ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672
10311 HOUSE JUDICIARY

SB

363

LEGAL SERVICES

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MEMORANDUM May 11, 2002

SUBJECT: HCS CSSB 363(JUD)

TO: Representative Norm Rokeberg, Chair
Attn: House Judiciary Committee

FROM: Pam Finley
Revisor of Statutes

Enclosed is the referenced CS. Please note that at secs. 1, 3, 4, 5 and 9 we have added references to ch. 1, SLA 2002 (which took effect April 16) and in secs. 1, 3 and 5 we have added a reference to nongroup entity in the statutory language. (The reference to nongroup entity in sec. 4 was already in the bill.) Normally I wait until the end of the session to reconcile bills that amend the same statute, but in this case reconciling the repeal and reenactment of AS 15.13.040(d) in sec. 1 of HCS CSSB 363(JUD) with the amendment of the same subsection in ch. 1, SLA 2002 could be done in two different ways. To avoid any questions about the legislature's intent on this point, I have simply added nongroup entities to the list in sec. 1. This assumes that the legislature intends to have the nongroup entities report expenditures in the same manner as the other groups. Please let us know if this is not your intention.

Also, I would like to bring to your attention one more oddity regarding this bill and ch. 1, SLA 2002. Section 6 of ch. 1, SLA 2002 adds AS 15.13.040(j), which requires nongroup entities to report certain contributions to and by the nongroup entity. Section 4 of HCS CSSB 363(JUD) also requires individuals, persons, nongroup entities and groups to report certain contributions made by the individual, person, nongroup entity or group. There is some duplication, but in general the ch. 1 provision imposes more onerous reporting requirements on the nongroup entities than the sec. 4 provision imposes on others. I do not know whether the difference is significant enough to violate the First Amendment or the Equal Protection Clause, but that is always a possibility. Please let us know if you think AS 15.13.040(j), as added by sec. 6, ch. 1, SLA 2002 needs to be amended.

I am enclosing a copy of ch. 1, SLA 2002 for your information. Please let me know if you have questions about this memo.

PF:pjc
02-062.pjc

Enclosure

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: May 9, 2002 **FURTHER REFERRALS:**

Date of Committee Action: 5.10.02

The JUDICIARY Committee considered: **CSSB 363(STA) am**

CS FOR SENATE BILL NO. 363(STA) am **CAMPAIGN COMMUNICATIONS & DISCLOSURES**

"An Act relating to communications and elections, to reporting of contributions and expenditures, and to campaign misconduct in the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date."

Recommends it be replaced with H CS FOR CSSB 363 (JUD) [✓] **Same Title** [ ] **New Title**
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

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

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

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
HJUD/ADM				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
GOV	2			✓

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
	Berkowitz			✓	
	Meyer	✓			
	Coghill			✓	
	JAMES	✓			
	Kookesh			✓	
Chair:	Rokeberg			✓	
Chair:					

Amended

CS FOR SENATE BILL NO. 363(STA) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Amended: 5/8/02
Offered: 5/6/02

Sponsor(s): SENATE RULES COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to communications and elections, to reporting of contributions and expenditures, and to campaign misconduct in the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date."

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

*** Section 1.** AS 15.13.040(d) is repealed and reenacted to read:

(d) Every individual, person, or group making an expenditure shall make a full report of expenditures, upon a form prescribed by the commission, unless exempt from reporting.

*** Sec. 2.** AS 15.13.040(e) is amended to read:

(e) The report required under (d) of this section must contain the name, address, principal occupation, and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission [BY THE CONTRIBUTOR] no later than 10 days after the [CONTRIBUTION OR] expenditure is made. [A COPY OF THE REPORT SHALL BE FURNISHED TO THE

CANDIDATE, CAMPAIGN TREASURER, OR DEPUTY CAMPAIGN TREASURER AT THE TIME THE CONTRIBUTION IS MADE.]

* **Sec. 3.** AS 15.13.040(h) is amended to read:

(h) The provisions of **(d)** [(d)(2)] of this section do not apply to one or more expenditures made by an individual acting independently of any group and independently of any other individual if the expenditures

(1) cumulatively do not exceed $250 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

* **Sec. 4.** AS 15.13.040 is amended by adding a new subsection to read:

delete

(j) Every individual, person, nongroup entity, or group contributing ~~more than~~ $500 or more, calculated on a cummulative basis to a group organized for the principal purpose of influencing the outcome of a proposition shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or group during the calendar year.

Concept. Amend #3 Adopted

* **Sec. 5.** AS 15.13.090 is amended to read:

Sec. 15.13.090. Identification of communication. (a) All [ADVERTISEMENTS, BILLBOARDS, HANDBILLS, PAID-FOR TELEVISION AND RADIO ANNOUNCEMENTS, AND OTHER] communications [INTENDED TO INFLUENCE THE ELECTION OF A CANDIDATE OR OUTCOME OF A BALLOT PROPOSITION OR QUESTION] shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the **communication** [ADVERTISING]. In addition, candidates and groups ~~must~~ may identify the name of their campaign chairperson.

Concept. Amend #2 Adopted

(b) The provisions of (a) of this section do not apply when the **communication** [ADVERTISEMENT]

(1) is paid for by an individual acting independently of any group and independently of any other individual;

(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

* **Sec. 6.** AS 15.13.380(c) is amended to read:

(c) Promptly after the final date for filing statements and reports, the commission shall notify all persons who have become delinquent in filing them [, INCLUDING CONTRIBUTORS WHO FAILED TO FILE A STATEMENT IN ACCORDANCE WITH AS 15.13.040,] and shall make available a list of these delinquents for public inspection. The commission shall also report to the attorney general the names of all candidates in an election whose campaign treasurers have failed to file the reports required by this chapter.

* **Sec. 7.** AS 15.13.390(a) is amended to read:

(a) A person who fails to register when required by AS 15.13.050(a) or who fails to file a properly completed and certified report within the time required by **AS 15.13.040** [AS 15.13.040(d) - (f)], 15.13.060(b) - (d), [15.13.080(c),] 15.13.110(a)(1), (3), or (4), (e), or (f) is subject to a civil penalty of not more than $50 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who fails to file a properly completed and certified report within the time required by AS 15.13.110(a)(?) or 15.13.110(b) is subject to a civil penalty of not more than $500 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who violates a provision of this chapter, except a provision requiring registration or filing of a report within a time required as otherwise specified in this section, is subject to a civil penalty of not more than $50 a day for each day the violation continues as determined by the commission, subject to right of appeal to the superior court. An affidavit stating facts in mitigation may be submitted to the commission by a person against whom a civil penalty is assessed. However, the imposition of the penalties prescribed in this section or in AS 15.13.380 does not

excuse that person from registering or filing reports required by this chapter.

*** Sec. 8.** AS 15.13.400(4) is amended to read:

(4) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

Concept. Amend by Adopted

*** Sec. 9.** AS 15.13.400 is amended by adding new paragraphs to read:

include direct, automatic telemarketing

(13) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing $500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c);

(14) "electioneering communication" means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified;

and

(C) occurs within the 30 days preceding a primary election or a municipal election, or within the 60 days preceding a general election;

(15) "express communication" means a communication that, when read as a whole, and with limited reference to external events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;

(16) "issues communication" means a communication that

(A) directly or indirectly identifies a candidate; and

(B) addresses an issue of national, state, or local political importance.

*** Sec. 16.** AS 15.56.014(a) is amended to read:

(a) A person commits the crime of campaign misconduct in the second degree if the person

(1) knowingly circulates or has written, printed or circulated a letter, circular, or publication relating to an election, to a candidate at an election, or an election proposition or question without the name and address of the author appearing on its face;

(2) except as provided by AS 15.13.090(b), knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid-for television or radio announcement, or [OTHER] communication**, as that term is defined in AS 15.13.400,** intended to influence the election of a candidate or outcome of a ballot proposition or question without the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the advertising or communication and, if a candidate or group, with the name of the campaign chair;

(3) knowingly **makes a communication, as that term is defined in AS 15.13.400,** [WRITES OR PRINTS AND CIRCULATES, OR HAS WRITTEN, PRINTED AND CIRCULATED, A LETTER, CIRCULAR, BILL, PLACARD, POSTER, OR ADVERTISEMENT IN A NEWSPAPER, ON RADIO OR TELEVISION]

(A) containing false factual information relating to a candidate

for an election;

(B) that the person knows to be false; and

(C) that would provoke a reasonable person under the circumstances to a breach of the peace or that a reasonable person would construe as damaging to the candidate's reputation for honesty **or** [,] integrity, or **to** the candidate's qualifications to serve if elected to office.

*** Sec. 11.** AS 15.13.080 is repealed.

*** Sec. 12.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

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Eagle River, AK 99577
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Senate Rules Committee

Senator Randy Phillips, Chair

SB 363, "An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."

Sponsor Statement

SB 363, "Electioneering Communications", seeks to require parties, groups, and non-group entities making "electioneering communications" to disclose the source of funds used to pay for the communications.

SB 363 defines "electioneering communications" as a communication that is intended to influence the election of a candidate and that clearly identifies one or more candidates or political parties and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Senator John Cowdery, Vice-Chair
Senator Rick Halford, Senator Gene Therriault, Senator Johnny Ellis
Senator_Randy_Phillips@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSSB 363 (STA)
(S) Publish Date: 5/7/02

Revision Date/Time (Note if correction):
Dept. Affected: Admin
Title: An act relating to communications...
BRU: AK Public Offices Commission
Component:
Sponsor: Senate Rules
Requester: Senate Finance
Component No.: 70

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	5.0	0.0	0.0	0.0	0.0	0.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**5.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	5.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**5.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

This bill deletes the requirement that contributors report their maximum contributions to candidates or groups. It also creates new definitions for "communication," "electioneering communication," "express communication," and "issues communication." This new language provides a bright line for the Commission to evaluate when issue communcations are subject to the contribution limits and reporting requirements of the campaign disclosure law (AS 15.13). One time funding is requested for paper, postage, printing and training outreach.

Prepared by: Brooke Miles
Phone 907-276-4176
Division: APOC
Date/Time 5/6/02 4:25 PM
Approved by: Jim Duncan, Commissioner
Date 5/6/2002
Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 363
(S) Publish Date: 5/6/02

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: An Act relating to electioneering communications
BRU: Elections
Component: Elections
Sponsor: Senate Rules
Requester: Senate State Affairs
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	0.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by: Gail Fenumiai, Election Administrative Supervisor
Phone: 465-3935
Division: Division of Elections
Date/Time: 4/22/02 2:31 PM
Approved by: Lieutenant Governor Fran Ulmer
Date: 04/22/2002
Agency: Office of the Lieutenant Governor

Senate Majority News

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For Immediate Release: May 8, 2002 **Contact: Ron Irwin, Press Secretary: 465-3803**

Senate Republicans Get Unanimous Vote on Campaign Finance Reform Legislation

(JUNEAU) – Recognizing that the people of Alaska have a right to be informed about groups or individuals who try to influence the outcome of public elections, the Senate unanimously passed Senate Bill 363 on Wednesday.

Sponsored by the Senate Rules Committee, SB 363 establishes guidelines individuals must follow prior to promulgating a mass message to the public, which is designed to effect the outcome of an election, whether that message is delivered by, radio, television, print ads or direct mailing.

"During the 2000 election year roughly $375,000 was spent in Alaska by people and entities trying to influence the electoral process of the state, by use of mass communication," said Sen. Gene Therriault (R-North Pole), who carried the bill for the Senate Rules Committee. "Many of these people and groups who anonymously finance these politically charged ads, actually represent out of state special interest groups. I believe the people of Alaska have a right to know who is trying to influence their voting decision process."

SB 363 addresses specifically "electioneering communications," which are communications that:

1. Directly or indirectly identifies a candidate;
2. Addresses an issue of national, state or local political importance and attributes a position on that issue to an identified candidate;
3. Occur 30 days preceding a primary or municipal election or 60 days prior to a general election.

SB 363 establishes guidelines, which must be followed when producing or running mass advertisements that qualify as "electioneering communications," as defined above.

First money for mass advertisements cannot come from prohibited entities, which include: corporations, unions or 501 (c) (3) non-profit corporations.

Secondly, all financing of "electioneering communications," as previously defined, must be reported to the Alaska Public Offices Commission and no more than 10 percent of the ad's financing can come from sources outside the state of Alaska.

Finally, funding for mass electioneering communications may not exceed current statutory limitations already in place. The law currently caps political contributions at: $5,000 per year for political parties, $1,000 a year for groups and $500 a year for individuals and non-group entities.

SB 363 now goes to the House of Representatives for their consideration and passage.

###

CAMPAIGN FINANCE REFORM SERIES

REGULATING ELECTIONEERING:
DISTINGUISHING BETWEEN "EXPRESS ADVOCACY" & "ISSUE ADVOCACY"

BY GLENN MORAMARCO

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Brennan Center Board of Directors

About the Brennan Center for Justice

The Brennan Center for Justice is a nonprofit institute devoted to discourse and action on issues of justice central to the jurisprudence of Justice William J. Brennan, Jr. The Center was founded in 1995 by Justice Brennan's family, friends, former law clerks, and admirers, in partnership with New York University School of Law. The Democracy Program is one of the Center's primary program areas. In keeping with its mission to enhance the openness of our democracy, the Brennan Center is a public education and litigation resource for campaign finance reform advocates, local and national public officials, and journalists. The Brennan Center has also worked on ballot access rules. In 1996, it participated in a successful lawsuit challenging New York's Republican presidential primary ballot rules and subsequently published *Voter Choice '96*, a 50-state survey of state ballot access laws.

About the Campaign Finance Reform Series

This paper is one of a series of papers issued by the Brennan Center exploring issues of money and politics. The following titles are part of the series:

Campaign Finance Reform and the Constitution: A Critical Look at *Buckley v. Valeo*
By Burt Neuborne

The Values of Campaign Finance Reform
By Burt Neuborne

A Survey of Existing Efforts to Reform the Campaign Finance Sytem
By Burt Neuborne

The Flow of Money in Congressional Elections
By Kenneth Weine

Regulating Electioneering: Distinguishing Between "Express Advocacy" & "Issue Advocacy"
By Glenn Moramarco

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Cover design by Jennifer Eisenpresser

About the Author

Glenn J. Moramarco is a Senior Attorney at the Brennan Center for Justice at NYU School of Law. He graduated from Yale Law School (1986), where he served as an editor of the *Yale Law Journal*, after receiving a B. Phil. in Philosophy, Politics, and Economics from Oxford (1983) and a B.A. from Harvard (1981). Upon graduating from law school, he clerked for Judge Leonard I. Garth on the U.S. Court of Appeals for the Third Circuit (1986-87). He has spent equal amounts of time in civil and criminal litigation, working for Wilmer, Cutler & Pickering in Washington, D.C. (1987-89) and Fine, Kaplan & Black in Philadelphia (1994-97), with a distinguished five-year tenure as an Assistant U.S. Attorney in New Jersey (1989-94).

Acknowledgments

This paper was prepared under the auspices of the Brennan Center's Democracy Program. The Brennan Center is grateful for the ongoing support of the following foundations, which fund the Center's Democracy Program:

Area Foundation

Carnegie Corporation of New York

Deer Creek Foundation

Ford Foundation

Joyce Foundation

Stewart R. Mott Charitable Trust

Open Society Institute

Florence & John Schumann Foundation

The following people made helpful comments on earlier drafts of this paper: Deborah Goldberg, Jonathan Krasno, Burt Neuborne, and E. Joshua Rosenkranz. The Center is grateful to Jennifer Eisenpresser for the cover design of the papers in this series.

Table of Contents

Introduction

For most of this century, one of the primary goals of federal campaign finance laws has been to restrict wealthy interests from exerting undue influence over the political process. Thus, in 1907, Congress passed legislation that prevented corporations from making financial contributions or expenditures in connection with any election for federal office. Forty years later, the ban was extended to labor unions, and in the early 1970s, Congress passed the Federal Election Campaign Act (FECA), which sought, among other things, to limit contributions by "fat cat" or wealthy donors to political parties and candidates.

Although these reforms did not completely remove the influence of "big money" from politics, the reforms nevertheless enjoyed some modest success in preventing the appearance of corruption that arises when wealthy donors and powerful corporations contribute directly and heavily to political campaigns. However, in recent years these reforms have lost their effectiveness, as wealthy donors, including prohibited contributors such as corporations and labor unions, have evaded the clear intent of the law.

In the 1996 federal elections, corporations, labor unions, political parties, and advocacy groups spent an estimated $135 to $150 million in advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in "issue advocacy" rather than "express advocacy." However, rather than educating the public broadly about issues, the typical "issue ad" mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day. The following is an example of an advertisement, run during the 1996 campaign, which the sponsor claimed was an unregulated "issue ad" rather than a regulated electioneering ad:

> It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

The sponsors of this advertisement claim it is an "issue ad" because, rather than urging viewers to "vote against" or "defeat" Congressman Ganske, the ad merely urges them to call Congressman Ganske. Surgically excising explicit words of advocacy, such as "elect" or "defeat," they claim, converts blatant electioneering into mere "issue advocacy," which is wholly unregulated and immune from federal disclosure laws.

