IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

D[redacted] J[redacted] and A[redacted] G[redacted],	)	
Appellants,	)	
vs.	)	Case No. 3AN-16-[redacted] CI
	)	(Consolidated)
State of Alaska, Department of Revenue,	)	
Appellee.	)	

Opinion

Introduction.

In this consolidated appeal, appellants D[redacted] J[redacted] and A[redacted] G[redacted] challenge the constitutionality of a physical presence requirement for Permanent Fund Dividend (PFD) eligibility on multiple grounds. Appellee State of Alaska, Department of Revenue, has opposed each argument asserted by the J[redacted], and briefing is complete. Neither party requested oral argument and the matter is ripe for disposition. For the reasons set forth below, denial of the J[redacted] applications for PFDs is affirmed.

Facts and Proceedings.

The facts material to this proceedings are relatively few and are not disputed.[1] D[redacted] first came to Alaska in 1998 as an airman assigned to [redacted] Base. [R.95]. A[redacted] was born in Alaska and appears to have begun receiving PFDs in 1982. [Exc. II-140]. D[redacted] and

[1]Therefore, the facts in text sometimes cite the parties' briefs for support. Further, the Excerpt of Record is in two volumes so references are to "Exc. I-[page]" or "Exc. II-[page]." A table of contents for the Excerpt would have been extremely useful. Alaska R. App. P. 210(c)(4) (applicable here under Alaska R. App. P. 601(c).

A[redacted] married in October 2000, [Exc. I-55], and moved into her house, which the couple now owns and lives in. [R. 95]. About a year later, in November 2001, D[redacted] was reassigned to duty outside Alaska and the couple left the state. [R. 95]. Despite requests for posting back to Alaska, D[redacted] was not sent here "because of the needs of the Air Force." *Id.* From November 2001 through 2013, neither D[redacted] nor A[redacted] returned to Alaska for more than relatively short visits. [Exc. I-55-6]. D[redacted] remained eligible for PFDs from 2003 through 2010 because his absences during the qualifying years 2002 through 2009 were allowable. [Exc. II-13]; AS 43.23.008(3). A[redacted] received PFDs for those years as the spouse of an allowably absent, PFD-eligible, active-duty serviceman. *Id.*

As to 2011 PFDs, D[redacted] was presumed ineligible under 15 AAC 23.163(f) (repealed 1/1/14), by which an applicant absent from Alaska for longer than 180 days per year in each of the five years preceding application was presumed ineligible. *State, Dep't of Revenue v. Wilder*, 929 P.2d 1280 (Alaska 1997). The presumption applied even if the applicant's absences were completely allowable. *Id.* The presumption could be rebutted upon showing "to the department's satisfaction an intent at all times during the absence or absences to return to Alaska and remain indefinitely in Alaska." 15 AAC 23.163(f) (repealed 1/1/14). The regulation listed the factors for the Department's consideration of the question whether the applicant's evidence rebutted the presumption of ineligibility, 15 AAC 23.163(g)(1) – (7) (repealed 1/1/14), including "the frequency and duration of return trips to Alaska." The regulations then provided:

> When considering whether an individual who has been absent for more than five years has rebutted the presumption that the individual does not have the intent to return to Alaska and remain indefinitely in Alaska,

(1) the department will give greater weight to the claim of an individual who makes frequent voluntary return trips to Alaska during the period of the individual's absence than to the claim of an individual who does not; [and]

(2) the department will generally consider that an individual who has not been physically present in Alaska for at least 30 cumulative days during the past five years has not rebutted the presumption; however, this consideration does not apply if the individual shows to the department's satisfaction that unavoidable circumstances prevented that individual from returning for at least 30 cumulative days during the past five years.

15 AAC 23.163(h)(1) and (2). D[redacted] conceded he was absent more than 180 days in each of the years 2006 through 2010. He also conceded he was not physically present in Alaska for a cumulative 30 days during those years. At the hearing on his appeal of the denial, held before ALJ Jeffrey Friedman, D[redacted] presented evidence of his intention to return to, and remain permanently in, Alaska, and also offered evidence that his inability to meet the cumulative 30-day physical presence threshold resulted from "unavoidable circumstances." 15 AAC 23.163(h)(1) and (2).

ALJ Friedman concluded that D[redacted] failed to show his lack of 30 cumulative days' physical presence in Alaska resulted from "unavoidable circumstances." [Exc. I-59]. "Thus, there is an initial presumption that he *has not* rebutted the presumption that he no longer intends to return." [Exc. I-61] (emphasis in original). Nevertheless, ALJ Friedman ultimately found that D[redacted] overcame the "double presumption," [Exc. I-63], because A[redacted] demonstrated that she intended to return to and remain in Alaska,[2] and there was no reason to suspect D[redacted] would not go with her: "This additional evidence is sufficient to tip the balance in his favor and find that Maj. J[redacted] has overcome the double presumption." [Exc. I-63]. On that basis, the J[redacted] received PFDs for 2011. *Id.* The J[redacted] received PFDs for 2012, too. [Exc. II-6]. It is likely the Department did not deny eligibility

[2] A[redacted] was physically present in Alaska for more than 30 cumulative days during the five years before her 2011 application so was not faced with D[redacted] "double presumption." [Exc. I-56, 59].

in 2012 because of the finding in OAH No. 12-0129-PFD that the J[redacted] met the "intent to return and remain" requirement under the five year rule.

