolled situations.

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

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

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

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

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

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

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

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 5 | _____

Revision Date _____	Depl. Affected <u>Office of the Governor</u>
Title <u>Const. Amdt.: Relating to freedom of conscience</u>	BRU <u>Elective Operations</u>
Sponsor <u>Representative Martin</u>	Component <u>General and Primary Elections</u>
Requester <u>House State Affairs</u>	Component Serial No. <u>#22</u>

Expenditures/Revenues (Thousands of Dollars)

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES []						
----------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY97) cost: none

POSITIONS

Full-time		0				
Part-time		0				
Temporary		0				

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

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

Prepared by <u>Dana LaTour</u> <i>D. LaTour</i>	Phone <u>465-5347</u>
Division <u>Division of Elections</u>	Date <u>2/24/97</u>
Approved by Co <u>Lt. Governor Fran Ulmer</u> <i>F. Ulmer</i>	Date <u>2/24/97</u>
Agency <u>Office of the Lieutenant Governor</u>	

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HJR

7

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 13, 1997

FURTHER REFERRALS:

Judiciary
Finance

Date of Committee Action: 2/27/97

The STATE AFFAIRS Committee considered:

HIR 7

HOUSE JOINT RESOLUTION NO. 7

VOTER APPROVAL FOR NEW TAXES

Proposing an amendment to the Constitution of the State of Alaska prohibiting the imposition of state personal income taxation, state ad valorem taxation on real property, or state retail sales taxation without the approval of the voters of the state.

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

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

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

fiscal note(s) _____ fiscal note(s) _____

zero fiscal note(s) SI/OT/IC/RS zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Jeannette James</i>			✓	
<i>J. K. V. ...</i>		✓		
<i>...</i>			✓	
<i>...</i>	✓			
<i>...</i>			✓	
<i>...</i>			✓	

CHAIR'S SIGNATURE *Jeannette James*

Sponsor Statement

HJR 7

Proposing an amendment to the Constitution of the State of Alaska prohibiting the imposition of state personal income taxation, state ad valorem taxation on real property, or state retail sales taxation without the approval of the voters of the state.

With the continued successful production of North Slope oil, \$20 billion in their Permanent Fund and another \$3 billion plus in the budget reserve, Alaskans enjoy one of the lowest rates of personal taxation in the US.

We should keep it that way.

On the other hand, Alaskans have hardly any protection against the imposition of taxation by the Legislature, certainly not the kind of protection other states' citizens have. In Alaska, a simple majority of the House and Senate can approve and impose a new tax or raise an existing tax. In many other states, a supermajority vote of anywhere from 60 percent to 80 percent of the elected representatives is required to put new and higher taxes in effect.

While there has not been a serious threat of legislative imposition of the income tax since it was repealed in 1980, bills proposing the personal income tax have been introduced every Legislature since then. Perhaps the greatest effort was made in 1987-88 by then-Governor Steve Cowper, who went so far as to establish an income tax task force which tried to drum up support around the state for the idea; however, the majority in the Legislature has not been inclined to support the income tax.

I believe it is time for the Legislature to give back to the people some of their taxing powers, which few people realize were given away to the Legislature when the vote for statehood took place. The constitutional amendment proposed by HJR 7 would simply require the approval of the majority of Alaskan voters before any of three kinds of statewide taxes could take effect. I am firmly convinced that Alaska's voters have the wisdom to understand the state's financial picture; if that picture becomes so bleak as to require new taxes, the voters should have the final authority to approve them.

Sectional Analysis

HJR 7

Proposing an amendment to the Constitution of the State of Alaska prohibiting the imposition of state personal income taxation, state ad valorem taxation on real property, or state retail sales taxation without the approval of the voters of the state.

Section 1 amends Article IX, sec. 1 of the state constitution by adding a new sentence to read: "A law establishing a State tax on personal income, a State ad valorem tax on real property, or a State retail sales tax shall not take effect until approved by the voters of the State by a majority of the votes cast on the proposed law."

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 approved by the voters, the amendment takes effect 30 days after certification of the election by the Lt. Governor.

