ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10432 HOUSE STATE AFFAIRS

272

tutional amendment" in violation of Article V. 191 F. 3d 911, 918, 924, 925 (1999). The Court of Appeals also observed that, contrary to the Speech or Debate Clause in Art. I, §6, cl. 1, of the Federal Constitution, Article VIII "establishes a regime in which a state officer— the secretary of state— is permitted to judge and punish Members of Congress for their legislative actions or positions." 191 F. 3d., at 922.[9]

Although the Court of Appeals' decision is consistent with the views of other courts that have passed on similar voter initiatives,[10] the importance of the case prompted our grant of certiorari. 529 U. S. 1065 (2000).

II

Article VIII furthers the State's interest in adding a

---

[9] Although Judge Hansen, dissenting in part, thought that §§17 through 19 should be severed, leaving the rest of Article VIII intact, the majority declined to do so. 191 F. 3d, at 926, n. 12. Petitioner does not contend here that any parts of Article VIII should be severed if found unconstitutional, but rather urges us to uphold the provision "in its entirety." Reply Brief for Petitioner 1–2.

[10] See *Miller* v. *Moore*, 169 F. 3d 1119 (CA8 1999) (Nebraska initiative invalidated on Article V and right-to-vote grounds); *Barker* v. *Hazeltine*, 3 F. Supp. 2d 1008 (SD 1998) (South Dakota initiative invalidated on Article V, First Amendment, Speech or Debate Clause, and due process grounds); *League of Women Voters of Me.* v. *Gwadosky*, 966 F. Supp. 52 (Me. 1997) (Maine initiative invalidated on Article V grounds); *Bramberg* v. *Jones*, 20 Cal. 4th 1045, 978 P. 2d 1240 (1999) (California initiative invalidated on Article V grounds); *Morrissey* v. *State*, 951 P. 2d 911 (Colo. 1998) (Colorado initiative invalidated on Article V and Guarantee Clause grounds); *Simpson* v. *Cenarrusa*, 944 P. 2d 1372 (Idaho 1997) (Idaho initiative invalidated on Speech or Debate Clause and state constitutional grounds, but did not violate Article V); *Donovan* v. *Priest*, 326 Ark. 353, 931 S. W. 2d 119 (1996) (in preelection challenge, Arkansas initiative invalidated on Article V grounds); *In re Initiative Petition No. 364*, 930 P. 2d 186 (Okla. 1996) (Oklahoma initiative invalidated on Article V and state constitutional grounds).

term limits amendment to the Federal Constitution in two ways. It encourages Missouri's congressional delegation to support such an amendment in order to avoid an unfavorable ballot designation when running for reelection. And it encourages the election of representatives who favor such an amendment. Petitioner argues that Article VIII is an exercise of the "right of the people to instruct" their representatives reserved by the Tenth Amendment,[11] and that it is a permissible regulation of the "manner" of electing federal legislators within the authority delegated to the States by the Elections Clause, Art. I, §4, cl. 1.[12] Because these two arguments rely on different sources of state power, it is appropriate at the outset to review the distinction in kind between powers reserved to the States and those delegated to the States by the Constitution.

As we discussed at length in *U. S. Term Limits*, the Constitution "draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre existing sovereign States." 514 U. S., at 801. On the one hand, in the words of Chief Justice Marshall, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." *Sturges* v. *Crowninshield,* 4 Wheat. 122, 193 (1819). The text of the Tenth Amendment delineates this principle:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

On the other hand, as Justice Story observed, "the

---

[11] Brief for Petitioner 25, and n. 37; see Reply Brief for Petitioner 4.

[12] Brief for Petitioner 28, 38; Reply Brief for Petitioner 4, 8.

states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them." 1 Commentaries on the Constitution of the United States §627 (3d ed. 1858) (hereinafter Story). Simply put, '[n]o state can say, that it has reserved, what it never possessed." *Ibid.*

III*

To be persuasive, petitioner's argument that Article VIII is a valid exercise of the States' reserved power to give binding instructions to its representatives would have to overcome three hurdles. First, the historical precedents on which she relies for the proposition that the States have such a reserved power are distinguishable. Second, there is countervailing historical evidence. Third, and of decisive significance, the means employed to issue the instructions, ballots for congressional elections, are unacceptable unless Article VIII is a permissible exercise of the States' power to regulate the manner of holding elections for Senators and Representatives. Only a brief comment on the first two points is necessary.

Petitioner relies heavily on the part instructions played in the Second Continental Congress, the Constitutional Convention, the early Congress, the selection of United States Senators before the passage of the Seventeenth Amendment, and the ratification of certain federal constitutional amendments.[13] However, unlike Article VIII, none of petitioner's examples was coupled with an express legal sanction for disobedience.[14] At best, as an *amicus curiae* for

---

* JUSTICE SOUTER does not join this Part of the Court's opinion.

[13] Brief for Petitioner 10–17.

[14] For example, the Provincial Congress of North Carolina passed the following instruction on April 12, 1776: "*Resolved*, That the Delegates for this Colony in the Continental Congress be empowered to concur with the Delegates of the other Colonies in declaring Independency,

petitioner points out, and as petitioner herself acknowledges, such historical instructions at one point in the early Republic may have had "de facto binding force" because it might have been "political suicide" not to follow them.[15] This evidence falls short of demonstrating that either the people or the States had a right to give legally binding, *i.e.*, nonadvisory, instructions to their representatives that the Tenth Amendment reserved, much less that such a right would apply to federal representatives. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 802 (Tenth Amendment "could only 'reserve' that which existed before"); cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 430 (1819) (rejecting argument that States had reserved power to tax corporations chartered by Congress because an "original right to tax" such federal entities "never existed").

Indeed, contrary evidence is provided by the fact that the First Congress rejected a proposal to insert a right of the people "to instruct their representatives" into what would become the First Amendment. 1 Annals of Cong. 732 (1789). The fact that the proposal was made suggests that its proponents thought it necessary, and the fact that it was rejected by a vote of 41 to 10, *id.*, at 747, suggests that we should give weight to the views of those who opposed the proposal. It was their view that binding instructions would undermine an essential attribute of Congress by eviscerating the deliberative nature of that National Assembly. See,

---

and forming foreign alliances, reserving to this Colony the sole and exclusive right of forming a Constitution and Laws for this Colony . . . ." 5 American Archives 860 (P. Force ed. 1844).

[15] Brief for Professor Kris W. Kobach as *Amicus Curiae* 5, 13; see Brief for Petitioner 14, n. 13. But see 1 Annals of Cong. 744 (1789) (remarks of Rep. Wadsworth) ("I have known, myself, that [instructions] have been disobeyed, and yet the representative was not brought to account for it; on the contrary, he was caressed and re-elected, while those who have obeyed them, contrary to their private sentiments, have ever after been despised for it")

e.g., *id.*, at 735 (remarks of Rep. Sherman) ("[W]hen the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him"). As a result, James Madison, then a Representative from Virginia, concluded that a right to issue binding instructions would "run the risk of losing the whole system." *Id.*, at 739; see also *id.*, at 735 (remarks of Rep. Clymer) (proposed right to give binding instructions was "a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments"). [16]

In any event, even assuming the existence of the reserved right that petitioner asserts (and that Article VIII falls within its ambit), the question remains whether the State may use ballots for congressional elections as a means of giving its instructions binding force.

---

[16] Of course, whether the members of a representative assembly should be bound by the views of their constituents, or by their own judgment, is a matter that has been the subject of debate since even before the Federal Union was established. For instance, in his classic speech to the electors of Bristol, Edmund Burke set forth the latter view:

"To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution." The Speeches of the Right Hon. Edmund Burke 130 (J. Burke ed. 1867).

IV

The federal offices at stake "aris[e] from the Constitution itself." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 805. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *Id.*, at 804. Cf. 1 Story §627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the union"). Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." Art. I, §4, cl. 1; see *United States* v. *Classic*, 313 U. S. 299, 315 (1941). No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

With respect to the Elections Clause, petitioner argues that Article VIII "merely regulates the manner in which elections are held by disclosing information about congressional candidates."[17] As such, petitioner concludes, Article VIII is a valid exercise of Missouri's delegated power.

We disagree. To be sure, the Elections Clause grants to the States "broad power" to prescribe the procedural mechanisms for holding congressional elections. *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986); see also *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections").

------

[17] Brief for Petitioner 28; see also *id.*, at 38.

Nevertheless, Article VIII falls outside of that grant of authority. As we made clear in *U. S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U. S., at 833–834. Article VIII is not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections.[18] As to the last point, Article VIII bears no relation to the "manner" of elections as we understand it, for in our commonsense view that term encompasses matters like "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U. S., at 366; see also *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 833. In short, Article VIII is not among "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U. S., at 366, ensuring that elections are "fair and honest," and that "some sort of order, rather than chaos, is to accompany the democratic process," *Storer* v. *Brown*, 415 U. S. 724, 730 (1974).

Rather, Article VIII is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal. Cf. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9 (1983) ("We have upheld generally applicable

[18] Petitioner once shared our belief, when, in deposition testimony before the District Court, she admitted that Article VIII does not regulate the time, place, or manner of elections. App. 58.

and evenhanded [ballot access] restrictions that protect the integrity and reliability of the electoral process itself"). As noted, the state provision does not just "instruct" each member of Missouri's congressional delegation to promote in certain ways the passage of the specified term limits amendment. It also attaches a concrete consequence to noncompliance— the printing of the statement "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" by the candidate's name on all primary and general election ballots. Likewise, a nonincumbent candidate who does not pledge to follow the instruction receives the ballot designation "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

In describing the two labels, the courts below have employed terms such as "pejorative," "negative," "derogatory," "'intentionally intimidating,' " "particularly harmful," "politically damaging," "a serious sanction," "a penalty," and "official denunciation." 191 F. 3d, at 918, 919, 922, 925; 996 F. Supp., at 908; see *id.*, at 910, 916. The general counsel to petitioner's office, no less, has denominated the labels as "the Scarlet Letter." App. 34–35. We agree with the sense of these descriptions. They convey the substantial political risk the ballot labels impose on current and prospective congressional members who, for one reason or another, fail to comply with the conditions set forth in Article VIII for passing its term limits amendment. Although petitioner now claims that the labels "merely" inform Missouri voters about a candidate's compliance with Article VIII, she has acknowledged under oath that the ballot designations would handicap candidates for the United States Congress. *Id.*, at 66. To us, that is exactly the intended effect of Article VIII.

Indeed, it seems clear that the adverse labels handicap candidates "at the most crucial stage in the election process— the instant before the vote is cast." *Anderson* v. *Martin*, 375 U. S. 399, 402 (1964). At the same time, "by directing the citizen's attention to the single consideration" of

the candidates' fidelity to term limits, the labels imply that the issue "is an important— perhaps paramount— consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot" against candidates branded as unfaithful. *Ibid.* While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office.[19] Thus, far

---

[19]That much, apparently, also seemed clear to many Members of Congress operating under Article VIII or similar label laws adopted by other States, who consequently tailored their behavior to avoid the ballot designations. For example, in 1997, the House of Representatives voted on 11 different proposals to adopt a term limits amendment to the Constitution; 7 of those proposals were dictated by voter initiatives in 7 different States. Representative Blunt of Missouri introduced the Article VIII version to "ensure that members of the Missouri delegation have the ability to vote for language that meets a verbatim test of [the] Missouri Amendment" and thereby avoid "the scarlet letter provision." 143 Cong. Rec. H494 (Feb. 12, 1997). However, because each of the state initiatives provided a sanction similar to the ballot labels included in Article VIII, some Representatives explained that they were constrained to vote only for the version endorsed by the voters of their States, and to vote against differing versions proposed by congressional members from other States, even though they were supportive of term limits generally. See, *e.g.*, *id.*, at H486 (remarks of Rep. Hutchinson) ("I will vote against the bill of the gentleman from Florida [Mr. McCollum], not because I am opposed to term limits but because this particular resolution does not comply with the term limit instructions approved by the voters and the people of Arkansas"); *id.*, at H490 (remarks of Rep. Crapo) ("Last Congress I supported the McCollum term limits bill that, as I said, supported a 12-year term limit. However, in this Congress I must oppose this bill because of the initiative passed by the people of the State of Idaho which requires me to oppose any term limits measure that does not have the same set of term limit conditions that are included in the initiative that was passed in the State"). As Representative Frank of Massachusetts put it, "[e]very State's Members get to vote on their State's term limits so they make them feel better and they do not get the scarlet letter." *Id.*, at H487. Consequently, the most popular proposal for such an amendment, that of Representative McCollum of Florida, received 217 votes,

from regulating the procedural mechanisms of elections, Article VIII attempts to "dictate electoral outcomes." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 833–834. Such "regulation" of congressional elections simply is not authorized by the Elections Clause.[20]

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

---

10 fewer than it had in the preceding Congress. *Id.*, at H511. As for the Missouri version, it suffered a 353-to-72 defeat. *Id.*, at H497.

[20] At the margins, the parties have fought over whether the Elections Clause is even applicable because it is a grant of power to "each State by the Legislature thereof" and Article VIII is the product of referendum. Compare Brief for Petitioner 38, n. 46, with Brief for Respondents 12–13, n. 8. Of course, "[w]henever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932). Nevertheless, we need not delve into this inquiry, as it is clear, for the reasons stated in the text, that Article VIII is not authorized by the Elections Clause.

In discussing the Elections Clause issue, respondents have also relied in part on First Amendment cases upholding "time, place, and manner" regulations of speech. Brief for Respondents 13–14. Although the Elections Clause uses the same phrase as that branch of our First Amendment jurisprudence, it by no means follows that such cases have any relevance to our disposition of this case.

SUPREME COURT OF THE UNITED STATES

No. 99-929

REBECCA MCDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE KENNEDY, concurring.

I join the opinion of the Court, holding §15 *et seq.* of Article VIII of the Missouri Constitution violative of the Constitution of the United States. It seems appropriate, however, to add these brief observations with respect to Part III of the opinion. The Court does not say the States are disabled from requesting specific action from Congress or from expressing their concerns to it. As the Court holds, however, the mechanism the State seeks to employ here goes well beyond this prerogative.

A State is not permitted to interpose itself between the people and their National Government as it seeks to do here. Whether a State's concern is with the proposed enactment of a constitutional amendment or an ordinary federal statute it simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, §4. As the Court observed in *U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779 (1995), the Elections Clause is a "grant of authority to issue procedural regulations," and not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.,* at 833–834. The Elections Clause thus delegates but limited power over federal elections to the

States. *Id.,* at 804. The Court rules, as it must, that the amendments to Article VIII of the Missouri Constitution do not regulate the time or place of federal elections; rather, those provisions are an attempt to control the actions of the State's congressional delegation.