Of course, to the eyes of the voting public, the above advertisement is indistinguishable from electioneering ads that Congressman Ganske's opponent would run. This ad and the vast majority of so-called "issue ads" that appeared during the 1996 federal election season had the unmistakable intent of encouraging the viewer to vote for or against

particular candidates. Although there are no reliable estimates concerning the dollar amount spent on "issue advocacy" in state and local races, it is nevertheless clear that the problem is not limited to federal elections. The presentation of electioneering ads under the guise of "issue advocacy" has given rise to a separate parallel track of wholly unregulated electioneering, a development that threatens to make a mockery of the entire scheme of federal and state campaign finance regulation.

This paper reviews the history of the rise of "issue advocacy," describes the current legal landscape, and explains some of the leading regulatory approaches for defining "express advocacy" and "issue advocacy" in a more realistic and constitutionally-permissible manner. ❑

"Issue Advocacy" and "Express Advocacy" -- The Paradigm Cases

The phrase "issue advocacy," like the phrase "express advocacy," appears nowhere in the statutes that comprise federal campaign finance law. Rather, the concepts were created by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that political advertisements that expressly advocate the election or defeat of a candidate are subject to federal regulation, but political advertisements that merely relate to political issues (without expressly advocating the election or defeat of a candidate) are not subject to regulation.

Relying on the *Buckley* decision, some lower federal court decisions have adopted a very narrow, bright-line test -- the "magic words" test. Under the "magic words" test, regardless of the intent of the speaker or the effect of the advertisement on the listener, an advertisement that fails to use "magic words" such as "elect," "defeat," "support," "reject" (or nearly identical synonyms) is considered "issue advocacy" rather than "express advocacy." However, the proper legal test for defining "express advocacy" and "issue advocacy" remains a hotly contested legal issue. Before that issue can be addressed, it is necessary to understand what it is the law is attempting to differentiate between when it uses the terms "issue advocacy" and "express advocacy."

The paradigms are relatively easy to describe. A paradigmatic "issue advocacy" advertisement: (1) addresses an issue of national or local political importance, (2) discusses only the issue and not the actions of particular political actors in regard to that issue, and (3) is broadcast at a time when legislative or executive action on the issue may be pending or contemplated, but no election is imminent.

Recent examples of the "issue advocacy" paradigm are advertisements that labor unions ran in late 1993, when the Senate was considering ratification of the North American Free Trade Agreement (NAFTA):

> In Washington, big corporations and lobbyists are spending millions making false claims about the NAFTA trade deal. But across America, people going to factories, to farms, to offices know it means jobs going south. Economists who've studied job loss say we'll lose up to 500,000 jobs to NAFTA. Americans want to expand trade, but not by trading away their jobs. NAFTA: It's a bad deal for America, and Americans know it.

When these anti-NAFTA advertisements were broadcast, there was no national election pending, and the primary purpose of the advertisements was to sway public and Congressional opinion on this important public policy choice.

Similarly, in late 1993 and early 1994, when President Clinton proposed comprehensive national health care reform, the Health Insurance Association of America ran a series of paradigmatic "issue advocacy" radio and television spots. The advertisements featured an ordinary American couple -- Harry and Louise -- discussing their fears about the proposed health care reform package. Again, there were no national elections pending, and the advertisements were intended to sway public opinion against health care reform and convince Congress to reject the President's health care initiatives.

A paradigmatic "express advocacy" advertisement: (1) names one or more individual candidates for public office, (2) attributes one or more actions or beliefs to the candidate, (3) appears in close proximity to an election, and (4) explicitly urges the viewer to vote either for or against the candidate. The following advertisement is an example of "express advocacy":

> Senator Smith is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost jobs. What's worse, Senator Smith's made a career of putting the rights of criminals ahead of the rights of victims. Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong, that's liberal, but that's Senator Smith. On Tuesday, vote against Senator Smith.

The majority of political advertisements that appear during an electoral season fall in between these paradigms. The decision to classify an advertisement as either "express advocacy" or "issue advocacy" has enormous practical implications. If the communication is deemed to be "express advocacy," then three consequences follow under federal election law. First, the communication is subject to disclosure rules. FECA requires that speakers engaging in "express advocacy" disclose the sources of their money and the nature of their expenditures. Second, the communication is subject to source restrictions. FECA bars certain speakers, such as corporations and unions, from spending money to engage in "express advocacy." Third, the communication is subject to fund-raising restrictions. FECA limits not only the sources from which speakers may raise their money, but also the size of contributions they may receive.

If, however, the communication is deemed to be "issue advocacy," then the communication is not, and indeed cannot constitutionally be, subject to regulation, including source restrictions, fund-raising restrictions, or even public disclosure. Thus, it is vitally important that campaign finance law be able to distinguish intelligently between "issue advocacy," which is intended to educate the public about important public issues, and "express advocacy," which is intended to persuade a voter to support or defeat a particular candidate at the polls. ❑

The Supreme Court Invents "Issue Advocacy"

In 1974, on the heels of President Nixon's resignation and public hearings on the Watergate scandals, Congress built on reforms begun initially in 1971, and enacted FECA -- a comprehensive set of campaign reforms that established: (1) contribution limits for donations to politicians and political parties; (2) expenditure limits that applied to private parties, political parties, and those seeking public office; (3) disclosure rules for both contributions and expenditures; and (4) public financing of presidential elections. These reforms, which were set to go into effect with the upcoming 1975-76 election cycle, were immediately challenged in the courts.

The Supreme Court reviewed the constitutionality of FECA in *Buckley v. Valeo*, 424 U.S. 1 (1976). In general, the Court upheld the disclosure rules and the public financing of presidential elections. However, on the issue of limits on campaign contributions and expenditures, the Court issued a split decision. The Court upheld the limits on contributions as necessary to further the government's compelling interest in avoiding corruption or the appearance of corruption. However, the Court struck down the limits on expenditures as violating a candidate's First Amendment rights without serving a compelling government interest.

FECA attempted to regulate not only candidate and party expenditures, but also expenditures by private parties. One section of FECA imposed a $1,000 limit on expenditures "relative to a clearly identified candidate." Another section of FECA imposed reporting requirements for persons who make independent expenditures of over $100 "for the purpose of influencing" a federal election. The Court in *Buckley* concluded that these regulations presented potential problems both of vagueness and overbreadth.

Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of "express advocacy" might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The Court in *Buckley* found that the FECA regulations, which applied to expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. In *Buckley*, the Court was concerned that a regulation that applies to any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public and political importance. For example, the Harry and Louise health care advertisements, which were intended to be "issue advocacy" communications, might nevertheless have the effect of *influencing* viewers to oppose Democrats in general or President Clinton in particular. If the FECA regulations were interpreted to reach all expenditures that merely mention a political candidate or could influence the outcome of a federal election, the sweep would be broad indeed.

In order to avoid these vagueness and overbreadth problems, the Court held that the government's regulatory power under FECA would be construed to reach only funds used for communications that "expressly advocate" the election or defeat of a clearly identified candidate. Thus, it was the Supreme Court, and not the Congress, that invented the distinction between "express advocacy," which may be regulated, and "issue advocacy," which cannot be regulated. Although the words "express advocacy" and "issue advocacy" appear nowhere in the statutory language, they are now an important part of the statutory and constitutional federal election law framework.

The "Magic Words" Test

In an important footnote in the *Buckley* opinion, the Supreme Court provided some guidance on how to decide whether a communication is "express advocacy" or "issue advocacy." The Court stated that its construction of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" It is this footnote from *Buckley* that has led some to conclude that the Supreme Court has adopted a "magic words" test for distinguishing between "express advocacy" and "issue advocacy." Under the "magic words" approach, unless a communication contains one of the words listed by the Supreme Court in this footnote, or a near-perfect synonym, the communication is "issue advocacy," regardless of the intent of the speaker or the likely reaction of any reasonable listener.

Proponents of the "magic words" approach interpret it strictly. Thus, the following advertisement, even if aired within days of an election, would be considered "issue advocacy" by strict constructionists:

> Congresswoman Smith voted to increase income taxes, sales taxes and capital gains taxes by over a billion dollars. Then she voted against the largest property tax cut in history. Is she: (a) a liberal, (b) a big spender, (c) out of touch, or (d) all of the above? If you said "(d) all of the above," you've made the right call. Make another right call to Congresswoman Smith. She never met a tax she didn't hike.

Because the tag line on the ad says "call" Congresswoman Smith rather than "defeat" Congresswoman Smith, it would be deemed an "issue ad" under the strict "magic words" approach. If adopted by the courts, the "magic words" approach, with its narrow and wooden definition of "express advocacy" would create a potentially massive loophole in the campaign finance laws that would allow advocacy groups and prohibited donors to spend unlimited resources on unregulated electioneering advertisements like the one cited above.

The Appellate Courts Disagree About How To Define "Express Advocacy"

The Supreme Court has only once applied the "express advocacy" test to a concrete set of facts, and that case, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1980), has aspects that both support and undermine the "magic words" approach. In that case, Massachusetts Citizens for Life, a nonprofit corporation, published a "Special Election Edition" of its newsletter which urged its readers to "vote pro-life" in an upcoming primary election, listed every candidate for state and federal office, and identified each candidate's view on pro-life issues, together with a disclaimer stating that the newsletter did not endorse any particular candidate.

The Supreme Court held that, despite the disclaimer, the pro-life newsletter contained "express advocacy." The Court began its analysis by returning to *Buckley*, and reiterating that a finding of "express advocacy" depends upon the use of language such as "vote for," "elect," or "support." However, despite the fact that the newsletter used the explicit phrase "vote pro-life," the Court did not limit its analysis to the mere presence or absence of these "magic words." Rather the Court examined the newsletter as a whole and rested its decision on the "essential nature" of the message and what it conveyed "in effect." Thus, *Massachusetts Citizens for Life* can be read as supporting a test for "express advocacy" that looks beyond the mere presence or absence of "magic words" and considers the context and true intent of a communication.

Because the Supreme Court has not definitively settled the issue of how to differentiate between advertisements that constitute "issue advocacy" and advertisements that constitute "express advocacy," the issue has been left to the lower federal courts. The federal courts of appeals have split in their interpretation of "issue advocacy."

One of the earliest decisions in this area is *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). In that case a private citizen, Harvey Furgatch, placed a full page advertisement in the *New York Times* and the *Boston Globe* that was critical of President Carter during the week preceding the 1980 election. Furgatch's advertisement stated that President Carter was "cultivat[ing] the fears, not the hopes, of the voting public," and "degrading the electoral process and lessening the prestige of the office." Furgatch's advertisement accused President Carter of trying "to buy entire cities, the steel industry, the auto industry, and others with public funds" during the election campaign. Finally, the advertisement warned that "[i]f he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT."

The FEC sued Furgatch for, among other things, failing to report his expenditures on these newspaper advertisements. The United States Court of Appeals for the Ninth Circuit held that, even though Furgatch's advertisements did not use any of the "magic words" listed in *Buckley*, they nevertheless expressly advocated the defeat of President Carter, and thus had to be reported to the FEC as independent expenditures.

According to the appellate court, the "magic words" test urged by Furgatch would preserve the First Amendment interest in unfettered expression only at the expense of eviscerating FECA. Nominally independent campaign spenders could too easily circumvent the Act by simply avoiding certain key words while conveying a message that is unmistakably an electioneering message. The Court held that a communication is "express advocacy" when the communication, when read as a whole and with limited reference to external events, is reasonably susceptible to interpretation only as an exhortation to vote for or against a specific candidate.

Despite this important early ruling by the United States Court of Appeals for the Ninth Circuit, the recent trend among federal appellate courts has been to adopt the "magic words" approach for "express advocacy." For example, in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), the FEC brought an enforcement action against the Christian Action Network, alleging that the following advertisement, which was aired in the weeks leading up to the November 3, 1992 presidential election, should not have been funded with corporate money because it expressly advocated the defeat of President Clinton and Vice-President Gore:

Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

Despite the obvious intent of this television commercial, the United States Court of Appeals for the Fourth Circuit, in very strong language, criticized the FEC's position that the ad, which failed to use "magic words" such as "defeat" or "vote against," was expressly advocating the defeat of Clinton and Gore. The court found that the Supreme Court had limited the FEC's regulatory authority to communications containing explicit words urging election or defeat of candidates. ❑

The Real World Practices

Corporations, labor unions, political parties, and advocacy groups have seized upon the "magic words" approach adopted by some courts and have engaged in multi-million dollar electioneering campaigns under the guise of "issue advocacy." A recent report by the Annenberg Public Policy Center at the University of Pennsylvania examined the "issue advocacy" expenditures of 27 organizations in the 1995-96 election cycle (groups such as the AFL-CIO, the NRA, the NEA, and the Sierra Club) and found that these 27 organizations alone spent an estimated $135 million to $150 million in election-related advertising. This was at a time when all federal candidates for office combined (President, Senate, and House of Representatives) spent an estimated $400 million on advertising. Indeed, in some races, "issue advocacy" spending by interested groups exceeded the advertising expenditures of the candidates themselves. As the Annenberg Center noted, this level of spending by unregulated groups is "unprecedented, and represents an important change in the culture of campaigns."

The "issue advocacy" advertisements sponsored by these organizations are virtually indistinguishable from the campaign commercials put out by the candidates. For example, during the 1996 election season, Citizens for the Republic Education Fund, a tax-exempt organization founded by Lyn Nofziger on June 20, 1996, spent hundreds of thousands of dollars on "issue ads" that were intended to help Republican Senate candidates. Citizens for the Republic Education Fund aired the following television commercial against Arkansas Democratic Senate candidate Winston Bryant:

> Senate candidate Winston Bryant's budget as Attorney General increased 71%. Bryant has taken taxpayer funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about $100,000 on new furniture. Unfortunately, as the state's top law enforcement official, he's never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: government waste, political junkets, soft on crime. [Superimposed: Call Winston Bryant and tell him to give the money back.]

Because the ad urges the viewer to "call Winston Bryant," rather than vote against him, the Citizens for the Republic Education Fund considered this an issue advertisement, not subject to federal regulation, rather than "express advocacy," which would have been subject to spending limits and disclosure.

Similarly, the Democratic National Committee in 1996 ran an advertisement in which the announcer states:

> Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would've slashed Medicare $270 billion, cut college scholarships. The President defended our values, protected Medicare. And now a tax cut of $1,500

> a year for the first two years of college, most community colleges free. Help adults go back to school. The President's plan protects our values.

Because the advertisement never used the magic words, "vote for" Clinton or "defeat" Dole, the Democratic National Committee considered this an issue ad that did not expressly advocate the reelection of President Clinton or the defeat of Senator Dole.

The "magic words" approach is a loophole that threatens to swallow the entirety of federal campaign financing law. The bans on corporate and labor union expenditures are rendered meaningless when corporations and labor unions run multi-million dollar advertising campaigns that target individual legislators for defeat under the banner of "issue advocacy." Similarly, the $5,000 limit on contributions to PACs, which was upheld by the Supreme Court, is rendered meaningless when individuals contribute sums substantially in excess of that amount in order to fund multi-million dollar advertising campaigns that attempt to influence the outcome of specific electoral races. And the expenditure limits which the presidential candidates voluntarily agreed to abide by as a condition for receiving public matching funds are rendered meaningless when the national party committees run unregulated advertising campaigns that mirror those of their nominees. ❑

"Magic Words" and First Amendment Jurisprudence

The federal court decisions that reject the Ninth Circuit approach in *Furgatch* and adopt a "magic words" test for "express advocacy" construe *Buckley* as imposing restrictions that are beyond those imposed in any other First Amendment context. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. For example, in another election-related context -- union representation elections -- employers are permitted to make "predictions" about the consequences of unionizing, but they may not issue "threats." Although the courts have developed an extensive jurisprudence to distinguish between "predictions" and "threats," there is no bright-line test, and an employer could harbor considerable uncertainty as to whether the words he is about to utter are either protected under the First Amendment or sanctionable as illegal advocacy.

Similarly, in libel cases involving the press, an area of core First Amendment concern, the Court has eschewed the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead, the Court utilizes a multi-factor analysis that examines, among other things, whether the subject of the statement is a public figure, whether the statement involves matters of public concern, whether the speaker acted with reckless disregard for the truth or falsity of the statement, and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole.

In no area of First Amendment jurisprudence has the Court mandated a wooden, mechanical test that ignores context and purpose. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

Moreover, many of those courts that have adopted the "magic words" approach have applied it uncritically to all of the various different types of possible election law restrictions, and have thereby failed to grapple with the important distinction in First Amendment jurisprudence between restrictions on speech and mere disclosure rules. In *Buckley*, the Court made it clear that the governmental interests that justify disclosure of election-related spending are broader than the governmental interests that justify prohibitions or restrictions on election-related speech. When legislation does not proscribe speech, there is less of a concern about either chilling or vagueness. Thus, even if certain advertisements cannot be prohibited because they are arguably within the ambit of "issue advocacy," it does not follow that the speaker cannot be required to disclose the funding sources for those ads. If a legislature were to pass a law requiring, for example, that the source of funds be disclosed for every communication whose cost exceeds $10,000 and mentions a specific candidate for public office within 60 days of an election, such a law might well be upheld regardless of how "express advocacy" and "issue advocacy" are defined in other contexts.

