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## Zobel's Ghost: The Equity of Being Alaskan Still Haunts Permanent Fund Dividend Eligibility

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### Cover Page Footnote

Thank you to my grandparents, Tom and Martha Jo Roberts, for lovingly taking me into their Fairbanks home in 2004; thank you to my parents, for taking my sister and I on wonderful vacations to Alaska in grade school, and for instilling in me a healthy respect for hard work and higher learning; thank you to Sonja Kawasaki, without whom I would never have been in a position to write this comment in the first place; and thank you to Dean Paul McGreal, whose guidance and insightful law review article (see *infra* note 79) gave me the freedom to analyze this issue as I have. Incidentally, any circular logic, use of emotional rhetoric at the expense of legal analysis, or citation to a marginally credible source that appears below belongs exclusively to myself, and not to the bright, hardworking staff writers of the *University of Dayton Law Review*.

# ZOBEL’S GHOST: THE EQUITY OF BEING ALASKAN STILL HAUNTS PERMANENT FUND DIVIDEND ELIGIBILITY

*Ehren D. Lohse\**

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\* B.A., English Language & Literature, University of Chicago, 2004; J.D., University of Dayton School of Law, 2014; Outside Articles Editor, The University of Dayton Law Review, 2013–2014. Thank you to my grandparents, Tom and Martha Jo Roberts, for lovingly taking me into their Fairbanks home in 2004; thank you to my parents, for taking my sister and I on wonderful vacations to Alaska in grade school, and for instilling in me a healthy respect for hard work and higher learning; thank you to Sonja Kawasaki, without whom I would never have been in a position to write this comment in the first place; and thank you to Dean Paul McGreal, whose guidance and insightful law review article (*see infra* note 79) gave me the freedom to analyze this issue as I have. Incidentally, any circular logic, use of emotional rhetoric at the expense of legal analysis, or citation to a marginally credible source that appears below belongs exclusively to myself, and not to the bright, hardworking staff writers of the Dayton Law Review.

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## I. INTRODUCTION

The permanent fund dividend (“PFD”)<sup>1</sup> comes once a year in the form of a check or direct deposit from the state of Alaska, usually in October, to residents who eagerly anticipate the windfall and likely have been planning for months on how to spend it: on a vacation, winter fuel, or some new recreational item.<sup>2</sup> Some local snow machine businesses affectionately refer to the days just after the pay-out as “Early Christmas.”<sup>3</sup> And advertising geared toward PFD-recipients has become “an annual ritual at businesses around Alaska, as residents look for ways to spend their share of the state’s oil royalties.”<sup>4</sup> Since its inception in 1982, the payout has averaged about \$1,000 per person.<sup>5</sup> In 2008, the PFD reached its apex, with the state of Alaska giving each eligible resident \$2,069.<sup>6</sup> In the days after that historic payment, one reporter, watching “sports fans . . . wheeling big-screen TVs out of Best Buy” and “wads of cash” changing hands at registers, noted everyone “seemed jovial, kind of like [they] just won a game show prize.”<sup>7</sup> One Alaskan economist points out that, greeted as it is each year with hype and a media barrage, the PFD has “the aura of being special income.”<sup>8</sup>

<sup>1</sup> The PFD is an annual payment from the State of Alaska to a resident of Alaska, which was originally financed by the 1969 state auction of leases on Alaska’s North Slope to oil companies, the proceeds of which have been reinvested and protected by statute and Alaska’s constitution so that they make it into the hands of Alaskans year after year. Stephen E. Branchflower, *The Alaska Office of Victims’ Rights: A Model for America*, 21 ALASKA L. REV. 259, 283–84 (2004); see also discussion *infra* notes 18–21.

<sup>2</sup> See ALASKA STAT. § 43.23.055(a)(1-2) (2012) (mandating that the State Department of Revenue “pay the dividends by December 31.”).

<sup>3</sup> Jeff Richardson, *Fairbanks merchants soak up Alaska Permanent Fund cash*, FAIRBANKS DAILY NEWS-MINER (Oct. 11, 2009, 11:58 PM), [http://newsminer.com/view/full\\_story/3958225/article-Fairbanks-merchants-soak-up-Alaska-Permanent-Fund-cash?](http://newsminer.com/view/full_story/3958225/article-Fairbanks-merchants-soak-up-Alaska-Permanent-Fund-cash?)

<sup>4</sup> *Id.*

<sup>5</sup> See *Permanent Fund Dividend Div. 2011 Annual Report*, STATE OF ALASKA DEP’T OF REVENUE, PERMANENT FUND DIVIDEND DIV. 1, 30 (2011), <http://pfd.alaska.gov/Content/AnnualReports/2011AnnualReport.pdf> [hereinafter 2011 ANNUAL REPORT].

<sup>6</sup> *Id.* In 2008, the Alaska legislature also passed an energy rebate, which tacked another \$1,200 onto that year’s PFD. See Wesley Loy, *Legislature passes \$1,200 rebate*, ANCHORAGE DAILY NEWS (Aug. 7, 2008), <http://www.adn.com/article/20080807/legislature-passes-1200-rebate>.

<sup>7</sup> Julia O’Malley, *Alaskans waste no time spending PFD, rebate*, ANCHORAGE DAILY NEWS (Sept. 12, 2008), <http://www.adn.com/2008/09/12/524040/alaskans-waste-no-time-spending.html#storylink=misearch>.

<sup>8</sup> Scott Goldsmith, *The Alaska Permanent Fund Dividend: An Experiment in Wealth Distribution*, BASIC INCOME EUR. NETWORK 9<sup>TH</sup> INT’L CONG 1, 16 (2002), <http://ilo.org/public/english/protection/ses/download/docs/gold.pdf>.

As a newcomer to Alaska in 2004, I too grew accustomed to anticipating my PFD. As the birch and aspen-blanketed hills encircling Fairbanks turned lemon yellow, as the crisp wind began to insinuate darkness and snow, and as the smell of fallen cranberries stung the air, I would think of the PFD as a sort of paid vacation that made up for the slow hours at the end of the summer construction season and corresponding daytrips to fish for fiercely hungry grayling or trout in their soon-to-be icy waters. Positioned as it is, the PFD payout seems like Alaska's way of enticing you to stay through the winter and its week-long cold snaps of forty below zero, high heating bills, and bleak days that are truncated into only five hours of weak, low-slanted sunlight. It seems only fair that, if one drives to work on thudding tires frozen flat overnight by the cold, walks outside, inhales, and feels a quick freezing moving up one's nostrils, then one should be compensated by whatever cockamamie, obstinate government decided to bestow its sovereignty on such a god-forsaken place. So is the PFD just a state kickback for Alaska's frigid winters? You certainly are not entitled to one if you leave the state because your physician recommended "climatic change" would do you good.<sup>9</sup>

How can it be that "[e]ligibility for PFDs includes meeting a definition of residency tied to physical contact to the state, which may be more difficult to meet than the definition of residency for other purposes[?]"<sup>10</sup> Something else, then, must be at work, some continual reevaluation by the Alaskan body politic of what it means to be Alaskan, an idea that we must take stock of ourselves every spring,<sup>11</sup> after the winter questioned our allegiance to our state, and awake from the hibernating darkness to check the right box on a form: "Yes, I've made it – I haven't eloped for too long to warmer, sunnier climes – and I would like to be compensated soon too, please." So it may be true that, at least in Alaska, "political citizenship 'runs with the land.'"<sup>12</sup> The PFD, as sheer cash and as a token of political belonging, has such symbolic force in Alaska that one oil company, facing a lawsuit in Alaska that could have increased PFD amounts, claimed to the Ninth Circuit "that the financial interest of every Alaskan judge or juror in the outcome of the pending state proceedings supports a ruling that, as a matter of law, Alaska cannot provide an unbiased tribunal."<sup>13</sup> Criminal defendants attacking the composition of the juries

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<sup>9</sup> ALASKA STAT. § 43.23.008(a)(5) (2014). An allowable absence may include "receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended . . . if the treatment or convalescence is not based on a need for climatic change." *Id.*

<sup>10</sup> *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728, 733 n.12 (Alaska 1995).

<sup>11</sup> See ALASKA STAT. § 43.23.011(a) (2007) ("An application for a permanent fund dividend shall be filed during the period that begins January 1 and ends March 31 of that dividend year.").

<sup>12</sup> Christopher L. Griffin, Jr., Comment, *The Alaska Permanent Fund Dividend and Membership in the State's Political Community*, 29 ALASKA L. REV. 79, 81 (2012).

<sup>13</sup> *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). The argument was dismissed without prejudice on procedural grounds. *Id.* at 630.

selected to judge them argue that jurors chosen from a list of PFD recipients rather than a list of the state's voters would be more equitable.<sup>14</sup> And researchers focusing on the program's inception have even correlated the receipt of a PFD to a fourteen-gram increase in the birth weight of newborn Alaskans,<sup>15</sup> which in turn suggests increased health at birth.<sup>16</sup>

This Comment will examine how challenges to the allocation of PFDs have rarely met with success. Section II will sketch a brief history of the PFD: how its first incarnation fared poorly against an equal protection challenge in the United States Supreme Court, how the PFD program changed because of that decision, and finally, how the PFD program is currently justified constitutionally by the Alaska Supreme Court. Section III will delve through formal administrative hearings to show that, despite the seminal *Zobel* ruling,<sup>17</sup> Alaska's administrative law judges continually cull permanent residents from the brink of PFD ineligibility while denying PFDs to most newcomers to the state. Section III will also suggest three interrelated solutions geared toward ridding the PFD eligibility inquiry of its reliance on an applicant's past Alaskan residency or lack thereof. In addition to Section III's solutions, Section IV will make the case that, although the PFD program does serve legitimate state interests, those interests are not the ones articulated by the courts. The current justifications for the PFD program do not closely align with how it is administered. The PFD would rest on surer constitutional grounds – and would be more transparent, reliable, and equitable in general – if the legislature formally recognized that its utility comes from keeping Alaskan money in Alaska.

## II. THE ORIGINS AND LEGALITY OF THE PERMANENT FUND DIVIDEND PROGRAM

The revenue that created the PFD comes from “large oil reserves on state-owned land in the Prudhoe Bay area of Alaska,”<sup>18</sup> the discovery of which in 1967 radically reshaped Alaska's fiscal health: “The State, which had a total budget of \$ 124 million in 1969, before the oil revenues began to flow into the state coffers, received \$ 3.7 billion in petroleum revenues during the 1981 fiscal year.”<sup>19</sup> In 1976, less than a decade after its discovery, this newfound wealth prompted prospective-looking Alaskan legislators and voters to amend the state's constitution to require that “[a]t

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<sup>14</sup> See *United States v. Sabil Mujahid*, No. 3:10-cr-00091(JWS), 2010 U.S. Dist. LEXIS 128738, at \*10 (D. Alaska Dec. 3, 2010). The defendant argued unsuccessfully that the District Court of Alaska should follow the Alaska state court system and select jurors from a list of Alaskans who received PFDs because the state system “is a model of inclusiveness and representativeness.” *Id.*

<sup>15</sup> Wankyo Chung & Beomsoo Kim, *Money Transfer and Birth Weight A Causal Link from Alaska*, ECONWEB.UMD.EDU 1, 9 (March 29, 2011), <http://econweb.umd.edu/~davis/eventpapers/KimMoney.pdf>.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Zobel v. Williams*, 457 U.S. 55 (1982).

<sup>18</sup> *Id.* at 56 (citations omitted).

<sup>19</sup> *Id.*

least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State . . . be placed in a permanent fund.”<sup>20</sup> The amendment comports well with the Alaska Constitution’s mandate that “[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”<sup>21</sup> And Alaskans have benefitted as a result of the PFD program. For example, one commentator attributes Alaska’s income distribution, one of the most equitable in the country, to the “dramatic effect” of the PFD, noting that

in the last ten years the income of the poorest fifth of Alaska families increased 28 percent compared to a 7 percent increase for the richest fifth. In contrast, for the entire United States over the same period, the increase for the poorest fifth was 0.8 percent compared to 14.9 percent for the richest fifth.<sup>22</sup>

*A. Alaska’s First PFD Program Violated the U.S. Constitution: the Zobel Ruling*

Debate over how best to utilize the Permanent Fund focused on two vying notions: either use it like a savings account or else treat it as investment capital for development projects throughout Alaska.<sup>23</sup> Because a fund that benefitted the people more directly would keep the money out of the hands of politicians while also perhaps combatting high population turn over, the idea of a cash distribution to all Alaskans became increasingly popular.<sup>24</sup> In 1980, Governor Hammond encouraged the legislature to enact a scheme to disburse this wealth to Alaskans,<sup>25</sup> but it faced an immediate constitutional challenge: because it allocated payments based on years resided in Alaska, entitling a life-long resident to roughly twenty times the amount a newcomer would receive, the United States Supreme Court found the statute violated the equal protection clause of the Fourteenth

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<sup>20</sup> ALASKA CONST. art. IX, § 15.

<sup>21</sup> ALASKA CONST. art. VIII, § 2.

<sup>22</sup> Deborah Groban Olson, *Fair Exchange: Providing Citizens with Equity Managed by a Community Trust, in Return for Government Subsidies or Tax Breaks to Businesses*, 15 CORNELL J.L. & PUB. POL’Y 231, 299–300 (2006) (citing Jared Bernstein, et al., *Pulling Apart: A State-by-State Analysis of Income Trends*, CTR. ON BUDGET & POLICY PRIORITIES 22 (Jan. 2000), <http://www.cbpp.org/archiveSite/1-18-00sfp.pdf>).

<sup>23</sup> Goldsmith, *supra* note 8, at 2.

<sup>24</sup> *Id.* at 2–4. The popular distrust of Alaska’s state government at this time stemmed from how it had quickly spent a \$900 million payment made by oil companies, leaving behind a bad taste of “bigger government without an enhanced ability to pay for it.” *Id.* at 2.

<sup>25</sup> *Id.* at 4.

Amendment.<sup>26</sup> The *Zobel* Court failed to see how Alaska's statute rationally related to the distinctions it sought to make.<sup>27</sup>

First, against the state's argument that a payout tailored to one's length of residency would create an incentive for newcomers to migrate to Alaska and maintain residency there, the Court objected that the smaller payments available to newcomers would have the opposite effect: if Alaska wanted to entice new residents to settle within its borders, larger payments would be more appropriate.<sup>28</sup> Second, although Alaska justified the unequal payout on the grounds that it would encourage residents to become more aware of and involved in the fund's management and expenditure,<sup>29</sup> the Court found no rational connection between this goal and the state's insistence on calculating payments retroactively based on residency.<sup>30</sup> Finally, while Alaska argued that rewarding citizens for past contributions was a legitimate state purpose, the Court thought otherwise: if such reasoning were upheld, nothing would stop access to other more finite state resources – such as student loans, civil service jobs, or government contracts – from being apportioned according to one's length of residency within the state.<sup>31</sup> Alaska's law bent on dividing citizens “into expanding numbers of permanent classes” could not stand.<sup>32</sup> After the *Zobel* ruling, the Alaska legislature crafted a simpler payout scheme that allocated an equal amount to every Alaskan regardless of their length of residency.<sup>33</sup>

#### B. *The PFD's Current Statutory and Administrative Form*

Now, an Alaskan may claim a PFD if she: (1) files an application; (2) is a state resident when she does so; (3) was a state resident during the qualifying year;<sup>34</sup> (4) was physically present in the state for a continuous 72 hours during any time within “the prior two years before the current dividend year;” and (5) is a U.S citizen or reasonably legitimate federal facsimile thereof.<sup>35</sup> Parents may apply for their minor children or disabled

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<sup>26</sup> *Zobel v. Williams*, 457 U.S. 55, 65 (1982). The original dividend program created \$50 dividend units: every year of residency since Alaska became a state in 1959 equated to one unit for citizens over the age of 18. *Id.* at 57.

<sup>27</sup> *Id.* at 65.

<sup>28</sup> *Id.* at 61–62 & n.9.

<sup>29</sup> *Id.* at 61 n.7. At the time, the state argued that a per capita distribution, as opposed to its weighted distribution scheme, would deplete the permanent fund too quickly as population increased, which would in turn put popular pressure on the legislature to make riskier investments; it also argued that a “per capita distribution would encourage rapacious development of natural resources.” *Id.* at 62.

<sup>30</sup> *Id.* at 61–63. Despite what the state thought was a logical and well-formulated argument on this point, the Court was of a different mindset: “We think not.” *Id.* at 63.

<sup>31</sup> *Id.* at 64.

<sup>32</sup> *Id.*

<sup>33</sup> Goldsmith, *supra* note 8, at 5.

<sup>34</sup> See ALASKA STAT. § 43.23.095(6) (2014) (“‘qualifying year’ means the year immediately preceding January 1 of the current dividend year.”).

<sup>35</sup> *Id.* § 43.23.005(a) (2014).



or incompetent individuals.<sup>36</sup> An otherwise eligible Alaskan who either dies after applying for a PFD or before she could have applied still has an interest in the PFD recoverable by her successor or personal estate representative.<sup>37</sup>

Although the general rule is that one may not be absent from the state for longer than 180 days and still claim a dividend, there are many exceptions to this rule.<sup>38</sup> The following is a non-exhaustive list of acceptable reasons to leave Alaska that do not defeat PFD eligibility so long as they are properly documented and proven: becoming a full-time student at a secondary or postsecondary institution;<sup>39</sup> serving in the United States military on active duty or, as a spouse or minor dependent, accompanying someone who is;<sup>40</sup> receiving medical treatment;<sup>41</sup> caring for a dying relative or settling the estate of a deceased one;<sup>42</sup> serving in the United States Congress as a member or that member's staff;<sup>43</sup> volunteering in the Peace Corps;<sup>44</sup> or competing in the Olympics.<sup>45</sup>

Alaska defines residency as “being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.”<sup>46</sup> However, for purposes of PFD eligibility, “the legislature has given broad discretion to the commissioner [of the PFD program] to determine the factors which define a permanent resident.”<sup>47</sup> In fact, the legislature requires the commissioner to adopt administrative regulations to determine “the eligibility of individuals for permanent fund dividends.”<sup>48</sup> Pursuant to this authority, there are currently eleven administrative regulations creating bright-line rules (and some murkier ones) to streamline the eligibility-determination process.<sup>49</sup> Among the most prominently applied of these are

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<sup>36</sup> *Id.* § 43.23.005(c). Children, upon reaching majority, may file for dividends owed them from years past if they were otherwise eligible but their parent or guardian failed to timely file. ALASKA ADMIN. CODE tit. 15, § 23.133 (2008). This Comment will not deal with why Alaskan law does not provide for how a parent should spend or save their child's dividends. Alaska's legislature has, however, set up a fund – the University of Alaska College Savings Plan – wherein parents can deposit 50% of their child's dividend for use as in-state college tuition; the Alaska Department of Revenue also contributes to the fund. ALASKA STAT. § 14.40.807 (2007). For treatment of this issue in the context of a national discussion, see Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 U. CIN. L. REV. 457, 477–80 (2004) (noting that “[a]lthough the [Alaska Supreme] court has held that a parent has a right to control a child's dividend, it is unclear whether such control allows the parent to take ownership of the dividend, or whether the parent has some duty to the child with regard to the dividend.”).