STATE OF ALASKA
HOUSE OF REPRESENTATIVES

STATE AFFAIRS COMMITTEE
Representative Jeannette James, Chair



Room 102, Capitol Building, Juneau

Phone 465-3743, FAX 465-2381

**Please add the attached to your
State Affairs packet for HJR 7.**

State Individual Income Tax Rates

Tax rate for tax year 1997 -- as of January 1, 1997

State	---Tax Rates---		# of Brackets	--Income Brackets--		---Personal Exer	
	Low	High		Low	High	Single	Married
ALABAMA	2.0	- 5.0	3	500 (b)	- 3,000 (b)	1,500	3,000
ALASKA	No State Income Tax						
ARIZONA	3.0	- 5.6	5	10,000 (b)	- 150,000 (b)	2,100	4,200
ARKANSAS	1.0	- 7.0 (e)	6	2,999	- 25,000	20 (c)	40 (c)
CALIFORNIA (a)	1.0	- 9.3	6	4,908 (b)	- 223,390 (b)	67 (c)	134 (c)
COLORADO	5.0		1	-----Flat rate-----		-----None-----	
CONNECTICUT	3.0	- 4.5	2	2,250 (b)	- 2,250 (b)	12,000 (f)	24,000 (f)
DELAWARE	0.0	- 6.9	7	4,500	- 30,000	100 (c)	200 (c)
FLORIDA	No State Income Tax						
GEORGIA	1.0	- 6.0	6	750 (g)	- 7,000 (g)	1,500	3,000
HAWAII	2.0	- 10.0	8	1,500 (b)	- 20,500 (b)	1,040	2,080
IDAHO	2.0	- 8.2	8	1,000 (g)	- 20,000 (g)	2,550 (d)	5,300 (d)
ILLINOIS	3.0		1	-----Flat rate-----		1,000	2,000
INDIANA	3.4		1	-----Flat rate-----		1,000	2,000
IOWA (a)	0.4	- 9.98	9	1,112	- 50,040	20 (c)	40 (c)
KANSAS	4.4	- 7.75	3	20,000 (i)	- 30,000 (i)	2,000	4,000
KENTUCKY	2.0	- 6.0	5	3,000	- 8,000	20 (c)	40 (c)
LOUISIANA	2.0	- 6.0	3	10,000 (b)	- 50,000 (b)	4,500 (j)	9,000 (j)
MAINE (a)	2.0	- 8.5	4	4,150 (b)	- 16,500 (b)	2,100	4,200
MARYLAND	2.0	- 5.0	4	1,000	- 3,000	1,200	2,400
MASSACHUSETTS	5.95 (k)		1	-----Flat rate-----		2,200	4,400
MICHIGAN (a)	4.4		1	-----Flat rate-----		2,500	5,000
MINNESOTA (a)	6.0	- 8.5	3	16,510 (l)	- 54,250 (l)	2,650 (d)	5,300 (d)
MISSISSIPPI	3.0	- 5.0	3	5,000	- 10,000	6,000	9,500
MISSOURI	1.5	- 6.0	10	1,000	- 9,000	1,200	2,400
MONTANA (a)	2.0	- 11.0	10	1,900	- 66,399	1,520	3,040
NEBRASKA (a)	2.62	- 6.99	4	2,400 (n)	- 26,500 (n)	69 (c)	138 (c)
NEVADA	No State Income Tax						
NEW HAMPSHIRE	State Income Tax is Limited to Dividends and Interest Income Only.						
NEW JERSEY	1.4	- 6.37	6	20,000 (o)	- 75,000 (o)	1,000	2,000