Finally, and most importantly, even if *Buckley* should be read as limiting the current

regulatory reach of FECA to advertisements using "magic words," that holding would not foreclose future legislatures, either state or federal, from adopting new legislation that regulates electioneering or defines "express advocacy" more broadly. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. For example, in the obscenity context, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), provided specific examples of "hard core" sexual conduct that could be prohibited under state or federal obscenity laws. In a companion case, *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973), the Court stated that, if necessary to eliminate potential vagueness and overbreadth problems in federal obscenity statutes, the Court was prepared to narrowly construe such statutes to reach only those specific examples of "hard core" sexual conduct specifically delineated in *Miller v. California*. However, the Court made it clear that Congress remained free to enlarge upon this narrowing construction and go beyond the specifically enumerated "magic acts." *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. at 130 n.7 ("Of course, Congress could always define other specific 'hard core' conduct.")

This same reasoning doubtless applies in the election law context. In *Buckley*, the Court was confronted with FECA regulations that purported to regulate all expenditures that were "relative to a clearly identified candidate" and "for the purpose of influencing" an election -- two very broad and imprecise phrases. When the Court chose to save FECA from constitutional invalidity by narrowly construing these phrases to reach only "express advocacy," it was forced to invent its own definition of "express advocacy" without any legislative language to use as a guide. Even if the Court intended to limit "express advocacy" in FECA to "magic words," future legislative attempts to regulate electioneering activity are not necessarily bound by that limitation. Future legislatures are, of course, bound by the vagueness and overbreath concerns that undergird the *Buckley* decision. But as long as the legislation is both sufficiently narrow and precise, future legislatures are free to adopt a more refined definition of "express advocacy" and regulate electioneering activity in a manner that accords with political reality. *See Miller v. California*, 413 U.S. at 25 (the function of the Court is not to propose regulatory schemes, but instead to await concrete legislative efforts while providing the general principles for acceptable constitutional definitions). ❑

Recent Attempts To Better Define "Express Advocacy"

Spurred in part by the abuses of the last election cycle, where corporations, labor unions, political parties, and advocacy groups spent hundreds of millions of dollars on advertisements that they claimed were mere "issue ads" despite a clear electioneering intent, the government and reformers inside and outside of government have attempted to codify a definition of "express advocacy" that goes beyond the "magic words" approach and better reflects real world electioneering practices. Prominent among the recent attempts to define "express advocacy" are two different general approaches: (1) a "reasonable person" approach, which has been adopted by the FEC, and (2) a delimited time-period approach, which has been proposed in the Senate. These two approaches demonstrate the tension inherent in any attempt to satisfy simultaneously the Supreme Court's dual concerns regarding vagueness and overbreadth. The "reasonable person" approach tends to tilt in favor of increased breadth of coverage, but sacrifices some clarity. The "delimited time-period" approach offers clarity, but raises issues of potential over- and under-breadth of coverage. Either of these two approaches, however, is a clear improvement over the unworkable "magic words" approach.

The FEC Adopts a "Reasonable Person" Approach

The FEC promulgated a regulation which incorporated a "reasonable person" approach into its definition of "express advocacy." Under the regulation, "express advocacy" is defined to include not only those communications which contain "magic words," but also communications that "[w]hen taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s) . . . ." The regulation further states that, under its reasonable person approach, the electoral portion of the communication must be "unmistakable, unambiguous, and suggestive of only one meaning."

The definition of "express advocacy" contained in this FEC regulation attempts to codify the expanded definition of "express advocacy" that met with the court's approval in *Furgatch*. It goes beyond "magic words" by incorporating a "reasonable person" standard that applies in only a very narrow set of circumstances. In short, if "magic words" are not used, the advertisement is "express advocacy" only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of "magic words."

Despite its narrow reach, this regulation was immediately challenged in the courts as an unconstitutional encroachment on free speech. In *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8 (D. Me. 1996), a non-profit membership corporation brought suit in federal district court in Maine, arguing that this definition of "express advocacy" was beyond the FEC's authority because it was both too broad and unconstitutionally vague. The trial court concluded that this FEC definition of "express advocacy," although derived from the appellate language in the *Furgatch* opinion,

goes further than permitted by Supreme Court precedent. In a thoughtful opinion, the trial court nevertheless showed great sympathy for the FEC's regulatory attempt:

> [T]he Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions. . . . Language, moreover, is an elusive thing. The topic here is communication and it is commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. . . . One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. [This] appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

Despite these words of endorsement, the court reluctantly concluded that *Buckley* and *Massachusetts Citizens for Life* required the more rigid "magic words" approach. The court believed that the Supreme Court endorsed a bright line test in order to protect free speech, regardless of the effect on enforcement of the election laws. As the court noted, "[t]he result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way." Thus, although the court candidly indicated that it believed that "the FEC had the better of the argument on its regulation so far as the logic of language is concerned," it nevertheless concluded that *Buckley* had foreclosed anything other than the narrow "magic words" test.

This trial court decision was affirmed by the United States Court of Appeals for the First Circuit. Because that decision conflicts with the decision by the United States Court of Appeals for the Ninth Circuit in *Furgatch*, the government asked the Supreme Court to review the case and resolve the split among the appellate courts. The Supreme Court declined to consider the case, and thus the split remains.

Senators Propose a Delimited Time Period Approach

In response to criticism that the "reasonable person" approach and other similar tests that involve subjective criteria are too vague, some reformers have sought to define "express advocacy" through clearly delimited criteria that expand upon the "magic words" approach. Prominent among these types of reforms is a "delimited time period" approach. Under this approach, any advertisement that airs within a specified period of time prior to an election is deemed "express advocacy" if it refers to a specifically identified candidate.

In the McCain-Feingold Bill introduced in the Senate in 1997, for example, the definition of "express advocacy" included not only

communications that contain "magic words," but also communications that advocate the election or defeat of a candidate by "referring to one or more clearly identified candidates in a paid advertisement . . . within 60 calendar days preceding the date of an election. . . ." Under this delimited time period approach, a potential speaker knows with certainty which advertisements will be deemed "express advocacy," since the criteria -- explicitly referring to a candidate and the date on which the advertisement is communicated -- are clear and objectively determined.

The principal objection leveled against the delimited time period approach is that it is potentially overbroad. One can imagine an advertisement which, although its intent is to influence the debate on an issue, mentions or depicts a political candidate who is strongly identified with that issue. Thus, for example, opponents of the Vietnam War might desire to air an anti-war advertisement that depicts President Johnson, or opponents of some more recent congressional initiative might desire to produce advertisements that depict Newt Gingrich.

Despite these theoretical possibilities, the delimited time period approach is based on the common-sense recognition that, in the real world, advertisements that depict candidates and are run shortly before an election are almost invariably intended to influence the election or defeat of the depicted candidate. In fact, the public rarely sees commercials depicting a politician or political candidate except immediately before an election, and those commercials are broadcast in that time frame precisely because they are intended to influence the outcome of the imminent election.

Under McCain-Feingold's delimited time period approach, a person who desires to produce an issue advertisement is given clear notice of what is and is not permissible. Advertisements that simply discuss issues, without naming candidates are always permissible. Advertisements that are communicated more than 60 days prior to an election must simply avoid the use of "magic words." Advertisements that are communicated within 60 days of an election can discuss issues, as long as the ads do not depict a particular candidate.

The commercials listed below in the column on the left, all of which were broadcast during the 1996 election, were considered issue ads by their sponsors. Under the McCain-Feingold proposal, these advertisements would all be recharacterized as "express advocacy." However, the advocacy organizations, if their true intent is to educate the public rather than influence the outcome of a specific election, could easily reformulate these ads as shown in the column on the right, and run those advertisements any time, even within days of an election. Additionally, because the ads in the column on the left fail to use "magic words," under the McCain-Feingold proposal they can be broadcast without change as "issue ads" when an election is more than 60 days away. ❑

EXPRESS ADVOCACY

Announcer: They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. But Congressman X voted five times to cut their Medicare. Even their nursing home care. To pay for a $16,892 tax break he voted to give the wealthy. Congressman X, it's not your money to give away. Don't cut their Medicare. They earned it.

Announcer: Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call Representative X today. Ask him why he voted against the Flag Protection Amendment. Against the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

Announcer: Election year. There'll be a lot flying through the air. But when you look through the mud, you see what Congressman X has helped to achieve: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. Call Congressman X and tell him to keep on reforming our government.

ISSUE ADVOCACY

Announcer: They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. Now *Congress* wants to cut their Medicare, even their nursing home care. Why? To pay for a $16,892 tax break for the wealthy. *Write or phone your Congressman and tell him* not to cut Medicare. They earned it.

Announcer: Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call *your Congressman and ask him to support* the Flag Protection Amendment. *Get Congress to support* the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

Announcer: Election year. There'll be a lot flying through the air. But when you look through the mud, you see what *Congress* has achieved: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. *Call your Congressman and urge* him to keep on reforming our government.

As the above examples illustrate, it is possible to define "express advocacy" in a manner that both upholds the intent of the federal election laws (by preventing blatant electioneering with unregulated expenditures), while providing clear notice to advocacy groups concerning the limits imposed on "issue advocacy" when an election is imminent. Although the delimited time period approach has a broader sweep than some advocacy groups might ideally desire, it nevertheless provides a very wide berth for true issue-oriented campaigns, even when they are conducted in the midst of a federal election. The rule of thumb would be, if you are interested in advancing an issue, rather than a candidate, then stick to the issue being advanced, rather than the political personalities who may be associated with the issue, at least when an election is imminent.

Additional Approaches and Refinements

The "reasonable person" approach and the delimited time-period approach do not, of course, exhaust the spectrum of possible reforms that can provide the requisite level of certainty without prohibiting too much non-electioneering speech. Another model for reform is an intent-based approach, which attempts to regulate advertisements based on the speaker's actual intent. Under this approach, a statute might prohibit, for example, advertisements in which the speaker's "primary purpose" is to influence voters to elect a clearly identified candidate.

The intent-based approach raises no serious concerns in regard to overbreadth — it is narrowly-tailored to reach only those advertisements that are truly intended to be electioneering ads. Neither is it impermissibly vague, for if there is one thing that any individual speaker surely knows, it is his or her own purpose or intent. Of course, the problem arises at the enforcement stage, since although an individual speaker will know his or her own intent, that intent cannot be objectively ascertained by a fact-finder. In practice, the enforcement of an intent-based approach would likely mirror the enforcement of a "reasonable person" approach. A person is presumed to intend the normal consequences of his actions, and regulators would assume that the intent of an advertisement can be discerned from how the ad is received by the viewing public.

A regulatory solution to defining "express advocacy" and "issue advocacy" can adopt one or more of these approaches, in whole or in part. There are also a multitude of refinements that can be made to any of these approaches. For example, one could add a dollar threshold, adopt various targeting requirements, adopt higher burdens of proof, use legal presumptions, or allow limited exemptions, to name just a few possibilities.

A dollar threshold, for example, is useful for insuring that the election law does not inhibit *de minimis* electoral communications and likewise does not become a trap for small and unsophisticated groups not engaging in a significant amount of electioneering. Thus, a statute could specify that expenditures by an individual or organization during an election cycle that, in the aggregate, amount to less than perhaps $10,000 are not subject to regulation.

A separate targeting requirement is helpful in ensuring that the regulations are narrowly tailored to reach advertisements that are in fact intended to influence the outcome of a particular election. Thus, a regulation could prohibit communications that refer to a clearly identified candidate and are "targeted to or substantially distributed in the geographic area in which the

candidate is seeking election." Under this refinement, if the Sierra Club, for example, wants to educate the American public concerning the anti-environmental record of the Speaker of the House, it can do so during an election year if the ads are run nationally rather than targeted to the media market for the Speaker's district.

Another method for addressing potential overbreadth problems in the "reasonable person" or intent-based approaches is to raise the standard of proof required for an exercise of regulatory power. For example, there is a world of difference between regulating an advertisement which a reasonable person could interpret as containing an electioneering message, and regulating advertisements that no reasonable person could take as containing anything other than an electioneering message. The first approach sweeps in all ads that are arguably electioneering, while the latter approach sweeps in only those ads that are indisputably electioneering. Similarly, an intent-based approach could require a regulator to present "clear and convincing" evidence of a speaker's electioneering intent before finding an election law violation, a standard which would reduce the likelihood of government over-regulation of speech that is close to the line.

The use of presumptions provides another potential refinement that can serve to address the overbreadth issue in regard to any of these approaches. For example, an intent-based approach could incorporate a rebuttable presumption that ads which mention a candidate and are aired within a certain time frame are for an electioneering purpose. Because the presumption is rebuttable, rather than conclusive, there is less risk of overbreadth. Thus, the Vietnam War protestors discussed above could air their advertisement depicting President Johnson, although they would be on notice that, if the ad is run close to an election in which President Johnson is a candidate, the burden will be on them to demonstrate their non-electioneering intent. The use of objective presumptions, while providing speakers with a high degree of certainty concerning what type of speech will normally be subject to regulation, also provides a safety-valve that allows speakers to demonstrate that their communication, although in a format usually associated with electoral advocacy, is in fact not electioneering.

Finally, exemptions can also be provided for specific electioneering conduct that raises heightened First Amendment concerns. For example, an exemption can be provided for speech with an electioneering message that is communicated solely to an organization's own membership. Such an exemption eliminates the possibility that prohibitions on electioneering will attempt to reach regular editions of a newsletter put out by a corporation or labor union and sent only to their members. Similarly, an exemption can be tailored for non-partisan voting cards, such as those put out by the League of Women Voters.

As this short discussion indicates, reform initiatives are not limited to any single approach for defining "express advocacy." There are several different types of approaches that provide the requisite level of certainty without restricting too much speech that truly is not electioneering in nature. Likewise, there are many refinements which can, in principle, help make the major approaches more narrowly-tailored to reach only electioneering speech. ❑

Conclusion

Any attempt by campaign finance reformers to expand the definition of "express advocacy" beyond "magic words" will likely lead to a court challenge until the Supreme Court resolves the split among the appellate courts concerning this issue. While the Court in *Buckley* was properly concerned that an ambiguous test for "express advocacy" might serve to chill constitutionally protected "issue advocacy," that concern does not justify a wooden "magic words" test that elevates form over substance and eviscerates the effectiveness of the entire regulatory scheme governing electioneering. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. It is unlikely that the First Amendment requires, in the area of election regulations alone, a mechanical, formulaic test that readily invites evasion.

The challenge facing campaign finance reformers seeking to regulate electioneering communications is to develop a test for "express advocacy" that meets the Supreme Court's dual concerns regarding vagueness and overbreadth, which are necessarily in tension with each other. The test must be clear enough so that persons or organizations seeking to engage in political advertising will be able to determine with reasonable certainty beforehand whether an advertisement will be treated as regulated "express advocacy." Additionally, the test must be broad enough to cover situations in which an electioneering intent and message are clear, but not so broad as to sweep in true "issue advocacy." Recent proposals by the FEC and Congressional reformers are promising attempts to define "express advocacy" and "issue advocacy" in both a more realistic and a constitutionally permissible manner. ❑

BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

161 Avenue of the Americas, 5th Floor, New York, NY 10013 (212) 998-6730 / Fax (212) 995-4550

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSSB 363 (STA) am
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Admin
Title: Campaign Comm. & Disclosures
BRU: AK Public Offices Commission
Component:
Sponsor: Senate Rules
Requester: House Judiciary
Component No.: 70

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by: Heather Nobrega, Counsel
Phone 907-465-4990
Division: House Judiciary Committee
Date/Time 5/10/02 9:33 AM
Approved by: Norman Rokeberg, Chairman
Date 5/10/2002
Agency: House Judiciary Committee

(Revised 9/2001 OMB)

Sec. 15.13.040. Contributions, expenditures, and supplying of services to be reported.

(a) Except as provided in (g) of this section, each candidate shall make a full report, upon a form prescribed by the commission, listing the date and amount of all expenditures made by the candidate, the total amount of all contributions, including all funds contributed by the candidate, and for all contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor and the date and amount contributed by each contributor. The report shall be filed in accordance with AS 15.13.110 and shall be certified correct by the candidate or campaign treasurer.

(b) Each group shall make a full report upon a form prescribed by the commission, listing

(1) the name and address of each officer and director;

(2) the aggregate amount of all contributions made to it; and, for all contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; and

(3) the date and amount of all contributions made by it and all expenditures made, incurred or authorized by it.

(c) The report required under (b) of this section shall be filed in accordance with AS 15.13.110 and shall be certified as correct by the group's treasurer.

(d) Every individual, person, or group making a contribution or expenditure shall make a full report, upon a form prescribed by the commission, of

(1) contributions made to a candidate or group and expenditures made on behalf of a candidate or group

(A) as soon as the total contributions and expenditures to that candidate or group reaches $500 in a year; and

(B) for all subsequent contributions and expenditures to that candidate or group in a year whenever the total contributions and expenditures to that candidate or group that have not been reported under this paragraph reaches $500;

(2) unless exempted from reporting by (h) of this section, any expenditure whatsoever for advertising in newspapers or other periodicals, on radio, or on television; or, for the publication, distribution, or circulation of brochures, flyers, or other campaign material for any candidate or ballot proposition or question.

(e) The report required under (d) of this section must contain the name, address, principal occupation, and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission by the contributor no later than 10 days after the

contribution or expenditure is made. A copy of the report shall be furnished to the candidate, campaign treasurer, or deputy campaign treasurer at the time the contribution is made.