The dispositive principle in this case is fundamental to the Constitution, to the idea of federalism, and to the theory of representative government. The principle is that Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside. The Constitution was ratified by Conventions in the several States, not by the States themselves, U. S. Const., Art. VII, a historical fact and a constitutional imperative which underscore the proposition that the Constitution was ordained and established by the people of the United States. U. S. Const., preamble. The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate. As noted in the concurring opinion in *Thornton*, "[n]othing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." 514 U. S., at 842. Yet that is just what Missouri seeks to do through its law— to wield the power granted to it by the Elections Clause to handicap those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred

position on a certain issue. Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it. For these reasons Article VIII is void.

This said, it must be noted that when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action. See W. Miller, Arguing About Slavery 105–107 (1995). This right is preserved to individuals (the people) in the First Amendment. Even if a State, as an entity, is not itself protected by the Petition Clause, there is no principle prohibiting a state legislature from following a parallel course and by a memorial resolution requesting the Congress of the United States to pay heed to certain state concerns. From the earliest days of our Republic to the present time, States have done so in the context of federal legislation. See, *e.g.,* 22 Annals of Cong. 153–154 (1811) (reprinting a resolution by the General Assembly of the Commonwealth of Pennsylvania requesting that the charter of the Bank of the United States not be renewed); 2000 Ala. Acts 66 (requesting targeted relief for Medicare cuts); 2000 Kan. Sess. Laws ch. 186 (urging Congress to allow state-inspected meat to be shipped in interstate commerce). Indeed, the situation was even more complex in the early days of our Nation, when Senators were appointed by state legislatures rather than directly elected. At that time, it appears that some state legislatures followed a practice of instructing the Senators whom they had appointed to pass legislation, while only requesting that the Representatives, who had been elected by the people, do so. See 22 Annals of Cong. 153–154 (1811). I do not believe that the situation should be any different with respect to a proposed constitutional amendment, and indeed history bears this out. See, *e.g.,* 13 Annals of Cong. 95–96

(1803) (reprinting a resolution from the State of Vermont and the Commonwealth of Massachusetts requesting that Congress propose to the legislatures of the States a constitutional amendment akin to the Twelfth Amendment). The fact that the Members of the First Congress decided not to codify a right to instruct legislative representatives does not, in my view, prove that they intended to prohibit nonbinding petitions or memorials by the State as an entity.

If there are to be cases in which a close question exists regarding whether the State has exceeded its constitutional authority in attempting to influence congressional action, this case is not one of them. In today's case the question is not close. Here the State attempts to intrude upon the relationship between the people and their congressional delegates by seeking to control or confine the discretion of those delegates, and the interference is not permissible.

With these observations, I concur in the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 99-929

REBECCA MCDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE THOMAS, concurring in Parts I and IV and concurring in the judgment.

I continue to believe that, because they possess "reserved" powers, "the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 846 (1995) (THOMAS, J., dissenting). For this reason, I disagree with the Court's premise, derived from *U. S. Term Limits*, that the States have no authority to regulate congressional elections except for the authority that the Constitution expressly delegates to them. See *ante*, at 11. Nonetheless, the parties conceded the validity of this premise, see Brief for Petitioner 25–26; Brief for Respondents 12–13, and I therefore concur.

SUPREME COURT OF THE UNITED STATES

No. 99-929

REBECCA MCDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I would affirm the judgment of the Court of Appeals, but on the ground that Missouri's Article VIII violates the First Amendment to the United States Constitution. Specifically, I believe that Article VIII violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State. Our ballot access cases based on First Amendment grounds have rarely distinguished between the rights of candidates and the rights of voters. In *Bullock* v. *Carter*, 405 U. S. 134, 143 (1972), we said: "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." And in *Anderson* v. *Celebrezze*, 460 U. S. 780, 787 (1983), we said that "voters can assert their preferences only through candidates or parties or both." Actions such as the present one challenging ballot provisions have in most instances been brought by the candidates themselves, and no one questions the standing of respondents Gralike and Harmon to

raise a First Amendment challenge to such laws.*

Article I, §4, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." Missouri justifies Article VIII as a "time, place, and manner" regulation of election. Restrictions of this kind are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). Missouri's Article VIII flunks two of these three requirements. Article VIII is not only not content neutral, but it actually discriminates on the basis of viewpoint because only those candidates who fail to conform to the State's position receive derogatory labels. The result is that the State injects itself into the election process at an absolutely critical point— the composition of the ballot, which is the last thing the voter sees before he makes his choice— and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter.

In *Anderson* v. *Martin*, 375 U. S. 399 (1964), we held a Louisiana statute requiring the designation of a candidate's race on the ballot violated the Equal Protection

———————

*The Court of Appeals upheld their First Amendment claim, but based its reasoning on the view that the ballot statements were "compelled speech" by the candidate, and therefore ran afoul of cases such as *Wooley* v. *Maynard*, 430 U. S. 705 (1977). I do not agree with the reasoning of the Court of Appeals. I do not believe a reasonable voter, viewing the ballot labeled as Article VIII requires, would think that the candidate in question chose to characterize himself as having "disregarded voters' instructions" or as "having declined to pledge" to support term limits.

Clause. In describing the effect of such a designation, the Court said: "[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important— perhaps paramount— consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." *Id.*, at 402. So, too, here the State has chosen one and only one issue to comment on the position of the candidates. During the campaign, they may debate tax reform, Social Security, national security, and a host of other issues; but when it comes to the ballot on which one or the other of them is chosen, the State is saying that the issue of term limits is paramount. Although uttered in a different context, what we said in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) is equally applicable here: "[Government] may not select which issues are worth discussing or debating."

If other Missouri officials feel strongly about the need for term limits, they are free to urge rejection of candidates who do not share their view and refuse to "take the pledge." Such candidates are able to respond to that sort of speech with speech of their own. But the State itself may not skew the ballot listings in this way without violating the First Amendment.

Article 2. CONGRESSIONAL TERM LIMITS

Section

500. Findings and declarations.
505. Purpose and intent.
510. Ballot information for state legislators.
515. Ballot information for members of Congress.
520. Ballot information on term limit pledge for non-incumbents.
525. Designation.
530. Severability.
535. Short title.

Revisor's notes. AS 15.15.500 - 15.15.535 were enacted by 1996 Ballot Measure No. 4 and codified by the revisor of statutes in 1996.

Effective dates. 1996 Ballot Measure No. 4, which proposed enactment of law codified as AS 15.15.500 - 15.15.535, was approved by a majority of the voters in the November 5, 1996 election. It was certified on November 27, 1996 and took effect February 25, 1997.

Opinions of attorney general. Under the authority of AS 44.62.060(b), the proposed regulations implementing AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525 from Ballot Measure No. 4, SLA 1996, are disapproved on the basis that the requirements imposed by those statutes impose additional qualifications for Congressional office beyond those set out in the United States Constitution. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.500. Findings and declarations.

The People of the State of Alaska find and declare as follows:

(a) The People of Alaska voted by more than 62 percent to limit the terms of U.S. Representatives to three terms and limit U.S. Senators to two terms.

(b) The U.S. Supreme Court has ruled that an amendment to the U.S. Constitution is necessary to limit terms of members of Congress.

(c) There are two methods to propose amendments to the U.S. Constitution that must then be ratified by three-fourths of the States, or 38. These methods are (1) for two-thirds of both houses of the United States Congress to so vote or (2) for 34 states to apply for an amendment convention to so vote.

(d) The Congress has refused to propose such an amendment, and by a clear majority defeated the same term limits passed by over 62 percent of the Voters of Alaska in 1994.

(e) The Congress has a clear conflict of interest in proposing term limits on themselves.

(§ 2 1996 Ballot Measure No. 4)

Sec. 15.15.505. Purpose and intent.

The purpose and intent in enacting AS 15.15.500 - 15.15.535 is to secure the following amendment under the provisions of Article V of the United States Constitution by informing voters of acts and omissions by candidates for congressional and legislative office with respect to

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

said constitutional amendment:

CONGRESSIONAL TERM LIMITS AMENDMENT

Section A. No person shall serve in the office of the United States Senator for more than two terms, but upon ratification, no person who has held the office of the United States Senator or who then holds the office shall serve in the office for more than one additional term.

Section B. No person shall serve in the office of United States Representative for more than three terms, but upon ratification no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section. C. This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the States.

It is the further purpose and intent of AS 15.15.500 - 15.15.535 to instruct all candidates, including incumbents running for retention of office, to use all of his or her delegated powers to secure the amendment to the United States Constitution, as set forth above, and further to specifically instruct the legislature of the State of Alaska to support the following proposed application to Congress:

We, the people, and legislature of the State of Alaska, due to our desire to establish term limits on the Congress of the United States, hereby make application to Congress, pursuant to our power under Article V of the United States Constitution, to call an Article V Convention.

(§ 3 1996 Ballot Measure No. 4)

Revisor's notes. In 1996, in this section "AS 15.15.500 - 15.15.535" was substituted for "this legislation" and "this act" in order to reflect the codification of 1996 Ballot Measure No. 4.

Sec. 15.15.510. Ballot information for state legislators.

(a) All primary, special and general election ballots shall have "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any respective state senator or representative who during the preceding term of office:

(1) fails to vote in favor of the application set forth above when brought to a vote or;

(2) fails to second the application set forth above if it lacks for a second or;

(3) fails to vote in favor of bringing the application set forth above before any committee or subcommittee upon which he or she serves in the respective house or;

(4) fails to propose or otherwise bring to a vote of the full legislative body the application set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the application set forth above or;

(5) fails to vote against any attempt to delay, table or otherwise prevent a vote by the full legislative body of the application set forth above or;

(6) fails in any way to ensure that all votes on the application set forth above are recorded and made available to the public or;

(7) fails to vote against any change, addition or modification to the application set forth above or;

(8) fails to vote in favor of the amendment set forth above if it is sent to the states for ratification or;

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(9) fails to vote against any amendment with longer limits if such an amendment is sent to the state for ratification.

(b) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" when required by any of subsections (1) through (7) shall not appear adjacent to the names of candidates for state legislature if the State of Alaska has made an application to Congress for an Article V convention pursuant to the Act and such application has not been withdrawn, or if a Congressional Term Limits Amendment has been submitted to the States for ratification.

(1) the State of Alaska has made an application to Congress for an Article V amendment pursuant to the Act and such application has not been withdrawn or;

(2) the Congressional Term Limits Amendment set forth above has been submitted to the states for ratification and has been ratified by this state or the Amendment set forth above has become part of the United States Constitution.

(c) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" when required by subsection (8) or (9) shall not appear adjacent to the names of candidates for state legislature if the State of Alaska has ratified the proposed Congressional Term Limits Amendment set forth above.

(d) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" when required by any of subsections (1) through (9) shall not appear adjacent to the names of candidates for state legislature if the proposed Congressional Term Limits Amendment set forth above has become part of the United States Constitution.

(§ 4 1996 Ballot Measure No. 4)

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.515. Ballot information for members of Congress.

(a) All primary, special and general election ballots shall have "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Senator or Representative who during the preceding term of office:

(1) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote or;

(2) fails to second the proposed Congressional Term Limits Amendment set forth above if it lacks for a second before any proceeding of the legislative body or;

(3) fails to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above or;

(4) fails to vote in favor of all votes bringing the Congressional Term Limits Amendment set forth above before any committee of subcommittee of the respective house upon which he or she serves or;

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(5) fails to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment set forth above or;

(6) fails to abstain or vote against any proposed constitutional amendment that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above regardless of any other actions in support of the proposed Congressional Term Limits Amendment set forth above or;

(7) sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above or;

(8) fails in any way to ensure that all votes on the proposed Congressional Term Limits Amendment set forth above are recorded and made available to the public.

(b) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of candidates for Congress if the Congressional Term Limits Amendment set forth above is before the states for ratification or has become part of the United States Constitution.

(§ 5 1996 Ballot Measure No. 4)

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.520. Ballot information on term limit pledge for non-incumbents.

(a) Non-incumbent candidates for United States Senator and Representative, and state senator and representative shall be given an opportunity to take a "Term Limits" pledge regarding Term Limits each time they file to run for such office. Those who decline to take the "Term Limits" pledge shall have "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their name on every primary and general election ballot.

(b) The "Term Limits" pledge shall be offered to non-incumbent candidates for United States Senator and Representative, and to non-incumbent candidates for state senator and representative until a Constitutional Amendment which limits the number of terms of United States Senators to no more than two and United States Representatives to no more than three shall have become part of our United States Constitution.

(c) The "Term Limits" pledge that each non-incumbent candidate, set forth above, shall be offered is as follows:

I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Congressional Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

____

Signature of Candidate

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(d) The language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" shall not appear adjacent to the names of non-incumbent candidates for Congress or the legislature if the Congressional Term Limits Amendment set forth above has become part of the United States Constitution.

(§ 6 1996 Ballot Measure No. 4)

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.525. Designation.

(a) The Lieutenant Governor and state election officials shall be responsible for making a determination as to whether state and federal legislators and non-incumbent candidates shall have placed adjacent to their name on the election ballot "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS".

(b) The determination as to whether or not "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" shall be placed adjacent to a candidate's name shall be made at a time necessary to ensure placement of that designation on the ballot after a forty-five (45) day public comment period.

(c) If the official(s) with the authority to determine whether or not the designation "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" shall be placed adjacent to a candidate's name choose(s) not to place such designation adjacent to the name of a senator or representative for state or federal office, any citizen may sue within the 45 day public comment period to have such a designation made. Upon the filing of a suit, such a designation shall be made unless the candidate or the official(s) responsible for determining whether or not the designation shall appear adjacent to the candidate's name can show by clear and convincing evidence that the candidate has met the requirements set forth in this amendment and therefore should not have the designation "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" adjacent to the candidate's name.

(§ 7 1996 Ballot Measure No. 4)

Revisor's notes. In the last sentence of subsection (c), "'VIOLATED VOTER INSTRUCTION ON TERM LIMITS' or 'DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS'" appears after the last occurrence of "designation" even though it did not appear in the voter's pamphlet because the language was included in the text of the initiative as it was filed with the Lieutenant Governor's Office.

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op.

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

Att'y Gen.

Sec. 15.15.530. Severability.

If any portion, clause, or phrase of AS 15.15.500 - 15.15.535 is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

(§ 8 1996 Ballot Measure No. 4)

Revisor's notes. In 1996, in this section "AS 15.15.500 - 15.15.535" was substituted for "this initiative" in order to reflect the 1996 codification of 1996 Ballot Measure No. 4.