One more event is useful to put the current dispute into perspective: the J[redacted] receipt of PFDs in 2013 for the qualifying year of 2012. Until June 2013:

> "[a]n otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year." [AS 43.23.008(c) (repealed)]. The revised statute, which became effective in 1999, created a ten-year rule whereby, starting in 2009, individuals who had been allowably absent from the state for ten straight years would no longer receive dividends until they returned to the state.

Ross v. State, Dep't of Revenue, 292 P.3d 906, 908 (Alaska 2012). The Alaska Supreme Court upheld that "ten-year rule against equal protection and due process challenges, as well as a claim that it was unconstitutionally retroactive. *Id.* at 908. Under that rule, the J[redacted] PFD applications for 2013 PFDs, for the qualifying year of 2012, would have been denied since they had been continuously absent from Alaska for the qualifying years 2002 to 2011, inclusive.

However, in June 2013 the PFD eligibility statute was amended by HB 52. The ten year rule, AS 43.23.008(c), was repealed and a presumption of ineligibility after a five year absence codified:

> After an individual has been absent from the state for more than 180 days in each of the five preceding qualifying years, the department shall presume that the individual is no longer a state resident. The individual may rebut this presumption by providing clear and convincing evidence to the department that
>
> (1) the individual was physically present in the state for at least 30 cumulative days during the past five years; and
>
> (2) the individual is a state resident as defined in AS 43.23.095.

AS 43.23.008(d). Notably, there is no exception to the statute's 30 day physical presence

requirement. Of relevance to the J[redacted], HB 52 took effect in June 2013 but was made retroactive to 1 January 2013. 2013 Alaska Sess. L. Ch. 33 § 5. It also provided that the amendment "may not be applied to make ineligible any person otherwise eligible for a 2013 dividend under AS 43.23 as it read on December 31, 2012." 2013 Alaska Sess. L. Ch. 33 § 4. By virtue of the amendment, D[redacted] was not subject to either the ten-year rule under former AS 43.23.008(c), or presumptive ineligibility under AS 43.23.008(d)(1). Thus, as ALJ Pauli recognized, D[redacted] received a PFD in 2013 because the regulations which provided both presumptions and exceptions concerning five-year absences were still in effect. [Exc. I-315 and II-6].

In 2014, AS 43.23.008(d)(1) was applied to D[redacted] and his application was denied by the Department. A[redacted]'s application was derivative of D[redacted]'s so hers was also denied. AS 423.23.008(a)(3)(B). Their PFD applications in 2015 were denied because neither had re-established PFD eligibility during the 2014 qualifying year. *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 995 (Alaska 2011); [Exc. II-146]. On this appeal, the Department and the J[redacted] agree that for the 2014 PFD, D[redacted] met the requirement of AS 43.23.008(d)(2), but did not meet the requirement of AS 43.23.008(d)(1). They also agree that during the calendar year 2013, A[redacted] was absent from Alaska for more than 180 days, and during 2014, neither D[redacted] nor A[redacted] was present in Alaska for 180 days or more. The legal dispute devolves to a single question: Was AS 43.23.008(d)(1) properly applied to D[redacted] as to his 2014 PFD application?

Standard of Review.

This appeal involves legal issues only, either statutory construction or analysis of the statute's constitutionality. No agency expertise is involved so questions about the statute's construction are

considered *de novo*, and this court will adopt "the rule of law that best reflects precedent, reason, and policy." *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001). The court applies its independent judgment to questions of constitutional law. *Id.*

Analysis.

The J[redacted] were ineligible for 2014 PFDs under a plain reading of the amended statute.

PFD eligibility is described in AS 43.23.005(a)(1) – (7). Only the sixth factor is at issue here, which requires that the applicant "was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008." AS 43.23.005(6). The statutory subsection governing the claimed allowable absence in this case provides:

> Subject to (b) and (d) of this section, an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent . . . (3) serving on active duty as a member of the armed forces of the United States or accompanying, as that individual's spouse, minor dependent, or disabled dependent, an individual who is [both] (A) serving on active duty as a member of the armed forces of the United States; and (B) eligible for a current year dividend.