(f) During each year in which an election occurs, all businesses, persons, or groups that furnish any of the following services, facilities, or supplies to a candidate or group shall maintain a record of each transaction: newspapers, radio, television, advertising, advertising agency services, accounting, billboards, printing, secretarial, public opinion polls, or research and professional campaign consultation or management, media production or preparation, or computer services. Records of provision of services, facilities, or supplies shall be available for inspection by the commission.

(g) The provisions of (a) of this section do not apply if a candidate

(1) indicates, on a form prescribed by the commission, an intent not to raise and not to expend more than $2,500 in seeking election to office, including both the primary and general elections;

(2) accepts contributions totaling not more than $2,500 in seeking election to office, including both the primary and general elections; and

(3) makes expenditures totaling not more than $2,500 in seeking election to office, including both the primary and general elections.

(h) The provisions of (d)(2) of this section do not apply to one or more expenditures made by an individual acting independently of any group and independently of any other individual if the expenditures

(1) cumulatively do not exceed $250 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

(i) The permission of the owner of real or personal property to post political signs, including bumper stickers, or to use space for an event or to store campaign-related materials is not considered to be a contribution to a candidate under this chapter unless the owner customarily charges a fee or receives payment for that activity. The fact that the owner customarily charges a fee or receives payment for posting signs that are not political signs is not determinative of whether the owner customarily does so for political signs.

(§ 1 ch 76 SLA 1974; am § 13 ch 189 SLA 1975; am § 33 ch 50 SLA 1989; am § 4 ch 126 SLA 1994; am §§ 5 - 7 ch 48 SLA 1996; am §§ 6, 7 ch 6 SLA 1998; am § 1 ch 74 SLA 1998)

Administrative Code. - For campaign disclosure, see 2 AAC 50, art. 2.

Effect of amendments. The 1996 amendment, effective January 1, 1997, in subsection (a), added the exception at the beginning of the first sentence and made a related stylistic change; in subsection (d), in paragraph (2), added "unless exempted from reporting by (h) of this section," and inserted "or other

periodicals" and made minor stylistic changes and added subsections (g) and (h).

The first 1998 amendment, effective June 28, 1998, rewrote paragraph (d)(1) and the second and third sentences in subsection (f).

The second 1998 amendment, effective June 4, 1998, added subsection (i).

NOTES TO DECISIONS

Constitutionality. - In the case of First Nat'l Bank v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707, rehearing denied, 438 U.S. 907, 98 S. Ct. 3126, 57 L. Ed. 2d 1150 (1978), the supreme court of the United States has indicated in unmistakable terms that state disclosure laws pertaining to ballot issues are constitutional. Messerli v. State, 626 P.2d 81 (Alaska 1980).

When there is no showing that an individual must remain anonymous with respect to advertising as to ballot propositions because of the possibility of being subject to reprisals, economic or otherwise, the state campaign disclosure laws are not unconstitutional as applied to a contributor hoping to influence the outcome of a ballot issue, because the objective of an informed electorate is sufficiently compelling to overcome an interest in anonymous political expression. Messerli v. State, 626 P.2d 81 (Alaska 1980).

The disclosure requirements of this chapter are not unconstitutionally vague or overbroad, nor do they violate the constitutional right of the people to privacy. VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n, 753 P.2d 703 (Alaska 1988), appeal dismissed, 488 U.S. 919, 109 S. Ct. 298, 102 L. Ed. 2d 317 (1988).

Sec. 15.13.080. Statement by contributor.

(a) An individual who contributes $500, or goods or services with a value of $500, to a candidate shall file a contributor's statement as required by this section.

(b) An individual required to file a contributor's statement under (a) of this section shall file on a form made available by the commission. The statement must

(1) identify the contributor and the candidate and all groups receiving contributions;

(2) itemize the contributions and goods; and

(3) state that the contributor is not prohibited by law from contributing and that the contribution consists of funds or property belonging to the contributor and has not been given or furnished by another person or group.

(c) The contributor's statement shall be filed with the commission by the contributor no later than 30 days after the contribution that requires the contributor to report under AS 15.13.040(d) is made.

(§ 1 ch 76 SLA 1974; am § 29 ch 189 SLA 1975; am § 13 ch 48 SLA 1996; am §§ 8, 9 ch 6 SLA 1998)

Administrative Code. - For campaign disclosure, see 2 AAC 50, art. 2.

Effect of amendments. The 1996 amendment, effective January 1, 1997, rewrote this section.

The 1998 amendment, effective June 28, 1998, rewrote subsection (a) and, in subsection (c) substituted "30 days" for "10 days" and inserted "that requires the contributor to report under AS 15.13.040(d)."

SB

364

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 9, 2002 **FURTHER REFERRALS: Finance**

Date of Committee Action: 5·10·02

The JUDICIARY Committee considered: **SB 364**

SENATE BILL NO. 364 **MEDICAID PAYMENTS FOR ABORTIONS**

"An Act relating to medical services under the state Medicaid program."

Recommends it be replaced with _____CS_____(_____) [ ] Same Title [ ] New Title

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent _____Committee

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

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

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

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Berkowitz		—		
	Meyer	✓			
	Coghill	—			
	JAMES	—			
	Kookesh			✓	
Chair:	ECKERT			✓	
Chair:					

Moved by Rokeberg

FAILS

[redacted]

AMENDMENT #1

[redacted]

OFFERED IN THE HOUSE

TO: SB 364

Page 1, line 12, through page 2, line 8:

Delete all material and insert:

"physician that the abortion is medically necessary to

(1) treat a serious

(A) adverse physical condition of a pregnant woman that

(i) either is caused by the pregnancy or would be significantly aggravated by continuation of the pregnancy; and

(ii) would seriously endanger the physical health of the woman if the pregnancy were not terminated by an abortion; or

(B) psychological illness of a pregnant woman who requires medication for treatment of the illness if

(i) the medication required to treat the illness would be highly dangerous to the fetus; and

(ii) the health of the woman would be endangered if the medication was not taken during the pregnancy; or

(2) abort a fetus that would not survive until live birth."

Page 2, line 13, following "(3)":

Insert ""live birth" has the meaning given in AS 18.50.950;

(4)"

breathe or show evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles;

(9) "filing" means the presentation of a certificate, report, or other record provided for in this chapter, of a birth, death, fetal death, adoption, marriage, or divorce for registration by the bureau;

(10) "final disposition" means the burial, interment, cremation, or other disposition of a dead body or fetus;

(11) "institution" means a public or private establishment that provides in-patient medical, surgical, or diagnostic care or treatment, or nursing, custodial, or domiciliary care to two or more unrelated individuals, or to which persons are committed by law;

(12) "live birth" means the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, that, after expulsion or extraction, breathes or shows evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached;

(13) "medical history" includes information relating to a person's medical conditions and treatment, immunization records, and other medical information about the person that could be important to the health care of the adopted person;

(14) "physician" means a person authorized or licensed to practice medicine under the laws of the state;

(15) "registration" means the acceptance by the bureau and the incorporation in its official records of certificates, reports, or other records provided for in this chapter, of births, deaths, fetal deaths, adoptions, marriages, or divorces;

(16) "state registrar" means the state registrar of vital statistics;

(17) "system of vital statistics" includes the registration, collection, preservation, amendment, and certification of vital statistics records, and related activities including the tabulation, analysis, and publication of statistical data derived from them;

(18) "vital statistics" means records of birth, death, fetal death, marriage, divorce, adoption, and related data. (§ 1 ch 118 SLA 1960; am § 6 ch 104 SLA 1971; am § 3 ch 140 SLA 1986; am § 3 ch 124 SLA 1994)

Revisor's notes. — Formerly AS 18.50.370. Renumbered in 1986 and reorganized to alphabetize the defined terms.

Effect of amendments. — The 1994 amendment, effective January 1, 1996, made a section reference substitution in paragraph (4).

Sec. 18.50.990. Short title. This chapter may be cited as the Vital Statistics Act. (§ 33 ch 118 SLA 1960)

Revisor's notes. — Formerly AS 18.50.380. Renumbered in 1986.

Chapter 54. Housing Development Revolving Loan Fund.

[Repealed, § 72 ch 113 SLA 1982.]

Chapter 55. Housing, Public Buildings, Urban Renewal, and Regional Housing Authorities.

Article

1. Housing Project and Public Building Assistance Act (§§ 18.55.010 — 18.55.290)
2. Moderate Cost and Rental Housing (§§ 18.55.300 — 18.55.470)
3. Slum Clearance and Redevelopment Act (§§ 18.55.480 — 18.55.960)
4. Regional Native Housing Authorities (§§ 18.55.995 — 18.55.998)

Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
Phone: (907) 465-2327
Fax: (907) 465-5241

Interim:
119 N. Cushman
Fairbanks, AK 99701
Phone: (907) 456-8161
Fax: (907) 456-8163

Senator Pete Kelly
District P

SB 364 Sponsor Statement

"An Act relating to medical services under the State Medicaid program"

A majority of Alaskans agree it is inappropriate to use state funds to provide elective abortions. Despite the many efforts of the legislature, however, we have been unable to implement the will of the people. All attempts to bring Alaskan Medicaid funding under standards, which prohibit funding abortions except for rape, incest and life of mother, have been thwarted by the Alaska Supreme Court.

The Alaska Administrative Code defines therapeutic abortion as, "the termination of a pregnancy; certified by a physician as *medically necessary* to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health." Currently, any form of emotional discomfort a woman may experience from pregnancy could warrant a "medically necessary" termination.

SB 364 defines *medically necessary* broadly enough to cover those situations where an abortion is medically necessary yet narrowly enough to prevent fraud or abuse. This definition ensures that funds appropriated to provide health care to indigent Alaskans are used for that purpose and not to fund abortions on demand.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 364
(S) Publish Date: 4/24/02

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services
Title: MEDICAL SERVICES UNDER THE STATE MEDICAID PROGRAM
BRU: Medical Assistance
Component: Medicaid Services

Sponsor: SENATE (RLS) BY REQUEST
Requestor: SENATE (FIN)
Component Number: 2077

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Othe (Specify Type--do not abbrevia						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost:

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

The department cannot determine a fiscal impact related to this bill, as it is unclear how physicians will interpret the language in subsection (b), and how that interpretation may or may not differ from current practice in referring a woman for an abortion.

Prepared by: Nancy Weller
Phone 465-3355
Division Medical Assistance
Date/Time 04/22/2002
Approved by: Elmer A. Lindstrom, Deputy Commissioner
Date 04/22/2002
Agency Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

7 AAC 47.290. DEFINITIONS

In 7 AAC 47.010 - 7 AAC 47.290

(1) "prescribed drug" means a simple or compound substance, or mixtures of substances, prescribed for the cure, mitigation, or prevention of disease, or for health maintenance that is prescribed by a physician or other licensed practitioner of the healing arts within the scope of practice as defined and limited by federal and state law, and is dispensed by a licensed pharmacist on a valid prescription that is recorded and maintained in the pharmacist's records;

(2) "disabled" or"disability" means being unable to or the inability to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months;

(3) "elective procedure" means a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but not necessary to prevent the death or disability of the patient, and includes an elective abortion;

(4) "major medical care" means non-elective inpatient hospital services that cannot be performed on an outpatient basis and that are certified as necessary by the professional review organization contracted by the division of medical assistance; "major medical care" does not include inpatient psychiatric hospital services;

(5) repealed 2/19/93;

(6) "recipient" means an individual who is financially eligible for General Relief Medical assistance and who may receive a covered medical service if determined to be eligible to receive the service;

(7) "elective abortion" means a procedure, other than a therapeutic abortion, to terminate a pregnancy;

(8) "therapeutic abortion" means the termination of a pregnancy;

(A) certified by a physician as medically necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health; or

(B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410 - 11.41.425, a crime of sexual abuse of a minor under AS 11.41.434 - 11.41.440, or the crime of incest under AS 11.41.450.

History: Eff. 8/1/85, Register 95; am 12/4/85, Register 96; am 8/1/86, Register 99; am 11/26/86, Register 100; am 2/19/93, Register 125; am 8/8/97, Register 143

Authority: AS 47.05.010

AS 47.25.120

AS 47.25.130

AS 47.25.170

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAL ASSISTANCE

P.O. BOX 110660
JUNEAU, ALASKA 99811-0660
PHONE: (907) 465-3355
FAX: (907)465-2204

March 3, 1998

The Honorable Representative Terry Martin
Alaska State Legislature
State Capitol Room 427
Juneau, Alaska 99801-1182

Dear Representative Martin:

You have raised several questions about some noted discrepancies regarding the data presented by the Division in it's FY97 Annual Report.

1. You have asked about the difference between the unduplicated eligibles for the State Only Programs on page 23 of the FY97 Annual Report as compared to the number of GRM eligibles shown on page 5 of the report. The State Only Programs data on page 23 include the General Relief Medical, Permanent Fund Dividend Hold Harmless and the Alaska Longevity Bonus Hold Harmless programs.

2. You also asked what is included in the 887.8 Abortion XIX expenditure listed as FY97 Actuals on page 35 of the Annual Report; for example, would that amount include all costs associated with the abortion? See the answer to question #3.

3. You have questioned the difference between the amount shown as abortion expenditures on page 35 of the Annual Report compared to the document we previously provided you entitled "Abortion Services by Category of Service FY97" which show a cost for abortions of 506.6.

There are several very important differences between the numbers presented in theses two reports. The first difference revolves around the composition of the two numbers. The "Abortion Services by Category of Service FY97" report is limited to expenditures which carry a procedure or diagnosis code indicating abortion. Costs such as transportation, pharmacy, laboratory or accommodation do not carry either an abortion procedure or diagnosis code and are not included in the report. The expenditures in the Annual Report are from the state accounting system and includes a quarterly transfer of expenditures for the abortion client's costs within 2 weeks of the abortion procedure from the related medicaid category of service to the GRM Abortion XIX colocation code 956. These transfers were initiated a number of years ago as a result of federal reviews of abortion services to limit the expenditure of federal funds around this issue.

Attachment A-2

The second difference is that the expenditure information presented in the Annual Report is based upon the date that claims were paid. Therefore, in the Annual Report, the expenditure information reflects all expenditures made during FY97 irrespective of when the medical service was provided. The expenditure information presented in the "Abortion Services by Category of Service FY97" report is based upon the date the services were provided irrespective of when the claims were actually paid. Across all medical assistance providers there is a lag on average of from 1 to 5 months from the date a service is provided until the claim is submitted by the provider and paid by the medical assistance program. Therefore, the transfers noted in the previous paragraph are based on date of service but made quarterly on the claims payment system. Which further distorts the difference between the numbers in the two reports.

Each report has been developed to serve specific purposes. As a result the information between the two is not very comparable. The Annual Report is designed to present information around what did the Medical Assistance program pay for during the fiscal year. The Medical Assistance program reports expenditures to the Alaska State Accounting System based upon the date that claims were paid. Therefore, all claims paid during FY97 are reported as expenditures of FY97. This allows for fast and timely comparison of a fiscal year's expenditures with the appropriation for the same period. This is the perspective of from which most policy makers and reviewers view the Medical Assistance program's activities.

The "Abortion Services by Category of Service FY97" report generated each year is designed to answer the question: during the fiscal year how many abortions were provided and at what cost? This report takes a snapshot in time well after the close of the fiscal year. Therefore, most of the expenditures reported were paid during FY97; but some of the expenditures were actually paid from FY98. Again this is because we are counting the number of times that procedure or diagnosis code occurred during a fiscal year.

4. What is the relationship of the number of 856 GRM eligibles listed on page 5 of the Annual Report and the 843 number of unduplicated recipients listed on the abortion report we previously provided you? The 856 GRM eligibles listed in the Annual Report does not include the 843 Medicaid clients receiving abortion services.

As a result of your questions the Division will be examining the transfer process and the criteria used for opportunities to increase federal participation in some of these costs.