Sec. 15.15.535. Short title.

AS 15.15.500 - 15.15.535 shall be known as and may be cited as "The Congressional Term Limits Act of 1996".

(§ 1 1996 Ballot Measure No. 4)

Article 3. TERM LIMITS PLEDGE FOR CONGRESSIONAL AND LEGISLATIVE CANDIDATES

Section

550. Findings and declarations.
555. Purpose and intent.
560. Term Limits Pledge.
565. Ballot information and implementation.
570. Severability.
575. Short title.

Revisor's notes. AS 15.15.550 - 15.15.575 were enacted by 1998 Ballot Measure No. 7 and codified by the revisor of statutes in 1999, at which time internal references were conformed to reflect the codification.

Effective dates. 1998 Ballot Measure No. 7, § 1, which enacted this article, took effect on March 4, 1999.

Sec. 15.15.550. Findings and declarations.

The People of the State of Alaska find and declare as follows:

(1) polls of the People of Alaska indicate that a clear majority favor federal and state legislators serving only a limited number of years;

(2) The United States Congress and the Alaska Legislature have a clear conflict of interest in proposing term limits on themselves and have consistently refused to limit their own terms;

(3) the voters of Alaska want to elect federal and state legislators that pledge to limit their own terms;

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(4) the voters of Alaska want to know which candidates for the United States Congress and the Alaska Legislature support term limits and the concept of a citizen legislature.

(§ 1 1998 Ballot Measure No. 7)

Revisor's notes. In 1999, upon codification, the numbering of paragraphs (1)-(4) was substituted for (a)-(d) to conform to the style of the Alaska Statutes.

Sec. 15.15.555. Purpose and intent.

The purpose and intent in enacting AS 15.15.550 - 15.15.575 is to require the lieutenant governor to permit but not require any candidate for the United States Congress and the Alaska Legislature to submit to the lieutenant governor an executed copy of the applicable Term Limits Pledge set forth in AS 15.15.560 up until 15 days prior to the lieutenant governor's certification of the ballot in order for the ballot information set forth in AS 15.15.565(a), (b), and (c) to be included on that ballot.

(§ 1 1998 Ballot Measure No. 7)

Sec. 15.15.560. Term Limits Pledge.

(a) The lieutenant governor shall permit but not require any candidate for the United States Congress and the Alaska Legislature to submit to the lieutenant governor an executed copy of the Term Limits Pledge set forth in (b) of this section up until 15 days prior to the lieutenant governor's certification of the ballot in order for the ballot information set forth in AS 15.15.565(a), (b), and (c) to be included on that ballot.

(b) The Term Limits Pledge will be as set forth herein and will incorporate the applicable language in [ ] for the office the candidate seeks:

Term Limits Pledge for Candidates for the

United States Congress

I voluntarily pledge not to serve in the United States [House of Representatives more than 3 terms] [Senate more than 2 terms] after the effective date of this provision and authorize the Lieutenant Governor to notify the voters of this action by placing the applicable ballot information, "Signed TERM LIMITS pledge: Will serve no more than [3 terms] [2 terms]" or "Broke TERM LIMITS pledge" next to my name on every election ballot and in all state sponsored voter education material in which my name appears as a candidate for the office for which the pledge refers.

________________ ____

Signature Date

Term Limits Pledge for Candidates for the

Alaska Legislature:

I voluntarily pledge not to serve in the Alaska Legislature for more than 8 years in any 16

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

year period after the effective date of this provision and authorize the Lieutenant Governor to notify the voters of this action by placing the applicable ballot information, "Signed TERM LIMITS pledge: Will serve no more than 8 years" or "Broke TERM LIMITS pledge" next to my name on every election ballot and in all state sponsored voter education material in which my name appears as a candidate for the office for which the pledge refers.

Signature Date

(§ 1 1998 Ballot Measure No. 7)

Sec. 15.15.565. Ballot information and implementation.

(a) The lieutenant governor shall place on every election ballot and in all state sponsored voter education material the applicable ballot information, "Signed TERM LIMITS pledge: Will serve no more than [3 terms] [2 terms]" next to the name of any candidate for the office of United States Representative and United States Senator who has ever executed the Term Limits Pledge except when (c) of this section applies.

(b) The lieutenant governor shall place on every election ballot and in all state sponsored voter education material the ballot information, "Signed TERM LIMITS pledge: Will serve no more than 8 years" next to the name of any candidate for the Alaska Legislature who has ever executed the Term Limits Pledge except when (c) of this section applies.

(c) The lieutenant governor shall place on every election ballot and in all state sponsored voter education material the ballot information, "Broke TERM LIMITS pledge" next to the name of any candidate who at any time executes the applicable Term Limits Pledge and thereafter qualifies as a candidate for a term that would exceed the number of terms or years set forth in the applicable Term Limits Pledge.

(d) For the purpose of this section, service in office for more than one-half of a term shall be deemed service for a term.

(e) The state-recognized proponent(s) and sponsor(s) of the initiative that enacted AS 15.15.550 - 15.15.575 shall have standing to defend it.

(f) The lieutenant governor shall implement this section by rule as long as that rule does not alter the intent of this section.

(§ 1 1998 Ballot Measure No. 7)

Revisor's notes. In 1999, "the initiative that enacted AS 15.15.550 - 15.15.575" was substituted for "this initiative" to reflect the codification of 1998 Ballot Measure No. 7 as AS 15.15.550 - 15.15.575.

Sec. 15.15.570. Severability.

If any portion of this section is held invalid for any reason, the remaining portion to the fullest extent possible shall be severed from the void portion and given the fullest force and application.

(§ 1 1998 Ballot Measure No. 7)

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

HOUSE BILL NO. 189

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 3/16/01
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

1 **"An Act repealing statutory provisions relating to term limits and term limit pledges."**

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

3 * **Section 1.** AS 15.15.500, 15.15.505, 15.15.510, 15.15.515, 15.15.520, 15.15.525,
4 15.15.530, 15.15.535, 15.15.550, 15.15.555, 15.15.560, 15.15.565, 15.15.570, and 15.15.575
5 are repealed.

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465- 040

Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 189

On February 28, 2001, in a case entitled *Cook v. Gralike, et al.*, the United States Supreme Court ruled that printing term limit pledges on the ballot next to a Congressional candidate's name is unconstitutional. The Missouri act which was struck down required "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" to be printed on ballots by the names of members failing to take certain legislative acts in support of the proposed term limit amendment. It also provided that "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed by the names of the non-incumbent candidates refusing to take a "Term Limit" pledge to bring about a specified "Congressional Term Limits Amendment."

Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places, Manner of holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." The states may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

The Supreme Court found that the requirement of printing on the ballot a candidate's lack of acceptance of a term limit pledge was not a procedural regulation. It did not regulate the time of elections; it did not regulate the place of elections; nor did it regulate the manner of elections. Rather, the court found, the requirement was plainly designed to favor candidates who are willing to support the particular form of a term limits amendment, and to disfavor those who either oppose term limits entirely or who would prefer a different proposal. The Court stated that:

> ...it seems clear that the adverse labels handicap candidates at the most crucial state in the election process-the instant before the vote is cast. The labels imply that the issue 'is an important-perhaps paramount-consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot' against candidates branded as unfaithful. Thus far from regulating the procedural mechanisms of elections, the Missouri act attempts to dictate electoral outcomes. Such 'regulation' of congressional elections simply is not authorized by the 'Elections Clause.'

Alaska statutes AS 15.15.500-575 require that "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" be printed on the ballot adjacent to the name of any respective state senator or representative who failed to take appropriate action in support of a congressional term limit amendment to the constitution, during the preceding term of office. The same shall be printed

on the ballot adjacent to the name of any United States Senator or Representative who also fails to take appropriate action during the preceding term.

Non-incumbent candidates for United States Senator and Representative, and state senator and representative who decline to take a "Term Limits' pledge shall have "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their name on every primary and general election ballot.

Any candidate for the United States Congress and the Alaska Legislature is permitted to submit to the lieutenant governor an executed copy of the Term Limits Pledge set for in AS 15.15.560(b). The lieutenant governor shall place on every election ballot "Signed TERM LIMITS pledge: Will serve no more than [3 terms] [2 terms]" next to the name of any candidate who has ever executed the Term Limits Pledge. In addition, "Broke TERM LIMITS pledge" shall be placed on every ballot next to the name of any candidate, who at any time executes the applicable Term Limits Pledge, and thereafter qualifies as a candidate for a term that would exceed the number of terms or years set for in the applicable Term Limits Pledge.

Since the Alaska statutes are so similar to those of Missouri, this United States Supreme Court ruling suggests that our statutes are unconstitutional. This bill will repeal these unconstitutional statutes.

The committee urges your support of this bill.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COOK *v.* GRALIKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-929. Argued November 6, 2000— Decided February 28, 2001

In *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, the Court held that an Arkansas law prohibiting otherwise eligible congressional candidates from appearing on the general election ballot if they had already served two Senate terms or three House terms was an impermissible attempt to add qualifications to congressional office rather than a permissible exercise of the States' Elections Clause power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," U. S. Const., Art., I, §4, cl. 1. In response, Missouri voters adopted an amendment to Article VIII of their State Constitution designed to bring about a specified "Congressional Term Limits Amendment" to the Federal Constitution. Among other things, Article VIII "instruct[s]" Missouri Congress Members to use all their powers to pass the federal amendment; prescribes that "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on ballots by the names of Members failing to take certain legislative acts in support of the proposed amendment; provides that "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed by the names of nonincumbent candidates refusing to take a "Term Limit" pledge to perform those acts if elected; and directs the Missouri Secretary of State (Secretary), the petitioner here, to determine and declare whether either statement should be printed by candidates' names. Respondent Gralike, a nonincumbent House candidate, sued to enjoin petitioner from implementing Article VIII on the ground it violated the Federal Constitution. The District Court granted Gralike summary judgment, and the Eighth Circuit affirmed.

Held: Article VIII is unconstitutional. Pp. 6–15.

(a) Because petitioner's arguments that Article VIII is an exercise

of the people's right to instruct their representatives reserved by the Tenth Amendment, as well as a permissible regulation of the "manner" of electing federal legislators under the Elections Clause, rely on different sources of state power, the Court reviews the distinction in kind between reserved state powers and those delegated to the States by the Constitution. The Constitution draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. *U. S. Term Limits*, 514 U. S., at 801. On the one hand, such retained powers proceed, not from the American people, but from the people of the several States. They remain, after the Constitution's adoption, what they were before, except insofar as they are abridged by that instrument. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 193. On the other hand, the States can exercise no powers springing exclusively from the National Government's existence which the Constitution did not delegate. Pp. 6–8.

(b) Petitioner's argument that Article VIII is a valid exercise of the State's reserved power to give binding instructions to its representatives is unpersuasive for three reasons. First, the historical precedents on which she relies—concerning the part instructions played in the Second Continental Congress, the Constitutional Convention, the early Congress, the selection of United States Senators before the Seventeenth Amendment's passage, and the ratification of certain federal constitutional amendments—are distinguishable because, unlike Article VIII, none of petitioner's examples was coupled with an express legal sanction for disobedience. Second, countervailing historical evidence is provided by the fact that the First Congress rejected a proposal to insert a right of the people "to instruct their representatives" into what would become the First Amendment. Third, and of decisive significance, the means employed to issue the instructions, ballots for congressional elections, are unacceptable unless Article VIII is a permissible exercise of the State's power to regulate the manner of holding congressional elections. Pp. 8–10.

(c) The federal offices at stake arise from the Constitution itself. See *U. S. Term Limits,* 514 U. S., at 805. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to the States, rather than reserved under the Tenth Amendment. *Id.*, at 804. No constitutional provision other than the Elections Clause gives the States authority over congressional elections. By process of elimination then, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of their Elections Clause power. The Court disagrees with petitioner's argument that Article VIII is a valid exercise of that power in that it

regulates the "manner" in which elections are held by disclosing information about congressional candidates. The Clause grants to the States "broad power" to prescribe the procedural mechanisms for holding congressional elections, *e.g., Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217, but does not authorize them to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints, *U. S. Term Limits*, 514 U. S., at 833–834. Article VIII is not a procedural regulation. It does not control the "manner" of elections, for that term encompasses matters like notices, registration, supervision of voting, and other requirements as to procedure and safeguards which experience shows are necessary to enforce the fundamental right involved. See, *e.g., Smiley* v. *Holm*, 285 U. S. 355, 366. Rather, Article VIII is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal. Cf. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9. It not only "instruct[s]" Missouri's congressional Members to promote the passage of the specified term limits amendment, but also attaches a concrete consequence to noncompliance— the printing of an adverse label by the candidate's name on ballots. The two labels impose substantial political risk on candidates who fail to comply with Article VIII, handicapping them at the most crucial stage in the election process— the instant before the vote is cast, *Anderson* v. *Martin*, 375 U. S. 399, 402. And, by directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue is an important— perhaps paramount— consideration in the citizen's choice. *Ibid.* Article VIII thus attempts to "dictate electoral outcomes." *U. S. Term Limits*, 514 U. S., at 833–834. Such "regulation" of congressional elections is not authorized by the Elections Clause. Pp. 11–15.

191 F. 3d 911, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined, in which SOUTER, J., joined, as to Parts I, II, and IV, and in which THOMAS, J., joined as to Parts I and IV. KENNEDY, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 99–929

REBECCA MCDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE STEVENS delivered the opinion of the Court.

In *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995), we reviewed a challenge to an Arkansas law that prohibited the name of an otherwise eligible candidate for the United States Congress from appearing on the general election ballot if he or she had already served three terms in the House of Representatives or two terms in the Senate. We held that the ballot restriction was an indirect attempt to impose term limits on congressional incumbents that violated the Qualifications Clauses in Article I of the Constitution rather than a permissible exercise of the State's power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives" within the meaning of Article I, §4, cl. 1.

In response to that decision, the voters of Missouri adopted in 1996 an amendment to Article VIII[1] of their State Constitution designed to lead to the adoption of a

[1] We shall follow the parties' practice of referring to the amendment as "Article VIII" even though it merely added new §§15 through 22 to the pre-existing article.

specified "Congressional Term Limits Amendment" to the Federal Constitution. At issue in this case is the constitutionality of Article VIII.