AS 43.23.008(a)(3). The J[redacted] do not argue there is any ambiguity in the foregoing statute, nor is any perceived by the court. D[redacted] "remain[ed] eligible for a [2014 PFD while not present in Alaska because he was] serving on active duty as a member of" the U. S. Air Force – subject to AS 43.23.008(b) and (d).[3] Since he was not physically present in Alaska for 30 cumulative days during the five year span preceding 2014, *i.e.*, 2009 through 2013, the law plainly disallowed his receipt of a PFD in 2014. Since D[redacted] was not eligible for a 2014 PFD, A[redacted] could not meet the requirements of AS 43.23.008(a)(3)(B) for a 2014 PFD, either. And since she was absent from

[3]AS 43.23.008(b) prohibits consideration of any absence as "allowable" unless the applicant "was a resident of the state for at least six consecutive months immediately before leaving the state." *Id.* It is agreed here that both D[redacted] and A[redacted] were Alaska residents for at least six consecutive months before leaving the state.

Alaska for more than 180 days during 2013, she is ineligible independently under AS 43.23.008(17). Of course, if any of the J[redacted] arguments against the constitutionality of the statute is correct, D[redacted] and A[redacted] should have received dividends in 2014 as well as in 2015.

The amendment does not create an irrebuttable presumption that violates due process.

The J[redacted] rely principally on *Vlandis v. Kline*, 412 U.S. 441 (1973), as authority for the argument that the amendment created an irrebuttable presumption against residency that violates their right to due process of law. As correctly argued by the Department, however, the 30 day physical presence requirement does not raise an irrebuttable presumption. This is indisputably demonstrated by the J[redacted] receipt of PFDs in 2016. Conversely, the students in *Vlandis* who were non-residents when they applied to attend the state university, were thereafter absolutely prohibited from attending the university for the lower tuition paid by students who were Connecticut residents at the time of their applications. It was not that Connecticut was precluded from categorizing applicants as residents (who paid nominal tuition) or non-residents (who paid higher tuition), but that the distinction could never be changed:

> The appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and nonresident students, thereby obligation (sic) nonresident students to pay higher tuition and fees than do *bona fide* residents. The State's right to make such a classification is unquestioned here. Rather, the appellees attack Connecticut's irreversible and irrebuttable statutory presumption that because a student's legal address was outside the State at the time of his application for admission or at some point during the preceding year, he remains a non-resident for as long as he is a student there.

Id. at 445. In the course of Justice Stewart's opinion, he made clear that the Court believed reasonable restrictions on access to public benefits were acceptable and "our decision [should not]

be construed to deny a State the right to impose on a student, as one element in demonstrating *bona fide* residence, a reasonable durational residency requirement, which can be met while in student status." In support of that observation, the Court cited *Starns v. Malkerson*, 401 U.S. 985 (1971), where the Court "summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits." *Vlandis v. Kline*, 412 U.S. at 455 (Marshall joinder).[4] The statute at issue does not raise an irrebuttable presumption.

30 days in Alaska over 5 years is not an unconstitutional durational residency requirement.

Part II of the J[redacted] Argument section, Opening Brief at 18-21, appears to rest on two contentions: (1) the 30 cumulative day physical presence provision is a durational residency requirement; and (2) the provision impinges on the J[redacted] right to interstate travel. What neither the Opening Brief nor Reply Brief addresses is the actual definition of "durational residency requirements." Just as importantly, the J[redacted] nowhere describe how the 30 day cumulative physical presence provision impairs their right to interstate travel.

"A 'durational residency requirement' is a waiting period. This term is also used to describe laws, including waiting periods, that draw distinctions between old and new residents." *Heller v. State, Dep't of Revenue*, 314 P.3d 69, 78 (Alaska 2013). In that case, the Alaska Supreme Court recognized that durational residency requirements are not *ipso facto* constitutionally infirm and observed, "The legislature clearly contemplated allowing for varying residency requirements depending on the context – requiring longer periods of physical presence for some purposes than for others." *Id.* at 79. The statute at issue is not a "durational residency requirement" because it has

[4] *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), provides an excellent overview of applicable law.

absolutely no application to a person seeking to establish residency in Alaska upon moving here from another country or a different state. Fairly obviously, before one's cumulative 30 day physical presence factors into PFD eligibility, one first must have been a PFD-eligible Alaska resident, allowably absent from the state for the preceding five years. Therefore, this court is not called upon to "distinguish between, on the one hand, residency requirements that treat residents differently from nonresidents, and on the other hand, durational residency requirements that treat new residents differently from established ones." *Id.* at 78. Rather, the question here is simply whether the legislature may constitutionally require, as a condition of PFD eligibility during years-long absences, that applicants show they have been physically present in the state for 30 cumulative days over the course of that absence. The answer is, "Yes."

The Alaska Supreme Court and U.S. Supreme Court both have held that where "mere economic interests" are at stake, even a one year physical presence requirement is acceptable as a condition precedent for receipt of a state benefit. For example, in *Lindly v. Malone*, the case cited by appellants, then-Superior Court Judge Dana Fabe held that presence in Alaska for two years was too long to withhold eligibility for a PFD. In the same order Judge Fabe ruled that one year was acceptable: "[F]or the purposes of administering the [PFD] program, the one-year contingency residency requirement enacted in A.S. 43.23.005(e) [repealed] . . . is DECLARED AND ADJUDGED to be valid and constitutional." *Lindly v. Malone*, Summary Judgment Order at 4, Case No. 3AN-09-02586 CI (Alaska Superior Court, July 18, 1990). And as discussed in the preceding section of this opinion, the U. S. Supreme Court had no trouble finding a "durational residency requirement" of one year constitutionally valid, even though a state benefit of reduced university

tuition was thereby allocated to longer-term residents than to new residents. *Starns v. Malkerson*, 401 U.S. 985 (1971), cited with approval in *Vlandis v. Kline*, 412 U.S. at 453 n.9.