<sup>37</sup> ALASKA STAT. § 43.23.005(h) (2014).

<sup>38</sup> See *id.* § 43.23.008(a).

<sup>39</sup> *Id.* § 43.23.008(a)(1).

<sup>40</sup> *Id.* § 43.23.008(a)(3).

<sup>41</sup> *Id.* § 43.23.008(a)(5).

<sup>42</sup> *Id.* § 43.23.008(a)(6), (8).

<sup>43</sup> *Id.* § 43.23.008(a)(9)–(10).

<sup>44</sup> *Id.* § 43.23.008(a)(14).

<sup>45</sup> *Id.* § 43.23.008(a)(15).

<sup>46</sup> *Id.* § 01.10.055(a) (2007).

<sup>47</sup> *Church v. Dep't of Revenue*, 973 P.2d 1125, 1129 (Alaska 1999).

<sup>48</sup> ALASKA STAT. § 43.23.015(a) (2014).

<sup>49</sup> See generally, ALASKA ADMIN. CODE tit. 15, § 23.103 (2011) (Application generally); *id.* § 23.113 (2011) (Application on behalf of a child); *id.* § 23.123 (2008) (Application on behalf of a

the sections dealing with establishing and maintaining Alaska residency and allowable absences.<sup>50</sup> Physical presence in Alaska alone is insufficient to establish residency for PFD purposes; an additional step, such as obtaining employment or purchasing a home, is necessary.<sup>51</sup> Generally, acts that disqualify an applicant from receiving her PFD involve asserting residency in another state, usually to obtain a benefit, and include any of the following acts, if done outside of Alaska: maintaining a home, paying “resident taxes,” registering a vehicle or registering to vote, acquiring “a driver’s license, business license, or professional license,” and, as a catch-all, receiving “benefits under a claim of residency in . . . another jurisdiction.”<sup>52</sup>

Furthermore, there is a presumption that an applicant who has left Alaska for whatever statutorily allowable reason does not intend to return to Alaska and remain there indefinitely if she has been outside of Alaska for more than five years and, during each of those years, she spent roughly more time outside of Alaska than within it.<sup>53</sup> This presumption may be overcome, however, by a showing that the applicant in fact returned to Alaska for at least thirty cumulative days at any point during the five-year absence and that she retained the subjective intent necessary to remain an Alaska resident.<sup>54</sup>

### C. PFD Data for 2011 – What’s at Stake

All eligible Alaskans dutifully apply for a PFD, and they have good reason to do so: “[s]ince [the PFD’s] inception, Alaskans have received on average \$ 1,100 per year between 1982 and 2010” from the fund.<sup>55</sup> In 2011, 672,237 Alaskans, or 93% of the state’s population, applied for a PFD.<sup>56</sup> Of those applicants, 615,122, or 92%, actually received a dividend, meaning that 57,115 applicants were denied dividends.<sup>57</sup> In 2011, Alaska had a

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disabled, incompetent, or other adult); *id.* § 23.133 (2008) (Application for a prior year dividend); *id.* § 23.143 (2013) (Establishing and maintaining Alaska residency); *id.* § 23.154 (2005) (Eligibility of aliens); *id.* § 23.163 (2014) (Allowable absences); *id.* § 23.173 (2014) (Proof of eligibility); *id.* § 23.183 (1997) (Individuals identified as incarcerated for certain offenses); *id.* § 23.193 (2009) (Payment of dividends to individuals identified as non-compliant sex offenders); *id.* § 23.993 (2013) (Definitions).

<sup>50</sup> *Id.* § 23.143 (2013); *id.* § 23.163 (2014) (codified as amended at ALASKA STAT. § 43.23.008(d)-(e) (2014)).

<sup>51</sup> *Id.* § 23.143(c)-(d) (2013).

<sup>52</sup> ALASKA STAT. § 43.23.008(e)(4) (2014).

<sup>53</sup> *See* § 43.23.008(d) (2014); *see also* discussion *infra* Section III.A.

<sup>54</sup> ALASKA STAT. § 43.23.008(d)-(e) (2014).

<sup>55</sup> Griffin, *supra* note 12, at 79 (citations omitted).

<sup>56</sup> 2011 ANNUAL REPORT, *supra* note 5, at 30.

<sup>57</sup> *Id.* at 30. To put this in perspective, Alaska’s second largest city, Fairbanks, has a population of 30,970. *What is the population?*, EXPLORE FAIRBANKS ALASKA, <http://www.explorefairbanks.com/articles/detail/8/what-is-the-population> (last visited Nov. 16, 2014). Forty-one percent of Alaska’s population – or 291,826 people – reside in Anchorage. *Anchorage Population and Other Fun Anchorage Facts*, THE OFFICIAL SOURCE FOR ANCHORAGE, ALASKA TRAVEL INFORMATION, <http://www.anchorage.net/anchorage-population-and-other-fun-anchorage-facts> (last visited Nov. 16, 2014).

population of 722,190;<sup>58</sup> during that same year the Permanent Fund Dividend Division (“PFDD”), the purpose of which is the “timely payment of dividends to eligible Alaskans,”<sup>59</sup> was contacted 147,982 times by individuals seeking assistance in either filing or determining their eligibility for a PFD.<sup>60</sup> Assuming no one contacted the PFDD more than once, one in five Alaskans did so in 2011,<sup>61</sup> which either speaks to the PFDD’s usefulness or else to the opacity of the administrative codes that have sprouted up around the concept of eligibility. Only 42% of 2011 applicants were born in Alaska, and only 91,124 applicants – or 13% of the population – have received all 30 PFDs since the program began in 1982.<sup>62</sup> The state of Alaska has paid out \$18.8 billion to the 17.2 million applicants who have filed for PFDs since 1982.<sup>63</sup>

#### *D. The State of the Law: Three Alaska Supreme Court Decisions*

In each of the following cases, the Alaska Supreme Court deferred to the PFD statutes or else to the relevant administrative codes promulgated and interpreted by the Alaska Department of Revenue, PFDD.<sup>64</sup> Constitutional challenges to the allocation of Alaska’s mineral wealth through the PFD have been subjected to a minimal scrutiny analysis because the PFD is a mere economic interest<sup>65</sup> as opposed to a more fundamentally protected constitutional right, such as the freedom of speech. By and large, these challenges have foundered against the strength of the “fair and substantial relationship” that the body of law protecting PFDs bears to Alaska’s “legitimate governmental objectives.”<sup>66</sup> These objectives are:

‘(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state’s energy wealth derived from the development and production of the natural resources belonging to them as Alaskans; (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and (3) to encourage increased awareness and involvement by the

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<sup>58</sup> 2011 ANNUAL REPORT, *supra* note 5, at 30.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* at 12.

<sup>61</sup> *See id.* at 12, 30.

<sup>62</sup> *Id.* at 19, 31.

<sup>63</sup> *Id.* at 30.

<sup>64</sup> The PFDD determines applicants’ eligibility in order to faithfully distribute the annual dividend paid to Alaska residents. *About Us*, ALASKA DEP’T OF REVENUE, PERMANENT FUND DIVIDEND DIV., <http://pfd.alaska.gov/DivisionInfo/AboutUs> (last visited Nov. 16, 2014). The PFDD’s mission is “[t]o administer the permanent fund dividend program assuring that: all eligible Alaskans receive timely dividends; fraud is prosecuted; and all internal and external stakeholders are treated with respect.” *Mission*, ALASKA DEP’T OF REVENUE, PERMANENT FUND DIVIDEND DIV., <http://pfd.alaska.gov/Home/MissionStatement> (last visited Nov. 16, 2014).

<sup>65</sup> *Church v. Dep’t of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999).

<sup>66</sup> *Ross v. State*, 292 P.3d 906, 911 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2014); *see infra* note 98 and accompanying text.

residents of the state in the management and expenditure of the Alaska permanent fund.<sup>67</sup>

Although the *Zobel* court struck down Alaska's initial PFD distribution scheme, Alaska's Supreme Court continues to rely on these same legitimate state interests to which the former scheme had no rational relation. Even though it has divided its citizenry into one large class of individuals eligible to receive a PFD, and a much smaller class of ineligible citizens,<sup>68</sup> the state continues to rely on, and the Alaska Supreme Court continues to uphold, the same rationale analyzed by the *Zobel* court, with the exception that the PFD no longer purports to retroactively reward more permanent citizens to the exclusion of newcomers based on a past-contributions-to-the-commonwealth theory.<sup>69</sup>

The following three cases and their cursory analyses of the Constitutional issues involved, both state and federal, show the extent to which the court permits the PFDD free reign in defining, refining, and re-defining PFD eligibility.

#### 1. *Church v. Department of Revenue*

In *Church v. Department of Revenue*, Patrick Church left Alaska for 274 days to care for his dying mother before an exception existed for caring for a dying family member;<sup>70</sup> when he was denied a PFD, he brought constitutional claims against the Alaska Department of Revenue, PFDD, alleging it violated "his procedural and substantive due process rights, his equal protection rights, his right to travel, and his rights to privacy and family relationships."<sup>71</sup>

Although Church violated the regulation on its face because his absence from Alaska exceeded 180 days, he argued the regulation itself violated the legislative intent behind the PFD program.<sup>72</sup> However, the Court noted that a regulation can "'exclude [PFD] applicants who arguably fall within the statutory definition of eligible applicants'" unless the

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<sup>67</sup> *Id.* at 910 (quoting *Zobel v. Williams*, 457 U.S. 55, 61 n.7 (1982)) (quoting 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982)).

<sup>68</sup> See *supra* notes 56–57 and accompanying text.

<sup>69</sup> See, e.g., *Schafer v. Vest*, 680 P.2d 1169, 1170–71 (Alaska 1984) ("After *Zobel III*, it is clear that the federal Constitution will not tolerate a state benefit program which 'creates fixed, permanent distinctions between ... concededly bona fide residents, based on how long they have been in the State.'" (quoting *Zobel*, 457 U.S. at 59); "The state concedes that in view of the holding in *Zobel III* -- that residents cannot be rewarded for past contributions measured simply by length of residence in the state," the state cannot rely on a past contributions theory to justify its plan to sell land to Borough residents at a discount commensurate with their length of residency in the Borough. *Gilman v. Martin*, 662 P.2d 120, 128 (Alaska 1983).

<sup>70</sup> *Church*, 973 P.2d at 1127.

<sup>71</sup> *Id.* at 1127. The court summarily treated his right to privacy and family relationships as a corollary of his right to travel. *Id.* at 1131–32.

<sup>72</sup> *Id.* at 1128.

regulation is unreasonable, arbitrary, or contrary to legislative intent.<sup>73</sup> The 180 day cut-off regulation at issue was in sync with the legislative purpose of the PFD: “to limit payment of dividends to permanent residents,”<sup>74</sup> and it also created a bright-line rule useful in quickly determining eligibility so as not to clog the PFDD’s administrative system.<sup>75</sup> Although by statute, Church had the subjective intent to remain in Alaska while caring for his mother out of state, for PFD purposes he could not be labeled a “permanent resident.”<sup>76</sup>

Church’s procedural due process claim failed because no law existed under which his argument could prevail; the PFDD was not required to conduct a formal hearing for such cases.<sup>77</sup> Under Alaska’s substantive due process standard, the alleged violation must “shock the universal sense of justice” before a claim exists: the Court stated simply that the PFDD’s “requirements are a reasonable way to ensure that only legitimate permanent residents receive PFDs.”<sup>78</sup> Against Church’s argument that he had been denied equal protection relative to others who received PFDs because they were allowably absent while he was arbitrarily not, the Court noted that a PFD is only an “economic interest” and as such deserves minimal scrutiny.<sup>79</sup> Applying this test, the Court found that the PFDD’s bright-line rule that cut off Church’s eligibility was an efficient way “to limit PFD eligibility to permanent residents.”<sup>80</sup>

Finally, Church argued that, under an equal protection analysis, he

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<sup>73</sup> *Id.* (quoting State Dep’t of Revenue v. Cosio, 858 P.2d 621, 625 (Alaska 1993)).

<sup>74</sup> *Id.* (quoting Brodigan v. Alaska Dep’t of Revenue, 900 P.2d 728, 732 (Alaska 1995)).

<sup>75</sup> *See id.* at 1129.

<sup>76</sup> *Id.* The Court uses the phrase *permanent resident* eleven times in its opinion without once proffering a definition. *See generally id.* The idea of what it means to be a *permanent resident* has been left to the discretion of lawmakers and law-interpreters: it entails a factually sensitive inquiry centered around an individual’s subjective intent and, for PFD purposes, has been applied to newcomers to the state as well as to residents like Church, who has resided in Alaska since 1975. *Id.* at 1127. The closest any Alaska court has come to ascribing a workable meaning to the concept of a *permanent resident* was to state that “[t]he legislature has given broad discretion to the commissioner to determine the factors which define a permanent resident.” *Id.* at 1129.

<sup>77</sup> *Id.* at 1129–30.

<sup>78</sup> *Id.* at 1130.

<sup>79</sup> *Id.* Unlike Federal equal protection analysis, which determines the level of scrutiny that applies to the challenged legislation based on the classifications it makes, Alaska equal protection law has developed a sliding scale approach. *See* Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 252 (1998) (stating that “[Alaska’s] pure means-end analysis differs from the federal equal protection test, which uses means-end analysis to smoke out illegitimate government purposes.”); *see also* State v. Ostrosky, 667 P.2d 1184, 1192–93 (Alaska 1983) (noting that “[i]n contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.”). When the sliding scale stops at minimal scrutiny, the test is whether “the challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a ‘fair and substantial’ relationship to the accomplishment of that objective.” Underwood v. State, 881 P.2d 322, 325 (Alaska 1994) (citing State Dep’t of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993); State v. Anthony, 810 P.2d 155, 158 (Alaska 1991)).

<sup>80</sup> *Church*, 973 P.2d at 1131.

was entitled to heightened scrutiny because his right to travel had been impeded.<sup>81</sup> Although one of the legitimate state interests relied on by the Court was the PFD's ability "to encourage people to stay in Alaska,"<sup>82</sup> the Court nonetheless held that any infringement on Church's right to travel was "relatively small and would not be likely to deter a person from traveling."<sup>83</sup> Weighed against the over-arching purposes of the PFD program, the Court found his right to travel was not impaired enough to merit judicial protection while again highlighting Mr. Church's mere economic expectancy interest in a PFD.<sup>84</sup> Patrick Church, an Alaska resident since 1975, was not a resident for PFD purposes on the year in question, and his claim faltered and broke down against the logic of the PFD regulations, "which ensure that benefits 'provided for residents are enjoyed only by residents.'"<sup>85</sup>

## 2. *Brodigan v. Alaska Department of Revenue*

In an earlier case, *Brodigan v. Alaska Department of Revenue*, which helped to lay the constitutional framework relied upon by the *Church* Court, the Alaska Supreme Court had to determine whether a snowbird<sup>86</sup> couple merited PFDs.<sup>87</sup> The Brodigans moved to Alaska in 1962, and three censuses counted them as Alaska residents.<sup>88</sup> However, Mr. Brodigan had vascular problems that his physician recommended he treat by going south for the winter.<sup>89</sup> One such six-and-a-half-month absence in the winter of 1989–1990 led to the Brodigans not receiving their 1990 PFDs because of how a PFDD regulation<sup>90</sup> confined the statutory meaning of an allowable medical absence<sup>91</sup> to exclude seasonal travel for health issues.<sup>92</sup> The Court affirmed the lower court's reasoning that "medical treatment" implied "some specific therapeutic application by medical personnel" rather than merely basking in the sun under doctor's orders.<sup>93</sup>

The PFDD regulation was therefore reasonable: because the Brodigans became snowbirds in their old age, they could no longer legally

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<sup>81</sup> *Id.* at 1130.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1131.

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* (quoting *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 n.3 (1986)). As Church's case worked its way through the courts, the Alaska legislature enacted ALASKA STAT. § 43.23.095(8) (1997) (current version at ALASKA STAT. § 43.23.008(a)(6–7) (2014)), allowing for absences to care for ailing relatives. *Church*, 973 P.2d at 1129 n.4.

<sup>86</sup> "[O]ne who travels to warm climes for the winter." *Snowbird Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/snowbird?show=0&t=1351473199> (last visited Nov. 16, 2014).

<sup>87</sup> *Brodigan v. Alaska Dep't of Revenue*, 900 P.2d 728, 729 (Alaska 1995).

<sup>88</sup> *Id.* at 729 & n.1.

<sup>89</sup> *Id.* at 729.

<sup>90</sup> ALASKA ADMIN. CODE tit. 15 § 23.175(c)(6) (1990) (codified at ALASKA STAT. § 43.23.008(a)(5) (2014)).

<sup>91</sup> ALASKA STAT. § 43.23.095(b) (1990) (current version at ALASKA STAT. § 43.23.095(7) (2007)).

<sup>92</sup> *Brodigan*, 900 P.2d at 731 n.7.

<sup>93</sup> *Id.* at 731.

form the intent necessary to remain in the state permanently and consequently could not receive a PFD.<sup>94</sup> The Court noted that, were it to strike down the regulation, anyone could come to the state seasonally, establish paper connections to Alaska, claim that a physician ordered climatic change to improve their health, travel back to their actual state of residence for the winter, and then benefit from the PFD program.<sup>95</sup> The PFDD's narrower definition of "medical treatment" that excluded travel for climatic reasons helped to preserve PFDs for "legitimate claims of permanent residents."<sup>96</sup> The same balancing test at work in *Church* quashed the Brodigans' equal protection claim based on an alleged violation of their right to travel.<sup>97</sup>

### 3. *Ross v. State*

In *Ross v. State*,<sup>98</sup> a lifelong Alaskan and marine argued that a 1998 amendment to the dividend qualifications, which cut-off eligibility for those allowably absent after ten years,<sup>99</sup> violated the Fourteenth Amendment's equal protection clause.<sup>100</sup> Ross left Alaska in 1990 to serve in the Marine Corps for eighteen years; the ten-year statute went into effect in 2009, denying him and his children a PFD for the first time.<sup>101</sup> Ross argued that the statute unconstitutionally distinguished between absent residents and non-absent residents, noting that the rule did not apply to Alaskan members of Congress.<sup>102</sup> Again, the Court applied minimal scrutiny because the PFD

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<sup>94</sup> *Id.* at 731 n.7. Although the Brodigans were still Alaska residents, they were not *permanent residents* that year for purposes of PFD eligibility. *See id.* at 732.

<sup>95</sup> *Id.* at 732.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 734 & n.13; *see also supra* text accompanying notes 81–85.