Sincerely,

Bob Labbe

Bob Labbe
Director

Medicaid and General Relief Medical Services in Alaska

FY	From 1992 Audit Abortions 'Elective'	'Non-elective'	Dental GRM	Dental %GRM	glasses hearing aids	physical/ occupational therapy	Prosthetic Medical	Prosthetic %GRM	Medicaid Eligibles	Total Medical
97			$3,600	0.11%	0	0	$20,800	0.61%	87,977	353,079,800
96			$3,500	0.10%	0	0	$19,200	0.57%	87,159	330,180,200
95			$24,200	0.55%	0	0	$23,600	0.54%	86,445	300,981,100
94			$19,900	0.27%	0	0	$14,100	0.19%	83,920	281,099,300
93			$28,100	0.45%	0	0	$25,500	0.41%	78,418	231,033,500
92			$20,100	0.35%	0	0	$22,400	0.38%	69,286	208,008,100
91	877	1,167	$8,900	0.16%	0	0	$12,500	0.22%	57,251	182,582,900
90	674	898	$27,200	0.45%	0	0	$27,300	0.45%	49,622	155,092,695
89	751	924							46,090	130,630,500
88									44,872	109,526,900
87									41,559	92,899,200
86										
85										
84										
83										
82										
81										
80										
79										
78										
77										22,351,696
76									22,952	
75										11,034,251
74										9,678,712
73										8,017,103
72										7,028,462
71										5,307,445
70										3,250,159
69										2,356,496

3/18/98

Medicaid and General Relief Medical Services in Alaska

	From DHSS Annual Reports*							Category of Service Report DHSS**	
	No. Recipients		Abortion Costs		Total	Abortion %	Total	Abortions	
FY	GRM	Medicaid	Title XIX	GRM	GRM Costs	GRM Total	Medicaid Costs	Number	Total Cost / FY
97	856	71,179	$887,800	$4,400	$3,412,864	26%	$349,170,283	843	$506,639
96	760	69,608	$654,800	$4,800	$3,361,700	20%	$326,276,200	737	$487,101
95	646	69,739	$631,500	$4,400	$4,389,400	14%	$295,926,800	703	$456,997
94	680	69,631	$592,800	$1,500	$7,466,400	8%	$272,977,600	649	$308,989
93	603	63,663	$351,200	$2,000	$6,188,500	6%	$224,142,100	814	$389,658
92	862	57,251	$359,700	$4,800	$5,820,600	6%	$200,596,400	852	$398,434
91	733	47,802	$309,100	$7,800	$5,592,200	6%	$173,761,000	823	$415,539
90	507	40,447	$314,400	$7,800	$6,067,238	5%	$146,799,100	626	$370,818
89	582	37,460			$7,706,600		$121,021,600	729	$423,187
88		33,490			$9,225,355			463	$210,207
87		29,319							
86		28,386							
85		19,946							
84									
83									
82									
81							$39,218,437		
80							$33,256,320		
79					$6,769,100		$38,811,695		
78					$6,213,100		$25,915,719		
77	2,631	11,815			$3,743,128		$18,608,568		
76					$2,881,213		$14,328,201		
75	3,300	9,770			$2,358,080		$9,320,753		
74	3,800	8,500			$2,576,457		$6,869,286		
73	5,000	7,000			$3,675,277		$4,447,219		
72					$7,028,462		Medicaid Starts		
71					$5,307,445				
70					$3,250,159				
69					$2,356,496				

* Does not include transportation or other costs

**Includes transportation and other costs

Acct	Category of Service	FY96 Actuals	FY97 Actuals
	TOTAL ALL MEDICAID SERVICES	**326,276.2**	**349,170.3**
	GENERAL RELIEF MEDICAL		
	GRM HOSPITAL		
900	Inpatient Hospital	1,113.8	684.3
905	Outpatient Hospital	0.2	0.2
	TOTAL GRM HOSPITAL	**1,114.0**	**684.5**
930	GRM PHYSICIANS SERVICES	1,080.4	1,148.6
	TOTAL GRM PHYSICIANS SERVICES	**1,080.4**	**1,148.6**
	GRM OTHER SERVICES		
939	GRM Other Services	0.0	0.0
940	Pharmaceuticals XIX	0.0	0.0
941	Pharmaceuticals GRM	394.7	488.4
942	Transportation	91.7	118.7
943	Dental Care XIX	0.0	0.0
944	Dental Care GRM	3.5	3.6
947	Prof Device-Medical Equipment	19.2	20.8
950	Independent Labs	16.3	19.3
951	Nursing Home Care	(60.0)	13.3
955	Family Planning	2.8	2.3
956	Abortion XIX	654.8	887.8
957	Sterilization (ALL OTHER)	23.2	18.2
958	Abortion GRM	4.8	4.4
	TOTAL GRM OTHER SERVICES	**1,151.0**	**1,576.8**
989	TPL Recovery Contract	16.3	2.9
	TOTAL TPL RECOVERY CONTRACT	**16.3**	**2.9**
	TOTAL ALL GRM SERVICES	**3,361.7**	**3,412.9**
	ALASKA LONGEVITY BONUS HOLD HARMLESS		
790	ALB Hold Harmless	29.4	43.3
	TOTAL ALB HOLD HARMLESS	**29.4**	**43.3**
	PERMANENT FUND DIVIDEND HOLD HARMLESS		
750	PFD Hold Harmless Non-Facility	122.8	139.4
760	PFD Hold Harmless Facilities	390.0	314.0
	TOTAL PFD HOLD HARMLESS	**512.8**	**453.4**
	TOTAL MEDICAL ASSISTANCE	**330,180.1**	**353,079.8**

Attachment 'A2'

	GRM		PFDHH		Medicaid	
FY97 Eligibles	856		764		87,977	
Race Distribution	White	[illegible]	White	47%	White	45%
	Black	9%	Alaska Native	42%	Alaska Native	37%
	Hispanic	3%	Black	4%	Black	6%
	Asian	3%	Asian	2%	Hispanic	4%
	Unknown	2%	Hispanic	2%	Asian	3%
	Alaska Native	2%	American Indian	1%	Unknown	2%
	Pacific Islander	2%	Unknown	1%	Pacific Islander	2%
	American Indian	1%			American Indian	1%
Age	21-44	61%	21-44	75%	21-44	27%
	45-64	36%	45-64	13%	6-14	24%
	15-20	2%	65+	5%	1-5	19%
			15-20	3%	15-20	10%
			6-14	2%	0	7%
			1-5	1%	65+	6%
					45-64	6%
Eligibles by location	Anchorage	46%	Anchorage	25%	Anchorage	34%
	Fairbanks	11%	Fairbanks	7%	Fairbanks	7%
	Wasilla	8%	Wasilla	6%	Wasilla	5%
	Juneau	4%	Palmer	5%	Juneau	3%
	Palmer	4%	Emmonak	2%	Palmer	3%
	North Pole	3%	Kodiak	2%	Ketchikan	2%
	Soldotna	3%	Kipnuk	2%	Kenai	2%
	Ketchikan	2%	Togiak	2%	Soldotna	2%
	Sitka	2%	Nunapitchuk	2%	North Pole	2%
	Homer & Eagle River	1%	Delta Junction	2%	Kodiak	2%
	Kodiak & Big Lake	1%	Soldotna	2%	Homer	1%
Expenditure by Category of Service	Physician	41%	Nursing Home	65%	Hospital	34%
	Hospital	34%	Hospital	13%	Physician	17%
	Pharmacy	15%	Physician	9%	Nursing Home	12%
	Other	6%	Pharmacy	5%	Physician	17%
	Transportation	3%	Mental Health Clinics	3%	Mental Health Clinics	10%
	Nursing Home	1%	Other	3%	Other	8%
			Transportation	2%	Pharmacy	7%
					Waivers	5%
					EPSDT	4%
					Transportation	3%
Expenditures	$3,412,364.51		$453,441.69		$349,170,283.57	

Attachment A-5

Defining Medical Assistance

The Division of Medical Assistance, within Alaska's Department of Health and Social Services (DHSS), administers programs that are designed to help residents meet their medical needs: Medicaid and General Relief Medical (GRM). The Permanent Fund Dividend Hold Harmless (PFDHH) and the Alaska Longevity Bonus Hold Harmless (ALBHH) programs are also available to help Medicaid recipients maintain Medicaid eligibility. While the GRM, PFDHH and ALBHH programs are vital to the health care of many Alaskans, this report will emphasize the Medicaid program as it serves more people and requires greater expenditures.

Overview of Medical Assistance

Medicaid is an "entitlement program" created by the federal government, but administered by the state, to provide payment for medical services for low-income citizens. People qualify for Medicaid by meeting federal income and asset standards and by fitting into a specified eligibility. Under federal rules, DHSS has authority to limit services as long as the services provided are adequate in "amount, duration, and scope" to satisfy the recipient's medical needs.

Medicaid began as a program to pay for health care for poor people who were unable to work. It covered the aged, the blind, the disabled, and single parent families. Over the years, Medicaid has expanded to cover more people. For instance, children and pregnant women may qualify under higher income limits and without asset limits. Families with unemployed parents may qualify, and families who lose regular Family Medicaid because a parent returns to work may continue to be covered for up to one year.

There have also been changes in the eligibility rules for people who need the level of care provided in an institution, such as a nursing home. Now, most Alaskans who need — but cannot afford — this expensive care may qualify for Medicaid. In addition, recent changes within the Alaska Medicaid program give some people who need an institutional level of care the opportunity to stay at home to receive that care.

General Relief Medical (GRM) is a 100% state-funded medical assistance program that pays for a very limited amount of health care services for very low income adults who do not qualify for Medicaid. Covered services include limited inpatient hospital stays and prescription drugs for individuals with certain chronic illnesses.

The Alaska Legislature created the *Permanent Fund Dividend Hold Harmless* program (PFDHH) to protect those Medicaid clients who would lose their eligibility as a result of receipt or retention of the Permanent Fund Dividend. Receipt of the PFD

How it works

Eligibility for Medicaid is determined by the Division of Public Assistance according to federal and state rules. The case worker will look at age, income, assets, disability status, and other factors to determine what eligibility category will work. Once determined eligible, the individual will be assigned a unique identification number and issued a Medicaid coupon, which contains information on removable labels. For the most part, recipients are able to choose their own health care provider, but before Medicaid will pay the medical bill, the provider must be enrolled with the Medicaid program. When services are provided, the enrolled provider removes one of the labels and sticks it on a special claim form. Some providers are also able to submit claims electronically. All prescription drug claims are submitted electronically. Before Medicaid reimburses the provider, a claim review is done to make sure the claim fits within acceptable medical and fiscal guidelines. Reimbursement rates for physicians and other private practice providers are established according to a methodology that assigns a relative value to the service provided. Hospital and nursing home rates are established by a special rate setting commission. Except for established recipient cost sharing amounts, providers must agree to accept the Medicaid rate as full reimbursement and not require the recipient to pay more.

GENERAL RELIEF MEDICAL (GRM) ASSISTANCE PROGRAM

WHO IS ELIGIBLE?

- A person with a monthly income of less than $300 and less than $500 in assets.
- A person with an immediate need for medical care for a terminal illness, chemotherapy treatment for cancer, or a chronic condition such as diabetes, a seizure disorder, chronic mental illness, or hypertension, and therapeutic abortions.

WHAT SERVICES ARE COVERED?

- Hospital, nursing home care, physician services, laboratory, x-rays, prescription drugs, medical transportation, and outpatient surgical center services.
- Physician services are limited to 12 visits per year and hospitalization is limited to eight days per year.
- A GRM recipient must pay $50 per day up to a maximum of $200 per hospital admission, and $1 copayment on each prescribed drug or medical supply item.
- Payment for facility services is limited to 28.7% of the Medicaid rate.

DEMOGRAPHICS OF THE GRM PROGRAM

- 79% are White, 9% are Black, 3% are Hispanic - What happened to Natives receiving abovtions? 30%
- 53% are male
- 61% are between the ages of 21 and 44; 36% are between the ages of 45 and 64.
- 44% reside in Anchorage, 13% in Fairbanks, 7% in Wasilla, 4% each in Juneau and Palmer.

FY97 EXPENDITURES

Hospital	$ 684.5
Physician	$1,148.6
Other services	$1,579.8
TOTAL	$3,412.9 - Does this include P.F. hold harmless $$?

Prepared by the Division of Medical Assistance

February 27, 1998

Applicable Statutes:

AS 47.25.230. Persons Liable For Support and Burial.

Every needy person shall be supported while living and upon dying, shall be given a decent burial by the spouse, children, parents, grandparents, grandchildren, or siblings of the needy person, if they, or any of them, have the ability to do so, in the order named. Every designated person who fails to support the needy person when directed by the department to do so, or fails to give the needy person a decent burial shall reimburse the state or a municipality for the funds expended by either the state or a municipality for the relief or burial of the needy person, and these sums with interest and costs may be recovered by the state or a municipality of the state in a civil action.

AS 47.25.240. Action Against Person Liable For Care of Recipient.

If, during the continuance of an allowance, the department ascertains that a person liable for the support of the recipient of assistance is able to provide the necessary care and support of the recipient, and the person liable for the care and support of the recipient fails or refuses to support and care for the recipient, the state has a claim for the assistance against the person liable for it. This claim may be enforced by civil action brought in the name of the state by the attorney general against the person liable for the recovery of the amount of money, with interest, paid to the recipient, together with the costs and disbursements of the action.

Abortion Services by Category of Service
FY97

AGE	Less Than 13		13-16		17-21		22-30		Over 30		Total	
Category of Service	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars
Physician-43	3	$985	82	$14,128	494	$89,458	788	$134,592	314	$45,644	1,681	$284,807
Clinic-24	1	$353	11	$2,100	70	$14,770	108	$22,720	52	$10,900	242	$50,843
Inpatient-01	0	$0	0	$0	0	$0	1	$3,108	1	$4,228	2	$7,336
Outpatient-07	0	$0	3	$4,299	23	$28,108	30	$31,031	2	$3,041	58	$67,479
Other Services	0	$0	103	$7,173	470	$35,511	538	$39,096	202	$14,391	1,313	$96,174
TOTAL	4	$1,338	199	$27,701	1,057	$168,847	1,465	$230,550	571	$78,203	3,296	$506,639
Unduplicated Recipients	1		46		270		381		143		843	

RACE	White		Native		Black		Hispanic		Other		Total	
Category of Service	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars
Physician-43	825	$136,055	465	$86,369	197	$27,243	77	$14,621	117	$20,319	1,681	$284,807
Clinic-24	107	$22,195	71	$14,465	37	$8,266	13	$2,875	14	$3,020	242	$50,843
Inpatient-01	0	$0	2	$7,336	0	$0	0	$0	0	$0	2	$7,336
Outpatient-07	25	$30,389	28	$28,902	1	$1,434	3	$5,167	1	$1,586	58	$67,479
Other Services	547	$38,952	554	$41,010	83	$6,431	33	$2,827	96	$6,953	1,313	$96,174
TOTAL	1,504	$227,590	1,120	$176,102	318	$43,376	126	$25,690	226	$31,880	3,296	$506,639
Unduplicated Recipients	402		264		81		37		69		843	

IN STATE/OUT of STATE	Instate		Out of State		Total	
Category of Service	# Claim Lines	Dollars	# Claim Lines	Dollars	# Claim Lines	Dollars
Physician-43	1,676	$284,398	5	$409	1,681	$284,807
Clinic-24	242	$50,843	0	$0	242	$50,843
Inpatient-01	2	$7,336	0	$0	2	$7,336
Outpatient-07	58	$67,479	0	$0	58	$67,479
Other Services	462	$38,665	851	$57,509	1,313	$96,174
TOTAL	2,460	$448,721	836	$57,918	3,296	$506,639
Unduplicated Recipients	765		78		843	

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAL ASSISTANCE

P.O. BOX 110660
JUNEAU, ALASKA 99811-0660
PHONE: (907) 465-3355
FAX: (907)465-2204

April 22, 1998

The Honorable Terry Martin
Alaska House of Representative
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Martin:

I wanted to clarify the diagnosis code information provided to you on April 18th in the packet of General Relief Medical Assistance materials delivered to your office, as it seems to be causing some confusion.

The diagnosis codes were provided in order to allow legislators to review the conditions for which clients apply to the program for treatment. Diagnosis codes are required on the claim form submitted by the rendering provider in order to receive payment. The diagnosis codes are at the discretion of the provider, and multiple diagnosis codes are frequently submitted on a single claim to describe all of the physical factors the provider feels appropriate in describing the patient's condition. Because multiple diagnosis codes are submitted for treatment of a single patient, the number of diagnosis codes on the list exceeds the number of clients served by the program.

I apologize for not having clearly explained this with the transmission of the diagnosis code materials.

But the heading clearly states "Unduplicated Recipients"

Sincerely,

Bob Labbe

Bob Labbe,
Director

06-F145LH

Attachment A-4

1 of 1

MEMORANDUM

To: Senate Finance Members

From: Representative Terry Martin

Date: April 23, 1998

Subject: GRM Information

The Department of Health and Social Services notes that "there is a desire for more detailed information about the General Relief Medical Assistance Program". This is well noted. We have gotten lots of information and it is has often been contradictory. I am thankful to DHSS that we are now getting their explanation of the differing numbers

At one point the DHSS reported 843 abortions for a cost of $506,000 including transportation and lodging: *Abortion Services by Category of Service - FY 97* [See Attachment A-1]

Next the *Annual Report* and a Department memo tell us that these 843 abortions cost $892,000 NOT including transportation and lodging. Yesterday, I learned that this cost may include transportation and that the numbers differ (by almost 50%) because of accounting techniques. [Attachment A-2]

The Department had given us the number of abortions as 843 but recently distributed a spreadsheet showing the number of unduplicated recipients at 1,079. The DHSS several days later clarified the report back to 843. [Attachment A-4]

So the most recent real numbers are 843 abortions for $892,000 at $1,058 per abortion and 26% of the GRM budget. (Not including ancillary costs?) [A-3]

The *Annual Report* said there were 856 GRM eligibles in 1997 [Attachment A-5]. The report then gives an expenditure summary on that page of $3.4 million dollars and does not mention that $892,000 of that amount paid for an additional 843 women to have elective abortions. So now we see there were 1,699 people using GRM!