I

Article VIII "instruct[s]" each Member of Missouri's congressional delegation "to use all of his or her delegated powers to pass the Congressional Term Limits Amendment" set forth in §16 of the Article. Mo. Const., Art. VIII, §17(1). That proposed amendment would limit service in the United States Congress to three terms in the House of Representatives and two terms in the Senate.[2]

Three provisions in Article VIII combine to advance its purpose. Section 17 prescribes that the statement "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on all primary and general ballots adjacent to the name of a Senator or Representative who fails to take any one of eight legislative acts in support of the proposed amendment.[3] Section 18 provides that the

———————

[2] The full text of the proposed amendment is as follows:

"Congressional Term Limits Amendment

"(a) No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of the United States Representative or who then holds the office shall serve for more than two additional terms.

"(b) No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve in the office for more than one additional term.

"(c) Any state may enact by state constitutional amendment longer or shorter limits than those specified in section "a" or "b" herein.

"(d) This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the several States."

[3] Section 17(2) provides that the statement shall be printed "adjacent to the name of any United States Senator or Representative who:

statement 'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed on all primary and general election ballots next to the name of every nonincumbent congressional candidate who refuses to take a 'Term Limit" pledge that commits the candidate, if elected, to performing the legislative acts enumerated in §17.[4] And §19 directs the Missouri Secretary of State to determine and declare, pursuant to §§17 and 18, whether either

———————

'(a) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote or;

'(b) fails to second the proposed Congressional Term Limits Amendment set forth above if it lacks for a second before any proceeding of the legislative body or;

'(c) fails to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above or;

'(d) fails to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment set forth above before any committee or subcommittee of the respective house upon which he or she serves or;

'(e) fails to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment set forth above or;

'(f) fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed Congressional Term Limits Amendment set forth above regardless of any other actions in support of the proposed Congressional Term Limits Amendment set forth above or;

'(g) sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above or;

'(h) fails to ensure that all votes on Congressional Term Limits are recorded and made available to the public."

[4] The pledge, contained in §18(3), reads:

'I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS'will not appear adjacent to my name."

statement should be printed alongside the name of each candidate for Congress.[5]

Respondent Don Gralike was a nonincumbent candidate for election in 1998 to the United States House of Representatives from Missouri's Third Congressional District. A month after Article VIII was amended, respondent brought suit[6] in the United States District Court for the Western District of Missouri to enjoin petitioner, the Secretary of State of Missouri, from implementing the Article, which the complaint alleges violates several provisions of the Federal Constitution.

The District Court decided the case on the pleadings, granting Gralike's motion for summary judgment. The court first held that Article VIII contravened the Qualifications Clauses of Article I of the Federal Constitution because it "has the sole purpose of creating additional qualifications for Congress indirectly and has the likely effect of handicapping a class of candidates for Congress." 996 F. Supp. 917, 920 (1998); see 996 F. Supp. 901, 905–909 (1998). The court further held that Article VIII places an impermissible burden on the candidates' First Amendment right to speak freely on the issue of term limits by

[5] Section 19(5) permits a voter to appeal to the Missouri Supreme Court a determination that a statement should not be placed next to a candidate's name, and §19(6) allows a candidate to appeal to the State's highest court a determination that such a statement should be printed. In either case, clear and convincing evidence is required to demonstrate that the statement does not belong on the ballot adjacent to the candidate's name.

The remainder of Article VIII provides for automatic repeal of the Article should the specified Congressional Term Limits Amendment be ratified, §20; exclusive jurisdiction of challenges to the Amendment in the Supreme Court of Missouri, §21; and severance of "any portion, clause, or phrase" of Article VIII that is declared invalid, §22.

[6] Although respondent intended to run for Congress when he filed suit, under Missouri law he could not formally file a declaration for candidacy until February 1998. App. 25–26.

"punish[ing] candidates for speaking out against term limits" through putting "negative words next to their names on the ballot," and by "us[ing] the threat of being disadvantaged in the election to coerce candidates into taking a position on the term limits issue." 996 F. Supp., at 910; see 996 F. Supp., at 920. Lastly, the court found Article VIII to be an indirect and unconstitutional attempt by the people of Missouri to interject themselves into the amending process authorized by Article V of the Federal Constitution. In doing so, the court endorsed the reasoning of other decisions invalidating provisions similar to Article VIII on the ground that negative ballot designations "place an undue influence on the legislator to vote in favor of term limits rather than exercise his or her own independent judgment as is contemplated by Article V." 996 F. Supp., at 916; see 996 F. Supp., at 920.[7] Accordingly, the court permanently enjoined petitioner from enforcing §§15 through 19 of Article VIII.

The United States Court of Appeals for the Eighth Circuit affirmed.[8] Like the District Court, it found that Article VIII "threatens a penalty that is serious enough to compel candidates to speak— the potential political damage of the ballot labels"; "seeks to impose an additional qualification for candidacy for Congress and does so in a manner which is highly likely to handicap term limit opponents and other labeled candidates"; and "coerce[s] legislators into proposing or ratifying a particular consti-

------

[7] See *League of Women Voters of Me.* v. *Gwadosky*, 966 F. Supp. 52 (Me. 1997); *Donovan* v. *Priest*, 931 S. W. 2d 119 (Ark. 1996).

[8] While the appeal was pending, respondent Gralike withdrew from the 1998 election and respondent Harmon, a nonincumbent candidate in the 2000 Republican congressional primary in the Seventh District of Missouri, intervened as an appellee. In view of Harmon's participation, there is no contention that this case is moot. See *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974).

tutional amendment" in violation of Article V. 191 F. 3d 911, 918, 924, 925 (1999). The Court of Appeals also observed that, contrary to the Speech or Debate Clause in Art. I, §6, cl. 1, of the Federal Constitution, Article VIII "establishes a regime in which a state officer— the secretary of state— is permitted to judge and punish Members of Congress for their legislative actions or positions." 191 F. 3d., at 922.[9]

Although the Court of Appeals' decision is consistent with the views of other courts that have passed on similar voter initiatives,[10] the importance of the case prompted our grant of certiorari. 529 U. S. 1065 (2000).

II

Article VIII furthers the States' interest in adding a

---

[9] Although Judge Hansen, dissenting in part, thought that §§17 through 19 should be severed, leaving the rest of Article VIII intact, the majority declined to do so. 191 F. 3d, at 926, n. 12. Petitioner does not contend here that any parts of Article VIII should be severed if found unconstitutional, but rather urges us to uphold the provision "in its entirety." Reply Brief for Petitioner 1–2.

[10] See *Miller* v. *Moore*, 169 F. 3d 1119 (CA8 1999) (Nebraska initiative invalidated on Article V and right-to-vote grounds); *Barker* v. *Hazeltine*, 3 F. Supp. 2d 1088 (SD 1998) (South Dakota initiative invalidated on Article V, First Amendment, Speech or Debate Clause, and due process grounds); *League of Women Voters of Me.* v. *Gwadosky*, 966 F. Supp. 52 (Me. 1997) (Maine initiative invalidated on Article V grounds); *Bramberg* v. *Jones*, 20 Cal. 4th 1045, 978 P. 2d 1240 (1999) (California initiative invalidated on Article V grounds); *Morrissey* v. *State*, 951 P. 2d 911 (Colo. 1998) (Colorado initiative invalidated on Article V and Guarantee Clause grounds); *Simpson* v. *Cenarrusa*, 944 P. 2d 1372 (Idaho 1997) (Idaho initiative invalidated on Speech or Debate Clause and state constitutional grounds, but did not violate Article V); *Donovan* v. *Priest*, 326 Ark. 353, 931 S. W. 2d 119 (1996) (in preelection challenge, Arkansas initiative invalidated on Article V grounds); *In re Initiative Petition No. 364*, 930 P. 2d 186 (Okla. 1996) (Oklahoma initiative invalidated on Article V and state constitutional grounds).

term limits amendment to the Federal Constitution in two ways. It encourages Missouri's congressional delegation to support such an amendment in order to avoid an unfavorable ballot designation when running for reelection. And it encourages the election of representatives who favor such an amendment. Petitioner argues that Article VIII is an exercise of the "right of the people to instruct" their representatives reserved by the Tenth Amendment,[11] and that it is a permissible regulation of the "manner" of electing federal legislators within the authority delegated to the States by the Elections Clause, Art. I, §4, cl. 1.[12] Because these two arguments rely on different sources of state power, it is appropriate at the outset to review the distinction in kind between powers reserved to the States and those delegated to the States by the Constitution.

As we discussed at length in *U. S. Term Limits*, the Constitution "draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States." 514 U. S., at 801. On the one hand, in the words of Chief Justice Marshall, "It was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." *Sturges* v. *Crowninshield,* 4 Wheat. 122, 193 (1819). The text of the Tenth Amendment delineates this principle:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

On the other hand, as Justice Story observed, "the

---

[11] Brief for Petitioner 25, and n. 37; see Reply Brief for Petitioner 4.

[12] Brief for Petitioner 28, 38; Reply Brief for Petitioner 4, 8.

states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them." 1 Commentaries on the Constitution of the United States §627 (3d ed. 1858) (hereinafter Story). Simply put, '[n]o state can say, that it has reserved, what it never possessed." *Ibid.*

III*

To be persuasive, petitioner's argument that Article VIII is a valid exercise of the State's reserved power to give binding instructions to its representatives would have to overcome three hurdles. First, the historical precedents on which she relies for the proposition that the States have such a reserved power are distinguishable. Second, there is countervailing historical evidence. Third, and of decisive significance, the means employed to issue the instructions, ballots for congressional elections, are unacceptable unless Article VIII is a permissible exercise of the State's power to regulate the manner of holding elections for Senators and Representatives. Only a brief comment on the first two points is necessary.

Petitioner relies heavily on the part instructions played in the Second Continental Congress, the Constitutional Convention, the early Congress, the selection of United States Senators before the passage of the Seventeenth Amendment, and the ratification of certain federal constitutional amendments.[13] However, unlike Article VIII, none of petitioner's examples was coupled with an express legal sanction for disobedience.[14] At best, as an *amicus curiae* for

———————

* JUSTICE SOUTER does not join this Part of the Court's opinion.

[13] Brief for Petitioner 10–17.

[14] For example, the Provincial Congress of North Carolina passed the following instruction on April 12, 1776: "*Resolved*, That the Delegates for this Colony in the Continental Congress be empowered to concur with the Delegates of the other Colonies in declaring Independency,

petitioner points out, and as petitioner herself acknowledges, such historical instructions at one point in the early Republic may have had "de facto binding force" because it might have been "political suicide" not to follow them.[15] This evidence falls short of demonstrating that either the people or the States had a right to give legally binding, *i.e.*, nonadvisory, instructions to their representatives that the Tenth Amendment reserved, much less that such a right would apply to federal representatives. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 802 (Tenth Amendment "could only 'reserve' that which existed before"); cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, 430 (1819) (rejecting argument that States had reserved power to tax corporations chartered by Congress because an "original right to tax" such federal entities "never existed").

Indeed, contrary evidence is provided by the fact that the First Congress rejected a proposal to insert a right of the people "to instruct their representatives" into what would become the First Amendment. 1 Annals of Cong. 732 (1789). The fact that the proposal was made suggests that its proponents thought it necessary, and the fact that it was rejected by a vote of 41 to 10, *id.*, at 747, suggests that we should give weight to the views of those who opposed the proposal. It was their view that binding instructions would undermine an essential attribute of Congress by eviscerating the deliberative nature of that National Assembly. See,

---

and forming foreign alliances, reserving to this Colony the sole and exclusive right of forming a Constitution and Laws for this Colony . . . ." 5 American Archives 860 (P. Force ed. 1844).

[15] Brief for Professor Kris W. Kobach as *Amicus Curiae* 5, 13; see Brief for Petitioner 14, n. 13. But see 1 Annals of Cong. 744 (1789) (remarks of Rep. Wadsworth) ("I have known, myself, that [instructions] have been disobeyed, and yet the representative was not brought to account for it; on the contrary, he was caressed and re-elected, while those who have obeyed them, contrary to their private sentiments, have ever after been despised for it")

e.g., *id.*, at 735 (remarks of Rep. Sherman) ("[W]hen the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him"). As a result, James Madison, then a Representative from Virginia, concluded that a right to issue binding instructions would "run the risk of losing the whole system." *Id.*, at 739; see also *id.*, at 735 (remarks of Rep. Clymer) (proposed right to give binding instructions was "a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments"). [16]

In any event, even assuming the existence of the reserved right that petitioner asserts (and that Article VIII falls within its ambit), the question remains whether the State may use ballots for congressional elections as a means of giving its instructions binding force.

------

[16] Of course, whether the members of a representative assembly should be bound by the views of their constituents, or by their own judgment, is a matter that has been the subject of debate since even before the Federal Union was established. For instance, in his classic speech to the electors of Bristol, Edmund Burke set forth the latter view:

"To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution." The Speeches of the Right Hon. Edmund Burke 130 (J. Burke ed. 1867).

IV

The federal offices at stake "aris[e] from the Constitution itself." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 805. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *Id.*, at 804. Cf. 1 Story §627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the union"). Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." Art. I, §4, cl. 1; see *United States* v. *Classic*, 313 U. S. 299, 315 (1941). No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

With respect to the Elections Clause, petitioner argues that Article VIII "merely regulates the manner in which elections are held by disclosing information about congressional candidates."[17] As such, petitioner concludes, Article VIII is a valid exercise of Missouri's delegated power.

We disagree. To be sure, the Elections Clause grants to the States "broad power" to prescribe the procedural mechanisms for holding congressional elections. *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986); see also *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections").

[17] Brief for Petitioner 28; see also *id.*, at 38.

Nevertheless, Article VIII falls outside of that grant of authority. As we made clear in *U. S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U. S., at 833–834. Article VIII is not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections.[18] As to the last point, Article VIII bears no relation to the "manner" of elections as we understand it, for in our commonsense view that term encompasses matters like "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U. S., at 366; see also *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 833. In short, Article VIII is not among "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U. S., at 366, ensuring that elections are "fair and honest," and that "some sort of order, rather than chaos, is to accompany the democratic process," *Storer* v. *Brown*, 415 U. S. 724, 730 (1974).