<sup>98</sup> *Ross v. State*, 292 P.3d 906 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2014). This statute repealed subsection (C), the subsection under which Ross had sued, and was enacted after Mr. Ross personally lobbied the Alaska Legislature and "expressed hope that his personal story and his thoughts on how the 10-year rule unfairly penalizes those in the military will convince [the legislature to allow long-absent military personnel to receive PFDs]." *Allowable Absence: Hearing on H.B. 52 Before the House Comm. on State Affairs*, 2013 Leg., 28th Sess. (2013) (statement of Michael Paschall, Staff for Rep. Eric Feige, bill sponsor), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=H&beg\\_line=00448&end\\_line=00518&session=28&comm=STA&date=20130129&time=0804](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00448&end_line=00518&session=28&comm=STA&date=20130129&time=0804).

<sup>99</sup> ALASKA STAT. § 43.23.008(c) (2007) (stating that "[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."), *repealed by* H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013); *see supra* note 34 (defining qualifying year). The sponsor of the bill that struck subsection (C) entirely, Rep. Eric Feige, issued a sponsor statement, which reads in part: "Although these individuals choose to serve in the Armed Forces of the United States, once they are sworn into service, they do not have the option to choose to be physically present in Alaska. It is time to correct this injustice and allow Alaska residents who decide to join the military the opportunity to continue to receive their deserved Permanent Fund Dividend while at the same time making sure that only those that truly intend to return to Alaska continue to receive a dividend on an allowable absence." Eric Feige, *Sponsor Statement: HB 52*, THE ALASKA HOUSE MAJORITY (Jan. 16, 2013, 10:21 PM), <http://www.housemajority.org/2013/01/16/sponsor-statement-hb-52/>.

<sup>100</sup> *Ross*, 292 P.3d at 908.

<sup>101</sup> *Id.* at 907–08.

<sup>102</sup> *Id.* at 909.

is “merely an economic interest,” and it therefore sought a legitimate governmental objective to which the statute bore a fair and substantial relationship.<sup>103</sup> While Ross’ argument focused on discrediting the legitimate state interests relied on since *Zobel*,<sup>104</sup> the state proffered a legitimate interest in addition to the *Zobel* interests that the statute sought to uphold: preventing fraud.<sup>105</sup> The record showed Ross understood he was the exception to the perceived norm of a service member serving a three-year tour in Alaska, establishing residency, and then collecting PFDs based on the allowable military absence statute: the ten-year rule was meant to cut off this windfall to non-permanent, long-absent residents.<sup>106</sup> As in *Church*, the statute in question eased the administrative burden of distributing the PFDs by making the determination of eligibility easier – again, the court reiterated that only “permanent residents” merited PFDs.<sup>107</sup>

As for Ross’ argument that the statute treated him differently than Congress members, the Court deferred to the legislature, which “apparently concluded that the ties that bind a member of Congress or a congressional staffer to Alaska are strong enough to indicate an intention to return to Alaska indefinitely to reside, thus vitiating concerns of fraud and dividends being paid to non-Alaskans.”<sup>108</sup>

PFDs have also been denied to: a student whose crash while driving from Alaska back to his college in Utah caused him to miss the fall registration deadline, making him an unwilling part-time student;<sup>109</sup> several

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<sup>103</sup> *Id.* at 910 (citations omitted).

<sup>104</sup> *Id.* at 911. Ross argued: (1) that the legitimate interest of equitably distributing the fund failed because it would be inequitable to deny an Alaskan marine his benefits; (2) that the state interest in maintaining its citizenry was disserved because the law would encourage him to find a more beneficial state in which to reside; and (3) that his involvement in the funds democratic management might end since a denial of benefits would encourage him to seek residency elsewhere. *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 912.

<sup>107</sup> *Id.* *But compare* *Heller v. Dep’t of Revenue*, 314 P.3d 69, 75 n.19 (Alaska 2013) (correctly noting that the applicant, Mr. Heller, met state residency requirements and that therefore the only issue was whether he was a permanent resident for PFD purposes) *with id.* at 81 (suggesting that “[f]ar from singling out newcomers,” PFD eligibility requirements are intended to ensure that PFDs are distributed “only to state residents” seemingly without realizing that Mr. Heller’s state residency had already been conceded). What is more, through an unfortunate use of words, the *Heller* court concludes that a subsection of the allowable absences statute “was enacted in an attempt to distinguish residents from nonresidents.” *Id.* at 80. However, as was stated in *Brodigan*, “[t]hrough the applicants are not eligible to receive Alaska Permanent Fund Dividends for 1989, that does not mean that they are not considered residents for other purposes.” *Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 733 n.12 (Alaska 1995). The relevant inquiry has always been whether or not an applicant was a *permanent resident* for PFD purposes, not whether PFD eligibility determines Alaskan residency. *See Harrod v. State*, 255 P.3d 991, 997 (Alaska 2011); *Eagle v. Dep’t of Revenue*, 153 P.3d 976, 980 (Alaska 2007); *Dep’t of Revenue v. Andrade*, 23 P.3d 58, 71–72 (Alaska 2001); *Schikora v. State*, 7 P.3d 938, 945 (Alaska 2000); *Church v. Dep’t of Revenue*, 973 P.2d 1125, 1128–29 (Alaska 1999); *Brodigan*, 900 P.2d at 732; *Dep’t of Revenue, Permanent Fund Dividend Div. v. Bradley*, 896 P.2d 237, 239 (Alaska 1995); *Dep’t of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 628 (Alaska 1993).

<sup>108</sup> *Ross*, 292 P.3d at 913.

<sup>109</sup> *See Bradley*, 896 P.2d at 238. The court emphasized a now-defunct Administrative Code that refined an allowable educational absence to mean “enrollment in good standing as a full-time student at a college, university, junior or community college.” *Id.* at 238–39 (quoting ALASKA ADMIN. CODE tit.



incarcerated felons who alleged, among other claims, that Alaska Statute section 43.23.005(d) (2012)<sup>110</sup> violated “the equal protection clause [and] the due process clause . . . in the Alaska and United States Constitutions”,<sup>111</sup> and two immigrants who entered the United States without inspection, wound up in Alaska, were denied PFDs, and then argued their intent to remain in Alaska should trump their illegal status that could cut off that intent at any time.<sup>112</sup> The rationale for upholding these denials originated in the first place in administrative hearings, where Administrative Law Judges (“ALJs”) either apply bright-line rules or weigh equitable factors to determine who is and who is not a *permanent resident* for purposes of PFD eligibility.<sup>113</sup> These proceedings perform the grunt work of defining what it means to be a deserving Alaska resident.

### III. ADMINISTRATIVE HEARINGS ANALYZED THROUGH THE LENS OF *ZOBEL*

In 1982, the United States Supreme Court rejected Alaska’s effort to reward past contribution to the state as inconsistent with the equal protection guaranteed to all citizens under the Fourteenth Amendment.<sup>114</sup> However, Alaska’s impetus to reward past contributions to the state, although no longer in the form of unequal dividend payments, survives in the rulings of ALJs who, when faced with a close call, allow the equitable factor of long-standing Alaskan residency to tip the scales in favor of PFD eligibility. This Comment in no way seeks to impugn the integrity of these ALJs who tirelessly apply the law to the facts at hand in an unbiased manner.<sup>115</sup> But

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15, § 23.175 (1990) (repealed Jan. 1, 1993). This comment will not address the problems students face when applying for PFDs, except to note that students have had particular trouble with checking the right box in response to the application’s question of whether they intend to return to Alaska to remain there indefinitely. *See generally* DS, OAH No. 12-0140-PFD (Alaska Dep’t of Revenue Oct. 15, 2012); J.S., OAH No. 11-0241-PFD (Alaska Dep’t of Revenue Aug. 30, 2011); E.M.T., OAH No. 09-0581-PFD (Alaska Dep’t of Revenue Feb. 3, 2010); M.B., OAH No. 09-0130-PFD (Alaska Dep’t of Revenue Aug. 13, 2009); M.G.B., OAH No. 09-0474-PFD (Alaska Dep’t of Revenue Jan. 25, 2009); M.H.M., OAH No. 11-0168-PFD at 2 n.13 (Alaska Dep’t of Revenue July 19, 2011) (quoting the “actual question” that appears on the PFD application).

<sup>110</sup> Anyone who has been convicted of a felony in Alaska during the qualifying year and has been sentenced, or else incarcerated for a felony or misdemeanor preceded by two prior misdemeanors or one prior felony is not eligible to receive a PFD. E.R., OAH No. 10-0063-PFD (Alaska Dep’t of Revenue April 13, 2010).

<sup>111</sup> *State v. Anthony*, 810 P.2d 155, 156 (Alaska 1991). This Comment will not deal with whether or not a felon should or should not have a legal right to a PFD. *See generally* *Hertz v. Storer*, 943 P.2d 725 (Alaska 1997); *Morgan v. Dep’t of Revenue*, 813 P.2d 295 (Alaska 1991) (exploring the issue of a felon’s PFD eligibility).

<sup>112</sup> *Dep’t of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 623 (Alaska 1993). This article will not deal with how an immigrant’s status interacts with her ability to form the intent necessary to be a resident of Alaska. For a brief discussion of this issue, see Stanley H. Friedelbaum, *Traditional State Interests and Constitutional Norms: Impressive Cases in Conventional Settings*, 64 ALB. L. REV. 1245, 1262–66 (2001).

<sup>113</sup> *See generally* *Permanent Fund Dividend Eligibility*, STATE OF ALASKA, DEP’T OF ADMIN., OFFICE OF ADMIN. HEARINGS, <http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName= PFD> (last visited Nov. 26, 2014) [hereinafter PFD ELIGIBILITY]

<sup>114</sup> *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *see supra* Section II.A.

<sup>115</sup> *See generally* PFD ELIGIBILITY, *supra* note 113 (listing approximately 500 downloadable administrative opinions from which this comment has selected an illustrative handful).

when one of the factors an ALJ can consider when determining PFD eligibility is “the length of the individual’s absence compared to the time the individual spent in Alaska before departing on the absence,”<sup>116</sup> it is clear that those who have more bona fide Alaskan connections to begin with are more likely than newcomers to the state to receive their annual payout. In situations where all other factors are equal for PFD-purposes, the more tenured the Alaska resident in question, the more accessible the dividend, even though the concept that “some citizens are more equal than others”<sup>117</sup> was excised from Alaskan jurisprudence over three decades ago.

This sort of inclusive favoritism grows out of Alaska’s unique boom and bust lifestyle, encouraged by the discovery of gold at the beginning of the last century and then by the discovery of oil and the construction of the trans-Alaska pipeline.<sup>118</sup> Alaska also booms perennially every summer when a nearly continuous sun circles over the long hours of the construction season, or when salmon return to their rivers, and out of state workers come to help in their harvest.<sup>119</sup> The Alaska Supreme Court, upholding the legality of the first PFD scheme that compensated the longevity of one’s residency, noted the economic situation unique to Alaska:

Throughout its history, from the days of the Gold Rush to the recent oil pipeline period, Alaska has been prone to the phenomenon that large numbers of people from without the state move in, derive great financial and other benefits from the state’s resources and opportunities, and then move out to enjoy the fruits of their labors elsewhere. This obviously results in a great drain of financial and other resources from the state.<sup>120</sup>

The Court felt Alaska was particularly prone to such a phenomenon “due to its harsh climate, its high cost of living, and its geographical isolation from the other states.”<sup>121</sup> The Court empathized with long-time residents, a hardy, eclectic lot who had weathered many winters, and deemed their perseverance meritorious: “Alaskan residents who have chosen

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<sup>116</sup> ALASKA ADMIN. CODE tit. 15, § 23.163(g)(1) (2010) (codified as amended at ALASKA STAT. § 43.23.008(e)(1) (2014)). The statute, borrowing heavily from the now-defunct administrative code, now reads: “the length of time the individual was absent from the state compared to the length of time the individual was physically present in the state.” *Id.*

<sup>117</sup> *Zobel*, 457 U.S. at 71 (Brennan, J., concurring); see also Gregory S. Fisher, *Historical Bar: “Law in the Last Frontier: Commemorating the District of Alaska’s 50th Anniversary*, 34 AK BAR RAG 19, 20 (2010) (“the dynamics of . . . exclusionary preferences will persist in Alaska. Local hire is a ‘can’t miss’ vote multiplier. No politician can resist trumpeting support ‘for Alaska,’ . . . we will probably see more cases involving preferences in the next 50 years.”).

<sup>118</sup> See Scott Goldsmith, *The Alaska Permanent Fund Dividend: A Case Study in the Direct Distribution of Resource Rent* 1, 2 (2011), [http://www.iser.uaa.alaska.edu/Publications/2011\\_01-PFRevenueWatchPaper.pdf](http://www.iser.uaa.alaska.edu/Publications/2011_01-PFRevenueWatchPaper.pdf).

<sup>119</sup> See *infra* note 341 and accompanying text.

<sup>120</sup> *Williams v. Zobel*, 619 P.2d 448, 459 (Alaska 1980), *rev’d* 457 U.S. 55 (1982).

<sup>121</sup> *Id.* at 460.

to stay, to enjoy the fruits of their labor here, and to make a lasting contribution, tangible or intangible, to the state's culture and commonwealth” could receive a PFD up to twenty-one times larger than a newcomer to the state.<sup>122</sup> This self-rewarding sentiment that propped up the defunct PFD scheme is no longer good law, but vestiges of it resurface to inequitably haunt the administrative hearings on PFD eligibility.

The administrative hearing process will be briefly described before its formal opinions are analyzed. When the PFDD rejects an application, the PFDD mails a letter explaining the reasons for the denial.<sup>123</sup> If the letter's recipient feels as though the PFDD reached its decision in error, that individual has the right to an administrative appeal.<sup>124</sup> The appeal must be filed within thirty days after the individual was notified of the PFDD's adverse decision.<sup>125</sup> At this stage, the individual participates in an informal conference where she is entitled to an explanation of the PFDD's decision as well as the portion of her file relied on to reach that decision.<sup>126</sup> The individual may supply documents in her favor to contest the adverse decision.<sup>127</sup> The ALJ must “promptly render a written decision” that “identif[ies] the issues in controversy for purposes of further appeal.”<sup>128</sup> This written decision represents the outcome of the informal appeals process, which may be appealed to the formal hearing stage, the last administrative step before the case can enter Alaska's court system.<sup>129</sup> Only 107 cases were resolved at the formal appeal level in 2011,<sup>130</sup> whereas 695 cases were resolved on formal appeal in 2002.<sup>131</sup> The outcomes of these formal appeals are the subject of this Section.

#### A. *The Thirty-Days-in-Five-Years Presumption*

Someone who has left Alaska under an allowable absence for more

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<sup>122</sup> *Id.* By way of analogy, the court reasoned that “[s]uch an attempt does not penalize those who choose to leave any more than a firm's awarding of a gold watch to a fifty-year employee penalizes employees who leave before working for fifty years.” *Id.*

<sup>123</sup> FAQ's, STATE OF ALASKA, DEP'T OF REVENUE, PERMANENT FUND DIVIDEND DIV., <http://pfd.alaska.gov/FAQ/index#why> (last visited Nov. 26, 2014) [hereinafter PFD FAQ's] (click on “Applications in Review or Denied Status,” then click on “What can I do if my dividend application is denied and I disagree?”).

<sup>124</sup> ALASKA STAT. § 43.23.015(g) (2014). It costs \$25 to appeal a decision, but the appellant may recover the fee if she prevails. *Id.*

<sup>125</sup> ALASKA ADMIN. CODE tit. 15, § 05.010(b)(5) (2013).

<sup>126</sup> *Id.* § 05.020(a) (1998).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 05.020(b).

<sup>129</sup> *See generally id.* § 05.030 (2013). The ALJ, also called a hearing officer, has broad authority to “exercise all other powers necessary for the orderly and expeditious conduct of the hearing.” *Id.* § 05.030(b)(8). Accordingly, “[h]earsay evidence is admissible if in the judgment of the hearing officer it is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” *Id.* § 05.030(h).

<sup>130</sup> 2011 ANNUAL REPORT, *supra* note 5, at 16.

<sup>131</sup> *Permanent Fund Dividend Div. 2002 Annual Report*, STATE OF ALASKA DEP'T OF REVENUE, PERMANENT FUND DIVIDEND DIV. 1, 47 (2002), <https://pfd.alaska.gov/Content/AnnualReports/2002AnnualReport.pdf>.

than five years “is presumed not to have the intent to return to Alaska and remain indefinitely in Alaska” and as a result will be ineligible to receive a dividend.<sup>132</sup> This presumption can be rebutted, however, by showing that return trips to the state totaled at least thirty days during the five-year absence.<sup>133</sup> A rebuttal cannot rely on cold, hard numbers; rather, the ALJ considers a host of equitable factors that bear on the applicant’s subjective intent to return to the state and include: (1) the length of the absence compared to the time spent in Alaska before the absence;<sup>134</sup> (2) the frequency and length of the trips back to Alaska;<sup>135</sup> (3) whether intent to return to Alaska is conditioned on uncontrollable circumstances, such as job-availability in Alaska;<sup>136</sup> (4) the extent to which settling down in another state has occurred;<sup>137</sup> (5) the priority given to Alaska “on an employment assignment preference list, such as those used by military personnel;”<sup>138</sup> (6) the choice of a career that by its nature conflicts with the ability to reside in Alaska;<sup>139</sup> and (7) the preservation of ties to Alaska.<sup>140</sup>

Consider how these factors play out in the following formal administrative hearings where each applicant was allowably absent because of his or her military service but had not returned for the requisite thirty days over the five preceding years.<sup>141</sup> As will be discussed after the next Section, the rationale underlying these cases was codified by statute in 2013, solving one problem the thirty-days-in-five-years presumption raised while simultaneously creating a new one.<sup>142</sup>

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<sup>132</sup> ALASKA ADMIN. CODE tit. 15, § 23.163(f) (2010) (codified as amended at ALASKA STAT. § 43.23.008(d) (2014)) (stating that if an applicant has been absent for over 180 days in each of the five preceding years, then “the department shall presume that the individual is no longer a state resident.”). Because each of the hearings discussed in this section apply the code and not the statute, the code will be cited or quoted where appropriate.

<sup>133</sup> ALASKA ADMIN. CODE tit. 15, § 23.163(h)(2) (codified as amended at ALASKA STAT. § 43.23.008(d)(1) (2014) and arguably changing this discretionary factor into a bright-line rule).

<sup>134</sup> *Id.* § 23.163(g)(1) (codified as amended at ALASKA STAT. § 43.23.008(e)(1) (2014)).

<sup>135</sup> *Id.* § 23.163(g)(2) (codified as amended at ALASKA STAT. § 43.23.008(e)(2) (2014)).

<sup>136</sup> *Id.* § 23.163(g)(3) (codified as amended at ALASKA STAT. § 43.23.008(e)(3) (2014)).