The *Annual Report* on page 4 says that General Relief Medical is a "...medical assistance program that pays for a very limited amount of health care services for very low income adults who do not qualify for Medicaid". According to their own information (given to us later), one half (843 out of 1,699) of their GRM services were for elective abortions for people who do qualify for Medicaid (but want an elective procedure that Medicaid will not cover)! [Attachment A-6]

The summary of the General Relief Medical Program, by the Division of Medical Assistance, prepared February 27, 1998 gave demographics of the program. The report said that 53% of the GRM recipients were male. The report listed $3.4 million dollars of expenditures and again decided not to inform the public that $892,000 of this went for an additional 843 female recipients. Further digging by my staff reveals that the only 'pregnancy-related' service paid for by GRM is abortion. [Attachment A-7]

And further it appears that the Department of Health and Social Services does not follow existing State law (AS 47.25.230. and AS 47.25.240.) to fund emergency medical needs. These statutes require the state to identify persons liable for support of the recipient which

include the spouse, children, grandchildren, parents, grandparents, or siblings who are financially able to. The statute requires that the legally responsible relative reimburse the state (with interest) for any relief granted in the event that the relative fails to provide for the immediate need. How much money has the Division of Medical Assistance recovered from liable third parties? How much have they tried to recover? [Attachment A-8]

Failure to provide identification of a third party involved who may have a responsibility to pay is supposed to result in the applicant's ineligibility.

The Legislature has no reason to believe that the DHSS has yet provided complete and accurate information nor that it is following its own regulations or State law.

Pro-life legislators are being blasted because they have worked to eliminate funding for the GRM program. The most pressing accusation now is that "the sickest of the sick and the poorest of the poor" will have nowhere else to turn. Indeed, where will they go?

The answer to this can be found, logically, in the Department of Health and Social Services. These people will go to the same places for service that the Department has sent them in past years when it has taken funding intended for their services and spent it on abortions instead.

In past years, the House Finance Committee has sought to stop abortion funding by asking the department how much it spends on abortions. It has then reduced the GRM budget by that amount, with the admonition that it was not to be used to fund abortions. But if the department persists in funding abortions--843 of them costing $892,000 in FY 97--clearly they have had to turn away the sick and the poor who would have been helped by those funds. Where did these people go last year?

The House Finance Committee has increased appropriations for adoption services, foster family services and adult public assistance programs. Hysterical rhetoric of extreme emotions misleads the public and camouflages the ever-increasing free abortions paid for by the state.

Abortions by Diagnosis

Diagnosis	Description	Unduplicated Recipients	Claim Lines
63590	LEGAL ABORT UNCOMPL-UNSP	510	2,478
V617	UNWANTED PREGNANCY NEC	233	349
635	LEGALLY INDUCED ABORTION	59	59
V2502	INITIATE CONTRACEPT NEC	53	56
63592	LEGAL ABORT UNCOMPL-COMP	45	56
6359	LEGAL ABORT UNCOMPLICAT	39	93
30928	ADJ REACT-MIXED EMOTION	18	21
V2509	CONTRACEPTIVE MANGMT NEC	17	24
V269	CONTRACEPTIVE MANGMT NOS	17	27
V724	PREG EXAM-PREG UNCONFIRM	15	15
V2549	CONTRACEPT SURVEILL NEC	10	16
V2540	CONTRACEPT SURVEILL NOS	9	18
6561	RHESUS ISOIMMUNIZATION	6	10
6352	LEGAL ABORT W PELV DAMAG	4	4
6260	ABSENCE OF MENSTRUATION	3	7
65641	INTRAUTER DEATH-DELIVER	3	4
V222	PREG STATE, INCIDENTAL	3	8
V7283	OTH SPCF PREOP EXAM	2	2
V22	NORMAL PREGNANCY	2	3
63572	LEG AB W COMPL NEC-COMP	2	2
63790	AB NOS UNCOMPLICAT-UNSP	2	2
6350	LEGAL ABORT W PELVIC INF	2	3
6358	LEGAL ABORT W COMPL NOS	1	3
63571	LEG AB W COMPL NEC-INC	1	1
63500	LEG ABOR W PELV INF-UNSP	1	2
6430	MILD HYPEREMESIS GRAVID	1	2
6268	MENSTRUAL DISORDER NEC	1	2
61610	VAGINITIS NOS	1	1
41519	PULM EMBOL/INFARCT NEC	1	1
6351	LEGAL ABORT W HEMORRHAGE	1	1
65963	OTH ADVNCD MTRNL AGE ANT	1	2
V4589	POSTSURGICAL STATES NEC	1	1
V255	INSERTION OF IMPLANTABLE SUBDERMAL CONTR	1	2
V2542	IUD SURVEILLANCE	1	2
V2501	PRESCRIP-ORAL CONTRACEPT	1	3
V242	ROUT POSTPART FOLLOW-UP	1	1
6400	THREATENED ABORTION	1	1
7989	UNATTENDED DEATH	1	1
6371	ABORT NOS W HEMORRHAGE	1	2
65613	RH ISOIMMUNIZAT-ANTEPART	1	1
65501	FETAL CNS MALFORM-DELIV	1	1
6550	FETAL CNS MALFORMATION	1	1
64003	THREAT ABORT ANTEPARTUM OR POSTPARTMUM	1	1
6387	ATTEMP ABORT W COMPL NEC	1	3
63791	AB NOS UNCOMPLICAT-INC	1	2
6379	ABORTION NOS UNCOMPLICAT	1	1
99553	CHILD MALTREATMENT SYNDROME	1	1
	Total	1,079	3,296

	GRM		PFDHH		Medicaid	
FY97 Eligibles	856		764		87,977	
Race Distribution	White	[illegible]%	White	47%	White	45%
	Black	9%	Alaska Native	42%	Alaska Native	37%
	Hispanic	3%	Black	4%	Black	6%
	Asian	3%	Asian	2%	Hispanic	4%
	Unknown	2%	Hispanic	2%	Asian	3%
	Alaska Native	2%	American Indian	1%	Unknown	2%
	Pacific Islander	2%	Unknown	1%	Pacific Islander	2%
	American Indian	1%			American Indian	1%
Age	21-44	61%	21-44	75%	21-44	27%
	45-64	36%	45-64	13%	6-14	24%
	15-20	2%	65+	5%	1-5	19%
			15-20	3%	15-20	10%
			6-14	2%	0	7%
			1-5	1%	65+	6%
					45-64	6%
Eligibles by location	Anchorage	46%	Anchorage	25%	Anchorage	34%
	Fairbanks	11%	Fairbanks	7%	Fairbanks	7%
	Wasilla	8%	Wasilla	6%	Wasilla	5%
	Juneau	4%	Palmer	5%	Juneau	3%
	Palmer	4%	Emmonak	2%	Palmer	3%
	North Pole	3%	Kodiak	2%	Ketchikan	2%
	Soldotna	3%	Kipnuk	2%	Kenai	2%
	Ketchikan	2%	Togiak	2%	Soldotna	2%
	Sitka	2%	Nunapitchuk	2%	North Pole	2%
	Homer & Eagle River	1%	Delta Junction	2%	Kodiak	2%
	Kodiak & Big Lake	1%	Soldotna	2%	Homer	1%
Expenditure by Category of Service	Physician	41%	Nursing Home	65%	Hospital	34%
	Hospital	34%	Hospital	13%	Physician	17%
	Pharmacy	15%	Physician	9%	Nursing Home	12%
	Other	6%	Pharmacy	5%	Physician	17%
	Transportation	3%	Mental Health Clinics	3%	Mental Health Clinics	10%
	Nursing Home	1%	Other	3%	Other	8%
			Transportation	2%	Pharmacy	7%
					Waivers	5%
					EPSDT	4%
					Transportation	3%
Expenditures	$3,412,364.51		$453,441.69		$349,170,293.57	

Attachment A-5

2002

ICD•9•CM

Professional for Physicians
Volumes 1 and 2

International Classification of Diseases
9th Revision
Clinical Modification

Sixth Edition

Effective October 1, 2001–September 30, 2002

Edited by:
Anita C. Hart, RHIA, CCS, CCS-P
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Abnormal — *continued*
- knee jerk 796.1
- labor NEC 661.9 [5]
  - affecting fetus or newborn 763.7
- laboratory findings — *see* Findings, abnormal
- length, organ or site, congenital — *see* Distortion
- loss of height 781.91
- loss of weight 783.21
- lung shadow 793.1
- mammogram 793.80 ▲
  - microcalcification 793.81 ●
- Mantoux test 795.5
- membranes (fetal)
  - affecting fetus or newborn 762.9
  - complicating pregnancy 658.8 [5]
- menstruation — *see* Menstruation
- metabolism (*see also* condition) 783.9
- movement 781.0
  - disorder NEC 333.90
    - specified NEC 333.99
  - head 781.0
  - involuntary 781.0
  - specified type NEC 333.99
- muscle contraction, localized 728.85
- myoglobin (Aberdeen) (Annapolis) 289.9
- narrowness, eyelid 743.62
- optokinetic response 379.57
- organs or tissues of pelvis NEC
  - in pregnancy or childbirth 654.9 [5]
    - affecting fetus or newborn 763.89
    - causing obstructed labor 660.2 [5]
      - affecting fetus or newborn 763.1
- origin — *see* Malposition, congenital
- palmar creases 757.2
- Papanicolaou (smear)
  - cervix 795.0
  - other site 795.1
- parturition
  - affecting fetus or newborn 763.9
  - mother — *see* Delivery, complicated
- pelvis (bony) — *see* Deformity, pelvis
- percussion, chest 786.7
- periods (grossly) (*see also* Menstruation) 626.9
- phonocardiogram 794.39
- placenta — *see* Placenta, abnormal
- plantar reflex 796.1
- plasma protein — *see* Deficiency, plasma, protein
- pleural folds 748.8
- position — *see* also Malposition
  - gravid uterus 654.4 [5]
    - causing obstructed labor 660.2 [5]
      - affecting fetus or newborn 763.1
- posture NEC 781.92
- presentation (fetus) — *see* Presentation, fetus, abnormal
- product of conception NEC 631
- puberty — *see* Puberty
- pulmonary
  - artery 747.3
  - function, newborn 770.8
  - test results 794.2
  - ventilation, newborn 770.8
    - hyperventilation 786.01
- pulsations in neck 785.1
- pupil reflexes 379.40
- quality of milk 676.8 [5]
- radiological examination 793.9
  - abdomen NEC 793.6
  - biliary tract 793.3
  - breast 793.89 ▲
    - mammogram NOS 793.80 ●
    - mammographic microcalcification 793.81 ●
  - gastrointestinal tract 793.4
  - genitourinary organs 793.5
  - head 793.0
  - intrathoracic organ NEC 793.2
  - lung (field) 793.1
  - musculoskeletal system 793.7
  - retroperitoneum 793.6
  - skin and subcutaneous tissue 793.9
  - skull 793.0
- red blood cells 790.09
  - morphology 790.09
  - volume 790.09

Abnormal — *continued*
- reflex NEC 796.1
- renal function test 794.4
- respiration signs — *see* Respiration
- response to nerve stimulation 794.10
- retinal correspondence 368.34
- rhythm, heart — *see also* Arrhythmia
  - fetus — *see* Distress, fetal
- saliva 792.4
- scan
  - brain 794.09
  - kidney 794.4
  - liver 794.8
  - lung 794.2
  - thyroid 794.5
- secretion
  - gastrin 251.5
  - glucagon 251.4
- semen 792.2
- serum level (of)
  - acid phosphatase 790.5
  - alkaline phosphatase 790.5
  - amylase 790.5
  - enzymes NEC 790.5
  - lipase 790.5
- shape
  - cornea 743.41
  - gallbladder 751.69
  - gravid uterus 654.4 [5]
    - affecting fetus or newborn 763.89
    - causing obstructed labor 660.2 [5]
      - affecting fetus or newborn 763.1
  - head (*see also* Anomaly, skull) 756.0
  - organ or site, congenital NEC — *see* Distortion
- sinus venosus 747.40
- size
  - fetus, complicating delivery 653.5 [5]
    - causing obstructed labor 660.1 [5]
  - gallbladder 751.69
  - head (*see also* Anomaly, skull) 756.0
  - organ or site, congenital NEC — *see* Distortion
  - teeth 520.2
- skin and appendages, congenital NEC 757.9
- soft parts of pelvis — *see* Abnormal, organs or tissues of pelvis
- spermatozoa 792.2
- sputum (amount) (color) (excessive) (odor) (purulent) 786.4
- stool NEC 787.7
  - bloody 578.1
    - occult 792.1
  - bulky 787.7
  - color (dark) (light) 792.1
  - content (fat) (mucus) (pus) 792.1
  - occult blood 792.1
- synchondrosis 756.9
- test results without manifest disease — *see* Findings, abnormal
- thebesian valve 746.9
- thermography — *see* Findings, abnormal, structure
- threshold, cones or rods (eye) 368.63
- thyroid-binding globulin 246.8
- thyroid product 246.8
- toxicology (findings) NEC 796.0
- tracheal cartilage (congenital) 748.3
- transport protein 273.8
- ultrasound results — *see* Findings, abnormal, structure
- umbilical cord
  - affecting fetus or newborn 762.6
  - complicating delivery 663.9 [5]
  - specified NEC 663.8 [5]
- union
  - cricoid cartilage and thyroid cartilage 748.3
  - larynx and trachea 748.3
  - thyroid cartilage and hyoid bone 748.3
- urination NEC 788.69
  - psychogenic 306.53
  - stream
    - intermittent 788.61
    - slowing 788.62
    - splitting 788.61
    - weak 788.62
- urine (constituents) NEC 791.9

Abnormal — *continued*
- uterine hemorrhage (*see also* Hemorrhage, uterus) 626.9
  - climacteric 627.0
  - postmenopausal 627.1
- vagina (acquired) (congenital)
  - in pregnancy or childbirth 654.7 [5]
    - affecting fetus or newborn 763.89
    - causing obstructed labor 660.2 [5]
      - affecting fetus or newborn 763.1
- vascular sounds 785.9
- vectorcardiogram 794.39
- visually evoked potential (VEP) 794.13
- vulva (acquired) (congenital)
  - in pregnancy or childbirth 654.8 [5]
    - affecting fetus or newborn 763.89
    - causing obstructed labor 660.2 [5]
      - affecting fetus or newborn 763.1
- weight
  - gain 783.1
    - of pregnancy 646.1 [5]
      - with hypertension — *see* Toxemia, of pregnancy
  - loss 783.21
- x-ray examination — *see* Abnormal, radiological examination

Abnormally formed uterus — *see* Anomaly, uterus

Abnormity (any organ or part) — *see* Anomaly

ABO
- hemolytic disease 773.1
- incompatibility reaction 999.6

Abocclusion 524.2

Abolition, language 784.69

Aborter, habitual or recurrent NEC
- without current pregnancy 629.9
- current abortion (*see also* Abortion, spontaneous) 634.9 [5]
  - affecting fetus or newborn 761.8
- observation in current pregnancy 646.3 [5]

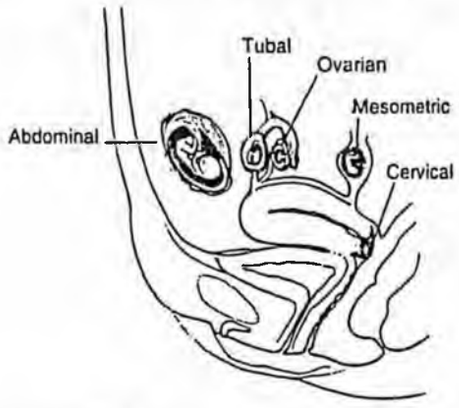
Abortion (complete) (incomplete) (inevitable) (with retained products of conception) 637.9 [5]

Note — Use the following fifth-digit subclassification with categories 634–637:

0	*unspecified*
1	*incomplete*
2	*complete*

- with
  - complication(s) (any) following previous abortion — *see* category 639 [4]
  - damage to pelvic organ (laceration) (rupture) (tear) 637.2 [5]
  - embolism (air) (amniotic fluid) (blood clot) (pulmonary) (pyemic) (septic) (soap) 637.6 [5]
  - genital tract and pelvic infection 637.0 [5]
  - hemorrhage, delayed or excessive 637.1 [5]
  - metabolic disorder 637.4 [5]
  - renal failure (acute) 637.3 [5]
  - sepsis (genital tract) (pelvic organ) 637.0 [5]
    - urinary tract 637.7 [5]
  - shock (postoperative) (septic) 637.5 [5]
  - specified complication NEC 637.7 [5]
  - toxemia 637.3 [5]
  - unspecified complication(s) 637.8 [5]
  - urinary tract infection 637.7 [5]
- accidental — *see* Abortion, spontaneous
- artificial — *see* Abortion, induced
- attempted (failed) — *see* Abortion, failed
- criminal — *see* Abortion, illegal
- early — *see* Abortion, spontaneous
- elective — *see* Abortion, legal
- failed (legal) 638.9
  - with
    - damage to pelvic organ (laceration) (rupture) (tear) 638.2
    - embolism (air) (amniotic fluid) (blood clot) (pulmonary) (pyemic) (septic) (soap) 638.6
    - genital tract and pelvic infection 638.0
    - hemorrhage, delayed or excessive 638.1
    - metabolic disorder 638.4
    - renal failure (acute) 638.3

Ectopic Pregnancy Sites



632 Missed abortion ♀
Early fetal death before completion of 22 weeks' gestation with retention of dead fetus
Retained products of conception, not following spontaneous or induced abortion or delivery
EXCLUDES *failed induced abortion (638.0-638.9)*
fetal death (intrauterine) (late) (656.4)
missed delivery (656.4)
that with abnormal product of conception (630, 631)

633 Ectopic pregnancy
INCLUDES ruptured ectopic pregnancy
DEF: Fertilized egg develops outside uterus.

633.0 Abdominal pregnancy ♀
Intraperitoneal pregnancy

633.1 Tubal pregnancy ♀
Fallopian pregnancy
Rupture of (fallopian) tube due to pregnancy
Tubal abortion

633.2 Ovarian pregnancy ♀

633.8 Other ectopic pregnancy ♀
Pregnancy:
cervical
combined
cornual
Pregnancy:
intraligamentous
mesometric
mural

633.9 Unspecified ectopic pregnancy ♀

OTHER PREGNANCY WITH ABORTIVE OUTCOME (634-639)

The following fourth-digit subdivisions are for use with categories 634-638:

.0 Complicated by genital tract and pelvic infection
Endometritis
Salpingo-oophoritis
Sepsis NOS
Septicemia NOS
Any condition classifiable to 639.0, with condition classifiable to 634-638
EXCLUDES *urinary tract infection (634-638 with .7)*

.1 Complicated by delayed or excessive hemorrhage
Afibrinogenemia
Defibrination syndrome
Intravascular hemolysis
Any condition classifiable to 639.1, with condition classifiable to 634-638

.2 Complicated by damage to pelvic organs and tissues
Laceration, perforation, or tear of:
bladder
uterus
Any condition classifiable to 639.2, with condition classifiable to 634-638

.3 Complicated by renal failure
Oliguria
Uremia
Any condition classifiable to 639.3, with condition classifiable to 634-638

.4 Complicated by metabolic disorder
Electrolyte imbalance with conditions classifiable to 634-638

.5 Complicated by shock
Circulatory collapse
Shock (postoperative) (septic)
Any condition classifiable to 639.5, with condition classifiable to 634-638

.6 Complicated by embolism
Embolism:
NOS
amniotic fluid
pulmonary
Any condition classifiable to 639.6, with condition classifiable to 634-638

.7 With other specified complications
Cardiac arrest or failure
Urinary tract infection
Any condition classifiable to 639.8, with condition classifiable to 634-638

.8 With unspecified complication

.9 Without mention of complication

634 Spontaneous abortion
INCLUDES miscarriage
spontaneous abortion
Requires fifth-digit to identify stage:
0 unspecified
1 incomplete
2 complete
DEF: Spontaneous premature expulsion of the products of conception from the uterus.