Rather, Article VIII is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal. Cf. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9 (1983) ("We have upheld generally applicable

———————

[18] Petitioner once shared our belief, when, in deposition testimony before the District Court, she admitted that Article VIII does not regulate the time, place, or manner of elections. App. 58.

and evenhanded [ballot access] restrictions that protect the integrity and reliability of the electoral process itself"). As noted, the state provision does not just "instruct" each member of Missouri's congressional delegation to promote in certain ways the passage of the specified term limits amendment. It also attaches a concrete consequence to noncompliance— the printing of the statement "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" by the candidate's name on all primary and general election ballots. Likewise, a nonincumbent candidate who does not pledge to follow the instruction receives the ballot designation "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

In describing the two labels, the courts below have employed terms such as "pejorative," "negative," "derogatory," "'intentionally intimidating,'" "particularly harmful," "politically damaging," "a serious sanction," "a penalty," and "official denunciation." 191 F. 3d, at 918, 919, 922, 925; 996 F. Supp., at 908; see *id.*, at 910, 916. The general counsel to petitioner's office, no less, has denominated the labels as "the Scarlet Letter." App. 34–35. We agree with the sense of these descriptions. They convey the substantial political risk the ballot labels impose on current and prospective congressional members who, for one reason or another, fail to comply with the conditions set forth in Article VIII for passing its term limits amendment. Although petitioner now claims that the labels "merely" inform Missouri voters about a candidate's compliance with Article VIII, she has acknowledged under oath that the ballot designations would handicap candidates for the United States Congress. *Id.*, at 66. To us, that is exactly the intended effect of Article VIII.

Indeed, it seems clear that the adverse labels handicap candidates "at the most crucial stage in the election process— the instant before the vote is cast." *Anderson* v. *Martin,* 375 U. S. 399, 402 (1964). At the same time, "by directing the citizen's attention to the single consideration" of

the candidates' fidelity to term limits, the labels imply that the issue "is an important— perhaps paramount— consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot" against candidates branded as unfaithful. *Ibid.* While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office.[19] Thus, far

---

[19]That much, apparently, also seemed clear to many Members of Congress operating under Article VIII or similar label laws adopted by other States, who consequently tailored their behavior to avoid the ballot designations. For example, in 1997, the House of Representatives voted on 11 different proposals to adopt a term limits amendment to the Constitution; 7 of those proposals were dictated by voter initiatives in 7 different States. Representative Blunt of Missouri introduced the Article VIII version to "ensure that members of the Missouri delegation have the ability to vote for language that meets a verbatim test of [the] Missouri Amendment" and thereby avoid "the scarlet letter provision." 143 Cong. Rec. H494 (Feb. 12, 1997). However, because each of the state initiatives provided a sanction similar to the ballot labels included in Article VIII, some Representatives explained that they were constrained to vote only for the version endorsed by the voters of their States, and to vote against differing versions proposed by congressional members from other States, even though they were supportive of term limits generally. See, *e.g.*, *id.*, at H486 (remarks of Rep. Hutchinson) ("I will vote against the bill of the gentleman from Florida [Mr. McCollum], not because I am opposed to term limits but because this particular resolution does not comply with the term limit instructions approved by the voters and the people of Arkansas"); *id.*, at H490 (remarks of Rep. Crapo) ("Last Congress I supported the McCollum term limits bill that, as I said, supported a 12-year term limit. However, in this Congress I must oppose this bill because of the initiative passed by the people of the State of Idaho which requires me to oppose any term limits measure that does not have the same set of term limit conditions that are included in the initiative that was passed in the State"). As Representative Frank of Massachusetts put it, "[e]very State's Members get to vote on their State's term limits so they make them feel better and they do not get the scarlet letter." *Id.*, at H487. Consequently, the most popular proposal for such an amendment, that of Representative McCollum of Florida, received 217 votes,

from regulating the procedural mechanisms of elections, Article VIII attempts to "dictate electoral outcomes." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S., at 833–834. Such "regulation" of congressional elections simply is not authorized by the Elections Clause.[20]

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

---

10 fewer than it had in the preceding Congress. *Id.*, at H511. As for the Missouri version, it suffered a 353-to-72 defeat. *Id.*, at H497.

[20] At the margins, the parties have fought over whether the Elections Clause is even applicable because it is a grant of power to "each State by the Legislature thereof" and Article VIII is the product of referendum. Compare Brief for Petitioner 38, n. 46, with Brief for Respondents 12–13, n. 8. Of course, "[w]henever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932). Nevertheless, we need not delve into this inquiry, as it is clear, for the reasons stated in the text, that Article VIII is not authorized by the Elections Clause.

In discussing the Elections Clause issue, respondents have also relied in part on First Amendment cases upholding "time, place, and manner" regulations of speech. Brief for Respondents 13–14. Although the Elections Clause uses the same phrase as that branch of our First Amendment jurisprudence, it by no means follows that such cases have any relevance to our disposition of this case.

SUPREME COURT OF THE UNITED STATES

No. 99-929

REBECCA MCDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE KENNEDY, concurring.

I join the opinion of the Court, holding §15 *et seq.* of Article VIII of the Missouri Constitution violative of the Constitution of the United States. It seems appropriate, however, to add these brief observations with respect to Part III of the opinion. The Court does not say the States are disabled from requesting specific action from Congress or from expressing their concerns to it. As the Court holds, however, the mechanism the State seeks to employ here goes well beyond this prerogative.

A State is not permitted to interpose itself between the people and their National Government as it seeks to do here. Whether a State's concern is with the proposed enactment of a constitutional amendment or an ordinary federal statute it simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, §4. As the Court observed in *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995), the Elections Clause is a "grant of authority to issue procedural regulations," and not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.*, at 833–834. The Elections Clause thus delegates but limited power over federal elections to the

States. *Id.*, at 804. The Court rules, as it must, that the amendments to Article VIII of the Missouri Constitution do not regulate the time or place of federal elections; rather, those provisions are an attempt to control the actions of the State's congressional delegation.

The dispositive principle in this case is fundamental to the Constitution, to the idea of federalism, and to the theory of representative government. The principle is that Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside. The Constitution was ratified by Conventions in the several States, not by the States themselves, U. S. Const., Art. VII, a historical fact and a constitutional imperative which underscore the proposition that the Constitution was ordained and established by the people of the United States. U. S. Const., preamble. The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate. As noted in the concurring opinion in *Thornton*, "[n]othing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." 514 U. S., at 842. Yet that is just what Missouri seeks to do through its law— to wield the power granted to it by the Elections Clause to handicap those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred

position on a certain issue. Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it. For these reasons Article VIII is void.

This said, it must be noted that when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action. See W. Miller, Arguing About Slavery 105–107 (1995). This right is preserved to individuals (the people) in the First Amendment. Even if a State, as an entity, is not itself protected by the Petition Clause, there is no principle prohibiting a state legislature from following a parallel course and by a memorial resolution requesting the Congress of the United States to pay heed to certain state concerns. From the earliest days of our Republic to the present time, States have done so in the context of federal legislation. See, *e.g.*, 22 Annals of Cong. 153–154 (1811) (reprinting a resolution by the General Assembly of the Commonwealth of Pennsylvania requesting that the charter of the Bank of the United States not be renewed); 2000 Ala. Acts 66 (requesting targeted relief for Medicare cuts); 2000 Kan. Sess. Laws ch. 186 (urging Congress to allow state-inspected meat to be shipped in interstate commerce). Indeed, the situation was even more complex in the early days of our Nation, when Senators were appointed by state legislatures rather than directly elected. At that time, it appears that some state legislatures followed a practice of instructing the Senators whom they had appointed to pass legislation, while only requesting that the Representatives, who had been elected by the people, do so. See 22 Annals of Cong. 153–154 (1811). I do not believe that the situation should be any different with respect to a proposed constitutional amendment, and indeed history bears this out. See, *e.g.*, 13 Annals of Cong. 95–96

(1803) (reprinting a resolution from the State of Vermont and the Commonwealth of Massachusetts requesting that Congress propose to the legislatures of the States a constitutional amendment akin to the Twelfth Amendment). The fact that the Members of the First Congress decided not to codify a right to instruct legislative representatives does not, in my view, prove that they intended to prohibit nonbinding petitions or memorials by the State as an entity.

If there are to be cases in which a close question exists regarding whether the State has exceeded its constitutional authority in attempting to influence congressional action, this case is not one of them. In today's case the question is not close. Here the State attempts to intrude upon the relationship between the people and their congressional delegates by seeking to control or confine the discretion of those delegates, and the interference is not permissible.

With these observations, I concur in the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 99-929

REBECCA McDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE THOMAS, concurring in Parts I and IV and concurring in the judgment.

I continue to believe that, because they possess "reserved" powers, "the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 846 (1995) (THOMAS, J., dissenting). For this reason, I disagree with the Court's premise, derived from *U. S. Term Limits*, that the States have no authority to regulate congressional elections except for the authority that the Constitution expressly delegates to them. See *ante*, at 11. Nonetheless, the parties conceded the validity of this premise, see Brief for Petitioner 25–26; Brief for Respondents 12–13, and I therefore concur.

SUPREME COURT OF THE UNITED STATES

No. 99-929

REBECCA MCDOWELL COOK, PETITIONER *v.* DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE OC ON-NOR joins, concurring in the judgment.

I would affirm the judgment of the Court of Appeals, but on the ground that Missouri's Article VIII violates the First Amendment to the United States Constitution. Specifically, I believe that Article VIII violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State. Our ballot access cases based on First Amendment grounds have rarely distinguished between the rights of candidates and the rights of voters. In *Bullock* v. *Carter*, 405 U. S. 134, 143 (1972), we said: "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." And in *Anderson* v. *Celebrezze*, 460 U. S. 780, 787 (1983), we said that "vo t-ers can assert their preferences only through candidates or parties or both." Actions such as the present one cha l-lenging ballot provisions have in most instances been brought by the candidates themselves, and no one questions the standing of respondents Gralike and Harmon to

raise a First Amendment challenge to such laws.*

Article I, §4, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." Missouri justifies Article VIII as a "time, place, and manner" regulation of election. Restrictions of this kind are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). Missouri's Article VIII flunks two of these three requirements. Article VIII is not only not content neutral, but it actually discriminates on the basis of viewpoint because only those candidates who fail to conform to the State's position receive derogatory labels. The result is that the State injects itself into the election process at an absolutely critical point— the composition of the ballot, which is the last thing the voter sees before he makes his choice— and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter.

In *Anderson* v. *Martin*, 375 U. S. 399 (1964), we held a Louisiana statute requiring the designation of a candidate's race on the ballot violated the Equal Protection

*The Court of Appeals upheld their First Amendment claim, but based its reasoning on the view that the ballot statements were "compelled speech" by the candidate, and therefore ran afoul of cases such as *Wooley* v. *Maynard*, 430 U. S. 705 (1977). I do not agree with the reasoning of the Court of Appeals. I do not believe a reasonable voter, viewing the ballot labeled as Article VIII requires, would think that the candidate in question chose to characterize himself as having "disregarded voters' instructions" or as "having declined to pledge" to support term limits.

Clause. In describing the effect of such a designation, the Court said: "[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important— perhaps paramount— consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." *Id.*, at 402. So, too, here the State has chosen one and only one issue to comment on the position of the candidates. During the campaign, they may debate tax reform, Social Security, national security, and a host of other issues; but when it comes to the ballot on which one or the other of them is chosen, the State is saying that the issue of term limits is paramount. Although uttered in a different context, what we said in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) is equally applicable here: "[Government] may not select which issues are worth discussing or debating."

If other Missouri officials feel strongly about the need for term limits, they are free to urge rejection of candidates who do not share their view and refuse to "take the pledge." Such candidates are able to respond to that sort of speech with speech of their own. But the State itself may not skew the ballot listings in this way without violating the First Amendment.

Article 2. CONGRESSIONAL TERM LIMITS

Section
500. Findings and declarations.
505. Purpose and intent.
510. Ballot information for state legislators.
515. Ballot information for members of Congress.
520. Ballot information on term limit pledge for non-incumbents.
525. Designation.
530. Severability.
535. Short title.

Revisor's notes. AS 15.15.500 - 15.15.535 were enacted by 1996 Ballot Measure No. 4 and codified by the revisor of statutes in 1996.

Effective dates. 1996 Ballot Measure No. 4, which proposed enactment of law codified as AS 15.15.500 - 15.15.535, was approved by a majority of the voters in the November 5, 1996 election. It was certified on November 27, 1996 and took effect February 25, 1997.

Opinions of attorney general. Under the authority of AS 44.62.060(b), the proposed regulations implementing AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525 from Ballot Measure No. 4, SLA 1996, are disapproved on the basis that the requirements imposed by those statutes impose additional qualifications for Congressional office beyond those set out in the United States Constitution. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.500. Findings and declarations.

The People of the State of Alaska find and declare as follows:

(a) The People of Alaska voted by more than 62 percent to limit the terms of U.S. Representatives to three terms and limit U.S. Senators to two terms.

(b) The U.S. Supreme Court has ruled that an amendment to the U.S. Constitution is necessary to limit terms of members of Congress.

(c) There are two methods to propose amendments to the U.S. Constitution that must then be ratified by three-fourths of the States, or 38. These methods are (1) for two-thirds of both houses of the United States Congress to so vote or (2) for 34 states to apply for an amendment convention to so vote.

(d) The Congress has refused to propose such an amendment, and by a clear majority defeated the same term limits passed by over 62 percent of the Voters of Alaska in 1994.

(e) The Congress has a clear conflict of interest in proposing term limits on themselves.

(§ 2 1996 Ballot Measure No. 4)

Sec. 15.15.505. Purpose and intent.

The purpose and intent in enacting AS 15.15.500 - 15.15.535 is to secure the following amendment under the provisions of Article V of the United States Constitution by informing voters of acts and omissions by candidates for congressional and legislative office with respect to

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

said constitutional amendment:

CONGRESSIONAL TERM LIMITS AMENDMENT

Section A. No person shall serve in the office of the United States Senator for more than two terms, but upon ratification, no person who has held the office of the United States Senator or who then holds the office shall serve in the office for more than one additional term.

Section B. No person shall serve in the office of United States Representative for more than three terms, but upon ratification no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section. C. This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the States.

It is the further purpose and intent of AS 15.15.500 - 15.15.535 to instruct all candidates, including incumbents running for retention of office, to use all of his or her delegated powers to secure the amendment to the United States Constitution, as set forth above, and further to specifically instruct the legislature of the State of Alaska to support the following proposed application to Congress:

We, the people, and legislature of the State of Alaska, due to our desire to establish term limits on the Congress of the United States, hereby make application to Congress, pursuant to our power under Article V of the United States Constitution, to call an Article V Convention.

(§ 3 1996 Ballot Measure No. 4)

Revisor's notes. In 1996, in this section "AS 15.15.500 - 15.15.535" was substituted for "this legislation" and "this act" in order to reflect the codification of 1996 Ballot Measure No. 4.

Sec. 15.15.510. Ballot information for state legislators.