NEW MEXICO	1.7	-	8.5	7	5,500 (p) - 65,000 (p)	2,650 (d)	5,300 (i)
NEW YORK	4.0	-	6.85	4	8,000 (b) - 20,000 (b)	0	0
NORTH CAROLINA	6.0	-	7.75	3	12,750 (q) - 60,000 (q)	2,500 (d)	5,000 (i)
NORTH DAKOTA	2.67	-	12.0 (r)	8	3,000 - 50,000	2,651 (d)	5,301 (i)
OHIO (s)	0.693	-	7.004	9	5,000 - 200,000	850 (s)	1,700 (i)
OKLAHOMA	0.5	-	7.0 (t)	8	1,000 - 10,000	1,000	2,000
OREGON (a)	5.0	-	9.0	3	2,200 (b) - 5,550 (b)	124 (c)	248 (i)
PENNSYLVANIA	2.8			1	-----Flat rate-----	-----None-----	
RHODE ISLAND	27.5% Federal tax liability					---	---
SOUTH CAROLINA (a)	2.5	-	7.0	6	2,280 - 11,400	2,650 (d)	5,300 (i)
SOUTH DAKOTA	No State Income Tax						
TENNESSEE	State Income Tax is Limited to Dividends and Interest Income Only.						
TEXAS	No State Income Tax						
UTAH	2.3	-	7.0	6	750 (b) - 3,750 (b)	1,988 (d)	3,975 (i)
VERMONT	25% Federal tax liability (w)					---	---
VIRGINIA	2.0	-	5.75	4	3,000 - 17,000	800	1,600
WASHINGTON	No State Income Tax						
WEST VIRGINIA	3.0	-	6.5	5	10,000 (b) - 60,000 (b)	2,000	4,000
WISCONSIN	4.9	-	6.93 (x)	3	7,500 - 15,000	0	0
WYOMING	No State Income Tax						
DIST. OF COLUMBIA	6.0	-	9.5	3	10,000 - 20,000	1,370	2,740

Source: The Federation of Tax Administrators from various sources.

(a) Seven states have statutory provision for automatic adjustment of tax brackets, personal exemption or standard deductions to the rate of inflation. Nebraska indexes the personal exemption amounts only.

(b) For joint returns, the tax is twice the tax imposed on half the income.

(c) tax credits.

(d) These states allow personal exemption or standard deductions as provided in the IRC. Utah allows a personal exemption equal to three-fourths the federal exemptions. Amounts reported include the 1996 index adjustment.

(e) A special tax table is available for low income taxpayers reducing their tax payments.

(f) Combined personal exemptions and standard deduction. An additional tax credit is allowed ranging from 75% to 0% based on state adjusted gross income. Exemption amounts are phased out for higher income taxpayers until they are eliminated for households earning over \$71,000. For tax years beginning after 1996, the tax bracket amount increases to \$4,500.

(g) The tax brackets reported are for single individuals and married households filing jointly. For married households filing separately, the same rates apply to income brackets ranging from \$500 to \$5,000.

(h) For joint returns, the tax is twice the tax imposed on half the income. A \$10 filing fee is charge for each return and a \$15 credit is allowed for each exemption.

(i) The tax brackets reported are for single individual and married households filing separately. For married household filing jointly, the rates range from 3.5% for income under \$30,000 to 6.45% for income over \$60,000.

(j) Combined personal exemption and standard deduction.

(k) A 12% tax rate applies to interest, dividends and capital gains.

- (l) The tax brackets reported are for single individuals. For married taxpayers filing jointly, the same rates apply to income brackets ranging from \$24,140 to \$95,920. An additional 0.5% tax is applied to certain income levels.
- (m) Limited to \$10,000 for joint returns and \$5,000 for individuals.
- (n) The tax brackets reported are for single individual. For married couples, the tax rates range from 2.62% for income under \$4,000 to 6.99% over \$46,750.
- (o) The tax brackets reported are for single individuals. A separate schedule is provided for married households filing jointly which ranges from 1.4% under \$20,000 to 6.37% for income over \$150,000.
- (p) The tax brackets reported are for single individuals. For married individuals filing jointly, the rate ranges from 1.7% under \$8,000 to 8.5% over \$100,000. Married households filing separately pay the tax imposed on half the income.
- (q) The tax brackets reported are for single individuals. For married taxpayers, the same rates apply to income brackets ranging from \$21,250 to \$100,000. An additional middle income tax credit is allowed.
- (r) Taxpayers have the option of paying 14% of the adjusted federal income tax liability, without a deduction of federal taxes. And additional \$300 personal exemption is allowed for joint returns or unmarried head of households.
- (s) Plus an additional \$20 per exemption tax credit. Tax rates are temporarily adjusted downward for 1996 and 1997, based on the amount of revenue in the general fund. Rates reported are adjusted for the 1996 tax year, statutory rates range from 0.743% to 7.5% with the same brackets.
- (t) The rate range reported is for single persons not deducting federal income tax. For married persons filing jointly, the same rates apply to income brackets ranging from \$2,000 to \$21,000. Separate schedules, with rates ranging from 0.5% to 10%, apply to taxpayers deducting federal income taxes.
- (u) Limited to \$3,000.
- (v) One half of the federal income taxes are deductible.
- (w) If Vermont tax liability for any taxable year exceeds the tax liability determinable under federal tax law in effect on December 31, 1994, the taxpayer will be entitled to a credit of 106% of the excess tax.
- (x) The tax brackets reported are for single individuals. For married taxpayers, the same rates apply to income brackets ranging from \$10,000 to \$20,000.