634.0 Complicated by genital tract and pelvic infection ♀

634.1 Complicated by delayed or excessive hemorrhage ♀

634.2 Complicated by damage to pelvic organs or tissues ♀

634.3 Complicated by renal failure ♀

634.4 Complicated by metabolic disorder ♀

634.5 Complicated by shock ♀

634.6 Complicated by embolism ♀

634.7 With other specified complications ♀

634.8 With unspecified complication ♀

634.9 Without mention of complication ♀

635 Legally induced abortion
INCLUDES abortion or termination of pregnancy:
elective
legal
therapeutic
EXCLUDES *menstrual extraction or regulation (V25.3)*
Requires fifth-digit to identify stage:
0 unspecified
1 incomplete
2 complete
DEF: Intentional expulsion of products of conception from uterus performed by medical professionals inside boundaries of law.

635.0 Complicated by genital tract and pelvic infection

635.1 Complicated by delayed or excessive hemorrhage

635.2 Complicated by damage to pelvic organs or tissues

Abortion — *continued*
- failed — *continued*
  - with — *continued*
    - sepsis (genital tract) (pelvic organ) 638.0
      - urinary tract 638.7
    - shock (postoperative) (septic) 638.5
    - specified complication NEC 638.7
    - toxemia 638.3
    - unspecified complication(s) 638.8
    - urinary tract infection 638.7
- fetal indication — *see* Abortion, legal
- fetus 779.6
- following threatened abortion — *see* Abortion, by type
- habitual or recurrent (care during pregnancy) 646.3 [4]
  - with current abortion (*see also* Abortion, spontaneous) 634.9 [4]
    - affecting fetus or newborn 761.8
  - without current pregnancy 629.9
- homicidal — *see* Abortion, illegal
- illegal 636.9 [4]
  - with
    - damage to pelvic organ (laceration) (rupture) (tear) 636.2 [4]
    - embolism (air) (amniotic fluid) (blood clot) (pulmonary) (pyemic) (septic) (soap) 636.6 [4]
    - genital tract and pelvic infection 636.0 [4]
    - hemorrhage, delayed or excessive 636.1 [4]
    - metabolic disorder 636.4 [4]
    - renal failure 636.3 [4]
    - sepsis (genital tract) (pelvic organ) 636.0 [4]
      - urinary tract 636.7 [4]
    - shock (postoperative) (septic) 636.5 [4]
    - specified complication NEC 636.7 [4]
    - toxemia 636.3 [4]
    - unspecified complication(s) 636.8 [4]
    - urinary tract infection 636.7 [4]
  - fetus 779.6
- induced 637.9 [4]
  - illegal — *see* Abortion, illegal
  - legal indications — *see* Abortion, legal
  - medical indications — *see* Abortion, legal
  - therapeutic — *see* Abortion, legal
- late — *see* Abortion, spontaneous
- legal (legal indication) (medical indication) (under medical supervision) 635.9 [4]
  - with
    - damage to pelvic organ (laceration) (rupture) (tear) 635.2 [4]
    - embolism (air) (amniotic fluid) (blood clot) (pulmonary) (pyemic) (septic) (soap) 635.6 [4]
    - genital tract and pelvic infection 635.0 [4]
    - hemorrhage, delayed or excessive 635.1 [4]
    - metabolic disorder 635.4 [4]
    - renal failure (acute) 635.3 [4]
    - sepsis (genital tract) (pelvic organ) 635.0 [4]
      - urinary tract 635.7 [4]
    - shock (postoperative) (septic) 635.5 [4]
    - specified complication NEC 635.7 [4]
    - toxemia 635.3 [4]
    - unspecified complication(s) 635.8 [4]
    - urinary tract infection 635.7 [4]
  - fetus 779.6
- medical indication — *see* Abortion, legal
- mental hygiene problem — *see* Abortion, legal
- missed 632
- operative — *see* Abortion, legal
- psychiatric indication — *see* Abortion, legal
- recurrent — *see* Abortion, spontaneous
- self-induced — *see* Abortion, illegal
- septic — *see* Abortion, by type, with sepsis
- spontaneous 634.9 [4]
  - with
    - damage to pelvic organ (laceration) (rupture) (tear) 634.2 [4]
    - embolism (air) (amniotic fluid) (blood clot) (pulmonary) (pyemic) (septic) (soap) 634.6 [4]
    - genital tract and pelvic infection 634.0 [4]
    - hemorrhage, delayed or excessive 634.1 [4]
    - metabolic disorder 634.4 [4]
    - renal failure 634.3 [4]
    - sepsis (genital tract) (pelvic organ) 634.0 [4]
      - urinary tract 634.7 [4]
    - shock (postoperative) (septic) 634.5 [4]
    - specified complication NEC 634.7 [4]
    - toxemia 634.3 [4]
    - unspecified complication(s) 634.8 [4]
    - urinary tract infection 634.7 [4]
  - fetus 761.8
  - threatened 640.0 [4]
    - affecting fetus or newborn 762.1
- surgical — *see* Abortion, legal
- therapeutic — *see* Abortion, legal
- threatened 640.0 [4]
  - affecting fetus or newborn 762.1
- tubal — *see* Pregnancy, tubal
- voluntary — *see* Abortion, legal

Abortus fever 023.9

Aboulomania 301.6

Abrachia 755.20

Abrachiatism 755.20

Abrachiocephalia 759.89

Abrachiocephalus 759.89

Abrami's disease (acquired hemolytic jaundice) 283.9

Abramov-Fiedler myocarditis (acute isolated myocarditis) 422.91

Abrasion — *see also* Injury, superficial, by site
- cornea 918.1
- dental 521.2
- teeth, tooth (dentifrice) (habitual) (hard tissues) (occupational) (ritual) (traditional) (wedge defect) 521.2

Abrikossov's tumor (M9580/0) — *see also* Neoplasm, connective tissue, benign
- malignant (M9580/3) — *see* Neoplasm, connective tissue, malignant

Abrism 988.8

Abruption, placenta — *see* Placenta, abruptio

Abruptio placentae — *see* Placenta, abruptio

Abscess (acute) (chronic) (infectional) (lymphangitic) (metastatic) (multiple) (pyogenic) (septic) (with lymphangitis) (*see also* Cellulitis) 682.9
- abdomen, abdominal
  - cavity — *see* Abscess, peritoneum
  - wall 682.2
- abdominopelvic — *see* Abscess, peritoneum
- accessory sinus (chronic) (*see also* Sinusitis) 473.9
- adrenal (capsule) (gland) 255.8
- alveolar 522.5
  - with sinus 522.7
- amebic 006.3
  - bladder 006.8
  - brain (with liver or lung abscess) 006.5
  - liver (without mention of brain or lung abscess) 006.3
    - with
      - brain abscess (and lung abscess) 006.5
      - lung abscess 006.4
  - lung (with liver abscess) 006.4
    - with brain abscess 006.5
  - seminal vesicle 006.8
  - specified site NEC 006.8
  - spleen 006.8
- anaerobic 040.0
- ankle 682.6
- anorectal 566
- antecubital space 682.3
- antrum (chronic) (Highmore) (*see also* Sinusitis, maxillary) 473.0
- anus 566
- apical (tooth) 522.5
  - with sinus (alveolar) 522.7
- appendix 540.1
- areola (acute) (chronic) (nonpuerperal) 611.0
  - puerperal, postpartum 675.1 [4]
- arm (any part, above wrist) 682.3
- artery (wall) 447.2
- atheromatous 447.2
- auditory canal (external) 380.10
- auricle (ear) (staphylococcal) (streptococcal) 380.10
- axilla, axillary (region) 682.3
  - lymph gland or node 683
- back (any part) 682.2
- Bartholin's gland 616.3
  - with
    - abortion — *see* Abortion, by type, with sepsis
    - ectopic pregnancy (*see also* categories 633.0-633.9) 639.0
    - molar pregnancy (*see also* categories 630-632) 639.0
  - complicating pregnancy or puerperium 646.6 [4]
  - following
    - abortion 639.0
    - ectopic or molar pregnancy 639.0
- bartholinian 616.3
- Bezold's 383.01
- bile, biliary, duct or tract (*see also* Cholecystitis) 576.8
- bilharziasis 120.1
- bladder (wall) 595.89
  - amebic 006.8
- bone (subperiosteal) (*see also* Osteomyelitis) 730.0 [4]
  - accessory sinus (chronic) (*see also* Sinusitis) 473.9
  - acute 730.0 [4]
  - chronic or old 730.1 [4]
  - jaw (lower) (upper) 526.4
  - mastoid — *see* Mastoiditis, acute
  - petrous (*see also* Petrositis) 383.20
  - spinal (tuberculous) (*see also* Tuberculosis) 015.0 [4] *[730.88]*
  - nontuberculous 730.08
- bowel 569.5
- brain (any part) 324.0
  - amebic (with liver or lung abscess) 006.5
  - cystic 324.0
  - late effect — *see* category 326
  - otogenic 324.0
  - tuberculous (*see also* Tuberculosis) 013.3 [4]
- breast (acute) (chronic) (nonpuerperal) 611.0
  - newborn 771.5
  - puerperal, postpartum 675.1 [4]
  - tuberculous (*see also* Tuberculosis) 017.9 [4]
- broad ligament (chronic) (*see also* Disease, pelvis, inflammatory) 614.4
  - acute 614.3
- Brodie's (chronic) (localized) (*see also* Osteomyelitis) 730.1 [4]
- bronchus 519.1
- buccal cavity 528.3
- bulbourethral gland 597.0
- bursa 727.89
  - pharyngeal 478.29
- buttock 682.5
- canaliculus, breast 611.0
- canthus 372.20
- cartilage 733.99
- cecum 540.1
- cerebellum, cerebellar 324.0
  - late effect — *see* category 326
- cerebral (embolic) 324.0
  - late effect — *see* category 326
- cervical (neck region) 682.1
  - lymph gland or node 683
  - stump (*see also* Cervicitis) 616.0
- cervix (stump) (uteri) (*see also* Cervicitis) 616.0

635.3 Complicated by renal failure ♀
635.4 Complicated by metabolic disorder ♀
635.5 Complicated by shock ♀
635.6 Complicated by embolism ♀
635.7 With other specified complications ♀
635.8 With unspecified complication ♀
635.9 Without mention of complication ♀

636 Illegally induced abortion

INCLUDES abortion:
criminal
illegal
self-induced

Requires fifth-digit to identify stage:
0 unspecified
1 incomplete
2 complete

DEF: Intentional expulsion of products of conception from uterus; outside boundaries of law.

636.0 Complicated by genital tract and pelvic infection ♀
636.1 Complicated by delayed or excessive hemorrhage ♀
636.2 Complicated by damage to pelvic organs or tissues ♀
636.3 Complicated by renal failure ♀
636.4 Complicated by metabolic disorder ♀
636.5 Complicated by shock ♀
636.6 Complicated by embolism ♀
636.7 With other specified complications ♀
636.8 With unspecified complication ♀
636.9 Without mention of complication ♀

637 Unspecified abortion

INCLUDES abortion NOS
retained products of conception following abortion, not classifiable elsewhere

Requires fifth-digit to identify stage:
0 unspecified
1 incomplete
2 complete

637.0 Complicated by genital tract and pelvic infection ♀
637.1 Complicated by delayed or excessive hemorrhage ♀
637.2 Complicated by damage to pelvic organs or tissues ♀
637.3 Complicated by renal failure ♀
637.4 Complicated by metabolic disorder ♀
637.5 Complicated by shock ♀
637.6 Complicated by embolism ♀
637.7 With other specified complications ♀
637.8 With unspecified complication ♀
637.9 Without mention of complication ♀

638 Failed attempted abortion

INCLUDES failure of attempted induction of (legal) abortion

EXCLUDES *incomplete abortion (634.0-637.9)*

DEF: Continued pregnancy despite an attempted legal abortion.

638.0 Complicated by genital tract and pelvic infection ♀
638.1 Complicated by delayed or excessive hemorrhage ♀
638.2 Complicated by damage to pelvic organs or tissues ♀
638.3 Complicated by renal failure ♀
638.4 Complicated by metabolic disorder ♀
638.5 Complicated by shock ♀
638.6 Complicated by embolism ♀
638.7 With other specified complications ♀
638.8 With unspecified complication ♀
638.9 Without mention of complication ♀

639 Complications following abortion and ectopic and molar pregnancies

Note: This category is provided for use when it is required to classify separately the complications classifiable to the fourth-digit level in categories 634-638; for example:
a) when the complication itself was responsible for an episode of medical care, the abortion, ectopic or molar pregnancy itself having been dealt with at a previous episode
b) when these conditions are immediate complications of ectopic or molar pregnancies classifiable to 630-633 where they cannot be identified at fourth-digit level.