<sup>137</sup> *Id.* § 23.163(g)(4) (listing as ties “maintenance of homes, payment of resident taxes, vehicle registrations, voter registration, driver’s licenses, or receipt of benefits under a claim of residency in another state.”) (codified as amended at ALASKA STAT. § 43.23.008(e)(4) (2014)).

<sup>138</sup> *Id.* § 23.163(g)(5) (codified as amended at ALASKA STAT. § 43.23.008(e)(5) (2014)). *But see* E. & W.M., OAH No. 09-0003-PFD 1, 4 (Alaska Dep’t of Revenue Mar. 26, 2009) (describing an Army member who protests that the military no longer uses “the traditional assignment preference list, or ‘dream sheet’” and suggesting that ALASKA ADMIN. CODE tit. 15, § 23.163(g)(5) (2012) be rewritten accordingly). However, as amended, ALASKA STAT. § 43.23.008(e)(5) (2014) retains the ‘dream sheet’ as a factor to consider when ascertaining one’s intent to return to Alaska and remain there indefinitely. ALASKA STAT. § 43.23.008(e)(5) (2014).

<sup>139</sup> ALASKA ADMIN. CODE tit. 15, § 23.163(g)(6) (2010) (codified as amended at ALASKA STAT. § 43.23.008(e)(3), (5) (2014)).

<sup>140</sup> *Id.* § 23.163(g)(7) (listing as ties “ownership of real and personal property, voter registration, professional and business licenses, and any other factors demonstrating the individual’s intent.”) (codified as amended at ALASKA STAT. § 43.23.008(e)(4) (2014)).

<sup>141</sup> *See* ALASKA STAT. § 43.23.008(a)(3) (2014) (preserving PFD eligibility for “member[s] of the armed forces of the United States”).

<sup>142</sup> *See* discussion *infra* Section III.A.2.

## 1. Selected Administrative Hearings

The Army assigned Mr. M.<sup>143</sup> to Alaska in the winter of 1998–1999, but he was reassigned out of state less than three years later, taking with him his Alaskan bride, Ms. M.<sup>144</sup> Throughout his absence, Mr. M. returned to the state only three times: once for six days, once for a week, and again for eight days, for a total of twenty-one days.<sup>145</sup> In response to inquiries from the PFDD, the couple indicated that, because of Mr. M.’s career choice, they did not plan to return to Alaska and remain there indefinitely until 2018.<sup>146</sup> The ALJ noted that, consistent with the transient lifestyle of most military service-members, Mr. and Ms. M. had not established residency ties to any other state, and Mr. M. had maintained paper ties – a bank account, current voter registration, a driver’s license, and vehicle registration – with Alaska.<sup>147</sup> The ALJ also found that it would have been impracticable for Mr. M., who spent nearly two out of the five years he was absent from Alaska serving in Iraq, to visit Alaska while off at war.<sup>148</sup>

However, Mr. M.’s return visits to the state totaled less than thirty days during the five-year absence, creating the rebuttable presumption that Mr. M. severed his Alaskan residency.<sup>149</sup> Weighing the first factor – length of absence compared to time spent in Alaska pre-absence – the ALJ noted: “[t]hree years spent in Alaska in a person’s early to mid 20s’ is not a strong indication that the person will return to Alaska around the age of forty,” apparently the age Mr. M. would be in 2018.<sup>150</sup> Ultimately, the seven factors comingled to deprive Mr. and Ms. M. of their 2007 PFDs; mere paper ties along with Mr. M.’s brief three-year presence in the state to begin were not enough for a PFD.<sup>151</sup>

Compare the denial of Mr. M.’s dividend to the awarding of one, “by the scantest of margins,” to Mr. V., also a career army man who lived in Alaska for four years – about a year longer than Mr. M. – before leaving the

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<sup>143</sup> All of the PFD opinions from the Office of Administrative Hearings abbreviate the appellant’s name. See generally PFD ELIGIBILITY, *supra* note 115.

<sup>144</sup> E. & W.M., OAH No. 09-0003-PFD 1, 1 (Alaska Dep’t of Revenue Mar. 26, 2009). Ms. M.’s eligibility derives from her husband’s eligibility. See ALASKA STAT. § 43.23.008(a)(3) (2007) (creating an allowable absence for a military member’s spouse who accompanies that member on his or her assignments).

<sup>145</sup> E. & W.M., OAH No. 09-0003-PFD at 1.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 2.

<sup>148</sup> *Id.* at 3.

<sup>149</sup> *Id.* at 2. This presumption has since been codified as a bright-line rule. See discussion *infra* Section III.A.2.

<sup>150</sup> *Id.* at 3.

<sup>151</sup> *Id.* at 5–6. The ALJ likened Mr. M.’s case to the case of a lifelong Alaskan absent for similar reasons who only returned to the state for a total of one week over a five-year period but who was also denied a dividend. *Id.* (citing *Anderson v. Dep’t of Revenue*, 26 P.3d 1106, 1110–11 (Alaska 2001) (noting that *Anderson*’s evidence was sufficient to rebut the presumption of non-residency but deferring to the ALJ because his interpretation was equally plausible given the evidence)).

state on military orders.<sup>152</sup> Like Mr. M., Mr. V. also went to war for two years, one year in Iraq and one in Afghanistan.<sup>153</sup> And like Mr. M., Mr. V. made it back to Alaska only three times over five years, but his visits totaled twenty-six days, five days longer than Mr. M.'s visits.<sup>154</sup> Like Mr. M., Mr. V. maintained similar paper ties with Alaska and did not establish more significant ties to any other state.<sup>155</sup> Eligibility, then, came down to the seven equitable factors listed in the Alaska Administrative Code title 15, section 23.163(g) (2012) (codified as amended at Alaska Statute section 43.23.008 (d)-(e) (2014)).<sup>156</sup> Mr. V., even though his absence from the state tripled his initial presence in it, still received his 2006 PFD.<sup>157</sup> The justifications for the award are equitable, and among them are familial ties to Alaska: the ALJ twice mentioned Mr. V.'s Alaskan relatives in passing, the implication being that the presence of in-state relatives emits a gathering, collecting influence over Mr. V.'s decision on where to retire after his military service.<sup>158</sup> Unlike Mr. M.'s case, which involved two dividends, Mr. V.'s case involved five dividends, one for his wife and three for his children, representing \$5,534.80.<sup>159</sup>

Whereas the ALJ in Mr. M.'s case negatively emphasized how Mr. M. chose a military career that placed the decision of where to reside largely out of his control,<sup>160</sup> the ALJ in Mr. V.'s case reasoned that, because military service is an allowable absence by statute,<sup>161</sup> the legislature could not have intended to penalize military service members for their decision to enter a career full of uncertainty and sudden change.<sup>162</sup> While Mr. V. may have received this leniency because of his personal affability, it is equally likely that his personal affability, at least in part, was compelling because of his familial ties to Alaska.

Three other facts favored Mr. V. First, had the five-year period been slightly expanded at both ends, the trips Mr. V. took to Alaska in 2000 and 2006 would have removed him from the operation of the less-than-

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<sup>152</sup> V V, L V, R V, X V, and Y V, OAH No. 07-0104-PFD 1, 2 (Alaska Dep't of Revenue May 14, 2007).

<sup>153</sup> *Id.* at 2-3.

<sup>154</sup> *Id.* at 2.

<sup>155</sup> *Id.* at 3.

<sup>156</sup> *Id.* at 4.

<sup>157</sup> *Id.* at 6. In 2007, Alaska's legislature had not yet passed ALASKA STAT. § 43.23.008(c) (2012), which creates a presumption that, after ten years of absence, Alaskan residency terminates. This provision has since been repealed. *See* H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013).

<sup>158</sup> V V, L V, R V, X V, and Y V, OAH No. 07-0104-PFD at 3, 6.

<sup>159</sup> *Id.* at 1; *see Summary of Dividend Application & Payments*, STATE OF ALASKA, DEP'T OF REVENUE, PERMANENT FUND DIVIDEND DIV., [http://pfd.alaska.gov/DivisionInfo/SummaryApplications Payments](http://pfd.alaska.gov/DivisionInfo/SummaryApplicationsPayments) (last visited Nov. 26, 2014) [hereinafter PFD PAYMENT SUMMARY].

<sup>160</sup> E. & W.M., OAH No. 09-0003-PFD 1, 5 (Alaska Dep't of Revenue Mar. 26, 2009).

<sup>161</sup> *See* ALASKA STAT. § 43.23.008(a)(3) (2007).

<sup>162</sup> V V, L V, R V, X V, and Y V, OAH No. 07-0104-PFD at 6 & n.21.

thirty-days-in-five-years presumption.<sup>163</sup> Second, unlike Mr. M., Mr. V. served the military at a time when it still issued assignment preference lists; both times Mr. V. received such a sheet, he indicated a desire to be re-assigned to an army base in Alaska.<sup>164</sup> Finally, Mr. V. bought land in Alaska in 2004 on which to retire, envisioning a post-military career employed as a civilian on an Alaskan military base.<sup>165</sup>

Because of the timing of his deployments, the ALJ in Mr. V.'s case invoked a regulation that dispelled the thirty-days-in-five-years presumption: “unavoidable circumstances’ prevented [Mr. V.] from returning.”<sup>166</sup> While many facts distinguish these two cases, one of them is the presence of Mr. V.'s relatives in Alaska, which perhaps, to the eyes of the ALJ, amplified the nature of Mr. V.'s residency in the state pre-absence while solidifying his resolve to relocate there upon discharge from the Army. The sort of affability or equity judicially ascribed to Mr. V. because of his family's bona fide Alaskan roots, which rescued him from PFD ineligibility, is exactly the type of preferential treatment that *Zobel* derided and which Alaska courts now guard against: “[i]t is this supposition that living in territorial Alaska makes an individual entitled to special *legal* stature that is impermissible.”<sup>167</sup> Nonetheless, it is one thing to declare something illegal because it is unconstitutional; it is quite another to alter a fiercely proud and exclusionist mindset by judicial fiat.<sup>168</sup>

Consider the case of Mr. T., who also remained out of state with the military for over five years while only returning for visits totaling seventeen days.<sup>169</sup> Despite falling well below the thirty-days-in-five-years threshold, Mr. T.'s equity as an Alaskan – his long history within the state – weighed

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<sup>163</sup> *Id.* at 2. This presumption has since been codified as a bright-line rule. See discussion *infra* Section III.A.2.

<sup>164</sup> Compare *id.* at 5, with E. & W.M., OAH No. 09-0003-PFD at 4 (noting that the military no longer uses an assignment preference list or “dream sheet”).

<sup>165</sup> V V, L V, R V, X V, and Y V, OAH No. 07-0104-PFD at 3.

<sup>166</sup> *Id.* at 4, quoting ALASKA ADMIN. CODE tit. 15, § 23.163(h)(2) (2010), repealed by H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013).

<sup>167</sup> *Schafer v. Vest*, 680 P.2d 1169, 1171 (Alaska 1984).

<sup>168</sup> See, e.g., *Hicklin v. Orbeck*, 565 P.2d 159, 169 (Alaska 1977), *rev'd*, 437 U.S. 518 (1978) (upholding pipeline era legislation requiring that oil and gas jobs go first to Alaska residents: “[W]e do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.”). In striking down the Alaska Hire Act at issue in *Hicklin* because of its conflict with the constitution's privileges and immunities clause, the Supreme Court wrote, “[i]n sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents.” *Hicklin v. Orbeck*, 437 U.S. 518, 531, 534 (1978). Only two years after the Alaska Hire Act failed to pass constitutional muster, the Alaska Supreme Court upheld the original PFD program that distributed more money to long-time Alaskans than to newcomers to the state. See *Williams v. Zobel*, 619 P.2d 448 (Alaska 1980), *rev'd* 457 U.S. 55. In fact, Alaska's preference for its own is ingrained in the state's constitution. ALASKA CONST. art. I, § 23 (“This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.”).

<sup>169</sup> R.T. and his child C.T., OAH No. 05-0409-PFD 1, 1 (Alaska Dep't of Revenue Nov. 18, 2005).

in his favor. For instance, although Mr. T. became an adult resident of Alaska in 1995, he began living there at the age of twelve,<sup>170</sup> alternating between his mother's residence outside Alaska and his father's home in Alaska, a home which he helped his father construct and which his father still owned.<sup>171</sup>

Like all the other military applicants discussed above, Mr. T. maintained paper ties with Alaska and established no significant ties of residency to any other state.<sup>172</sup> Notably, Mr. T. owned a house and a separate parcel of land in Alaska; he also proved he would inherit his father's house which he helped build.<sup>173</sup> Furthermore, like Mr. V. above, Mr. T. intended to return to Alaska in between tours of duty, but the military cancelled his leave, allowing the ALJ to invoke the "unavoidable circumstances" regulation, which in part rebutted the presumption of a severed Alaskan residency that Mr. T.'s infrequent returns to the state over his five-year absence created.<sup>174</sup>

Finally, in 2004 – the year for which he applied for a dividend – Mr. T. had in fact already returned to the state, an act that confirmed his erstwhile mere subjective intent to do so.<sup>175</sup> Mr T.'s case "qualifie[d] as a very rare exception to the rule" that a person who has revisited the state for fewer than thirty days during a five-year absence is presumed to have severed her residency.<sup>176</sup> While the Alaska Supreme Court has grafted the Supreme Court's *Zobel* holding, which relied on the equal protection clause, onto the state's jurisprudence,<sup>177</sup> ALJs can still interpret regulations in a

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<sup>170</sup> *Id.* In Alaska, a minor is a person under eighteen years of age. ALASKA STAT. § 13.06.050(29) (2007). Therefore, it is safe to assume that Mr. T. had partially resided in Alaska for six years once he turned eighteen. R.T. and his child C.T., OAH No. 05-0409-PFD at 1.

<sup>171</sup> R.T. and his child C.T., OAH No. 05-0409-PFD at 1.

<sup>172</sup> *Id.* at 2–3. In fact, Mr. T. was stationed at times in Guam and Italy, places the ALJ felt were unlikely to seem like a "new home [to Mr. T.] while he lived there." *Id.* at 3.

<sup>173</sup> *Id.* at 2.

<sup>174</sup> *Id.* at 3 (citing ALASKA ADMIN. CODE tit. 15, § 23.163(h)(2) (2010), *repealed by* H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013)).

<sup>175</sup> *Id.* at 3. Mr. T.'s return visits to the state would only count if they occurred during a qualifying year, meaning, in his case, one of the five years "immediately preceding January 1 of the current dividend year." See ALASKA STAT. § 43.23.095(6) (2007). But the ALJ was still able to make Mr. T.'s actual return to Alaska count towards his intent to remain in Alaska under ALASKA ADMIN. CODE tit. 15, § 23.163(g)(7) (2010) ("any other factors demonstrating the individual's intent"). This particular provision has been repealed and has no current statutory corollary. See H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013); ALASKA STAT. § 43.23.008(d)-(e) (2014).

<sup>176</sup> R.T. and his child C.T., OAH No. 05-0409-PFD at 4.

<sup>177</sup> See, e.g., *Schafer v. Vest*, 680 P.2d 1169, 1170–71 (Alaska 1984). In that case, the Alaska Supreme Court struck down a longevity bonus enacted to compensate life-long Alaskans over 65 with annual cash payments, reasoning that, like the original PFD program, it unconstitutionally "create[d] fixed, permanent distinctions between . . . concededly bona fide residents, based on how long they have been in the State." *Id.* (quoting *Zobel v. Williams*, 457 U.S. 55, 59 (1982)). The legislative purpose of the longevity bonus was to protect "Alaskans who through their tenacity and perseverance molded Alaska as we know it through skillful application of their talents." *Schafer*, 680 P.2d at 1170 n.4 (quoting ALASKA STAT. § 47.45.170 (repealed 1984)). Though ultimately unconstitutional, the stated legislative purpose was eloquent and powerful: "These pioneers are the same Alaskans, who in the prime of their life were in effect treated as second-class citizens by the federal government and who paid much



manner that turns longstanding Alaskan residency into a dispositive factor always weighing in favor of PFD eligibility.<sup>178</sup>

Yet another case demonstrates that an applicant's strong pre-allowable absence connection to Alaska can overcome the thirty-days-in-five-years presumption of severed residency and PFD ineligibility.<sup>179</sup> Mr. R. maintained paper ties to Alaska, did not establish strong ties to any other state, but fell short of the thirty-day requirement by two days.<sup>180</sup> However, Mr. R., twenty-six years old at the time of the hearing, had lived in Alaska since he was three, leaving only to pursue a career in the Air Force.<sup>181</sup> The ALJ distinguished Mr. R. from other military applicants who might merely mention Alaska on their "dream sheets" to curry favor with the PFDD, noting that when Mr. R. indicated a preference for an assignment to Alaska, he did so to "be close to his family."<sup>182</sup> Although the ALJ could have applied the "unavoidable circumstances" exception to Mr. R.'s failure to meet the thirty-day threshold, the rule's invocation was unnecessary: Mr. R. credibly testified to his firm, plausible plan of returning to Alaska after his military service.<sup>183</sup> As a handler of explosive-sniffing dogs, Mr. R. earnestly sought an assignment to an Air Force base outside of Anchorage, both to be closer to his family and to further his career plan of becoming a K-9 officer with the Anchorage Police Department.<sup>184</sup> As in other close PFD eligibility cases, Mr. R.'s upbringing in Alaska helped earn him a dividend by evidencing his "intent at all times during [his] absence . . . to return to Alaska and remain indefinitely in Alaska."<sup>185</sup>

And, even if an applicant's ties to Alaska seem paltry, his spouse's much more substantial connection to the state – one spanning thirty-five years – will also tip the scales in favor of PFD eligibility.<sup>186</sup> Mr. J., a major in the Air Force, only returned to Alaska for thirteen days during the five years immediately preceding the year for which he applied for a PFD, whereas

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of their hard-earned income to a government in which they did not have the right to participate through the power of the ballot. The legislature also is aware of the fact that many of these pioneers have been forced to live out their retirement years in areas far away from the land they loved and nurtured and thereby also suffering, in many cases, the loss of familial relationship with their own kin, an experience that is sad and frustrating to them as well as depriving new generations of Alaskans of the benefits of their wisdom and experience." *Id.* The foregoing language was once part of an Alaska Statute.

<sup>178</sup> See ALASKA ADMIN. CODE tit. 15 § 23.163(g) (2010) (allowing PFD eligibility - "the intent to return to Alaska and remain indefinitely" - to be calculated based upon "the time the individual spent in Alaska before departing on the [allowable] absence.") (codified as amended at ALASKA STAT. § 43.23.008(e)(1) (2014)).

<sup>179</sup> J.R., OAH No. 05-0299-PFD 1, 3 (Alaska Dep't of Revenue Nov. 17, 2004).

<sup>180</sup> *Id.* at 1, 3.

<sup>181</sup> *Id.* at 1.

<sup>182</sup> *Id.* at 3.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1, 3.