In Alaska, once a new resident reaches the requisite term for establishing entitlement to a PFD, eligibility in subsequent years hinges on continuing to show ties to Alaska beyond "paper ties." As the Alaska Supreme Court has remarked, "The legislature clearly contemplated allowing for varying residency requirements depending on the context – requiring longer periods of physical presence for some purposes than for others." *Heller v. State*, 314 P.3d at 79. Hence, one may be absent from the state yet receive a PFD for the year during which one or more **allowable** absences occurred. AS 43.23.008. A five years-long absence from Alaska is only allowable if, during that span, one spent a mere 1.6% of one's time in Alaska. Otherwise, the absence is not allowed and one's eligibility for PFDs is lost until such eligibility is re-established. *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 995 (Alaska 2011); [Exc. II-146]. If one's presence in Alaska for six months before one qualifies for a PFD is constitutionally acceptable, it is impossible to view the physical presence requirement specified in AS 43.23.008(d)(1) as constitutionally unacceptable. *Heller v. State, Dep't of Revenue*, 314 P.3d at 74 (Alaska 2013).

Appellants nevertheless argue, "[B]ecause AS 43.23.008(d)(1) intentionally forecloses the possibility of a PFD applicant proving his residency, it is not designed to establish the *bona fides* of a person's intent to remain in the state." Opening Brief at 20. First, the statute does not foreclose an applicant from demonstrating eligibility for a PFD. Part of the proof, but only if the applicant has been allowably absent for five years, is physical presence for 30 cumulative days over the course of the absence. As to the role of such provision in establishing the bona fides of a claimed PFD-eligible

resident, such a physical presence requirement would quite logically indicate whether that applicant truly had a connection with the state sufficient to warrant receipt of a PFD. Indeed, even after one establishes Alaska residency under AS 01.10.055(a), one is not eligible for a PFD unless during the qualifying year preceding the first application, one can demonstrate six months of residency. *Heller v. State*, 314 P.3d at 78. Part of the required residency showing is physical presence in Alaska. AS 01.10.055(a). Once one establishes eligibility for a PFD by meeting the requirements of AS 43.23.005 and .095(7), eligibility for a PFD continues so long as that resident was not absent from Alaska in the preceding year for more than 180 days, or if absent, the absence was excused. An absence of five years is **not** excused **if the applicant only spent 29 days or less in Alaska during that five years**. Each applicant, including D[redacted] and A[redacted], has the opportunity to demonstrate eligibility for a dividend. In 2014, A[redacted] chose to ground her PFD eligibility on the allowable absence provision that applied to her active duty military spouse. For his part, D[redacted] was not in the State for 30 or more days over the five year span of 2009 through 2013 so could not meet the eligibility criterion under AS 43.23.008(d)(1). He was, of course, provided the *opportunity* to demonstrate he met that criterion. The simple fact is that he had not, so could not.

The J[redacted] reliance on *Saenz v. Roe*, 526 U.S. 489 (1999), is therefore misplaced. As discussed above, the challenged statute is not a prohibited durational residency requirement. In addition, whether correctly or not, the Court in that case based its decision on the impingement on the right of interstate travel. *See Saenz v. Roe*, 526 U.S. at 511-21 (Rehnquist, C. J., dissenting). The J[redacted] do not explain how anyone's right to interstate travel is burdened by AS 43.23.008(d)(1) and the undersigned can divine no objective basis upon which to find an adverse impact on such

travel. *See Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 271 n.11 (Alaska 1984). As to the J[redacted] themselves, they make no effort to describe how the statute impairs their freedom of interstate travel. Indeed, travel to Alaska by its residents has long been encouraged by PFD eligibility statutes and regulations. And like all Alaska residents, the J[redacted] are free to leave the State whenever they wish, for as long as they wish. But it is not logical to argue that their constitutional right to interstate travel is infringed by the State's adoption of a statute that seeks their presence in Alaska, a point akin to the thrust of Justice Compton's dissent in *Alaska Pac. Assur. Co. v. Brown*, 687 P.2d at 276-80, particularly his reference to *Califano v. Torres*, 435 U.S. 1, 4 (1978) (a state may deny a benefit of residence in that state to one who moves to a different state).

The J[redacted] were not denied the opportunity to present evidence of bona fide residency.

The third argument posed by the J[redacted] contends:

> D[redacted] and A[redacted] are treated differently than other allowably absent Alaskans who have been present for 30 cumulative days over five years, insofar as AS 43.23.008(d)(1) prevents them from having an equal opportunity to present evidence of bona fide residency.