(a) All primary, special and general election ballots shall have "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any respective state senator or representative who during the preceding term of office:

(1) fails to vote in favor of the application set forth above when brought to a vote or;

(2) fails to second the application set forth above if it lacks for a second or;

(3) fails to vote in favor of bringing the application set forth above before any committee or subcommittee upon which he or she serves in the respective house or;

(4) fails to propose or otherwise bring to a vote of the full legislative body the application set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the application set forth above or;

(5) fails to vote against any attempt to delay, table or otherwise prevent a vote by the full legislative body of the application set forth above or;

(6) fails in any way to ensure that all votes on the application set forth above are recorded and made available to the public or;

(7) fails to vote against any change, addition or modification to the application set forth above or;

(8) fails to vote in favor of the amendment set forth above if it is sent to the states for ratification or;

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(9) fails to vote against any amendment with longer limits if such an amendment is sent to the state for ratification.

(b) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" when required by any of subsections (1) through (7) shall not appear adjacent to the names of candidates for state legislature if the State of Alaska has made an application to Congress for an Article V convention pursuant to the Act and such application has not been withdrawn, or if a Congressional Term Limits Amendment has been submitted to the States for ratification.

(1) the State of Alaska has made an application to Congress for an Article V amendment pursuant to the Act and such application has not been withdrawn or;

(2) the Congressional Term Limits Amendment set forth above has been submitted to the states for ratification and has been ratified by this state or the Amendment set forth above has become part of the United States Constitution.

(c) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" when required by subsection (8) or (9) shall not appear adjacent to the names of candidates for state legislature if the State of Alaska has ratified the proposed Congressional Term Limits Amendment set forth above.

(d) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" when required by any of subsections (1) through (9) shall not appear adjacent to the names of candidates for state legislature if the proposed Congressional Term Limits Amendment set forth above has become part of the United States Constitution.

(§ 4 1996 Ballot Measure No. 4)

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.515. Ballot information for members of Congress.

(a) All primary, special and general election ballots shall have "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Senator or Representative who during the preceding term of office:

(1) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote or;

(2) fails to second the proposed Congressional Term Limits Amendment set forth above if it lacks for a second before any proceeding of the legislative body or;

(3) fails to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above or;

(4) fails to vote in favor of all votes bringing the Congressional Term Limits Amendment set forth above before any committee of subcommittee of the respective house upon which he or she serves or;

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(5) fails to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment set forth above or;

(6) fails to abstain or vote against any proposed constitutional amendment that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above regardless of any other actions in support of the proposed Congressional Term Limits Amendment set forth above or;

(7) sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above or;

(8) fails in any way to ensure that all votes on the proposed Congressional Term Limits Amendment set forth above are recorded and made available to the public.

(b) The language "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of candidates for Congress if the Congressional Term Limits Amendment set forth above is before the states for ratification or has become part of the United States Constitution.

(§ 5 1996 Ballot Measure No. 4)

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.520. Ballot information on term limit pledge for non-incumbents.

(a) Non-incumbent candidates for United States Senator and Representative, and state senator and representative shall be given an opportunity to take a "Term Limits" pledge regarding Term Limits each time they file to run for such office. Those who decline to take the "Term Limits" pledge shall have "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their name on every primary and general election ballot.

(b) The "Term Limits" pledge shall be offered to non-incumbent candidates for United States Senator and Representative, and to non-incumbent candidates for state senator and representative until a Constitutional Amendment which limits the number of terms of United States Senators to no more than two and United States Representatives to no more than three shall have become part of our United States Constitution.

(c) The "Term Limits" pledge that each non-incumbent candidate, set forth above, shall be offered is as follows:

I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Congressional Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

____

Signature of Candidate

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(d) The language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" shall not appear adjacent to the names of non-incumbent candidates for Congress or the legislature if the Congressional Term Limits Amendment set forth above has become part of the United States Constitution.

(§ 6 1996 Ballot Measure No. 4)

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op. Att'y Gen.

Sec. 15.15.525. Designation.

(a) The Lieutenant Governor and state election officials shall be responsible for making a determination as to whether state and federal legislators and non-incumbent candidates shall have placed adjacent to their name on the election ballot "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS".

(b) The determination as to whether or not "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" shall be placed adjacent to a candidate's name shall be made at a time necessary to ensure placement of that designation on the ballot after a forty-five (45) day public comment period.

(c) If the official(s) with the authority to determine whether or not the designation "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" shall be placed adjacent to a candidate's name choose(s) not to place such designation adjacent to the name of a senator or representative for state or federal office, any citizen may sue within the 45 day public comment period to have such a designation made. Upon the filing of a suit, such a designation shall be made unless the candidate or the official(s) responsible for determining whether or not the designation shall appear adjacent to the candidate's name can show by clear and convincing evidence that the candidate has met the requirements set forth in this amendment and therefore should not have the designation "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" adjacent to the candidate's name.

(§ 7 1996 Ballot Measure No. 4)

Revisor's notes. In the last sentence of subsection (c), "'VIOLATED VOTER INSTRUCTION ON TERM LIMITS' or 'DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS'" appears after the last occurrence of "designation" even though it did not appear in the voter's pamphlet because the language was included in the text of the initiative as it was filed with the Lieutenant Governor's Office.

Opinions of attorney general. The provisions of Ballot Measure 4 of the 1996 general election (codified at AS 15.15.510, 15.15.515, 15.15.520, and 15.15.525)(requiring that candidates for public office be given the opportunity to take a term limits pledge and, if they refuse, the language "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" be printed adjacent to their name on the ballot) are unconstitutional and the implementing regulations are therefore also unconstitutional. May 1, 1998 Op.

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

Att'y Gen.

Sec. 15.15.530. Severability.

If any portion, clause, or phrase of AS 15.15.500 - 15.15.535 is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

(§ 8 1996 Ballot Measure No. 4)

Revisor's notes. In 1996, in this section "AS 15.15.500 - 15.15.535" was substituted for "this initiative" in order to reflect the 1996 codification of 1996 Ballot Measure No. 4.

Sec. 15.15.535. Short title.

AS 15.15.500 - 15.15.535 shall be known as and may be cited as "The Congressional Term Limits Act of 1996".

(§ 1 1996 Ballot Measure No. 4)

Article 3. TERM LIMITS PLEDGE FOR CONGRESSIONAL AND LEGISLATIVE CANDIDATES

Section
550. Findings and declarations.
555. Purpose and intent.
560. Term Limits Pledge.
565. Ballot information and implementation.
570. Severability.
575. Short title.

Revisor's notes. AS 15.15.550 - 15.15.575 were enacted by 1998 Ballot Measure No. 7 and codified by the revisor of statutes in 1999, at which time internal references were conformed to reflect the codification.

Effective dates. 1998 Ballot Measure No. 7, § 1, which enacted this article, took effect on March 4, 1999.

Sec. 15.15.550. Findings and declarations.

The People of the State of Alaska find and declare as follows:

(1) polls of the People of Alaska indicate that a clear majority favor federal and state legislators serving only a limited number of years;

(2) The United States Congress and the Alaska Legislature have a clear conflict of interest in proposing term limits on themselves and have consistently refused to limit their own terms;

(3) the voters of Alaska want to elect federal and state legislators that pledge to limit their own terms;

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

(4) the voters of Alaska want to know which candidates for the United States Congress and the Alaska Legislature support term limits and the concept of a citizen legislature.

(§ 1 1998 Ballot Measure No. 7)

Revisor's notes. In 1999, upon codification, the numbering of paragraphs (1)-(4) was substituted for (a)-(d) to conform to the style of the Alaska Statutes.

Sec. 15.15.555. Purpose and intent.

The purpose and intent in enacting AS 15.15.550 - 15.15.575 is to require the lieutenant governor to permit but not require any candidate for the United States Congress and the Alaska Legislature to submit to the lieutenant governor an executed copy of the applicable Term Limits Pledge set forth in AS 15.15.560 up until 15 days prior to the lieutenant governor's certification of the ballot in order for the ballot information set forth in AS 15.15.565(a), (b), and (c) to be included on that ballot.

(§ 1 1998 Ballot Measure No. 7)

Sec. 15.15.560. Term Limits Pledge.

(a) The lieutenant governor shall permit but not require any candidate for the United States Congress and the Alaska Legislature to submit to the lieutenant governor an executed copy of the Term Limits Pledge set forth in (b) of this section up until 15 days prior to the lieutenant governor's certification of the ballot in order for the ballot information set forth in AS 15.15.565(a), (b), and (c) to be included on that ballot.

(b) The Term Limits Pledge will be as set forth herein and will incorporate the applicable language in [ ] for the office the candidate seeks:

Term Limits Pledge for Candidates for the

United States Congress

I voluntarily pledge not to serve in the United States [House of Representatives more than 3 terms] [Senate more than 2 terms] after the effective date of this provision and authorize the Lieutenant Governor to notify the voters of this action by placing the applicable ballot information, "Signed TERM LIMITS pledge: Will serve no more than [3 terms] [2 terms]" or "Broke TERM LIMITS pledge" next to my name on every election ballot and in all state sponsored voter education material in which my name appears as a candidate for the office for which the pledge refers.

____

Signature Date

Term Limits Pledge for Candidates for the

Alaska Legislature:

I voluntarily pledge not to serve in the Alaska Legislature for more than 8 years in any 16

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

year period after the effective date of this provision and authorize the Lieutenant Governor to notify the voters of this action by placing the applicable ballot information, "Signed TERM LIMITS pledge: Will serve no more than 8 years" or "Broke TERM LIMITS pledge" next to my name on every election ballot and in all state sponsored voter education material in which my name appears as a candidate for the office for which the pledge refers.

____________ ____________________________________

Signature Date

(§ 1 1998 Ballot Measure No. 7)

Sec. 15.15.565. Ballot information and implementation.

(a) The lieutenant governor shall place on every election ballot and in all state sponsored voter education material the applicable ballot information, "Signed TERM LIMITS pledge: Will serve no more than [3 terms] [2 terms]" next to the name of any candidate for the office of United States Representative and United States Senator who has ever executed the Term Limits Pledge except when (c) of this section applies.

(b) The lieutenant governor shall place on every election ballot and in all state sponsored voter education material the ballot information, "Signed TERM LIMITS pledge: Will serve no more than 8 years" next to the name of any candidate for the Alaska Legislature who has ever executed the Term Limits Pledge except when (c) of this section applies.

(c) The lieutenant governor shall place on every election ballot and in all state sponsored voter education material the ballot information, "Broke TERM LIMITS pledge" next to the name of any candidate who at any time executes the applicable Term Limits Pledge and thereafter qualifies as a candidate for a term that would exceed the number of terms or years set forth in the applicable Term Limits Pledge.

(d) For the purpose of this section, service in office for more than one-half of a term shall be deemed service for a term.

(e) The state-recognized proponent(s) and sponsor(s) of the initiative that enacted AS 15.15.550 - 15.15.575 shall have standing to defend it.

(f) The lieutenant governor shall implement this section by rule as long as that rule does not alter the intent of this section.

(§ 1 1998 Ballot Measure No. 7)

Revisor's notes. In 1999, "the initiative that enacted AS 15.15.550 - 15.15.575" was substituted for "this initiative" to reflect the codification of 1998 Ballot Measure No. 7 as AS 15.15.550 - 15.15.575.

Sec. 15.15.570. Severability.

If any portion of this section is held invalid for any reason, the remaining portion to the fullest extent possible shall be severed from the void portion and given the fullest force and application.

(§ 1 1998 Ballot Measure No. 7)

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

Sec. 15.15.575. Short title.

AS 15.15.550 - 15.15.575 shall be known as and may be cited as The Term Limits Pledge Act of 1998.

(§ 1 1998 Ballot Measure No. 7)

© 2000 by The State of Alaska and Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

HB
192

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 19, 2001 FURTHER REFERRALS: Finance

Date of Committee Action: April 19, 2001

The STATE AFFAIRS Committee considered: HB 192

HOUSE BILL NO. 192 BRISTOL BAY SALMON CLASSIC

"An Act relating to the Bristol Bay Salmon Classic; and providing for an effective date."

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			
FN# *	List by Dept(s):	Fiscal	Indet.	Zero
	REV			✓

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

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	Stevens	X			
Harry T Crawford for	CRAWFORD	✓			
Jeannette James	JAMES	✓			
[signature]	Fate	✓			
[signature]	Hayes	✓			
Chair: John Coghill	Coghill	✓			
Chair:					

Representative Mary Kapsner
State Capitol • Juneau, Alaska 99801-1182
Phone: (907) 465-4942 • Fax: (907) 465-4589
E-Mail: Representative_Mary_Kapsner@legis.state.ak.us

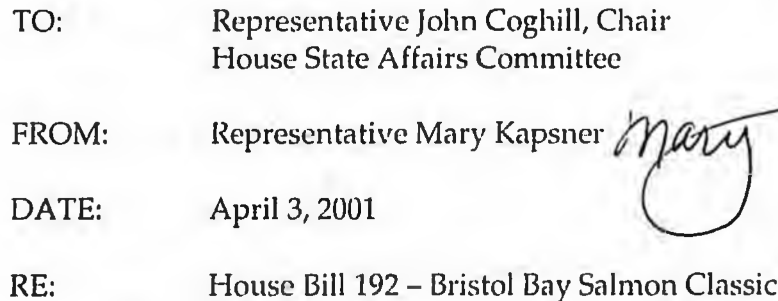
House District 39
Lower Kuskokwim and Upper Bristol Bay

Akiachak
Akiak
Aleknagik
Atmautluak
Bethel
Chefornak
Clarks Point
Dillingham
Eek
Ekuk
Ekwok
Goodnews Bay
Kasigluk
Kipnuk
Koliganek
Kongiganak
Kwethluk
Kwigillingok
Manokotak
Napakiak
Napaskiak
New Stuyahok
Nunapitchuk
Oscarville
Platinum
Portage Creek
Quinhagak
Togiak
Tuntutuliak
Twin Hills

MEMORANDUM

TO: Representative John Coghill, Chair
House State Affairs Committee

FROM: Representative Mary Kapsner



DATE: April 3, 2001

RE: House Bill 192 – Bristol Bay Salmon Classic

I would appreciate your consideration of scheduling House Bill 192 for a hearing in the House State Affairs Committee.

I am attaching a copy of my sponsor statement and letter of support from the Bristol Bay Native Corporation Education Foundation Committee. The bill is straightforward, simply adding the Bristol Bay Salmon Classic to the definition of salmon classics authorized under Title 5 of state law.

Thank you.