<sup>185</sup> See ALASKA ADMIN. CODE tit. 15, § 23.163(f) (2010) (codified as amended at ALASKA STAT. § 43.23.008(e) (2014)).

<sup>186</sup> D J and A G-J, OAH No. 12-0129-PFD 1, 8 (Alaska Dep't of Revenue July 23, 2012).

during that same time, his wife returned for forty-three days.<sup>187</sup> However, Mr. J.'s wife's eligibility hinged on her absence being allowable; as a military spouse accompanying her husband out of state under military orders, she could receive a PFD only if the ALJ determined her husband deserved one.<sup>188</sup> Although Mr. J. had only been in the state from 1998-2001, during which time he met and married his Alaskan wife, and even though his return trips fell well below the required thirty days, the ALJ, while purporting not to, relied on Mr. J.'s wife's bona fide Alaska upbringing in deciding that Mr. J. (and therefore his wife, too) deserved PFDs for the year in question.<sup>189</sup> "M[r]. J does have family ties in Alaska, as he has developed a close relationship with his wife's parents . . . . [T]he fact that his wife intends to return to Alaska is additional evidence in support of finding that M[r]. J also intends to return."<sup>190</sup> While there is perhaps no better way to gauge one's intent to return to and remain indefinitely in Alaska than by considering past residency and in-state familial ties, this type of evaluation will always favor long-time residents over newcomers who no less ardently wish to return to and remain in Alaska.

For example, consider the case of Mr. C., a member of the Air Force, and his wife Mrs. C.<sup>191</sup> Both Mr. and Mrs. C lived in Alaska during their childhood.<sup>192</sup> As with other applicants referenced in this section, because they returned to Alaska for fewer than thirty days over the preceding five years, they were faced with the presumption that they were no longer permanent Alaska residents eligible for a PFD. Again, the ALJ noted that this was a rare case – since the couple overcame the presumption – yet it is not so rare to find the ALJ relying on the couple's long history as Alaskans in his determination to award PFDs: "[t]he Cs are long-time Alaskan residents, and given their history of spending about two weeks every two years visiting with their relatives in Alaska, it was probably Mr. C's medical problems rather than a waning interest in returning to Alaska" that permitted them to return for only twenty-five days during the past five years.<sup>193</sup>

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<sup>187</sup> *Id.* at 2.

<sup>188</sup> *Id.* at 7; *see also* ALASKA STAT. § 43.23.008(a)(3) (2014).

<sup>189</sup> D J and A G-J, OAH No. 12-0129-PFD 1, 1–2, 8 & n.38 (Alaska Dep't of Revenue July 23, 2012).

<sup>190</sup> *Id.* at 8. The ALJ was mindful that the residency of one's spouse cannot be the principal factor in determining PFD eligibility. *See* ALASKA STAT. § 43.23.015(a) (2007). However, the ALJ stated that Ms. J's residency was "not the principal factor, but . . . an *additional* factor relied on to tip the balance in M[r]. J[s] favor." D J and A G-J, OAH No. 12-0129-PFD at 8 n.38; *see also* P.T., OAH No. 10-0386-PFD 1, 3 (Alaska Dep't of Revenue Oct. 4, 2010) (finding a military service member eligible for a dividend because his marriage to an Alaskan solidified his residency, permitting him to be allowably absent overseas, and stating: "It can hardly be doubted that a person who lives in Alaska, has married a firmly-rooted Alaskan, and has just adopted three Alaska children has shown strong evidence of being 'physically present in the state with the intent to remain indefinitely.'").

<sup>191</sup> A & J C and their child, A, OAH No. 11-0287-PFD 1, 1 (Alaska Dep't of Revenue Sept. 14, 2011).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 5; *see also* T and E C, individually and ex rel. H M and G C, OAH No. 11-0404-PFD 1, 4 n.29–30 (Alaska Dep't of Revenue Mar. 23, 2012) (compiling cases considering the thirty-days-in-five-years presumption). *T and E C* concerned a thirty-nine year old Inupiat woman who joined the Air Force

But the benefits of an Alaskan upbringing only go so far in securing a long-absent resident his PFD. Consider the case of Mr. J.M., who left the state in 1993 to pursue a career in the Air Force, applied for a 2004 PFD, but did not anticipate returning to Alaska to retire until 2014.<sup>194</sup> While the ALJ gave “particular weight to the fact that [Mr. J.M.] is from Alaska and was raised in this state, and that many of his relatives still live in Alaska,” the ALJ ruled that Mr. J.M., who had only returned for twenty-three days during his five-year absence, did not rebut the presumption that he no longer intended to return to Alaska and remain there indefinitely.<sup>195</sup> Even though the Air Force allowed Mr. J.M. thirty days of leave per year, he rarely used that time to return to Alaska, but instead spent it with his wife and school-age children on base in South Carolina.<sup>196</sup> Essentially, Mr. J.M. built a life outside of Alaska, an endeavor that cut off his PFD eligibility.<sup>197</sup>

However, there appears to be a trump card as powerful as a bona fide, pre-absence Alaskan residency.<sup>198</sup> If an individual, after the qualifying years in question, actually does return to and settle in Alaska, then her subjective intent, shaky when analyzed under the other thirty-days-in-five-years factors, reasserts itself as an accomplished fact that weighs strongly in favor of PFD eligibility.<sup>199</sup> For instance, A.R., a military service member similar to the others in this Section but with only weak ties to Alaska, managed to return to the state for just eleven days during the five-year period in question.<sup>200</sup> But, when he sought review at the informal appeals level, he was already a party to an executory contract to purchase a house in Alaska, and the deal closed before the formal appeal commenced.<sup>201</sup> The ALJ found that the tricky problem of gauging “something as ethereal as a person’s probable subjective intent” could be bypassed by A.R.’s recent purchase of an Alaskan home.<sup>202</sup> The ALJ found this fact outweighed all other factors – even the presumption of ineligibility created by the mere eleven days spent in Alaska over the five-year absence – and granted a PFD

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and had returned to Alaska for only twenty-six days in the five years preceding her PFD application but was granted a PFD in part because eleven years of her life were spent in Alaska at various times, and in part because “she was born in the state and has a large number of close and extended family members there, and that, as an Alaska Native, she has cultural ties to Alaska that cannot be replicated elsewhere,” all of which verified her intent to return to Alaska upon retirement from the Air Force. *Id.* at 1–2, 10.

<sup>194</sup> J.M. and his child B.M., OAH No. 05-0297-PFD 1, 1 (Alaska Dep’t of Revenue Nov. 17, 2004).

<sup>195</sup> *Id.* at 1, 3–4. This presumption has since been codified as a bright-line rule. See discussion *infra* Section III.A.2.

<sup>196</sup> *Id.* at 1.

<sup>197</sup> *Id.* at 3.

<sup>198</sup> See M & A.R., OAH No. 06-0228-PFD 1, 2–4 (Alaska Dep’t of Revenue Aug. 25, 2006) (granting a PFD when the applicant, despite returning to the state for only eleven days during his five-year allowable absence, actually did return to the state).

<sup>199</sup> *Id.* at 3.

<sup>200</sup> *Id.* at 2.

<sup>201</sup> *Id.* at 1, 3.

<sup>202</sup> *Id.* at 3.

in this rare instance.<sup>203</sup>

## 2. The Legislature Codifies a Faulty Administrative Code

As the administrative hearings illustrated above plainly show, the best way to rebut the administratively created presumption of ineligibility after a long absence from the state with few return trips is to tout the depth of your ties to the state – show that you married an Alaskan, show that you grew up there, or show that your family still lives there – in hopes of persuading an ALJ who may legally scrutinize this factor in determining your eligibility.

However, these hearings not only dabble in the realm of the speculative and hypothetical by adjudging something as necessarily unverifiable as someone's subjective intent to return to Alaska, but also emphasize the factor of one's equity as an Alaskan in contravention of *Zobel's* main holding: length of residency as a proxy for past contributions to the state cannot be disproportionately compensated to the detriment of newcomers who no less earnestly wish to remain in Alaska indefinitely.<sup>204</sup>

Rather than reject the favoritism ALJs bestowed on long-time Alaskans seeking PFDs, the Alaska Legislature codified the administrative code containing the thirty-days-in-five-years presumption, which became effective June 4, 2013.<sup>205</sup> It appears that ALJs have less discretion under the statute than they did under the administrative code. As the statute now reads, the presumption may be rebutted by “convincing evidence . . . that the individual was physically present in the state for at least 30 cumulative days during the past five years.”<sup>206</sup> By contrast, the old language in the regulation stated that “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.”<sup>207</sup> However, the statute's legislative history sends mixed signals despite the statute's clear wording and, even if the thirty-days-in-five-years presumption has been elevated to the status of a bright-line rule, any applicant who crosses its threshold will still be subjected to an equitable balancing test involving many factors,<sup>208</sup> the thrust of which favors long-time Alaska residents over newcomers.<sup>209</sup>

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<sup>203</sup> *Id.* at 3–4. The ALJ classified the purchase of the house under the catch-all provision of the seventh factor: any “other factors demonstrating the individual's intent.” *Id.* (quoting ALASKA ADMIN. CODE tit. 15, § 23.163(g)(7) (2010), *repealed by* H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013)).

<sup>204</sup> See discussion *supra* Section II.A.

<sup>205</sup> See ALASKA STAT. § 43.23.008(d)(e) (2014).

<sup>206</sup> *Id.* § 43.23.008(d)(1) (2014).

<sup>207</sup> ALASKA ADMIN. CODE tit. 15 § 23.163(h)(2) (2010) (emphasis added) (codified as amended at ALASKA STAT. § 43.23.008 (d)(1) (2014)).

<sup>208</sup> See ALASKA STAT. § 43.23.008(e) (2014).

<sup>209</sup> See *id.* § 43.23.008(e)(1). This factor conditions an applicant's subjective intent “to return and remain in the state indefinitely,” which has always been a prerequisite to PFD eligibility governed by ALASKA STAT. § 43.23.095(7) (2014), on “the length of time the individual was absent from the state

The statute's legislative history indicates that the PFDD "envision[ed] a scoring system . . . in determining a person's intent to return to Alaska,"<sup>210</sup> which would presumably be based on the factors set forth by Alaska Statute § 43.23.008(e) (2014). But the PFD distribution scheme struck down by *Zobel* had a scoring system too: each year of residency in the state since 1959 entitled an applicant to \$50, which would have allowed long-time residents to receive a PFD twenty-one times larger than a resident who had only been in Alaska one year.<sup>211</sup> While the PFD distribution scheme is now a zero-sum proposition – you either get one or you do not – disproportionately weighting the factor of long-time residency in the 'subjective-intent-to-remain-score' envisioned by the PFDD could have the effect of dividing Alaska's population into permanent classes. On the one hand, long-time residents who travel for over five years can still obtain dividends because of their equity as Alaskans, while on the other hand, newcomers who otherwise satisfy every PFD eligibility requirement but who only recently decided to build a life in Alaska before travelling elsewhere for over five years can obtain no dividends. And, as *Zobel* made clear, "favoring established residents over new residents' is constitutionally unacceptable" under federal equal protection jurisprudence.<sup>212</sup>

Furthermore, the legislative history behind the codification of the administrative code suggests that the legislature, or at least the bill's sponsor, who persuaded the legislature to enact it, agreed with the decisions arrived at by the ALJs under the old regulation and in fact wanted to further protect the coddling of long-time Alaskans at the heart of many of those decisions. "Putting the [administrative] provision in statute would make it easier for the division to deny applications that might not be valid and have that decision upheld through the administrative appeals process."<sup>213</sup> And when Dan DeBartolo, the current director of the PFDD, spoke on the Senate floor, his understanding of the proposed legislation seemed to miss the point that the statute would turn the thirty-days-in-five-years factor into its own necessary element that an applicant must meet before the factors analyzing subjective intent apply: "[n]ow the rule says if a person does not return to the state, cumulatively, for 30 days over a five-year period, that person will

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compared to the length of time the individual was physically present in the state." *See id*; *see also* ALASKA STAT. § 43.23.095(n.7) (2007).

<sup>210</sup> *Allowable Absence: Hearing on H.B. 52 Before the House Comm. on State Affairs*, 2013 Leg., 28th Sess. (2013) (statement of Michael Paschall, Staff for Rep. Eric Feige, bill sponsor), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=H&beg\\_line=00448&end\\_line=00518&session=28&comm=STA&date=20130129&time=0804](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00448&end_line=00518&session=28&comm=STA&date=20130129&time=0804).

<sup>211</sup> *Zobel v. Williams*, 457 U.S. 55, 57 (1982).

<sup>212</sup> *Id.* at 65 (quoting *Vlandis v. Kline*, 412 U.S. 441, 450 (1973)).

<sup>213</sup> *Allowable Absence: Hearing on H.B. 52 Before the Senate Comm. on State Affairs*, 2013 Leg., 28th Sess. (2013) (statement of Michael Paschall, Staff for Rep. Eric Feige, bill sponsor), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=S&beg\\_line=00350&end\\_line=00589&session=28&comm=STA&date=20130319&time=0902](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00350&end_line=00589&session=28&comm=STA&date=20130319&time=0902).

have to go through the process to show strong ties to the state.”<sup>214</sup> The statute actually states:

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.<sup>215</sup>

However, what is more troubling than the Director’s possible misunderstanding of the new statute is how the statute’s sponsor described the new objective test he hoped the PFDD would adopt to determine eligibility for PFDs under the second prong of the test, intent to return to Alaska and remain there indefinitely.<sup>216</sup>

The length of time the individual is absent from the state compared to the length of time the individual is physically present in the state. With this being in statute the [PFDD] felt that they would be able to develop a scoring criteria and use an example for, a possibility of say someone who is in the state for two years and then they are absent for five, they’re in their sixth year, they didn’t really establish strong ties to Alaska, so that would count against them versus someone say that was born in Alaska and was in Alaska for 18 years [and] went off to school or went off into the military, and now is in their sixth year, they’ve been absent a much less period of time in comparison to the length of time they’ve been [in Alaska], so that the [PFDD] would be able to hopefully develop a more objective scale instead of a

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<sup>214</sup> *Allowable Absence: Hearing on H.B. 52 Before the Senate Comm. on State Affairs*, 2013 Leg., 28th Sess. (2013) (statement of Dan Debartolo, Director of the Permanent Fund Dividend Division, Dep’t of Revenue), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=S&beg\\_line=00350&end\\_line=00589&session=28&comm=STA&date=20130319&time=0902](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00350&end_line=00589&session=28&comm=STA&date=20130319&time=0902).

Of course, the Commissioner could have been speaking about an earlier version of the Bill. The audio transcript records exactly what the Commissioner said: “Now the rule says basically very bright line that if you do not return to the state of Alaska cumulatively for thirty days over a five year period, that is the first criteria we are going to apply, and we are going to say you’ve severed your residency ties. At that point, in order to get the dividend, you’re going to have to go through the same process as when you first came to Alaska, essentially at least spend 6 months within the state and continue to show those strong residency ties to the state as [the bill sponsor’s staffer, Mr. Paschall] mentioned.” *Id.* (click on play button to Senate minutes) (scroll to time period 9:51:19 AM to 9:51:51 AM).

<sup>215</sup> ALASKA STAT. §43.23.008(d) (2014).

<sup>216</sup> *Id.* § 42.23.095(n.7) (2007).

subjective use of every reviewer's process to go through.<sup>217</sup>

Two and a half weeks later, testifying before the Senate Finance Committee, Mr. Paschall reiterated his conception of the scoring system that the PFDD would implement:

An applicant that was out of state for five years so now applying for the sixth year and they were in the state for three years, and then they moved or transferred to somewhere else, and I think you can identify what scenario that person is in, versus an individual that had been in Alaska say for, 18 years, or 19 years, and left the state and is now entering their sixth year, and in this case both of those individuals are in the military, which one has more of an intent to return to the state than the other one, and *it's clearly the individual that was here for the 18 years during their youth*, and [the PFDD] would be able to score that as a higher [score] based upon time in the state versus time out of the state.<sup>218</sup>

And, what is more, the current PFDD Director testified that he currently had score sheets in place, presumably ready to mathematically ascertain with complete and objective certainty an applicant's subjective intent to return to Alaska, a score sheet which must, in order to accomplish this task, treat long-time Alaska residency as a proxy for intent to return to the State, which unfairly prejudices newcomers to Alaska and defies the spirit of *Zobel*:

So we do have criteria score sheets in place right now. We've been looking at this, but the nice thing about it going into statute is we can first look at that thirty day return requirement and if you have no other criteria beyond that for us to look at, we can say you are simply denied until you

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<sup>217</sup> *Allowable Absence: Hearing on H.B. 52 Before the Senate Comm. on State Affairs*, 2013 Leg., 28th Sess. (2013) (statement of Michael Paschall, staff to Eric Feige, bill sponsor), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=S&beg\\_line=00350&end\\_line=00589&session=28&comm=STA&date=20130319&time=0902](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00350&end_line=00589&session=28&comm=STA&date=20130319&time=0902) (click on play button to Senate minutes) (scroll to time period 9:44:22 AM to 9:45:13 AM). The "reviewer's process" Mr. Paschall mentions likely refers to the discretion ALJs had under the old administrative code to award a PFD to an applicant who had not returned to Alaska for over 30 days in the past five years based on the subjective intent factors. *See* discussion *supra* Section III.A.1. Now, the thirty-days-in-five-years presumption has morphed into a bright-line rule, but after it has been met, the applicant must still prove subjective intent under the second prong of the test, which balances the old familiar factors from the administrative code. *See supra* text accompanying notes 132–40.

<sup>218</sup> *Hearing on H.B. 52 Before the Senate Comm. on Finance*, 2013 Leg., 28th Sess. (2013) (statement of Michael Paschall, staff to Eric Feige, bill sponsor), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=S&beg\\_line=00342&end\\_line=00627&session=28&comm=FIN&date=20130405&time=0912](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00342&end_line=00627&session=28&comm=FIN&date=20130405&time=0912) (emphasis added) (click on play button to Senate minutes) (scroll to time period 10:03:32 AM to 10:04:10 AM).

reestablish with the state of Alaska the residency ties.<sup>219</sup>

The point remains to be made that, whether a statute blatantly and transparently confers a benefit on some Alaska residents based on their length of residency,<sup>220</sup> or whether it smuggles this factor into an administrative equation that favors granting long-time residents their PFDs more often than newcomers, the law still draws invidious distinctions between Alaska residents based on their length of residency. The statute, then, leaves itself open to an equal protection claim, brought on behalf of the newcomer in either of Mr. Paschall's hypotheticals above who, especially if the newcomer does return to Alaska after her five year absence, will have a very strong argument that she was denied equal protection of the law if her applications for PFDs during those years were denied.