Opening Brief at 23. The argument ostensibly arises from a distinction between "'equal rights' and 'equal opportunities' [which] are broader – and distinct from – 'equal protection.'" Appellants cite to Justice Burke's concurring opinion in *Schafer v. Vest*, 680 P.2d 1169 (Alaska 1984), including his reference to statements by one of the Alaska Constitutional Convention delegates, Dorothy Awes. 5 Proceedings of the Alaska Constitutional Convention 3863 (February 3, 1956), *quoted in Schafer v. Vest*, 680 P.2d at 1172 (Burke, J., concurring). Perhaps "rights and opportunities" are somehow more broadly solicitous of citizens' interests than "equal protection" standing alone, but the J[redacted] do not really explain how or why that is so, nor do they explain in what manner that would effect the

outcome here. Justice Burke's concurring opinion can certainly be read to stand for a more mundane proposition: equal protection under the state constitution encompasses equal protection of citizen rights and opportunities.

However, D[redacted] maintains, as he did in his second argument discussed above, that because the amended statute requires 30 days of cumulative physical presence in Alaska over a five-year stretch, which requirement he was unable to meet, he did not have "an equal opportunit[y] under the law to prove [his] bona fide residency." Opening Brief at 23; compare Opening Brief at 20.[5] The crux of the argument appears to be that intention alone is sufficient to establish PFD eligibility, and the State may not include any physical presence requirement. However, it is a basic statutory requirement that one actually be in Alaska to establish residency: "A person establishes residency in the state **by being physically present in the state** with the intent to remain in the state indefinitely and to make a home in the state." AS 01.10.055(a)(1) (emphasis added). Of course, and as noted by the Alaska Supreme Court, some benefits of residency require longer physical presence than others.[6] Alaska law also recognizes that absence from the state does not automatically cause forfeiture of privileges attendant to residency. *See, e.g.*, AS 15.05.010 – .020 (voting allowed despite some absences); *see also* AS 16.05.415(b) (resident hunting and fishing privileges continue after certain absences). And as stated by the Alaska Supreme Court in the context of PFD eligibility:

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[5] "AS 43.23.008(d)(1) disqualifies D[redacted] and A[redacted] from establishing their bona fides to remain Alaska residents." Opening Brief at 20.

[6] A "resident" hunting or fishing license requires that one be domiciled in Alaska for 12 months. AS 16.05.330(a)(2). PFD eligibility has a similar durational requirement. AS 43.23.005(a)(3) and (6). Voting in a state or local election, although a fundamental right, still requires physical presence in Alaska for 30 days, although voting in a presidential or vice-presidential election has no durational residency requirement. AS 15.05.010 – .020.

> The allowable absences listed in AS 43.23.008 are exceptions to the "physically present" requirement of AS 43.23.005. And the specific language of subsection (b) makes clear that the requirement set out in this subsection concerns physical presence, which, in this case, serves as an important indicator of intent to remain in Alaska.

Heller v. State, 314 P.3d at 75. The J[redacted] had every opportunity to demonstrate they met the requirements for PFD eligibility, and any attempted distinction between the terms "rights," "opportunities," and "protections" adds nothing to their appeal. *Cf. Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005) ("[E]qual rights, opportunities, and protection under the law," Alaska Constitution, Art. I, § 1, analyzed under general equal protection analysis).

The 30-day physical presence requirement furthers legitimate state purposes.

The J[redacted] assert the 30 day physical presence requirement specified in AS 43.23.008(d)(1) is unconstitutional as applied to them. Opening Brief at 24. They argue the legislature's purposes as described in *Zobel v. Williams*, 457 U.S. 55 (1982), are not even rationally related to the physical presence requirement. In that case, the U. S. Supreme Court identified the purposes for the PFD program as: (1) creating an incentive for people to establish and maintain residency; (2) encouraging prudent management of the Permanent Fund; and (3) granting benefits based on undefined contributions by past residents. *Id.* at 60. The key problem for the Court as to the first two grounds was that neither was served at all by granting a greater PFD to residents who had been in Alaska before adoption of the program:

> As the Alaska Supreme Court apparently realized, the first two state objectives – creating a financial incentive for individuals to establish and maintain Alaska residence, and assuring prudent management of the Permanent Fund and the State's natural and mineral resources – are not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.

Id. at 61. As to the third basis, the Court said, "[T]hat objective is not a legitimate state purpose. A

similar "past contributions" argument was made and rejected in *Shapiro v. Thompson*, 394 U.S., at 632-633, 89 S.Ct., at 1330."

The first problem with the J[redacted] analysis is that the Court did not address the relationship of the specific statutory purposes identified in the legislation, to the PFD distribution structure. *See id.* at 60 n.7. Instead, the Court discussed the reasons advanced by the State in the litigation, which arguably are not the same as the legislature's avowed purposes. In any event, the problems with, and arguments about, the PFD distribution structure at issue in *Zobel* are so far removed from the instant case as to be largely irrelevant.