State Sales Tax Rates

January 1, 1997

State	Tax Rates	-----Exemptions-----		
		Food	Prescription Drugs	Non-prescription Drugs
ALABAMA	4		*	
ALASKA	none			
ARIZONA	5	*	*	
ARKANSAS (6)	4.5		*	
CALIFORNIA (4)	6	*	*	
COLORADO	3	*	*	
CONNECTICUT	6	*	*	
DELAWARE	none			
FLORIDA	6	*	*	*
GEORGIA (3)	4	2%	*	
HAWAII	4		*	
IDAHO	5		*	
ILLINOIS (2)	6.25	1%	1%	1%
INDIANA	5	*	*	
IOWA	5	*	*	
KANSAS	4.9		*	
KENTUCKY	6	*	*	
LOUISIANA	4		*(8)	
MAINE	6	*	*	
MARYLAND	5	*	*	*
MASSACHUSETTS	5	*	*	
MICHIGAN	6	*	*	
MINNESOTA (2)	6.5	*	*	*
MISSISSIPPI	7		*	
MISSOURI	4.225		*	
MONTANA	none			
NEBRASKA	5	*	*	
NEVADA	6.5	*	*	
NEW HAMPSHIRE	none			
NEW JERSEY	6	*	*	*
NEW MEXICO	5			

NEW YORK	4	*	*	*
NORTH CAROLINA	4	3%	*	
NORTH DAKOTA	5	*	*	
OHIO	5	*	*	
OKLAHOMA	4.5		*	
OREGON	none			
PENNSYLVANIA	6	*	*	*
RHODE ISLAND	7	*	*	*
SOUTH CAROLINA	5		*	
SOUTH DAKOTA	4		*	
TENNESSEE	6		*	
TEXAS	6.25	*	*	
UTAH	4.875		*	
VERMONT	5	*	*	
VIRGINIA	3.5		*	(7)
WASHINGTON	6.5	*	*	
WEST VIRGINIA	6		*	
WISCONSIN	5	*	*	
WYOMING (5)	4		*	
DIST. OF COLUMBIA	5.75	*	*	*

Source: Compiled by FTA from various sources.

(1) Some state tax food, but allow an (income) tax credit to compensate poor households. They are: HI, ID, KS, SD, VT, and WY.

(2) 1.25% of the tax in IL and 0.5% in MN is distributed to local governments.

(3) Taxed at 1% after October 1, 1997, fully exempt after October 1, 1998.

(4) Includes a 0.5% temporary tax pending a judicial ruling on school finance.

(5) Tax rate may be adjusted annually according to a formula based on balances in the unappropriated general fund and the school foundation fund.

(6) Effective July 1, 1997, tax rate in Arkansas will be 4.625%, Vermont 4%.

(7) Scheduled to be exempt after July 1, 1998

(8) Exemption does not apply to local sales taxes.