### 3. Exorcising *Zobel's* Ghost from the Thirty-Days-in-Five-Years Presumption

The basic goals of the PFD program state that it should: (1) equitably distribute the state's wealth to Alaskans; (2) reduce population turnover; and (3) increase democratic involvement in the fund.<sup>221</sup> Additionally, Alaska courts recognize ease of administering the PFD program and the prevention of fraud as equally legitimate purposes served by how the PFD is currently allocated.<sup>222</sup> In light of these objectives, the Alaska legislature should re-amend the thirty-days-in-five-years test by stripping it of its most incongruous and politically-fraught factor: "the length of time the individual was absent from the state compared to the length of time the individual was physically present in the state."<sup>223</sup> Under this new balancing test, once an applicant has shown that she has returned to the state for at least thirty days within the past five years, she would be barred from making arguments that her impressive length of residency or her extensive family ties to the state automatically make her more likely than a similarly situated newcomer to return to Alaska and put down roots. ALJs should be able to take a newcomer's intent to return to Alaska and start a life there at face value, just as they do in any case involving a long-time Alaska resident who has also been outside of Alaska for over five years.

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<sup>219</sup> *Hearing on H.B. 52 Before the Senate Comm. on Finance*, 2013 Leg., 28th Sess. (2013) (statement of Dan Debartolo, Director of the Permanent Fund Dividend Division, Dep't of Natural Resources), [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?ch=S&beg\\_line=00342&end\\_line=00627&session=28&comm=FIN&date=20130405&time=0912](http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00342&end_line=00627&session=28&comm=FIN&date=20130405&time=0912) (click on play button to Senate minutes) (scroll to time period 10:11:08 AM to 10:11:28 AM).

<sup>220</sup> See discussion *supra* Section II.A.

<sup>221</sup> *Ross v. State*, 292 P.3d 906, 910 (Alaska 2012) (citations omitted), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013).

<sup>222</sup> *Id.* at 911.

<sup>223</sup> See ALASKA STAT. § 43.23.008(e)(1) (2014).



An applicant's length of residency as a proxy for her intent to return to Alaska makes scant sense in a state with such a fluid population. "Alaska has among the highest rates of migration turnover in the nation. Even without migration of the seasonal workforce, Alaska had the second-highest rate of gross migration (in-migration plus out-migration, divided by total population) in the nation for 2009 to 2010 (the latest data available), at 14.5 percent."<sup>224</sup> The bygone era of us versus them, of sourdoughs versus cheechakos,<sup>225</sup> has long since passed. Now "[t]he majority of people living in Alaska are migrants to the state . . . . [O]nly 39.1 percent of Alaskans were born here."<sup>226</sup> In its most populous cities, the percentage of people born in Alaska declines slightly: "33.6 percent for Anchorage [and] 32.2 percent for Fairbanks North Star Borough."<sup>227</sup> And the people that Alaska is best at attracting, the people aged 25 to 34 who raise families and form households,<sup>228</sup> are precisely the ones whose efforts Alaska should reward with PFDs, whether or not they leave the state for over five years while serving in the military or obtaining a degree. Ridding the statute of its past residency factor<sup>229</sup> would help to dispel the notion – built up through administrative hearings – that someone with stronger ties to the state is more deserving of a PFD than a newcomer to the state when both applicants, in fact, may have the same desire to build a life in Alaska.

This rule change would better fulfill another core purpose of the PFD program: "to provide a mechanism for equitable distribution . . . of the state's energy wealth" to the people of Alaska.<sup>230</sup> Alaska is no longer an insular group of independent souls facing swarms of outsiders bent on finding work on the pipeline, as it was when the first PFD distribution scheme emerged.<sup>231</sup> Alaska should no longer fear newcomers, but should regard them as an economic boon to the state, a resource worthy of PFD investment.

Alaska's legislature should have retained one defense to ineligibility in the context of five-year absences: the provision in the administrative code

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<sup>224</sup> *Alaska Population Overview, 2012 Estimates*, ALASKA DEP'T OF LABOR & WORKFORCE DEV. 1, 11 (2013), <http://labor.alaska.gov/research/pop/estimates/pub/popover.pdf>. [hereinafter POPULATION OVERVIEW].

<sup>225</sup> *Alaska Lingo: The Wild Slang of Anchorage & Alaska*, THE OFFICIAL SOURCE FOR ANCHORAGE, ALASKA TRAVEL INFORMATION, <http://www.anchorage.net/Anchorage-Alaska-lingo-terminology> (last visited Nov. 26, 2014) (defining these two terms as newcomer and long-time Alaskan respectively).

<sup>226</sup> POPULATION OVERVIEW, *supra* note 224, at 11.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 12 (stating that Alaska typically has strong net migration gains of people ages 25 to 34).

<sup>229</sup> See ALASKA STAT. § 43.23.008(e)(1) (2014).

<sup>230</sup> *Ross v. State*, 292 P.3d 906, 910 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013), (citing *Zobel v. Williams*, 457 U.S. 55, 61 & n.7 (1982) (quoting 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982))).

<sup>231</sup> See POPULATION OVERVIEW, *supra* note 224, at 9. During the busiest year of the pipeline's construction, 1974 to 1975, 30,000 people came to Alaska; between 1980 and 1985, when the pipeline began producing and oil prices remained high, Alaska was "the fastest-growing state in the nation," increasing its population "nearly 30 percent in those five years." *Id.*

for “unavoidable circumstances.”<sup>232</sup> Against the bright-line thirty-day rule, this defense would provide that ineligibility “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.”<sup>233</sup> A PFD applicant who cannot meet the first prong of the test because she has not returned to Alaska for at least thirty days within the past five years<sup>234</sup> should be able to assert unavoidable circumstances as an affirmative defense:

Unavoidable circumstances have been found to exist where the ability to return to Alaska was beyond an applicants [sic] control such as deployment overseas with no opportunity for leave. An “unavoidable circumstance” is something more than having to choose between two options; it is a force precluding an applicant from even having the option to choose.<sup>235</sup>

Something that only makes it “‘impractical’ to return more often” or “‘extremely expensive and inconvenient” to do so does not show “that unavoidable circumstances prevented . . . more frequent returns.”<sup>236</sup> The unavoidable circumstances exception should survive because it has historically protected Alaska service members engaged in combat overseas.<sup>237</sup> Against this backdrop, it is likely that other unavoidable circumstances exceptions will require equally compelling scenarios.

Furthermore, the complex administrative rules that have sprouted up around the concept of eligibility have become so intricately self-referential as to be unintelligible to the average Alaskan (including this Comment’s author, who was continually surprised by the outcome of the administrative hearings even after reading scores of them). Therefore, the deletion of the past residency factor from the statutory balancing test – which has done nothing but present a blank canvas on which ALJs are wont to paint a masterpiece of the loyal Alaskan equitably getting his just deserts – would simplify the PFD eligibility process by engineering the histrionics out of it. Moreover, the very density of the rules themselves creates an argument that the PFD program has stopped fulfilling one of its basic purposes: “to increase citizen involvement in the management of the permanent fund.”<sup>238</sup> The system may be too opaque for the average Alaskan to interact with

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<sup>232</sup> See ALASKA ADMIN. CODE tit. 15, § 23.163(h)(2) (2010), *repealed* by H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013).

<sup>233</sup> *See id.*

<sup>234</sup> ALASKA STAT. §43.23.008(d)(1) (2014).

<sup>235</sup> K. A. P., OAH No. 09-0274-PFD 1, 4 (Alaska Dep’t of Revenue Nov. 17, 2009).

<sup>236</sup> *Id.* at 4–5 (citing S. H. et al., OAH No. 030093-PFD (Alaska Dep’t of Revenue, 2003)).

<sup>237</sup> *See id.* (collecting cases).

<sup>238</sup> *See* Ross v. State, 292 P.3d 906, 911 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013).

meaningfully. In fact, Alaska state legislators, in an attempt to repeal a section of PFD law that cut off eligibility for those absent longer than ten years (unless they were absent less than 180 days from Alaska on the dividend year for which they apply),<sup>239</sup> almost enacted a bill that would have given “dividends to people who have never visited Alaska,”<sup>240</sup> due to their failure to carefully read the interacting statutes and administrative codes on PFD eligibility. If our own elected representatives, presumably chosen at least in part for their familiarity with and expertise in the lawmaking process, could have so dramatically misread the PFD rules and statutes, then what chance does an everyday Alaskan have at making sense out of what it is, exactly, that she must do to become eligible for a PFD?

In reaction to all the allowable absences and presumptions, one longtime Fairbanks opinion columnist suggests that “[i]f you live in Alaska at least six months a year, you get a dividend. If you aren’t in Alaska six months a year, you don’t,” noting that his proposal would banish the decisive but unfortunately clairvoyant inquiry of “whether someone who lives Outside really intends to return to Alaska.”<sup>241</sup> Of course, this solution would be simpler to administer, but it would also do away with many reasonable exceptions that have been created over the years. Alaska residents who chose to become armed service members should not be punished for that choice. Similarly, any Alaska resident who wishes to become a doctor or lawyer must travel out of state to do so: there are no schools of medicine or law in Alaska.<sup>242</sup> Keep this tension between ease of administration and accommodation for genuinely meritorious absences in mind. An alternative solution to improve the PFD program – one that goes beyond just eliminating the past-residency factor while adding an unavoidable circumstances defense – will be examined after the next subsection of selected administrative hearings.

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<sup>239</sup> See H.B. 52, 28th Leg., 1st Reg. Sess. (Alaska 2013); see also discussion *supra* Section II.D.3 (explaining how ALASKA STAT. § 43.23.008(c) (2012), repealed by H.B. 52, 28th Leg., 1st Reg. Sess. (Alaska 2013) constitutionally denied a PFD to Mr. Ross, a long absent Alaska resident and marine).

<sup>240</sup> Dermot Cole, *State House nearly approves bill to extend Permanent Fund Dividends to some who have never lived in Alaska*, NEWSMINER.COM (last updated Feb. 2, 2013), [http://m.newsminer.com/blogs/staff\\_blogs/state-house-nearly-approves-bill-to-extend-permanent-fund-dividends/article\\_a52ae99e-6d74-11e2-8555-001a4bcf6878.html?mode=jqm](http://m.newsminer.com/blogs/staff_blogs/state-house-nearly-approves-bill-to-extend-permanent-fund-dividends/article_a52ae99e-6d74-11e2-8555-001a4bcf6878.html?mode=jqm) (noting that a vigilant representative realized “that dependents who had never been to Alaska could get dividends for up to 18 years if one of their parents had an allowable absence extending over a period of many years . . . [I]t would be hard to classify someone who has never visited Alaska as a resident.”).

<sup>241</sup> *Id.*; see also *Alaska Lingo: The Wild Slang of Anchorage & Alaska*, THE OFFICIAL SOURCE FOR ANCHORAGE, ALASKA TRAVEL INFORMATION, <http://www.anchorage.net/Anchorage-Alaska-lingo-terminology> (last visited Nov. 26, 2014) (“Outside – any place not in Alaska.”).

<sup>242</sup> See Christopher Eshleman, *Alaska Rep. Scott Kawasaki pitches law, med schools*, NEWSMINER.COM (last updated Dec. 26, 2012), [http://www.newsminer.com/news/alaska\\_news/article\\_6dfc4b94-5510-573e-94b7-7694c6fe55db.html](http://www.newsminer.com/news/alaska_news/article_6dfc4b94-5510-573e-94b7-7694c6fe55db.html); Martha Neil, *The Only State Without a Law School, Alaska Needs One, Lawmaker Says*, ABA JOURNAL (Dec. 28, 2010, 11:18 AM), [http://www.abajournal.com/news/article/the\\_only\\_state\\_without\\_a\\_law\\_school\\_alaska\\_needs\\_one\\_lawmaker\\_says/](http://www.abajournal.com/news/article/the_only_state_without_a_law_school_alaska_needs_one_lawmaker_says/).

### B. *Maintaining a Principal Home Outside of Alaska*

Because *Zobel* held that Alaska's PFD program could no longer disburse more of the fund to long-time residents than to recently minted ones, but because the program is still geared toward encouraging residents to remain in the state through its financial incentive, one might expect more decisions granting newcomers dividends based on the acceptance of their sworn intent to remain in Alaska.<sup>243</sup> However, perhaps because fewer newcomers apply for PFDs and even fewer appeal their denials,<sup>244</sup> the outcomes of most administrative hearings echo the reasoning debunked in *Zobel* by insisting that past residency best validates an applicant's intent to return to the state and remain indefinitely, thus ensuring that the longer an individual has resided in Alaska, the more likely she is to receive her yearly PFD.

The administrative hearings below all consider the issue of whether a PFD applicant has established residency before claiming a PFD. As a general rule, "[a]n individual's intent to establish residency, remain indefinitely in Alaska, or to return to Alaska and remain indefinitely is demonstrated through the establishment and maintenance of customary ties indicative of Alaska residency and the absence of those ties elsewhere."<sup>245</sup> Real evidence of ties to Alaska must be established at least six months prior to the qualifying year,<sup>246</sup> meaning the year that counts for PFD purposes and that immediately precedes the year in which one applies for a PFD.<sup>247</sup> A

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<sup>243</sup> See discussion *supra* Section II.A. "The separation of residents into classes hardly seems a likely way to persuade new Alaskans that the State welcomes them and wants them to stay." *Zobel v. Williams*, 457 U.S. 55, 62 n.9 (1982).

<sup>244</sup> Newcomers may appeal their cases less frequently or may be less knowledgeable about the PFD program than more seasoned Alaskans. It is not as though the PFDD advertises the dividend's availability. See PFD FAQ's, *supra* note 123 (click on "Applying for a Dividend" then click on "How do I get an application booklet? I did not receive one in the mail.") (stating that "[a]pplicants can apply online, or visit one of the designated distribution centers to pick up forms and an informative pamphlet for first time filers.").

<sup>245</sup> ALASKA ADMIN. CODE tit. 15 § 23.143(a) (2013).

<sup>246</sup> ALASKA ADMIN. CODE tit. 15 § 23.143(c). This administrative code stems from the statutory requirement that an applicant claiming certain allowable absences be "a resident of the state for at least six consecutive months immediately before leaving the state." ALASKA STAT. §43.23.008(b) (2014). This six month requirement applies to every allowable absence except an absence "for any reason consistent with the individual's intent to remain a state resident," so long as she returns within 180, 120, or 45 days, as the case may be. *Id.* § 43.23.008(a)(17), (b) (implying mysteriously that other allowable absences, such as getting an education or serving in the Army, are inconsistent with the intent to remain an Alaskan resident). Although it seems logical that being a resident for at least six months means residing in the state and intending to remain there, and while it also seems logical that, once residency is so established, a resident remains so even if she leaves Alaska but intends to return (see ALASKA STAT. § 01.10.055 (2007)), the Alaska Supreme Court has held that the six month time period in ALASKA STAT. §43.23.008(b) (2014) means that "[i]n order to claim the [allowable] absence, the PFD applicant must have first demonstrated a bona fide intent to remain in Alaska by physically residing in the state for six consecutive months." *Heller v. Dep't of Revenue*, 314 P.3d 69, 76–77 (Alaska 2013). *But see id.* (Winfrey, J., dissenting) (stating that "[a] consecutive six-month physical presence requirement for an allowable absence, which necessarily implies *continuous* physical presence, will come as a great surprise to the many [Alaskan] high school graduates who take an out-of-state spring break or summer vacation before departing for a college outside Alaska.").

<sup>247</sup> See ALASKA STAT. § 43.23.095(6) (2014).

veritable barrage of disqualifying actions can dissolve any customary ties an applicant has built up, chief among which is the maintenance of a principal home anywhere but Alaska during the qualifying year, “regardless of whether the individual spent a majority of time at that home,” unless the individual was allowably absent under certain sections of Alaska Statute section 43.23.008 (2014).<sup>248</sup> With sixteen disqualifying acts at their disposal,<sup>249</sup> ALJs rarely award PFDs to fledgling Alaskans. By contrast, the first case in the next subsection gives the benefit of the doubt to the new and curious.

### 1. Selected Administrative Hearings

Toward the end of 2007, an Ohio couple, Mr. E. and Ms. V., resolved to make a new start in Alaska after the oil conglomerate BP offered Mr. E. a job in Anchorage.<sup>250</sup> The couple traveled to Anchorage in December 2007, but Ms. V. returned to Ohio later that month to sell her home and to give her employer there her two-week notice.<sup>251</sup> She returned to Anchorage in January 2008, but was denied her 2009 PFD on the grounds that she had not established residency throughout the entirety of 2008, the qualifying year.<sup>252</sup> The PFDD argued that she had not established “customary ties indicative of Alaska residency,”<sup>253</sup> but the ALJ rejected such a formulaic approach to the regulation at issue, placing the primary emphasis instead on Ms. V.’s intent during her December, 2007 visit to Anchorage, Alaska:

There is no published list of “customary ties,” nor is it clear whose customs are to be considered. Alaska is known for colorful individualists who never establish what some people would consider “customary ties” of residency, yet have lived here all their lives with no intent to leave.<sup>254</sup>

Instead, the ALJ determined Ms. V.’s mind was resolved in December that Anchorage would be her new principal home, making her house for sale back in Ohio and her job there “temporary obligations” that posed no impediment to Ms. V. receiving her first PFD.<sup>255</sup>

Few decisions deal with newcomers with such a sympathetic,

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<sup>248</sup> ALASKA ADMIN. CODE tit. 15 § 23.143(d)(1) (2013).

<sup>249</sup> *See id.* §23.143(d)(1)–(15), (17), (h).

<sup>250</sup> M.V., OAH No. 09-0599-PFD 1, 1 (Alaska Dep’t of Revenue March 11, 2010).

<sup>251</sup> *Id.*

<sup>252</sup> *See id.*; *see also* ALASKA STAT. § 43.23.005(a)(3) (2014) (stating that “[a]n individual is eligible to receive one permanent fund dividend each year . . . if the individual . . . was a state resident during the entire qualifying year.”).

<sup>253</sup> M.V., OAH No. 09-0599-PFD 1 at 2 (citing ALASKA ADMIN. CODE tit. 15, § 23.143(a) (2013)).

<sup>254</sup> *Id.* at 2–3.