But the Alaska Supreme Court, for purposes of resolving equal protection challenges to the PFD program, has continued to analyze the end-means fit by reference to the legislative purposes stated in the statute invalidated in *Zobel*. *Id.*; *State, Dep't of Revenue, Permanent Fund Div. v. Cosio*, 858 P.2d 621, 627 (Alaska 1993). In *Cosio*, the State accepted the Alaska Supreme Court's recitation of statutory purposes, as it seems to do here. Responsive Brief at 11. The State's opposition to the J[redacted] argument that AS 43.223.008(d)(1) is not rationally related to the objectives enunciated in *Zobel* focuses on distinguishing the allocation formula disallowed in Zobel, from the residency issues here. Responsive Brief at 22; *see Cousins v. State, Dep't of Rev., PFD Division*, 2001 WL 34818200 at 2 (Alaska 2001). The Department's briefing also recognizes that since *Cosio*, in the several challenges to PFD distribution formulae, the Alaska Supreme Court has refined the purposes broadly stated in *Zobel*. Thus, limiting PFDs to permanent residents, avoiding or eliminating fraud, and allowing the agency the ability to administer the program efficiently, have been brought into the mix of accepted justifications for the structure of the PFD program. *Heller v.*

State, Dep't of Revenue, 314 P.3d at 75 ("[P]hysical presence . . . serves as an important indicator of intent to remain in Alaska."); *Ross v. State, Dep't of Revenue*, 292 P.3d at 912 (Ross's argument illustrates that a rational person could conclude that the ten-year rule furthered the State's interest in preventing fraud."); *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999) ("Some bright line rules are necessary to allow for the efficient distribution of dividends.").

The contention that because the statute "does not provide equitable distribution **to the J[redacted]**" Opening Brief at 24 (emphasis added), the 30-day physical presence requirement serves no legitimate purpose, is misguided. As stated by the Alaska Supreme Court:

> Even if application of the rule may seem harsh in the case of a [long-time] Alaskan [Airman] who . . . "strongly demonstrates [his] passion for retaining residency in Alaska," as we have observed in past cases, when reviewing dividend eligibility requirements under the Alaska Equal Protection Clause, "we do not determine whether a regulation 'is perfectly fair to every individual to whom it is applied.'" [*Eldridge v. State, Dep't of Revenue*, 988 P.2d 101, 104 (Alaska 1999)]. "[T]he possible exclusion of one deserving recipient does not make the regulation unreasonable." [*State, Dep't of Revenue, Permanent Fund Dividend Div. v. Bradley*, 896 P.2d 237, 240 (Alaska 1995).]

Ross v. State, Dep't of Revenue, 292 P.3d at 912. Here, as in past decisions of the Alaska Supreme Court, most especially *Ross, Heller* and *Church*, the 30-day cumulative physical presence requirement of AS 43.23.008(d)(1) "bears a fair and substantial relationship to the goals" of the PFD program, including: (1) equitable distribution through imposition of a physical presence requirement that serves as an indicator of one's link to Alaska; (2) imposition of an objective physical presence requirement to reduce or eliminate fraudulent attempts to secure undeserved PFDs; and (3) permit relatively efficient administration of a program requiring expeditious processing of nearly 700,000

applications.[7] One certainly could consider that not being physically present in one's claimed place of residence is "inconsistent" with an intent to be a resident. AS 01.10.055.

The amended statute is not an impermissible retroactive enactment.

The J[redacted] correctly note that *ex post facto* laws are prohibited by both the United States Constitution and the Alaska Constitution. "No State shall . . . pass any . . . *ex post facto* Law." U. S. Constitution, Art. 1, § 10. "No . . . *ex post facto* law shall be passed." Alaska Constitution, Art. I, § 15. However, "It is unclear whether the *ex post facto* clause applies to purely civil statutes." *In re Estate of Blodgett*, 147 P.3d 702, 711 (Alaska 2006). That case observed the "analysis [in *Underwood v. State*, 881 P.2d 322, 327–28 (Alaska 1994)] implies that [the] *ex post facto* clause could apply to civil statute[s]." *In re Estate of Blodgett*, 147 P.3d at 711 n.63.[8] In *Underwood*, the Alaska Supreme Court certainly did not embrace application of the Alaska Constitution, Art. I, § 15, to civil statutes. *See Doe v. State*, 189 P.3d 999, 1003 (2008) ("[T]he prohibition [against *ex post facto* laws] applies only to penal statutes.").[9] Indeed, the *Underwood* opinion does not clearly articulate either the constitutional basis for the challenge, or any constitutional basis for the result. As to the former, "The Underwoods alternatively urge us to . . . review the challenged enactment for fairness and reasonableness." *Underwood v. State*, 881 P.2d at 327. As to the latter, the court merely stated:

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[7]About 13,000 applicants annually have been absent for five years. [R. 362].