Representative Mary Kapsner
State Capitol • Juneau, Alaska 99801-1182
Phone: (907) 465-4942 • Fax: (907) 465-4589
E-Mail: Representative_Mary_Kapsner@legis.state.ak.us

House District 39
Lower Kuskokwim and Upper Bristol Bay

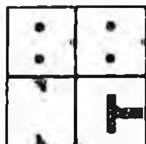
Akiachak
Akiak
Aleknagik
Atmautluak
Bethel
Chefornak
Clarks Point
Dillingham
Eek
Ekuk
Ekwok
Goodnews Bay
Kasigluk
Kipnuk
Koliganek
Kongiganak
Kwethluk
Kwigillingok
Manokotak
Napakiak
Napaskiak
New Stuyahok
Nunapitchuk
Oscarville
Platinum
Portage Creek
Quinhagak
Togiak
Tuntutuliak
Twin Hills

House Bill 192
Bristol Bay Salmon Classic

Sponsor Statement

House Bill 192 would add the Bristol Bay Native Corporation Education Foundation to existing law which authorizes salmon classics under AS 05.15.690(41) and allow the foundation to raise money for scholarships.

The BBNC Education Foundation has been active in supporting the educational goals of shareholders since their inception in 1991. They are a 501 (c) (3) organization, with a successful history in fundraising for educational scholarships. With the downturn in fishing and other impacts on the economy of the region, the challenges of fundraising have grown. The ability of the Foundation to organize the Bristol Bay Salmon Classic would provide an opportunity for individuals to share the load by purchasing a ticket and joining in the fun of guessing how many salmon will be harvested in the five Bristol Bay commercial fishing districts. Cassics of various types have been successful in other regions of the state, and the BBNC Education Foundation is confident the effort will be a source of both entertainment for those following the fisheries and revenue for young people needing scholarship assistance to meet their education goals.



Bristol Bay Native Corporation Education Foundation

800 Cordova Street, Suite 200, Anchorage, Alaska 99501-6299 / (907) 278-3602 / fax (907) 276-3925

March 21, 2001

Representative Mary Kapsner
State Capitol Office Room 424
Interdepartmental Mail Stop 3101
Juneau, AK 99801-1182

Dear Representative Kapsner:

Please allow me to introduce the Bristol Bay Native Corporation Education Foundation. The foundation was established in 1991 to promote the education of Alaska Native shareholders. In 1992, the U. S. Internal Revenue Service recognized the foundation as exempt from federal income tax under section 501 © (3) of the Internal Revenue Code.

Bristol Bay Native Corporation has contributed $435,000 to the foundation since 1992, and other donors have contributed more than $200,000. Over $435,000 has been awarded to scholarship recipients since 1993. During the 2000-01 school year 150 recipients were awarded scholarships ranging from $250-$1500. The number of applicants for scholarships has increased steadily over the past few years; especially since commercial fishing income for Bristol Bay area residents has decreased due to several successive poor fishing seasons.

The BBNC Education Foundation has a fundraising campaign target of $250,000 for 2001. In our fundraising efforts we utilize the availability of our raffle permit to generate additional scholarship funds. We believe that initiating a "Bristol Bay Salmon Classic" game of chance, which we would sponsor, would assist us in our efforts to raise additional funds for increasing demands for scholarship assistance. Tickets would be sold and a prize of money would be awarded for the closest guess of the total number of salmon harvested commercially in the five Bristol Bay commercial fishing districts between June 1 and September 30, as determined by the Department of Fish and Game.

We deeply appreciate your support in developing and sponsoring the legislation needed that would assist us in raising more scholarship funds.

Please do not hesitate to contact me at (907) 274-3611, if you have any questions, or need additional information.

Sincerely,

BBNC Education Foundation

Frank W Hill

Mr. Frank W. Hill
President/Chairman

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 192
(H) Publish Date: 4/19/01

Revision Date/Time (Note if correction):
Title: Bristol Bay Salmon Classic
Sponsor: Representative Kapsner
Requester: House State Affairs Committee

Dept. Affected: Revenue
BRU: Revenue Operations
Component: Tax Division
Component Number: 2476

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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)

FUND SOURCE	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal: [ ]

POSITIONS

POSITIONS	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Full-time						
Part-time						
Temporary						

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

Alaska Statute 05.15.690(41) of the state's charitable gaming laws allows certain organizations to conduct "salmon classic" games of chance. This legislation would add the Bristol Bay Native Corporation Education Foundation to the list, allowing the Education Foundation to conduct a fund-raising salmon classic with prize money awarded to the person who guesses closest to the total number of salmon harvested commercially in the five Bristol Bay fishing districts between June 1 and September 30 each year.

This legislation would not result in any additional cost or enforcement issues to the Charitable Gaming Section at the Tax Division.

Prepared by: Larry Persily, Deputy Commissioner
Division
Phone 465-5469
Date/Time April 17, 2001, 9 a.m.

Approved by: Larry Persily, Deputy Commissioner
Agency Department of Revenue
Date 04/17/2001

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

HB

195

Alaska State Legislature

- Interim (May-Dec.) -
10928 Eagle River Rd., Suite 140
Eagle River, Alaska 99577
☎ (907) 694-6683
FAX (907) 694-1015

- Session (Jan.-May) -
Alaska State Capitol
Juneau, Alaska 99801-1182
☎ (907) 465-2199
FAX (907) 465-4587

Toll free (800) 342-2199

- E-mail -
Representative_Fred_Dyson
@legis.state.ak.us

- Internet -
http://www.akrepublicans.org

REPRESENTATIVE FRED DYSON

MEMORANDUM

March 22, 2001

To: Representative Coghill Chair
State Affairs

From: Fred Dyson
State Representative

RE: Request for consideration of HB 195

HB 195 protects our Constitutionally given Freedom of Religion by inserting the long-standing "compelling interest" standard into statute so the judicial system cannot easily introduce a new direction.

I respectfully request that you schedule it for public hearing at your earliest convenience. Thank you.

FACSIMILE TRANSMISSION FROM THE
ALASKA CIVIL LIBERTIES UNION FOUNDATION

P.O. Box 201844 Anchorage, Alaska 99520-1844
907-258-0044, Fax 907-258-0288, E-Mail: akclu@alaska.net

4822

TO: Rep. Coghill FAX NO: 465-3258

WITH: House State Affairs Committee

FROM: Jennifer Rudinger DATE: ~~[illegible]~~ 4-10-01

NO. PAGES IN TRANSMISSION(INCLUDING COVER SHEET): 32

THIS IS A PRIVILEGED AND CONFIDENTIAL COMMUNICATION, TRANSMITTED FOR THE EXCLUSIVE USE OF THE ADDRESSEE. IT MAY NOT BE COPIED OR DISSEMINATED EXCEPT BY THE ADDRESSEE. SHOULD YOU RECEIVE THIS COMMUNICATION IN ERROR, PLEASE CALL ME IMMEDIATELY BY COLLECT PHONE CALL AND MAIL THE COMMUNICATION TO ME AT THE ABOVE ADDRESS BY FIRST CLASS MAIL. THANK YOU.

NOTES: Please distribute to House State Affairs Committee prior to Tuesday morning meeting.

I will testify on HB 195.

Thank you!

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union
P. O. Box 201844, Anchorage, AK 99520-1844
Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@alaska.net

To: House State Affairs Committee
From: Jennifer Rudinger, Executive Director
Date: April 10, 2001
Re: HB 195 ("ARFPA")

Enclosed please find the following materials, to be included in the State Affairs Committee's bill packets for HB 195, ***in addition to this cover sheet*:**

(1.) 1-page summary of amendments suggested by AkCLU

(2.) 12-page AkCLU position paper on HB 195

(3.) Two 2-page letters by NAACP in opposition to federal RLPA unless civil rights are protected

(4.) 2-page testimony by Texas Representative Scott Hochberg regarding the civil rights amendment to the Texas RFRA, signed into law by then-Texas Gov. George W. Bush

(5.) 2-page letter from National Fair Housing Alliance urging civil rights amendment in federal RLPA

(6.) 2-page letter from Coalition for the Free Exercise of Religion opposing federal RLPA because it could jeopardize civil rights laws

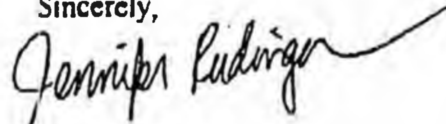
(7.) 1-page letter from the Episcopal Church withdrawing support for federal RLPA because of civil rights concerns

(8.) 3-page letter from a consortium of church organizations (United Church of Christ, Friends Committee on National Legislation, United Synagogues of Conservative Judaism, Evangelical Lutheran Church in America, and Union of American Hebrew Congregations) opposing federal RLPA without civil rights protections

(9.) 4-page Jewish Telegraphic Agency on-line article citing withdrawal of support for federal RLPA by Baptist and Jewish religious groups

I will testify via teleconference from Anchorage on HB 195 in the House State Affairs Committee at 8:00 a.m., Tuesday, April 10th, and I thank the Committee for allowing me to address our proposed amendments. Please feel free to call me at (907) 258-0044 if I may be of further assistance.

Sincerely,



Alaska Civil Liberties Union

To: House State Affairs Committee
From: Jennifer Rudinger, Executive Director
Date: April 10, 2001

Re: Summary of Proposed Amendments Submitted re: HB 195 ("ARFPA")

The AkCLU proposes the following **four amendments** to clarify the intent of HB 195 and to protect religious freedom at the same time as HB 195 protects the rights (including the *religious* rights) of others.

(1.) **Delete "individual rights of a third party" on Page _, line 27, and insert "rights of others by a person claiming a religious exemption to a law. This section does not establish or eliminate a defense to a civil action or criminal prosecution under a federal, state or local anti-discrimination law."**

The sponsor has stated that his intent is to prevent one person's free exercise of religion from infringing on the rights of another person. In other words, everyone has the right to practice his/her religion freely, exempt from laws that burden his/her religious exercise, as long as no one else is injured in the process. The AkCLU agrees with this assertion, and we feel that our amendment clarifies this balancing.

(2.) **Insert the modifier "substantial" before the word "burden" on Page 2, line 19 and in the bill title, Page 1, line 1.**

HB 195 states that a government entity "may not place a burden on a person's free exercise of religion..." (Emphasis added.) Our concern is that "burden" may be read very broadly to include any level of restriction, no matter how minor its impact on the free exercise of religion. The proposed federal RLPA used a different standard. The proposed federal RLPA provided in relevant part that "a [state or local] government shall not substantially burden a person's religious exercise..." (emphasis added).

(3.) **We suggest the following wording for Section (4): "while it is improper for the legislature to tell the judiciary how to interpret the Constitution of the State of Alaska, it is proper for the legislature to codify protection for the free exercise of religion, so long as that legislative action does not authorize the infringement of the rights of others by the person claiming a religious exemption to a facially neutral law of general applicability."**

We have some great qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect against discrimination, but Section (4) leaves open a lot of gray area where courts have not yet granted compelling interest status to the state's interest in remedying certain types of discrimination.

(4.) **We respectfully urge the deletion of "with clear and convincing evidence" on Page 2, line 21.** This evidentiary standard may actually drive up the costs of this type of litigation by forcing an evidentiary hearing.

Alaska Civil Liberties Union
Statement on the Protection of Religious Liberty
Before the House Committee on State Affairs

Presented by Jennifer Rudinger, AkCLU Executive Director
April 10, 2001

I. INTRODUCTION

Mr. Chairman and members of the Committee,

The Alaska Civil Liberties Union (AkCLU) greatly appreciates the opportunity to present this position paper on the importance of ensuring that any state legislation enhancing the protection of religious exercise will not cause any unintended harm to the enforcement of state and local civil rights laws. The American Civil Liberties Union (ACLU) historically supports legislation providing stronger protection of religious exercise--even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn a statutory shield for religious exercise into a sword against state and local civil rights laws.

Thus, the AkCLU respectfully urges the Committee to refrain from passing House Bill 195 (Alaska Religious Freedom Protection Act, or "ARFPA") unless it is amended to clarify its apparent intent that the exercise of an individual's religious freedom will have no adverse consequences on the rights of others. We offer several amendments, described below, to prevent any unintended adverse consequences. For the past decade, the ACLU has fought in Congress and the courts to preserve or restore the highest level of constitutional protection for claims of religious exercise. We have directly represented persons asserting burdens on their religious beliefs, filed *amicus* briefs with the Supreme Court, and were founding members of the coalition that supported the Religious Freedom Restoration Act in 1993, and the Religious Liberty Protection Act ("RLPA") during most of the Congress in which it was introduced.

However, we stopped supporting the federal RLPA, as introduced in the House, because we could not ignore the potentially severe consequences that it may have on state and local civil rights laws. Although we believe that courts should find civil rights laws compelling and uniform enforcement of those civil rights laws the least restrictive means, we know that at least several courts have already rejected that position. We agree with those in the Alaska Legislature who believe that the result reached by the Alaska Supreme Court in *Swanner* is a good result. *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Commission,* 874 P.2d 274 (Alaska 1994). However, we all know that the principle of stare decisis is not absolute. Furthermore, it is not at all clear whether the same compelling interest the *Swanner* Court found in preventing housing discrimination on the basis of marital status would also be extended to preventing discrimination on the basis of other classifications, such as familial status, pregnancy status, disability or religion.

There is much disagreement in other jurisdictions about the issues raised in *Swanner.* We have found that landlords across the country have been using state religious liberty claims to challenge the application of state and local civil rights laws protecting persons against marital status discrimination. None of the claims, including those in *Swanner*, involved owner-occupied housing; all of the landlords owned so many investment properties that they were outside the

state laws' exemptions for small landlords. These landlords all sought to turn the shield of religious exercise protections into a sword against the civil rights of prospective tenants.

Then, last year, Congress passed a federal law called the Religious Land Use and Institutionalized Persons Act (RLUIPA) that the ACLU and more than 60 groups supported, and that President Clinton signed into law. Some of the concerns raised in testimony in last Thursday's hearing on HB 195 in the Alaska House State Affairs Committee (i.e. a rabbi who was told he could not hold services in his garage) are exactly the types of concerns protected by the new RLUIPA. This new federal law is basically a narrow version of the original Religious Liberty Protection Act that covers the two biggest areas in which religious liberty and generally applicable public laws butt heads: zoning/land use and people in state facilities (hospitals, prisons, group homes). At the same time, the RLUIPA does NOT provide religious exemptions from other types of generally applicable laws like anti-discrimination laws.