<sup>255</sup> *Id.* at 3.

straightforward application of the law.<sup>256</sup> Instead, most of the cases use a well-established Alaskan pedigree as evidence weighing heavily in favor of a PFD. Consider the case of Ms. O., who moved to Alaska in 1984, established a business three years later, and then bought a house with her husband.<sup>257</sup> Ms. O. accompanied her children to New Jersey from 2000-2001, where they attended school, making her ineligible for those years' dividends because of absences over 180 days.<sup>258</sup> However, in 2006, Ms. O. traded her New Jersey driver's license for an Alaska one and reregistered to vote in Alaska before she applied for the 2007 PFD,<sup>259</sup> but the PFDD denied her application, claiming that she was no longer an Alaska resident or that, even if she were, she had maintained her principal home in New Jersey during the qualifying year, thus depriving herself of that year's dividend.<sup>260</sup> The ALJ disagreed and found that, despite her lengthy visits to New Jersey, Ms. O. had in fact returned to Alaska each summer – therefore, “because her husband, her business and her purchased home were all in Alaska, it [was] more likely than not that Ms. O. maintained her principal home in Alaska even though she did not spend a majority of her time in Alaska.”<sup>261</sup> Ms. O., who had a twenty-three year history with Alaska, was awarded her 2007 PFD.<sup>262</sup>

Or consider the case of Ms. H., whose daughter, J., was severely injured in a car accident and had to be airlifted to a hospital in Washington state in September 2007.<sup>263</sup> Ms. H. had lived in Alaska since the age of three, and her daughter was a life-long resident.<sup>264</sup> However, the PFDD denied them their 2008 PFDs on the grounds that they had established a

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<sup>256</sup> See, e.g., *Underwood v. State*, 881 P.2d 322, 327–28 (Alaska 1994) (denying dividends to a family of three from Texas who planned their move to be eligible for PFDs because the legislature shifted the date from which residency must be proven from April 1 to January 1 after the family arrived in Alaska on March 25); *L.S. and her minor child J.S.*, OAH No. 06-0772-PFD 1, 1–3 (Alaska Dep't of Revenue June 26, 2006) (denying 2005 PFDs to a mother and her child who had only resided in the state for about a year before leaving in December 2004 to care for an ailing relative because the mother could show no substantial ties to Alaska, lied on her 2005 application that she was physically present in Alaska at that time, and did not intend to return until August of 2007); *G.G.*, OAH No. 07-0043-PFD 1, 1–2 (Alaska Dep't of Revenue Aug. 14, 2007) (denying 2006 PFDs to a mother who arrived in Alaska with her child in October 2004, left their apartment in November 2005, claimed without any documentation that they then lived in an Alaskan hotel until May 2006, when they moved to Illinois and filed PFD applications because Mrs. G.'s intent to return to Alaska was conditioned upon her winning the lottery).

<sup>257</sup> *S.O.*, OAH No. 08-0480-PFD 1, 1 (Alaska Dep't of Revenue Mar. 13, 2009).

<sup>258</sup> *Id.* at 1–2. For reasons not preserved on record, but in part because Ms. O. did not reply to the PFDD's requests for additional information, she also did not receive dividends for 2005-2006. *Id.* at 2.

<sup>259</sup> *Id.* at 2.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 6. The administrative code at issue reads as follows: “An individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual has maintained the individual's principal home in another state or country, regardless of whether the individual spent a majority of time at that home . . . .” ALASKA ADMIN. CODE tit. 15, § 23.143(d)(1) (2013). The code seemingly contemplates a disqualifying principal home, but in this case the low threshold for disqualification has been inverted to benefit an oft-absent, but compellingly Alaskan, applicant. *S.O.*, OAH No. 08-0480-PFD at 1.

<sup>262</sup> *Id.* at 1.

<sup>263</sup> *J.H. and S. & N.J.*, OAH No. 09-0399-PFD 1, 1 (Alaska Dep't of Revenue Oct. 27, 2009).

<sup>264</sup> *Id.*

principal residence in Seattle, even though J. was then at a hospital in San Diego where doctors had recommended she convalesce while Ms. H. rented a nearby house.<sup>265</sup> Although their absence was indeterminate, the ALJ ruled that because Ms. H. had left her retirement fund as a state employee intact, she had a credible and very real financial incentive to return to the state in order to vest.<sup>266</sup> Regardless of the fact that both applicants were in San Diego at the time of the hearing, the ALJ was persuaded by their testimony that they planned to return to Alaska as soon as J. was better; the mother and daughter had only done what any ordinary Alaskan – whose in-state medical facilities can only cure so much – would have done, and so each was eligible for 2008 PFDs.<sup>267</sup>

In another case in which the ALJ had to resolve a “close question,” long-time Alaskan residency seemed to be the dispositive factor.<sup>268</sup> Mr. and Mrs. M., full-time residents since 1963, had received every dividend since the program’s inception.<sup>269</sup> However, the PFDD denied them their 2011 PFDs because they sold one of their Alaskan homes in February 2011 after buying a home in Arizona in November 2010 – an out of state home the PFDD alleged became the couple’s principal home.<sup>270</sup> Mr. and Mrs. M.’s absences were less than 180 days.<sup>271</sup> Furthermore, interpreting the principal home regulation, the ALJ noted that “an applicant is not required to have a principal home, and may have no principal home, but still remain an Alaska resident for PFD purposes”; rather, the regulation simply forbids establishing a principal home elsewhere.<sup>272</sup> Even though they sold their Alaskan home and bought one in Arizona to escape the Alaskan winters, their absences were not longer than proscribed, and the ALJ found them eligible for their 2011 PFDs, relying in part on the fact that they had always received one.<sup>273</sup>

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<sup>265</sup> *Id.* at 1–2. The ALJ notes: “climatic change was at least a partial element in the need to move to San Diego, but the change was not a change from Alaska, where the air can be quite dry, particularly in the winter, but rather a change from the climate of Seattle.” *Id.* at 2. This non sequitur makes sense only in light of the PFDD’s penchant for seizing on lone regulations or statutes while attempting to disprove an applicant’s eligibility. In this case, ALASKA STAT. § 43.23.008(5) (2014) proscribes absences from Alaska for climatic change in the context of PFD eligibility.

<sup>266</sup> J.H. and S. & N.J., OAH No. 09-0399-PFD at 3.

<sup>267</sup> *Id.* at 4–5. Ruling with the spirit and not the letter of the law, the ALJ rejected the PFDD’s argument, characterizing it as an out-of-context consideration of small actions that alone might demonstrate a lack of Alaskan residency even though “the body of evidence as a whole shows that the person has maintained the intent to return to Alaska to remain indefinitely and make a home.” *Id.* at 4.

<sup>268</sup> L and S M, OAH No. 11-0416-PFD 1, 2, 5 (Alaska Dep’t of Revenue Mar. 6, 2012).

<sup>269</sup> *Id.* at 1–2.

<sup>270</sup> *Id.* at 1–4.

<sup>271</sup> *Id.* at 1.

<sup>272</sup> *Id.* at 3–4. However, after downplaying the importance of maintaining a principal home in Alaska, the ALJ took pains to describe the cabin Mr. and Mrs. M. still owned in Alaska, complete with “electrical power, running water, hot shower, wood heat stove, propane refrigerator and cook stove, TV and cell phone service,” which then became Mr. and Mrs. M.’s “principal physical home” after selling their other house in Alaska. *Id.* at 2.

<sup>273</sup> *Id.* at 1–2, 5. *But see* W.J., M.J., and L.J., OAH No. 07-0487-PFD (Alaska Dep’t of Revenue Feb. 7, 2008). In that case, despite other decisions that hypothetically downplay the importance of a principal

In the case of Ms. G., the PFDD denied a 2008 PFD to an applicant born and raised in Alaska on the grounds that she had severed her Alaska residency and established a principal home in Washington near the Army base where her husband was stationed.<sup>274</sup> On appeal, the PFDD argued that because Ms. G.'s husband, a military service member, had not applied for a PFD, she too was ineligible.<sup>275</sup> The ALJ rejected this argument, noting that Ms. G.'s absence during the qualifying year fell well short of the 180-day cut-off.<sup>276</sup> Furthermore, the ALJ found Ms. G.'s testimony that she planned to return to Alaska in 2010, once her husband's commitment to the Army ended, persuasive – Ms. G. had “maintained family ties sufficiently strong that she and her children are welcome to move back into her mother-in-law's Anchorage home whenever they want.”<sup>277</sup> Even though she intended to stay out of state for twenty months accompanying her husband, who was ineligible for a 2008 PFD, Ms. G., who was “an Alaska resident and has been since she was born,” received her 2008 PFD.<sup>278</sup>

## 2. Removing the Specter of Alaskan Equity from the Administrative Code

Interestingly, Alaska has one statute<sup>279</sup> and three small sections of administrative code<sup>280</sup> that delimit how much weight an ALJ may give to a PFD applicant's marriage to a resident or nonresident spouse, but the provisions appear, if not contradictory, then at least at odds enough to explain why the ALJs in the previous subsections stressed Alaskan family ties as a powerful factor favoring PFD eligibility. For instance, by statute the “residency of an individual's spouse may not be the principal factor relied upon by the [PFDD] commissioner in determining the residency of the individual.”<sup>281</sup> However, by administrative code “[t]he fact that an

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home in Alaska, one ALJ ruled that when Mr. and Mrs. J., residents of Alaska since 1961, temporarily moved from an Anchorage trailer park to a trailer on their own property in Texas, intending to return to Alaska once their health improved, they could not receive PFDs because “the family had no permanent place of residence in Alaska, and their presence in Texas was not transient.” *Id.* at 1–2, 4–5.

<sup>274</sup> K. G. and her children I. & A. G., OAH No. 09-0257-PFD 1, 1–2 (Alaska Dep't of Revenue Oct. 27, 2009).

<sup>275</sup> *Id.* at 3; see ALASKA STAT. § 43.23.008(a)(3) (2014) (creating an allowable absence for a spouse accompanying a military service member if that service member is “eligible for a current year dividend.”).

<sup>276</sup> K. G. and her children I. & A. G., OAH No. 09-0257-PFD at 3–4. An applicant may be allowably absent during the qualifying year for 180 days “for any reason consistent with the individual's intent to remain a state resident.” See ALASKA STAT. § 43.23.008(a)(17) (2014).

<sup>277</sup> K. G. and her children I. & A. G., OAH No. 09-0257-PFD at 2.

<sup>278</sup> *Id.* at 2–3, 5. Because of her planned prolonged absence through 2008, if Ms. G wished to receive a 2009 PFD, her husband would need to apply to make her eligible under ALASKA STAT. § 43.23.008(a)(3) (accompanying a military service member); see also K. A. C. and minor child R. A. C., OAH No. 09-0367-PFD 1, 1–2, 5–6 (Alaska Dep't of Revenue Dec. 4, 2009) (holding that an applicant born and raised in Alaska who accompanied an ineligible military husband to California but was absent less than 180 days was eligible for a 2008 PFD even though she incorrectly filled out her application to indicate that she was maintaining her principal home outside of Alaska during the qualifying year).

<sup>279</sup> ALASKA STAT. § 43.23.015(a) (2014).

<sup>280</sup> See ALASKA ADMIN. CODE tit. 15 § 23.143(g), (i), (j) (2013).

<sup>281</sup> ALASKA STAT. § 43.23.015(a) (2014).



individual's spouse has not declared Alaska residency does not establish a presumption that an individual is not a resident."<sup>282</sup> But ALJs have broadened the term "spouse" to include family and have disregarded the statute in favor of the code's bizarre and faulty contrapositive: the fact that an individual's spouse or family *has* declared Alaska residency *does* establish a presumption that an individual *is* a permanent resident and therefore deserves a PFD.<sup>283</sup>

To counteract the ALJs reasoning, which swells and then bursts the plain meaning of the rules of law on which they rely, Alaska should look to similarly isolated states and territories that have adopted much more equitable and workable rules for residency. For instance, the Hawaii residency statute accounts for the gathering influence a family has on where one resides, but it also unequivocally deals with an individual who has broken those ties:

If a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place.<sup>284</sup>

The territory of Guam has essentially the same residency statute with one minor alteration.<sup>285</sup> An applicant's substantial ties to bona fide permanent Alaska residents should not always weigh in favor of PFD eligibility – otherwise, a good-old-boys network of us and them, sourdoughs versus cheechakos, will creep back into Alaskan jurisprudence in contravention of *Zobel's* holding and against the stated purpose of the PFD program itself: “to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state.”<sup>286</sup> Hawaii's statute, because it explicitly addresses familial ties by giving them only modest weight in the residency inquiry, should be brought into Alaska's Administrative Code right after the three provisions on the effects of marrying a nonresident.<sup>287</sup>

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<sup>282</sup> ALASKA ADMIN. CODE tit. 15, § 23.143(j) (2013); *see also id.* § 23.143(g) (stating that “[a] resident who marries a nonresident while physically present in Alaska is considered to have the intent to remain indefinitely in Alaska until the resident takes steps or actions to depart Alaska.”); *id.* § 23.143(i) (stating that “[t]he eligibility of a resident who marries a nonresident while absent from Alaska is not changed by the marriage, so long as the resident is absent for the resident's own allowable reason.”).

<sup>283</sup> *See, e.g.*, discussion of administrative hearings *supra* notes 156–58, 169–73, 186–93, 257–61, 273–78 and accompanying text; *see also* discussion of administrative hearings *infra* notes 292–304 and accompanying text.

<sup>284</sup> HAW. REV. STAT. § 11–13 (2008).

<sup>285</sup> *See* 3 GUAM CODE ANN. § 9123(c) (2012).

<sup>286</sup> *Ross v. State*, 292 P.3d 906, 910 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013), (citing *Zobel v. Williams*, 457 U.S. 55, 61 n.7 (1982) (quoting 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982))).

<sup>287</sup> This proposed rule change should be placed at ALASKA ADMIN. CODE tit. 15, § 23.143(k) (2012).

This addition would provide a much-needed counterweight to Alaska's permanent residency inquiry by unequivocally stating that family ties only count so long as they are maintained.

### C. *Retention of Residency and Intent*

Like the military service members discussed above, many Alaskan civilians venture out of state in the normal course of their lives; sometimes their absences are allowable for PFD purposes, other times they are not.<sup>288</sup> As a general rule of thumb, an absence “for any reason consistent with the individual's intent to remain a state resident” does not disqualify an individual from receiving a dividend so long as the absence does not exceed 180 days, though combining absences can lead to counterintuitive results.<sup>289</sup>

Because PFD applicants must be state residents,<sup>290</sup> the PFDD sometimes contests the residency of those who have moved out of state and appear to be laying down roots elsewhere. The PFDD often claims that those individuals have acted in a manner “inconsistent with an intent to remain in Alaska indefinitely.”<sup>291</sup> However, when the PFDD takes aim at longtime Alaska residents in this way, the ALJs often rely on past residency as the best indicator of future intent, thereby pulling longtime residents back from the brink of ineligibility. While their methodology has a practicality to it that is easy to administer – and probably a healthy dash of common sense to boot – the cases in which the ALJ advocates most for a longtime resident's PFD leave a faint impression that the applicant's past contributions are being rewarded.

#### 1. Selected Administrative Hearings

For instance, consider the case of D.C., who moved to Alaska in 1982 and whose children were born and raised in the state.<sup>292</sup> After D.C. divorced her husband, she took up with Mr. O., who “was born in Alaska

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<sup>288</sup> See ALASKA STAT. § 42.23.008 (2014) (describing allowable absences and ascribing them permissible durations, such as 180, 120, or 45 days); see also *supra* text accompanying notes 39–45 (listing some allowable absences).

<sup>289</sup> ALASKA STAT. § 43.23.008(a)(17) (2014); see E. & B.H., OAH No. 08-0706-PFD 1, 3 (Alaska Dep't of Revenue April 7, 2009) (explaining the “surprising and counterintuitive” results this provision may produce: “Under the law, a person could be absent from the state on vacation for 180 days, and the entire absence would be allowable. A person could be absent from the state for 365 days for medical reasons, and the absence would be allowable. But a person who takes a 46-day vacation early in the year, and then suffers an unforeseen accident or illness requiring an absence of more than 135 days later in the same year would not be eligible [because t]he total absence in that case would be 181 days . . . . A person who has been absent vacationing for 178 days in one year, as the [applicants] were, can only afford to be absent from Alaska for two more days for medical or any other reasons but military service and still be eligible for the following year's dividend.”).

<sup>290</sup> ALASKA STAT. § 43.23.005(a)(3) (2014).

<sup>291</sup> ALASKA ADMIN. CODE tit. 15, § 23.143(a)(3) (2013); see also ALASKA STAT. § 01.10.055(c) (2007).

<sup>292</sup> D.C., individually and ex rel. W. and W.G., and J.O., OAH No. 07-0653-PFD 1, 1 (Alaska Dep't of Revenue Feb. 1, 2008).

and has lived here all his life.”<sup>293</sup> When the couple planned a trip to Oregon to visit family, they left their belongings with D.C.’s mother, also an Alaska resident.<sup>294</sup> After they arrived in Oregon and visited with their family, the couple then decided to return to Alaska before the children’s school commenced, but their van needed mechanical work, so the couple decided to stay in Oregon long enough to finance their return trip.<sup>295</sup> D.C. applied for food stamps and Mr. O. found construction work.<sup>296</sup>

When D.C. applied for her PFD, the PFDD denied it on the grounds that the Oregon sojourn terminated her residency and that she had made Oregon her principal home.<sup>297</sup> The ALJ noted, however, that an extended vacation, for less than 180 days, was consistent with Alaskan residency.<sup>298</sup> Furthermore, “Ms. C. has lived here since 1982, when she was twelve; she married and raised her two children here, and her mother and sister continue to live here, as does the children’s’ [sic] father.”<sup>299</sup> The ALJ also had to contend with the PFDD’s claim that Ms. C. severed her Alaskan residency by establishing or claiming residency in another state when she applied for food stamps in Oregon.<sup>300</sup> Neither the department nor Ms. C. could produce sufficient evidence on whether obtaining food stamps in Oregon required claiming Oregon residency, but the ALJ ruled that, even if it did, such a claim would only establish evidence of a temporary residency.<sup>301</sup> By statute, Ms. C. would have also needed the intent to remain in Oregon to vitiate her Alaskan residency.<sup>302</sup> It is impossible to tell whether the ALJ in fact knew that applying for food stamps in Oregon required declaring residency in that state under penalty of federal law,<sup>303</sup> but he nonetheless advanced an interpretation of the regulations favorable to Ms. C., the longtime Alaska

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<sup>293</sup> *Id.* at 2.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 2–3.

<sup>298</sup> *Id.* at 3.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 4–5 (citing ALASKA STAT. § 01.10.055(c) (2007)); *see also* ALASKA ADMIN. CODE tit. 15, § 23.143(d)(17) (2013) (conditioning the receipt of a PFD on not obtaining a benefit “as a result of establishing or maintaining any claim of residency in another state,” but creating an exception for Medicaid beneficiaries).

<sup>301</sup> D.C., individually and ex rel. W. and W.G., and J.O., OAH No. 07-0653-PFD at 4–5.

<sup>302</sup> *Id.* at 5. The AJL read subsections of the Alaska’s residency statute *in pari materia* to hold that the same standard for establishing residency in Alaska applied to establishing residency outside the state. *Id.*; compare ALASKA STAT. § 01.10.055(a) (2007) (defining residency as “being physically present in the state with the intent to remain in the state indefinitely”) with *id.* § 01.10.055(c) (cutting off the Alaskan residency of whoever “establishes or claims residency in another state” without defining residency).