[8]The footnote continues, "Retroactive civil legislation must include an express statement of retroactivity within the statute. AS 01.10.090." The amendment here was made retroactive to 1 January 2013.

[9]"*Gryger* [*v. Burke*, 334 U.S. 728 (1948),] is dispositive of any claim based on [Art. 1 Sec. 10, of] the federal constitution, and we see no reason for us to interpret Alaska's constitutional provision differently." *Danks v. State*, 619 P.2d 720, 722 (Alaska 1980). There are suggestions from the U. S. Supreme Court that application of the Contract Clause depends upon some punitive action by the government. U. S. Trust Co. v.

> We are satisfied that [the 1992 PFD eligibility amendment] did not unfairly or unreasonably impinge upon any property rights or settled expectations. Thus, we find that the amendment does not violate the constitutional prohibition against retroactive legislation.

Id. at 328.

Despite the facile treatment by the Alaska Supreme Court of the Underwoods's nearly identical argument, the J[redacted] insist the amendment "unfairly impinges upon their settled expectations [with regard to PFD eligibility] in three different ways." Opening Brief at 27.[10] Therefore, they argue, AS 43.23.008(d)(1) is "an unconstitutional *ex post facto* law as applied to [them]." *Id.* As noted above, this court does not believe the federal or state *ex post facto* law prohibitions are applicable. And although the J[redacted] fail to provide a basis to determine whether the subject amendment is truly retrospective as the term is understood in the law, *see Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985), the court also doubts that AS 43.23.008(d)(1) meets the requirements for retrospective legislation, let alone prohibited retrospective legislation. *See, e.g., Arco Alaska, Inc. v. State*, 824 .2d 708 (Alaska 1992). In that case, the Alaska Supreme Court let stand retrospective application of an amendment to oil tax statutes that caused a $100 million increase in tax liability for North Slope oil producers. The opinion rather summarily dismissed the oil companies' argument that Art. 2, Sec. 18 "was intended by the [Alaska Constitutional Convention] delegates to provide a substantive constitutional safeguard against retroactive laws."[11] Simply put, even laws with clear retrospective effects may be

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[10]Like the *Underwood* opinion on which they rely, the J[redacted] do not explain why it is **unconstitutional** for the government to impinge – whether fairly or unfairly – upon one's "settled expectations."

[11]"Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date." Alaska Constitution, Art. 2, § 18.

permissible. *U. S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n.13 (1977).

Despite the lack of a legal foundation to support claims of unconstitutional retroactive legislation, the court will address the J[redacted] specific claims that the statute lacks "fairness and reasonableness." Opening Brief at 27. The first contention is:

> [T]he 2012 decision by ALJ Friedman ruled that they were Alaska residents for PFD purposes, and settled their expectations that they would be able to prove *bona fide* residency in future years under the unavoidable circumstances rubric.

Id. They cite the ALJ's decision for that claim, [Exc. I-63], upon examination of which it is clear the J[redacted] are mistaken. ALJ Friedman carefully considered whether D[redacted] failure to be in Alaska for a cumulative 30 days was excused by "unavoidable circumstances" under former 15 AAC 23.163(h)(2). [Exc. I-58-9]. He concluded, "Maj. J[redacted] did not meet his burden of proving that unavoidable circumstances prevented his return." [Exc. I-59].

Even leaving aside consideration of "unavoidable circumstances" for not being in Alaska for only 30 days over five years, the J[redacted] argument that the 2012 decision gave them "settled expectations" of future receipt of PFDs is unsupportable on the record. When D[redacted] and A[redacted] applied for PFDs in early 2013,[12] the record shows they had been allowably absent for the preceding 10 years. Any "settled expectation" of a 2013 PFD would have been a pipe dream due to AS 43.23.008(c) and the Alaska Supreme Court's approval of it in September 2012. *Ross v. State, Dep't of Revenue*, 292 P.3d 906 (Alaska 2012), *reh'g denied* January 10, 2013. Only an aberration in the law peculiar to 2013, recognized by ALJ Rebecca Pauli in her decision of 16 February 2016, permitted the J[redacted] to receive dividends in 2013. [Exc. I-315]; *see* text *supra* at 5. The state of

[12]Applications are typically due by March and the court is simply assuming that was so for 2013 applications for the qualifying year of 2012.

affairs as of October 2013, when PFD checks were distributed, was that the ten-year rule had been repealed, the 30 day physical presence requirement mandated by AS 43.23.008(d)(1) could not serve as grounds to deny a 2013 PFD, and the regulations governing both the 30 day physical presence and "intent to return and remain" remained on the books until 1 January 2014. As to that 2013 dividend, the record does not disclose whether the Department made any determination that "unavoidable circumstances" prevented D[redacted] from avoiding the 30-day "double presumption" described by ALJ Friedman. What seems very likely is that the J[redacted] simply stapled ALJ Friedman's decision to their 2013 PFD applications, and received checks without further Department inquiry. Whether that is so or not, the point is that matters were very much in flux during 2013, and it is impossible to believe that in that milieu the J[redacted] expectations were "settled."