An improperly drafted Alaska statute could jeopardize more than marital status protection. Some courts' analyses call into question all state and local civil rights laws that are not motivated by a "firm national policy" in favor of eradicating specific forms of discrimination. Thus, persons protected because of characteristics such as marital status, familial status, pregnancy status, disability, and perhaps religion itself, could find their protections under state or local laws eroded. If legislation such as unamended HB 195 becomes law, an applicant for a job or housing may have no state or local law protection against having to answer questions such as: Is that your spouse? Are those your children? Are you pregnant? Are you HIV-positive? Mentally ill? Physically disabled? What is your religion?

Even where a "firm national policy" in eradicating certain types of discrimination could be shown, such as classifications based on race or sex, courts may conclude that such a compelling governmental interest could be achieved without prohibiting the discriminatory conduct of the particular defendant claiming a religious exemption to a civil rights law. I am attaching a paper submitted by the NAACP to Congress in opposition to the federal RLPA. The NAACP paper analyzes this danger in greater detail.

In the wake of recent court decisions around the country, and in light of the lack of Alaskan precedent on so many of these issues, the Committee should not leave the problem of a state religious liberty statute's potential effect on state and local civil rights laws unresolved. The stakes are too high.

Instead, the AkCLU urges you to consider other alternatives for providing a shield for religious exercise without creating a sword against civil rights laws. As Texas State Representative Scott Hochberg's testimony to Congress (also attached with this paper) explains, then-Texas Governor George W. Bush signed into law – only a year and a half ago – a state RFRA that protects Texas' civil rights laws. In Congress, the ACLU and many other groups supported a civil rights amendment to RLPA offered by Congressman Nadler that would have had a similar result.

The AkCLU very much appreciates your willingness to consider these concerns as you consider HB 195. We believe that members of the legislature who justifiably care deeply about protecting both religious exercise and state and local civil rights laws should not be forced to choose. It is a false choice because both goals can be made compatible. We hope to work with members of the Committee to resolve this problem. Thank you once again for this opportunity to present our concerns.

II. SCOPE OF THE POTENTIAL PROBLEM

This Committee is presently considering HB 195, the Alaska Religious Freedom Protection Act ("ARFPA"), which would provide extensive statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1990 Supreme Court decision that lowered the standard of review for religious exercise claims. HB 195 provides, in relevant part, that:

> A governmental entity may burden a person's free exercise of religion only if (1.) the governmental entity demonstrates by clear and convincing evidence that (2.) application of the burden to the person is essential to further a compelling governmental interest and (3.) is the least restrictive means of furthering that compelling governmental interest.
>
> ... This section may not be construed to create an establishment of religion or to authorize the infringement of the individual rights of a third party.

As introduced, HB 195 does not have any provision specifically addressing its potential effect on state and local civil rights laws.

The scope of the potential civil rights problem raised by religious freedom statutes is broad. An original panel of the U.S. Court of Appeals for the Ninth Circuit and four state supreme courts have recently decided five cases with nearly identical fact patterns, namely, landlords claiming that their religious beliefs defeat housing discrimination claims brought by unmarried heterosexual persons based on marital status.[1] The decisions were split, with the original Ninth Circuit (opinion was later vacated on other grounds) and the Massachusetts and Minnesota courts holding that a religious liberty defense could defeat civil rights claims based on state or local laws. The courts could apply the reasoning in those decisions to civil rights claims made by members of other groups that also receive less protection from the courts and the federal government. Although the Alaska Supreme Court in *Swanner* upheld the anti-discrimination laws in the context of marital status, it is unclear whether the court's reasoning would extend to other types of civil rights claims.

The intent of at least some of the supporters of federal RLPA was clear. Several witnesses during hearings before the House and Senate Judiciary Committees specifically stated their belief that RLPA could and should be used as a defense to civil rights claims based on gender, religion, sexual orientation, and marital status.

In applying standards of review substantially similar to the Alaska RFPA and federal RLPA religious exercise standard, numerous courts have recently decided cases in which defendants raised a religious liberty defense to civil rights claims based on state or local laws protecting against discrimination in housing based on marital status. *See Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (governmental interest in preventing marital status discrimination was not compelling), later vacated for lack of a justiciable case or controversy; *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) [hereinafter *"Smith v. FEHC"*] (no substantial burden on religious exercise found); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means); *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) (the government's interest in providing equal access to housing was compelling and uniform application of the state anti-discrimination

law was the least restrictive means); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) ("marital status" did not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination). Thus, in the Ninth Circuit and Massachusetts and Minnesota, defendants may successfully use their religious beliefs to defeat at least certain civil rights claims based on state or local laws.

In those housing cases, the owner-occupied exceptions found in all state fair housing laws did not apply; the rental properties at issue were *not* owner-occupied, but instead were used solely for investment purposes. *See Thomas*, 165 F.3d 692 (statute provides exception for "space rented in the home of the landlord"); *Desilets*, 636 N.E.2d at 238 n.8 (law applicable only to "dwellings that are rented to three or more families living independently of each other"); *Swanner*, 874 P.2d at __ (statute provides exception for individual home "wherein the renter or lessee would share common living areas with the owner"); *French*, 460 N.W.2d 2 (owner did not live in subject property, a two-bedroom house); *Smith v. FEHC*, 913 P.2d at 912 (Smith "does not reside in any of the four units"). The landlords all claimed that their sincerely held religious beliefs about premarital sexual relations required them to deny housing to unmarried couples, despite state or local laws prohibiting discrimination on the basis of marital status in housing. Although the religious liberty defense was not always successful, the courts were split on whether the anti-discrimination laws impose a substantial burden on the exercise of the landlord's religion, and on whether the governmental interest in eradicating marital status discrimination in housing is compelling and pursued by the least restrictive means.

Defendants in civil rights cases have also raised religious liberty defenses in cases involving such characteristics as race or sexual orientation and in contexts ranging from educational institutions to employment. For example, defendants or courts unsuccessfully raised religious rationales for racially discriminatory practices. *E.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (religious university claimed that its religious beliefs about miscegenation – interracial marriage -- justified racial discrimination in admissions); *see also Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a Virginia statute prohibiting interracial marriage).

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), the use of religious liberty defenses to civil rights claims was widespread. *See, e.g.*, *Bob Jones Univ.*, 461 U.S. 574, 604; *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house claimed that dismissing employee in retaliation for bringing discrimination charges was based on religious doctrine forbidding members of the church from bringing lawsuits against the church); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (health club's owners insisted on hiring only employees whose religious beliefs were consistent with the owners' religious beliefs despite state anti-discrimination law forbidding employment discrimination based on religion, sex, and marital status); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (religious university argued that its religious beliefs justified the denial of "university recognition" to gay student group, despite a District of Columbia civil rights law prohibiting discrimination on the basis of sexual orientation).

Currently, Alaska state and local laws also provide protection based on other characteristics that receive less than strict scrutiny, such as disability, sex, age, familial status, or pregnancy. Although the governmental interest in eradicating discrimination has been found compelling in the context of *Swanner*, providing a new defense in civil rights actions will—at a minimum–increase the cost of litigation for plaintiffs. However, the risk for persons claiming

civil rights protection based on characteristics that receive lower levels of scrutiny is substantial. Because many of the groups claiming protection under state and local civil rights laws do not currently receive heightened scrutiny for their claims in court, and receive little or no explicit federal statutory protection from Congress, it is likely that at least some courts would find that the governmental interest in ending discrimination against these groups is not compelling. As noted above, courts around the country are divided on these questions, and these decisions have come from states that traditionally have been vigorous and strict in enforcing their civil rights laws.

III. APPLICATION OF THE FIVE-PART ALASKA RFPA TEST TO CIVIL RIGHTS CLAIMS

HB 195 provides, in relevant part, that:

> A governmental entity may burden a person's free exercise of religion only if (1.) the governmental entity demonstrates by clear and convincing evidence that (2.) application of the burden to the person is essential to further a compelling governmental interest and (3.) is the least restrictive means of furthering that compelling governmental interest.

Thus, in deciding a challenge to a civil rights claim based on a state or local anti-discrimination law, a court must apply a five-part test: (i) is the defendant's discrimination "religious exercise"?; (ii) does the applicable state or local anti-discrimination law "burden" the defendant's religious exercise?; (iii) is the government's interest in eradicating the discrimination "compelling"?; (iv) are uniformly applied anti-discrimination laws the least restrictive means of furthering any compelling governmental interest; and (v) has the government demonstrated (iii) and (iv) above with clear and convincing evidence?

A. Is Discrimination "Religious Exercise" Under ARFPA?

The first part of the ARFPA test is whether a refusal to comply with civil rights laws is religious exercise. Because ARFPA does not define what constitutes a religious exercise, any civil rights defendant who can show that his or her discriminatory actions were in any way "burdened" will be able to meet this prong of ARFPA. Under the pre-*Smith* Free Exercise Clause jurisprudence which ARFPA purports to restore, the "Supreme Court free exercise of religion cases have accepted, either implicitly or without searching inquiry, claimants' assertions regarding what they sincerely believe to be the exercise of their religion, even when the conduct in dispute is not commonly viewed as a religious ritual." *Desilets*, 636 N.E.2d at 237 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 137 (1987); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)).

Courts have held that refusal to rent an apartment to an unmarried heterosexual couple based on the landlord's religious belief that promoting premarital sex is sinful is religious exercise. *See, e.g., Smith v. FEHC*, 913 P.2d at 923 ("While the renting of apartments may not constitute the exercise of religion, if Smith claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA."); *Desilets*, 636 N.E.2d at 237 ("Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion.). Similarly, in the employment context, courts have accepted the argument that hiring decisions are religious exercise, if the employer can demonstrate that the decision was based on religious belief or

doctrine. *See, e.g., Pacific Press*, 676 F.2d at 1280 (retaliatory action taken by religious publisher against employee who instituted EEOC proceedings alleging sex discrimination was religious exercise because church doctrine prohibited lawsuits by members against the church).

B. Do State and Local Civil Rights Statutes "Burden" Religious Exercise?

The purpose of the second part of the ARFPA test should be to avoid litigation over neutral laws that have only a minimal impact on religious exercise. However, "burden" may be defined so broadly as to encompass *any* infringement on religious exercise, regardless of how slight the impact of that burden may be. **The AkCLU suggests that the word "burden" in HB 193 be replaced with the words "substantially burdens" a person's free exercise of religion.** Congress has not defined "substantial burden," and there is no generally applicable test to determine whether a substantial burden exists. *See Smith v. FEHC*, 913 P.2d at 924. However, several circuit courts have adopted a broad reading of "substantial burden," holding that

> a substantial burden on the free exercise of religion, within the meaning of the [RFRA], is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996); *see also Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) ("To exceed the 'substantial burden' threshold, governmental regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual beliefs."); *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (substantial burden imposed when person is compelled, "by threat of sanctions, to refrain from religiously motivated conduct") (quotations omitted). *But cf. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 171-72 (4th Cir. 1995) (substantial burden not imposed where plaintiffs "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take"); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (same); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam) (same).

Economic cost alone does not constitute a substantial burden. *See Braunfeld v. Brown*, 366 U.S. 599, 605 (1961); *Smith v. FEHC* at 926-27. However, even those courts that have adopted a narrow definition of substantial burden--where a substantial burden is imposed only where someone is compelled to engage in conduct forbidden by his or her religion, or forbidden to engage in conduct mandated by religious belief--have held that imposing liability on an employer for non-compliance with employment anti-discrimination laws constitutes a substantial burden when compliance would contradict religious belief or doctrine. *See, e.g., Pacific Press*, 676 F.2d at 1280 ("there is a substantial impact on the exercise of religious beliefs because EEOC's jurisdiction to prosecute . . . will impose liability on Press for disciplinary actions based on religious doctrine").

One court has held that compliance with state fair housing laws does not impose a substantial burden, in part because "one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an anti-discrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." *Smith v. FEHC*, 913 P.2d at 925. The court also noted that "the landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried

couples. No religious exercise is burdened if she follows the alternative course of placing her capital in another investment." *Id.* at 926.

Because the court in *Smith v. FEHC* used an analysis for "substantial burden" that may be more stringent than the analysis required by ARFPA, Alaska courts are likely to view the "choice" of engaging in a different occupation or complying with the anti-discrimination law and violating one's religious beliefs as too harsh, and conclude that the burden is substantial. *See, e.g., Desilets,* 636 N.E.2d at 237-38 (substantial burden imposed because the civil rights law "affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation," and "both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants' religion"). Indeed, all courts, other than the court in *Smith v. FEHC*, that have considered the question in the housing context have found that the state or local anti-discrimination law substantially burdened the defendant's exercise of his or her religious beliefs.

C. Is the Governmental Interest in Eradicating Discrimination Compelling?

The third part of the ARFPA test provides that only a compelling governmental interest justifies imposing a restriction on the exercise of religion. The courts that recently decided civil rights cases in which a defendant raised a religious liberty defense have split most sharply on this part of the test.

The governmental interest in eradicating certain types of discrimination, particularly racial and sex-based discrimination, should meet the compelling interest standard. *See Bob Jones Univ. v. United States,* 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. . . . [T]he government has a fundamental, overriding interest in eradicating racial discrimination in education . . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (the state government's "compelling interest in eradicating discrimination against its female citizens justifies the impact . . . on the male members' associational freedoms"). Such plaintiffs, however, should anticipate incurring litigation costs as defendants raise the defense.

Because marital status, disability, and other protected classes currently do not receive the same level of judicial scrutiny as race and sex, however, it may be more difficult to persuade all courts that the governmental interest in preventing discrimination on those grounds is compelling. For example, courts have reached divided results in determining whether preventing discrimination based on characteristics such as sexual orientation or marital status is compelling. *See, e.g., Gay Rights Coalition v. Georgetown Univ.,* 536 A.2d 1, 37 (D.C. App. 1987) (District of Columbia's interest in prohibiting educational institutions from denying equal access to tangible benefits on the basis of sexual orientation is compelling); *Swanner*, 874 P.2d at 282-83 (Anchorage's interest in prohibiting marital status discrimination in housing is compelling). *Desilets*, 636 N.E.2d 233 (remanding for further consideration of whether the government's interest in prohibiting marital status discrimination is compelling); *French*, 460 N.W.2d at 10-11 (plurality op.) (no compelling governmental interest in ending discrimination against unmarried couples).

Because ARFPA requires that the "application of the burden to the person is essential to further a compelling governmental interest", courts could require the government to prove that there is a compelling interest in requiring the specific landlord or employer to comply with the civil rights law. *See, e.g., Desilets*, 636 N.E.2d at 238 (the issue is "whether the record establishes that the Commonwealth has or does not have an important governmental interest that