1995 State Tax Revenues

	Per Capita		Percentage of Personal Income	
	(dollars)	Rank	(percentage)	Rank
Alabama	1,194	46	6.6	37
Alaska	3,185	2	13.6	1
Arizona	1,475	25	7.9	20
Arkansas	1,366	34	8.0	17
California	1,686	15	7.4	25
Colorado	1,209	45	5.5	49
Connecticut	2,282	4	7.6	23
Delaware	2,215	5	9.0	6
District of Columbia	4,400	1	6.1	42
Florida	1,312	42	6.5	38
Georgia	1,317	41	10.2	3
Hawaii	2,422	3	8.4	10
Idaho	1,490	24	5.9	45
Illinois	1,402	28	6.8	32
Indiana	1,386	31	7.7	21
Iowa	1,550	19	7.1	29
Kansas	1,468	26	9.2	5
Kentucky	1,028	16	6.0	44
Louisiana	1,077	49	7.6	22
Maine	1,460	27	6.4	40
Maryland	1,599	17	7.3	26
Massachusetts	1,910	7	8.3	13
Michigan	1,856	10	8.9	7
Minnesota	2,024	6	8.5	9
Mississippi	1,334	39	6.2	41
Missouri	1,268	44	8.0	18
Montana	1,395	29	6.7	36
Nebraska	1,356	37	7.9	19
Nevada	1,763	11	3.3	51
New Hampshire	798	51	6.1	43
New Jersey	1,713	13	10.0	4
New Mexico	1,688	14	7.2	28
New York	1,891	8	8.1	16
North Carolina	1,588	18	8.3	14
North Dakota	1,495	22	6.4	39
Ohio	1,362	36	7.6	24

Oklahoma	1,347	38	6.8	33
Oregon	1,365	35	6.8	34
Pennsylvania	1,513	20	6.7	35
Rhode Island	1,506	21	7.2	27
South Carolina	1,297	43	5.1	50
South Dakota	952	50	5.7	47
Tennessee	1,124	47	5.5	48
Texas	1,084	48	8.1	15
Utah	1,371	32	6.8	31
Vermont	1,370	33	5.8	46
Virginia	1,327	40	8.4	12
Washington	1,877	9	8.9	8
West Virginia	1,494	23	8.4	11
Wisconsin	1,763	12	7.0	30
Wyoming	1,388	30	13.5	2
U.S. Total	1,528		7.0	

Source: U.S. Bureau of the Census and Bureau of Economic Analysis.

1995 State Tax Collections by Source

(Percentage of Total)

	General Sales	Selective Sales	Ind. Income	Corp. Income	Other Taxes
Alabama	26.9	25.2	29.2	4.7	14.1
Alaska	0.0	5.3	0.0	27.5	67.3
Arizona	44.5	13.3	23.8	6.7	11.6
Arkansas	38.4	17.3	30.9	5.6	7.8
California	33.2	9.3	34.4	10.8	12.3
Colorado	27.2	15.1	46.4	4.2	7.2
Connecticut	31.7	17.9	33.1	9.4	7.9
Delaware	0.0	15.2	35.4	12.2	37.2
Florida	57.3	19.8	0.0	5.1	17.8
Georgia	37.3	9.7	40.5	6.9	5.6
Hawaii	47.4	15.0	32.2	1.6	3.7
Idaho	33.2	13.8	34.6	7.5	10.9
Illinois	29.9	20.9	32.0	8.9	8.2
Indiana	33.7	10.8	40.5	10.9	4.2
Iowa	33.2	13.7	36.7	5.0	11.3
Kansas	36.6	13.7	32.7	6.9	10.0
Kentucky	26.7	19.8	31.3	5.4	16.7
Louisiana	31.9	19.6	22.7	6.1	19.8
Maine	35.9	15.2	35.3	3.5	10.1
Maryland	24.2	19.2	42.2	4.5	9.9
Massachusetts	21.4	10.8	51.5	10.4	5.9
Michigan	33.1	10.2	30.9	12.0	13.8
Minnesota	29.4	15.3	39.3	7.1	8.9
Mississippi	47.0	20.3	19.0	5.6	8.1
Missouri	34.8	13.8	37.5	5.5	8.5
Montana	0.0	20.5	30.6	6.2	42.6
Nebraska	35.2	18.3	33.4	5.6	7.5
Nevada	53.3	30.5	0.0	0.0	16.2
New Hampshire	0.0	59.0	4.1	18.2	18.7
New Jersey	30.4	20.9	33.4	7.6	7.8
New Mexico	42.8	14.0	20.8	5.3	17.1
New York	20.0	14.4	51.3	8.2	6.2
North Carolina	24.5	18.1	41.1	7.9	8.4