The J[redacted] next appear to complain that because they could not time travel in order to meet the 30-day physical presence requirement, the statute must be unfair and unreasonable. The Underwood family made a nearly identical argument – they could not re-do the past by leaving Texas for Alaska three or four months earlier than they actually did. To that the Alaska Supreme Court responded:

> The effective date of the 1992 amendment to AS 43.23.005 was January 1, 1993. The amendment made state residency during calendar year 1992 relevant to eligibility for a 1993 PFD, thereby bearing some relation to events dating back to January 1, 1992, instead of April 1, 1992 as under the prior law. We are satisfied that this change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Thus, we find that the amendment does not violate the constitutional prohibition against retroactive legislation.

Underwood v. State, 881 P.2d at 327-8. As discussed, though pre-2013 events considered in denial of the J[redacted] 2014 PFD application, this court is "satisfied that [the amendment] did not unfairly or unreasonably impinge upon any property rights or settled expectations." *Id.*

The facts of the case at bar support the foregoing remark. D[redacted] was physically present in Alaska for 16 days in the "qualifying years" of 2009 through 2013 for purposes of satisfying the 30-day physical presence requirement. Opening Brief at 4. The subject amendment was adopted in June 2013, so D[redacted] had six months in which to find his way back to Alaska for two weeks, which would have enabled him to meet the "new" requirement so that he and A[redacted] would both qualify for 2014 dividends. Moreover, the Department continued the regulatory 30-day physical presence element for PFD eligibility for 2013 PFDs. Although D[redacted] failed to rebut the 30 day physical presence presumption for his 2011 PFD since his absences were **not** unavoidable, he apparently chose to gamble that he would be found PFD-eligible even if he was never in Alaska more than three days every two years. AS 43.23.005(a)(4).

The third basis on which the J[redacted] assert the amendment is not fair or reasonable to them is, "[U]nlike the 1998 amendment [that created an allowable absence provision separate from the definition of resident], the 2013 amendment does not 'mirro[r] the substance of the earlier statute and regulations.'" Opening Brief at 27, *quoting Heller v. State*, 314 P.3d at 80. The court understands that brief assertion to mean that the change to the PFD statute embodied in AS 43.23.008(d)(1) was substantive, unlike the changes discussed in the *Heller dictum* quoted in the Opening Brief. The J[redacted] are correct that HB 52 removed one's ability to explain away the lack of a physical connection to one's ostensible state of residence. In that sense the change was "substantive." But the observation merely begs the question why that was unfair or unreasonable? The 30-day physical presence requirement was based on the Department's longstanding practice of presuming an applicant was not eligible for a PFD if the applicant had spent less than an average of

six days in Alaska over a five year span. And the J[redacted] also do not acknowledge that, under prior law, meeting the 30-day physical presence requirement certainly did not guarantee receipt of a dividend. Amongst other possibilities, but most apropos of the J[redacted] particular circumstances, and as discussed above, the J[redacted] were ineligible to receive 2013 PFDs but for the amendment about which they now complain. Had HB 52 not substantively amended the earlier statute, they would not have received 2013 dividends **or** PFDs for 2014 and 2015. Perhaps the amendment only partially mirrored 15 AAC 23.163(h)(2), but it did not disadvantage the J[redacted], or "impinge upon any property rights or settled expectations." *Underwood v. State*, 881 P.2d at 328.

The court will not exercise the plenary authority urged by D[redacted] and A[redacted].

In the final argument of their Opening Brief, the J[redacted] ask the court to exercise its equitable powers to award them PFDs for 2014 and 2015. Even if the court held such powers, their exercise here would not be warranted. The J[redacted], like Representative Hughes, make the unfortunate – and false – assumption that one is not "Alaskan" if one does not receive a PFD. The Alaska legislature has the authority to define the conditions under which an Alaska resident does, or does not, qualify for a PFD. Where those conditions meet constitutional requirements, as they do here, the courts of Alaska are duty-bound to uphold them.

Conclusion.

The decisions of the ALJs appealed from by D[redacted] and A[redacted] J[redacted] are AFFIRMED. D[redacted] did not meet the eligibility requirements for a PFD in 2014 specified in AS 43.23.008(d)(1), and did not re-establish his eligibility during the qualifying year for a 2015 PFD. *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 995 (Alaska 2011); [Exc. II-146]. A[redacted] lost her eligibility for

a 2014 PFD along with D[redacted], and the quantum of her time in Alaska during 2014 was too short to re-establish her PFD eligibility for a 2015 PFD. The statutory framework at issue, particularly HB 52, meets federal and state constitutional requirements.

It is so ORDERED this 18th day of September, 2017.

By: [redacted]
Superior Court Judge Pro Tem Charles W. Ray, Jr.

I certify that on 9.19.17 a copy of the following was mailed/emailed to each of the following at their addresses of record.

[redacted]
Administrative Assistant

Burd
AG-Clement