639.0 Genital tract and pelvic infection ♀
Endometritis
Parametritis
Pelvic peritonitis
Salpingitis
Salpingo-oophoritis
Sepsis NOS
Septicemia NOS
} following conditions classifiable to 630-638

EXCLUDES *urinary tract infection (639.8)*

639.1 Delayed or excessive hemorrhage ♀
Afibrinogenemia
Defibrination syndrome
Intravascular hemolysis
} following conditions classifiable to 630-638

639.2 Damage to pelvic organs and tissues ♀
Laceration, perforation, or tear of:
bladder
bowel
broad ligament
cervix
periurethral tissue
uterus
vagina
} following conditions classifiable to 630-638

639.3 Renal failure ♀
Oliguria
Renal:
failure (acute)
shutdown
tubular necrosis
Uremia
} following conditions classifiable to 630-638

639.4 Metabolic disorders ♀
Electrolyte imbalance following conditions classifiable to 630-638

639.5 Shock ♀
Circulatory collapse
Shock (postoperative)
(septic)
} following conditions classifiable to 630-638

639.6 Embolism ♀
Embolism:
NOS
air
amniotic fluid
blood-clot
fat
pulmonary
pyemic
septic
soap
} following conditions classifiable to 630-638

V61.11 Counseling for victim of spousal and partner abuse
EXCLUDES *encounter for treatment of current injuries due to abuse (995.80-995.85)*

V61.12 Counseling for perpetrator of spousal and partner abuse

V61.2 Parent-child problems

V61.20 Counseling for parent-child problem, unspecified
Concern about behavior of child
Parent-child conflict

V61.21 Counseling for victim of child abuse
Child battering Child neglect
EXCLUDES *current injuries due to abuse (995.50-995.59)*

V61.22 Counseling for perpetrator of parent child abuse
EXCLUDES *counseling for non-parental abuser (V62.83)*

V61.29 Other
Probl concerning adopted or foster child

V61.3 Problems with aged parents or in-laws

V61.4 Health problems within family

V61.41 Alcoholism in family

V61.49 Other

Care of / Presence of | sick or handicapped person in family or household

V61.5 Multiparity

V61.6 Illegitimacy or illegitimate pregnancy ♀

V61.7 Other unwanted pregnancy ♀

V61.8 Other specified family circumstances
Problems with family members NEC

V61.9 Unspecified family circumstance

V62 Other psychosocial circumstances
INCLUDES those circumstances or fear of them, affecting the person directly involved or others, mentioned as the reason, justified or not, for seeking or receiving medical advice or care
EXCLUDES *previous psychological trauma (V15.41-V15.49)*

V62.0 Unemployment 5th
EXCLUDES *circumstances when main problem is economic inadequacy or poverty (V60.2)*

V62.1 Adverse effects of work environment 5th

V62.2 Other occupational circumstances or maladjustment 5th
Career choice problem
Dissatisfaction with employment

V62.3 Educational circumstances 5th
Dissatisfaction with school environment
Educational handicap

V62.4 Social maladjustment 5th
Cultural deprivation
Political, religious, or sex discrimination
Social:
isolation
persecution

V62.5 Legal circumstances 5th
Imprisonment
Legal investigation
Litigation
Prosecution

V62.6 Refusal of treatment for reasons of religion or conscience 5th

V62.8 Other psychological or physical stress, not elsewhere classified

V62.81 Interpersonal problems, not elsewhere classified 5th

V62.82 Bereavement, uncomplicated 5th
EXCLUDES *bereavement as adjustment reaction (309.0)*

V62.83 Counseling for perpetrator of physical/sexual abuse 5th
EXCLUDES *counseling for perpetrator of parental child abuse (V61.22)*
counseling for perpetrator of spousal and partner abuse (V61.12)

V62.89 Other 5th
Life circumstance problems
Phase of life problems

V62.9 Unspecified psychosocial circumstance 5th

V63 Unavailability of other medical facilities for care

V63.0 Residence remote from hospital or other health care facility 5th

V63.1 Medical services in home not available 5th
EXCLUDES *no other household member able to render care (V60.4)*

V63.2 Person awaiting admission to adequate facility elsewhere 5th

V63.8 Other specified reasons for unavailability of medical facilities 5th
Person on waiting list undergoing social agency investigation

V63.9 Unspecified reason for unavailability of medical facilities 5th

V64 Persons encountering health services for specific procedures, not carried out

V64.0 Vaccination not carried out because of contraindication 5th

V64.1 Surgical or other procedure not carried out because of contraindication 5th

V64.2 Surgical or other procedure not carried out because of patient's decision 5th

V64.3 Procedure not carried out for other reasons 5th

V64.4 Laparoscopic surgical procedure converted to open procedure 5th

V65 Other persons seeking consultation without complaint or sickness

V65.0 Healthy person accompanying sick person
Boarder

V65.1 Person consulting on behalf of another person
Advice or treatment for nonattending third party
EXCLUDES *concern (normal) about sick person in family (V61.41-V61.49)*

V65.2 Person feigning illness
Malingerer
Peregrinating patient

V65.3 Dietary surveillance and counseling
Dietary surveillance and counseling (in):
NOS
colitis
diabetes mellitus
food allergies or intolerance
gastritis
hypercholesterolemia
hypoglycemia
obesity

28 P.3d 904 STATE V. PLANNED PARENTHOOD OF ALASKA, INC. (S. Ct. 2001)
2001 Alas. Lexis 97

STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, KAREN PERDUE, Commissioner, Appellant,

vs.

PLANNED PARENTHOOD OF ALASKA, INC., JAN WHITEFIELD, M.D., and SUSAN LEMAGIE, M.D., Appellees.

Supreme Court No. S-9109, No. 5443
SUPREME COURT OF ALASKA
28 P.3d 904, 2001 Alas. LEXIS 97
July 27, 2001, Decided
Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sen K. Tan, Judge. Superior Court No. 3AN-98-7004 CI.

COUNSEL

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JUDGES

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

OPINION

FABE, Chief Justice.

I. INTRODUCTION

Alaska's Medicaid program funds virtually all necessary medical services for poor Alaskans -- "regardless of race, age, national origin, or economic standing"[1] -- **but it denies funding for medically necessary abortions. Alone among Medicaid-eligible Alaskans, women whose health is endangered by pregnancy are denied health care based solely on political disapproval of the medically necessary procedure. This selective denial of medical benefits violates Alaska's constitutional guarantee of equal protection. Our conclusion is supported by the majority of jurisdictions that have considered comparable restrictions on state**

funding of medically necessary abortions: these state courts have concluded that, under their state constitutions, government health care programs that fund other medically necessary procedures may not deny assistance to eligible women whose health depends on obtaining abortions.[2]

This case concerns the State's denial of public assistance to eligible women whose health is in danger. It does not concern State payment for elective abortions; nor does it concern philosophical questions about abortion which we, as a court of law, cannot aspire to answer. We join the California Supreme Court in clarifying that "this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child."[3] **Indeed, as the California Supreme Court emphasized, "similar constitutional issues would arise if the Legislature . . . funded [Medicaid] abortions but refused to provide comparable medical care for poor women who choose childbirth."[4] The constitutional issue in this case therefore "does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment."[5] As the California court recognized, the issue presented is "not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so."[6] Rather, the issue is whether the State, having enacted a benefits program, may discriminate between recipients in the manner attempted by the Department of Health and Social Services (DHSS) today. We hold that it may not. Once the State undertakes to fund medically necessary services for poor Alaskans, it may not selectively exclude from that program women who medically require abortions.**

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

II. FACTS AND PROCEEDINGS

Alaska provides medical services for poor Alaskans primarily through the Medicaid program.[7] **Medicaid is a comprehensive health care program designed to provide medical assistance for all eligible poor per sons in the state.[8] But a DHSS regulation, 7 Alaska Administrative Code (AAC) 43.140, imposes a limit on the state's health care funding: It denies Medicaid assistance for medically necessary abortions unless a pregnant woman is at risk of dying or her pregnancy resulted from rape or incest.[9] Because DHSS offers no other funding source for abortions, 7 AAC 43.140 ensures that a woman who medically requires an abortion will receive no assistance from the state.**

The range of women whose access to medical care is restricted by the regulation is broad.

According to medical evidence provided to the superior court, some women -- particularly those who suffer from pre-existing health problems -- face significant risks if they cannot obtain abortions. Women with diabetes risk kidney failure, blindness, and preeclampsia or eclampsia -- conditions characterized by simultaneous convulsions and comas -- when their disease is complicated by pregnancy. Women with renal disease may lose a kidney and face a lifetime of dialysis if they cannot obtain an abortion. And pregnancy in women with sickle cell anemia can accelerate the disease, leading to pneumonia, kidney infections, congestive heart failure, and pulmonary conditions such as embolus. Poor women who suffer from conditions such as epilepsy or bipolar disorder face a particularly brutal dilemma as a result of DHSS's regulation -- medication needed by the women to control their own seizures or other symptoms can be highly dangerous to a developing fetus. Without funding for medically necessary abortions, pregnant women with these conditions must choose either to seriously endanger their own health by forgoing medication, or to ensure their own safety but endanger the developing fetus by continuing medication. Finally, without state funding, Medicaid-eligible women may reach an advanced stage of pregnancy before they can gather enough money for an abortion; resulting late-term abortions pose far greater health risks than earlier procedures.

In June 1998 the plaintiffs -- two medical doctors and Planned Parenthood of Alaska -- filed a complaint against DHSS. They sought to enjoin enforcement of 7 AAC 43.140 and also sought a judgment declaring that the State's denial of funding for medically necessary abortions violates Alaska's Constitution. Superior Court Judge Sen K. Tan granted summary judgment in favor of Planned Parenthood. Based on this court's holding that "reproductive rights are fundamental . . . [and] include the right to an abortion,"[10] **the superior court concluded that 7 AAC 43.140 impermissibly interferes with Medicaid-eligible women's constitutional rights to privacy. Because the State failed to articulate a compelling state interest for this interference, the superior court permanently enjoined DHSS from enforcing the regulation "so as to deny coverage for medically necessary abortions." The State now appeals.**[11]

III. STANDARD OF REVIEW

We review a grant of summary judgment de novo, exercising our independent judgment to "determine whether the parties genuinely dispute any material facts and, if not, whether the undisputed facts entitle the moving party to judgment as a matter of law."[12] **On questions of constitutional law, we also apply our independent judgment.**[13] **We may affirm the superior court on any ground supported by the record.**[14]

IV. DISCUSSION

A. The Challenged Regulation Violates Equal Protection.

By providing health care to all poor Alaskans except women who need abortions, the challenged regulation violates the state constitutional guarantee of "equal rights, opportunities, and protection under the law."[15] **The State, having established a health care program for the poor, may not selectively deny necessary care to eligible women merely because the threat**

to their health arises from pregnancy. Because we decide this case on state constitutional equal protection grounds, we do not review the superior court's privacy-based ruling. We do note, however, that our analysis today closely parallels that applied by many of the fifteen courts that have rejected similar restrictions.[16] Although other courts' decisions have rested on a variety of state constitutional provisions, including equal protection,[17] constitutional equal-rights-for-women clauses,[18] due process,[19] and privacy,[20] the underlying logic has been the same in decision after decision: "When state government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens."[21] As the Massachusetts Supreme Judicial Court observed, the constitutional principle at issue is straightforward: "It is elementary that 'when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.'"[22] The State's spending discretion is limited by the constitution -- "while the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right."[23]

Alaska's constitutional equal protection clause mandates "equal treatment of those similarly situated;"[24] it protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause.[25] In analyzing a challenged law under Alaska's equal protection provision, we first determine what level of scrutiny to apply, using Alaska's "sliding scale" standard.[26] The "weight [that] should be afforded the constitutional interest impaired by the challenged enactment" is "the most important variable in fixing the appropriate level of review."[27] Second, we examine the State's interests served by the challenged regulation.[28] If the burden placed on constitutional rights by the regulation is minimal, then the State need only show that its objectives were legitimate for the regulation to survive an equal protection challenge.[29] But if "the objective degree to which the challenged legislation tends to deter [exercise of constitutional rights]"[30] is significant, the regulation cannot survive constitutional challenge unless it serves a compelling state interest.[31] Finally, if the State shows that its interests justify burdening the rights of citizens, for the regulation to survive constitutional challenge the State must demonstrate that the means it has chosen to advance those goals are well-fitted to the ends, and that its goals could not be accomplished by less restrictive means.[32]

The regulation at issue in this case affects the exercise of a constitutional right, the right to reproductive freedom.[33] Therefore, the regulation is subject to the most searching judicial scrutiny, often called "strict scrutiny."[34] We have explained in the past that such scrutiny is appropriate where a challenged enactment affects "fundamental rights," including "the exercise of intimate personal choices."[35] This court has specified that the right to

reproductive freedom "may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest."[36]

Judicial scrutiny of state action is equally strict where the government, by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right. In **Alaska Pacific Assurance Co. v. Brown**, we held the State to a "very high" burden to justify a statute that reduced workers' compensation benefits paid to workers who exercised their constitutional right to leave the state.[37] **We concluded that the challenged regulation did not meet this high standard and thus violated equal protection.[38] Like the regulation at issue today, the challenged statute in Alaska Pacific Assurance Co.** did not forbid individual exercise of constitutional rights; rather, it limited the government benefits distributed to the class of individuals who exercised that right.[39] **As we explained in that case, we look to the real-world effects of government action to determine the appropriate level of equal protection scrutiny: "The suspicion with which this court will view infringements upon [constitutional rights] depends upon . . . the objective degree to which the challenged legislation tends to deter [the exercise of those rights]."[40]**

We reached a similar conclusion in **Alaska Gay Coalition v. Sullivan**, holding that the Municipality of Anchorage could not constitutionally withhold a public benefit based on a potential recipient's beliefs and public expression.[41] **The municipality had undertaken to publish a guidebook to public and private organizations in Anchorage, but excluded the Alaska Gay Coalition from the book.[42] We held that this exclusion violated the Coalition's constitutional rights to equal protection under the law.[43] We explained:**

When the Municipality decided to publish a limited informational guide to public and private local resources, it did not thereby assume the obligation of providing space to every possible group. . . . Had the Municipality deleted groups at random or used criteria not related to the nature of the particular organizations, constitutional violations may not have resulted. In deleting the Alaska Gay Coalition . . . however, appellees denied that group access to a public forum based solely on the nature of its beliefs. In so doing, they violated appellant's constitutional rights to . . . equal protection under the law. [44]

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

The State argues in this case that it does not provide all necessary medical care to indigent Alaskans. For support, it cites 7 AAC 43.385, a regulation that excludes from Medicaid coverage such services as medically unnecessary inpatient treatment,[45] **beautifying cosmetic surgery,[46] and transplants of organs other than kidney, cornea, skin, and bone marrow.[47] This**

regulation has not been challenged, and the issue has not been thoroughly briefed by the parties, but the restrictions appear to relate to medical necessity, cost, and feasibility -- all politically neutral criteria. Such spending limits are irrelevant to the constitutional issue raised by the State's denial of coverage for medically necessary abortions. As the United States Supreme Court noted in Shapiro v. Thompson :

We recognize that the State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. [48]

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

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

In the seminal **Shapiro v. Thompson** decision, the United States Supreme Court also strictly scrutinized -- and ultimately held unconstitutional -- state programs that denied benefits to citizens based on their exercise of constitutional rights.[49] **Shapiro** invalidated state laws that denied welfare benefits to persons who had moved into the jurisdiction within the past year.[50] **The Court found that "the prohibition of benefits . . . creates a classification which constitutes an invidious discrimination denying [new residents] equal protection of the laws."[51] The Court held that states could not constitutionally tailor their benefits programs to deter immigration from other states: "If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."[52]**

Although **Shapiro** and **Alaska Pacific Assurance Co.** applied strict scrutiny to reject restrictions like the one at issue in this case, 7 AAC 43.140 would fail equal protection analysis under any standard. Under the regulation, the State grants needed health care to some Medicaid-eligible Alaskans, but denies it to others, based on criteria entirely unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons of this state.[53] **Thus, even if 7 AAC 43.140 did not affect constitutional privacy rights and we applied our most deferential standard of review, the regulation still could not withstand equal protection challenge. Under Alaska's rational basis standard,[54] differential treatment of similarly situated people is permissible only if the distinction between the persons "rests upon some ground of difference having a fair and substantial relation to the object of the legislation."[55] DHSS provides necessary medical care to all**

Medicaid-eligible Alaskans except women who medically require abortions. This differential treatment lacks a fair and substantial relation to the object of the Medicaid program, and therefore violates equal protection.[56]

The United States Supreme Court reached a similar conclusion in **Shapiro** : although the Court invalidated states' differential treatment of similarly situated welfare recipients under strict scrutiny, it also noted that the differentiation would be deemed "irrational and unconstitutional" even under federal rational basis review.[57] **In United States Department of Agriculture v. Moreno**, the United States Supreme Court invalidated a similar restriction under rational basis scrutiny alone.[58] **The Court found no rational basis for a statute denying food stamps to unrelated persons who shared a household; it therefore concluded that the statute violated equal protection.[59]**

Lower court decisions have applied this principle to states' allocation of health care benefits, and concluded that "classification [among recipients] must be based upon some difference between the classes which is pertinent to the purpose for which the legislation is designed."[60] **A California court found that the state violated equal protection by paying for attendant services by spouses of elderly and blind aid recipients, but denying payment for the same services by the spouses of otherwise disabled aid recipients.[61] And New York's highest court held that equal protection was violated by a statute that "effectively provided . . . that the aged, disabled, and blind are entitled to less public assistance than other needy persons."[62]**

DHSS's differential treatment of Medicaid-eligible Alaskans violates equal protection under rational basis review as surely as it does under strict scrutiny. Under any standard of review, "the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent."[63]

Because 7 AAC 43.140 infringes on a constitutionally protected interest, the State bears a high burden to justify the regulation.[64] **Unless the State asserts a compelling state interest, the statute will necessarily fail constitutional scrutiny.[65] The State has failed to demonstrate such an interest in this case. It primarily defends 7 AAC 43.140 on the grounds that "medical and public welfare interests . . . are served by the legislature's decision to fund childbirth." But the regulation does not relate to funding for childbirth, and the State's decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State's undisputed interest in providing health care to women who carry pregnancies to term has no effect on the State's interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.**

The State also asserts an interest in minimizing health risks to mother and child, and submits that these interests are often closely aligned. But those interests are not aligned in precisely the situation contemplated by 7 AAC 43.140's Medicaid exclusion: when pregnancy threatens a woman's health. Under the U.S. Supreme Court's analysis in **Roe v. Wade**, the State's interest in the life and health of the mother is paramount at every stage of pregnancy.[66] **And in Alaska, "the scope of the fundamental right to an abortion . . . is similar to that expressed in Roe v. Wade."[67] Thus, although the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman.[68]**

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

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

The State argues that by holding the Medicaid program to constitutional standards, the superior court effected an appropriation of funds in violation of the separation of powers between branches of government. We disagree. Under Alaska's constitutional structure of government, "the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature."[69] **The superior court had not only the power but the duty to strike the challenged restriction and any underlying legislation if it found them to violate constitutional rights; the same duty mandates our decision today.**

The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution.[70] **In light of the separation of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature.[71] But under the same doctrine, we "cannot defer to the legislature when infringement of a constitutional right results from legislative action"; legislative intent is not paramount when that intent conflicts with the constitution.[72] And the mere fact that the legislature's appropriations power underlies Medicaid funding cannot insulate the program from constitutional review. As the California Supreme Court observed in rejecting nearly identical restrictions on abortion funding, the State's claim would remove all constitutional restraints from legislative exercise of the spending power:**

There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper. [73]

Legislative exercise of the appropriations power has not in the past, and may not now, bar