<sup>303</sup> Assuming that the Oregon application for food stamps has not changed substantially in the past eight years, Ms. C. likely signed a form that stated: “By signing below I agree that: I have given DHS [OHA] true, correct and complete information; I understand that making false statements or hiding information may mean state and federal penalties, as well as having to repay any overpayment[;] . . . I declare I am a resident of Oregon.” *Application for Services*, DHS OREGON DEP’T OF HUMAN SERVICES 1, 12 (Jan. 2014), <https://apps.state.or.us/Forms/Served/de0415f.pdf> (emphasis added).

resident, by reading the statute against its plain meaning.<sup>304</sup>

In fact, in a later case, receiving the same benefit from the state of Oregon led to a PFD disqualification.<sup>305</sup> In that case, the parents of a young man who likely impregnated his girlfriend flew the pregnant girlfriend, a life-long Alaskan, down to Oregon in order to convince their son to take a paternity test.<sup>306</sup> Because the negotiations regarding the paternity test were lengthy, the young man's relatives encouraged the girl, Ms. L., to apply for Oregon public assistance benefits, which she did, filling out a form in which she declared she was a resident of Oregon.<sup>307</sup> Unlike D.C.'s case, the PFDD here presented evidence that the public assistance form required a claim of Oregon residency, and the ALJ determined that no dividend should be rewarded, noting that, although the applicant did not intend to disqualify herself, the "bright-line rule" embodied by the administrative code left no room for equitable considerations.<sup>308</sup>

It is hardly worth debating whether D.C., the stranded mother of two, or Ms. L., the pregnant girlfriend of a reluctant father, would be the more sympathetic applicant in the eyes of a judge, but both were long-time Alaska residents, yet one received a PFD while the other did not under virtually the same set of facts. The two rulings simply highlight the equitable leeway these ALJs have in crafting decisions, especially when (as in the case of D.C.) the PFDD had not done its homework before bringing a case.<sup>309</sup> Had the ALJ in Ms. L.'s case heeded the precedent set forth in D.C.'s case, Ms. L. would likely have received her dividend.<sup>310</sup>

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<sup>304</sup> D.C., individually and ex rel. W. and W.G., and J.O., OAH No. 07-0653-PFD at 5. The ALJ read the residency statute in the most equitable manner, but it could have, of course, been read differently. Subsection (c) divests an individual of Alaskan residency if she "establishes or *claims residency* in another state . . . or performs *other acts* or is absent under circumstances that are inconsistent with the intent required under (a) of this section to remain a resident of this state." ALASKA STAT. § 01.10.055(c) (2007) (emphasis added). The required intent is defined in subsection (a) as "the intent to remain in the state indefinitely and to make a home in the state." *Id.* § 01.10.055(a). Because *claims residency* is separated from *other acts* by the disjunctive 'or' and a comma, it could be argued that only the term *other acts* should be modified by subsection (a), which would require only those *other acts* to contradict an "intent to remain in [Alaska] indefinitely," meaning that a claim of residency in another state requires no intent to sever Alaskan residency. *See id.* § 01.10.055(a), (c). Furthermore, subsection (a) refers exclusively to one who "establishes residency," whereas subsection (c) refers to one who "establishes or *claims residency*." *Id.* § 01.10.055(a), (c) (emphasis added). Arriving at the ALJ's conclusion requires both treating *or claims* as surplusage and reading the 'or' in subsection (c) as an 'and.'

<sup>305</sup> J.T.L., OAH No. 09-0039-PFD 1, 4 (Alaska Dep't of Revenue April 24, 2009).

<sup>306</sup> *Id.* at 1.

<sup>307</sup> *Id.*; *see also supra* note 303.

<sup>308</sup> *Id.* at 4 (citing ALASKA ADMIN. CODE tit. 15, § 23.143(d)(17) (2013) (disqualifying an applicant who has "obtained any other benefit or benefits as a result of establishing or maintaining any claim of residency in another state or country or by disclaiming Alaska residency . . .").

<sup>309</sup> D.C., individually and ex rel. W. and W.G., and J.O., OAH No. 07-0653-PFD at 4-5.

<sup>310</sup> *Id.* at 5 (holding that "[m]ore fundamentally, even [if D.]C.'s application included a claim of Oregon residency for purposes of obtaining food stamps, [D.]C. did not claim permanent residency, because she retained the intent to return to Alaska and remain there indefinitely: a claim of residency for purposes of obtaining food stamps would only have been an acknowledgment of temporary residency."). *But see supra* note 308 and accompanying text.

Other discrepancies exist as well, especially when the cases turn on something as elusive and insusceptible to concrete proof as an applicant's subjective intent to return to Alaska and remain there indefinitely. As the opinions all recite in one way or another, "[a] resident who leaves the state remains a resident, but only for so long as he maintains the intent to return to Alaska to remain indefinitely and to make a home in the state, and only if the absence is under circumstances that are not inconsistent with this intent."<sup>311</sup> As may be suspected, long-time residents have a decisive edge over newcomers when it comes to proving their intent to return, arguably a sensible and widely-accepted result,<sup>312</sup> but one that nonetheless rewards long-time residents more consistently than other applicants.

For example, consider the case of Ms. C., who had a twenty-year history in Alaska, but who found herself in financial straits in Seattle, desiring to return to Alaska.<sup>313</sup> The PFDD denied Ms. C. and her children their 2008 PFDs, reasoning that without any money, Ms. C.'s intent to return to Alaska and remain there indefinitely was negated.<sup>314</sup> The ALJ disagreed, stating: "[t]he fact that at this point [Ms. C.'s family has] pinned their return to receipt of their dividends does not mean that they lack the requisite intent to return to Alaska to remain indefinitely and make their home."<sup>315</sup> In fact, Ms. C. had visited relatives in Washington state every seven years while always returning to Alaska.<sup>316</sup> But during this trip, five of the C. family's relatives passed away, and the C. family soon exhausted their resources, forcing Ms. C.'s husband and eldest son to take day-labor jobs while the younger children attended school in Spokane.<sup>317</sup> Still, the ALJ ruled that their twenty-year-long ties to Alaska were so strong that, even without PFDs, the C. family would have likely found a way to return to Alaska, where they had "better prospects for regaining their financial footing."<sup>318</sup> Their intent to return to the state was credible, so each family

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<sup>311</sup> *E.g.*, M.D., OAH No. 05-0027-PFD 1, 2 (Alaska Dep't of Revenue Aug. 26, 2005).

<sup>312</sup> *See, e.g.*, *People v. Mertz*, 842 N.E.2d 618, 622, 633, 635 (Ill. 2005) (upholding the death penalty for a defendant convicted of first degree murder after a former FBI special agent testified that "past behavior is the best indicator of future behavior."); *In re Goodwin*, No. 09-05-534 CV, 2006 Tex. App. LEXIS 9185, at \*7, \*13 (Tex. Ct. App. Oct. 26, 2006) (classifying Mr. Goodwin as a sexually violent predator who must undergo civil commitment after an expert "testified that past behavior is the best indicator of future behavior"); *State v. Clayton*, No. 81976, 2003 Ohio App. LEXIS 3066, at \*11 (Ohio Ct. App. June 26, 2003) (recounting psychologist's testimony that "past behavior is the best indicator of future behavior").

<sup>313</sup> *M. C. and her children P., K., S. & H.C. and A.S.*, OAH No. 09-0425-PFD 1, 1-2 (Alaska Dep't of Revenue Dec. 17, 2009).

<sup>314</sup> *Id.* at 3-4.

<sup>315</sup> *Id.* at 4.

<sup>316</sup> *Id.* at 1.

<sup>317</sup> *Id.* at 2.

<sup>318</sup> *Id.* at 4-5. To be fair, this same ALJ, when faced with the application of an Alaskan who played a part in the establishment of the permanent fund dividend itself but who was unallowably absent from the state for over 180 days, reasoned as follows:

In the end, the K.s' case must be decided not by a broad measure of Mr. K.'s extraordinary ties to Alaska, and indeed his participation in the history of the state, or by a weighing of the K.s' love for Alaska, their intent to return to Alaska when they are absent, or their desire to

member received a 2008 PFD.<sup>319</sup>

The following two administrative hearings highlight the contrast between how ALJs treat newcomers to the state as opposed to well-established residents. Ms. K., who was denied a 2008 PFD, established Alaska residency for PFD purposes in 2005.<sup>320</sup> Ms. K. was only gone during 2007, the qualifying year, for less than two weeks, but she then lived in her husband's house in Arizona until September 2008, at which point she returned to Alaska and had "remained in the state since then."<sup>321</sup> But, in response to questions on her PFD application asking whether she intended to return to Alaska to remain indefinitely, she wrote "no," and also indicated she had moved her household goods to Arizona.<sup>322</sup> The ALJ took these responses at face value and denied Ms. K. a 2008 PFD despite precedent holding that an actual return to the state trumps an earlier shaky intent to do so<sup>323</sup> and despite the widespread practice of reforming these mistakenly answered questions that ALJs have characterized as confusing.<sup>324</sup>

By contrast Mr. W., who received his contested 2007 PFD, was a long-time Alaska resident who purchased a home outside of Fairbanks in 1980.<sup>325</sup> Mr. W. was raising two daughters by himself and found it necessary to take a temporary construction job in San Diego from October 2003 to February 2005.<sup>326</sup> When Mr. W.'s eldest daughter decided to move closer to her father's Alaska home after she graduated high school, he resolved to return to Alaska permanently, regardless of the poorer job

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continue participating in the affairs of the state. Ultimately, it comes down to a mere counting of days on a calendar, and a routine and dispassionate application of rules to the reasons the applicants happened to be absent for certain numbers of days during the qualifying year.

L. & P. K., OAH No. 09-0067-PFD 1, 1, 3 (Alaska Dep't of Revenue Sept. 3, 2009).

<sup>319</sup> M. C. and her children P., K., S. & H.C. and A.S., OAH No. 09-0425-PFD at 5. Ms. C and her five children each received \$3,269, meaning that together they received \$19,614. See Eric Christopher Adam, *By the numbers: Alaska Permanent Fund Dividend*, ALASKADISPATCH (Sept. 18, 2012), <http://www.alaskadispatch.com/article/numbers-alaska-permanent-fund-dividend>; see also L.M., OAH No. 10-0065-PFD 1, 1, 3-5 (Alaska Dep't of Revenue Apr. 16, 2010) (granting 2009 PFDs to Ms. M., a long-time Alaska resident and mother of 4, who moved to Idaho to accompany her ineligible military spouse because her absence was less than 180 days and in part because the family planned to use their 2009 PFDs "to return to Alaska while Mr. M. was overseas."). But see M.D., OAH No. 05-0027-PFD 1, 1-3 (Alaska Dep't of Revenue Aug. 26, 2005) (denying PFD to applicant who spent his last penny to visit his dying father, who actually recovered to good health, because the applicant "lack[ed] the means to return to the state and [was] unlikely to be able to afford a return trip any time in the near future.").

<sup>320</sup> C. M. K. and minor child M., OAH No. 09-0418-PFD 1, 1 (Alaska Dep't of Revenue Feb. 10, 2010).

<sup>321</sup> *Id.* at 1-2.

<sup>322</sup> *Id.* at 2.

<sup>323</sup> *Id.* at 3; see also M & A.R., OAH No. 06-0228-PFD 1, 3 (Alaska Dep't of Revenue Sept. 22, 2006) (stating that "[i]t is plain to see, however, that the R.s have in fact already returned to Alaska to remain indefinitely and make their home, making conjecture about the likelihood of such a return an unproductive exercise."); see also discussion of administrative hearings *supra* notes 175, 198-203 and accompanying text.

<sup>324</sup> See generally E. M. T., OAH No. 09-0581-PFD (Alaska Dep't of Revenue Feb. 3, 2010).

<sup>325</sup> C.W., OAH No. 09-0430-PFD 1, 1 (Alaska Dep't of Revenue Dec. 17, 2009).

<sup>326</sup> *Id.*

prospects.<sup>327</sup> He returned in the spring of 2005, but left again for California later that summer to gather his belongings, returning in the spring of 2006, the qualifying year, though he left again briefly at the end of that year to drive his truck from San Diego to his parents' home in Seattle.<sup>328</sup> Although the PFDD contended that Mr. W.'s residency was in limbo throughout 2006, and that he had not done enough to establish himself as an Alaskan resident for PFD purposes, the ALJ ruled that Mr. W. had re-established his Alaskan residency back in 2005, stating: "in light of the fact that he owned a home in Alaska at all times that he kept partially vacant for his eventual return to the state, Mr. W. needed to do less than most people to quickly reestablish himself as an Alaskan."<sup>329</sup> Ms. K., like Mr. W., also moved back to Alaska by the time of the hearing,<sup>330</sup> making it difficult to escape the conclusion that the difference between the two outcomes boils down to Mr. W.'s long history within the state compared to Ms. K.'s status as a newcomer.<sup>331</sup>

## 2. Eligibility should require an Actual Return to Alaska – the Super-Dividend

As the allowable absences statute provides, one may be away from Alaska more often than not while receiving an education, serving the armed forces, receiving continuous medical treatment, looking after a terminally ill, out of state family member, or serving as a member of Congress.<sup>332</sup> Each of these absences allows an Alaska resident to spend the bulk of her time outside of the state while still receiving an annual PFD so long as she intends to return to Alaska to remain indefinitely and so long as she does not evince a similar intent with respect to another state.<sup>333</sup> The PFDs will continue to roll in until the fifth year of the resident's absence, at which point she faces the thirty-days-in-five-years presumption detailed above.<sup>334</sup> So long as she overcomes this presumption,<sup>335</sup> she may continue to receive PFDs, perhaps indefinitely, while remaining allowably absent outside of Alaska, subject only to the discretion of the PFDD or an ALJ.<sup>336</sup> The ten-

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<sup>327</sup> *Id.* at 2.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 3–4.

<sup>330</sup> C. M. K. and minor child M., OAH No. 09-0418-PFD 1, 2 (Alaska Dep't of Revenue Feb. 10, 2010).

<sup>331</sup> Not all newcomers encounter such a straightforward application of the law. For instance, Ms. B, who arrived in Alaska in 2001, was awarded a 2004 PFD even though she left the state to accompany her husband to a military base overseas only three months after filing her application. J.B., OAH No. 05-0318-PFD 1, 1 (Alaska Dep't of Revenue Nov. 28, 2005). Although her decision to join her husband so soon after filing made for "a suspicious set of circumstances," the ALJ was persuaded by a letter from Ms. B's employer testifying to her resolve to remain in Alaska indefinitely at the time she filed her application. *Id.* at 3.

<sup>332</sup> ALASKA STAT. § 42.23.008(a) (2014).

<sup>333</sup> *See id.*; ALASKA ADMIN. CODE tit. 15, § 23.143 (2013).

<sup>334</sup> *See supra* Section III.A.

<sup>335</sup> *See* ALASKA STAT. § 43.23.008(d)-(e) (2014).

<sup>336</sup> *Id.* (failing to establish a limit for applicants who have overcome the thirty-days-in-five-years presumption).

year final limit, which required an applicant to have been absent from Alaska for 180 days or fewer during her eleventh qualifying year to receive her PFD, has been repealed.<sup>337</sup>

Allowing Alaska residents to collect dividends while absent seems to utterly contradict one of the core governmental objectives around which the whole dividend program was constructed: “to encourage people to stay in Alaska.”<sup>338</sup> If this is the benchmark by which to measure the success of the PFD program, then it is safe to say that, either Alaska’s unique location and economy make it impossible to foster a stable resident population, or else the PFD program has failed miserably. “Alaska has one of the highest rates of population turnover in the nation – there are always large numbers of people moving in and out, regardless of whether the overall population is growing or shrinking.”<sup>339</sup> In fact, the only states with a smaller percentage of citizens born in state are Arizona, Florida, and Nevada.<sup>340</sup>

Because a stable, permanent population in turn leads to the retention of Alaskan wealth within Alaska’s communities,<sup>341</sup> it makes little sense to reward long-absent Alaska residents with a PFD meant to entice them to remain in Alaska. Instead, a resident allowably absent from the state for more than a year should have her PFDs held in a PFDD-administered escrow fund. Once she returns from out of state and re-establishes eligibility under the same processes with which any newcomer to the state must comply,<sup>342</sup> including at least six months spent in Alaska,<sup>343</sup> she would then be entitled to a super-dividend comprised of her prior years’ PFDs. A resident’s ten-year absence from the state, like the bar that once existed

<sup>337</sup> ALASKA STAT. § 42.23.008(c) (2007), *repealed by* H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013).

<sup>338</sup> *Ross v. State*, 292 P.3d 906, 911 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013).

<sup>339</sup> Eddie Hunsinger et al., *Alaska’s Highly Migratory Population: Annual move to, from, and across the state*, ALASKA ECON. TRENDS 1, 4 (Apr. 2012), <http://laborstats.alaska.gov/trends/apr12art1.pdf>.

<sup>340</sup> *Id.* at 8.

<sup>341</sup> See *supra* text accompanying note 120. One Alaskan economist classifies “tourism . . . seafood, mining, petroleum, and timber” as Alaska’s “‘enclave’ industries,” meaning that “a significant share of the workforce consists of nonresidents” and that the industry operates in a rural area, oftentimes seasonally. Scott Goldsmith, *Structural Analysis of the Alaska Economy: What are the Drivers?* 1, 67 (Oct. 2008), <http://www.iser.uaa.alaska.edu/Publications/structureAKEconomy.pdf>. As a result, “[m]ost of the inputs required by these businesses are not purchased locally within Alaska but rather imported directly and bypass the local economies within which they seasonally operate.” *Id.* People who come to Alaska to work and then leave “spend only a part of their earnings within the state economy and, thus, make a limited contribution to the overall size of the economy.” *Id.* at 123–24. As an example, nonresident oil workers are “concentrated in camps on the North Slope to which [they] commute . . . from outside the state.” *Id.* at 25. Therefore, isolated as they are, the money they make “does not contribute significantly to the Alaska economy.” *Id.* But see *Residency of Alaska Workers: 2012*, ALASKA DEP’T OF LABOR & WORKFORCE DEV. 1, 25 (Jan. 2014), <http://laborstats.alaska.gov/reshire/nonres.pdf> (stating that “[n]early 419,000 people worked in Alaska at some point in 2012, and about one-fifth of them weren’t residents. The nonresident workforce has a significant effect on Alaska’s economy, but determining whether it’s negative or positive is a complicated economic question the available data can’t answer.”).

<sup>342</sup> See ALASKA STAT. § 43.23.005 (2014); ALASKA ADMIN. CODE tit. 15, § 23.143 (2013); Heller v. Dep’t of Revenue, 314 P.3d 69, 74–75 (Alaska 2013); see also *supra* Section II.B.

<sup>343</sup> ALASKA STAT. § 43.23.008(b) (2014); ALASKA ADMIN. CODE tit. 15 § 23.143(c) (2013).



under Alaska Statute section 43.23.008(c) (2007),<sup>344</sup> would cut off her ability to recover withheld dividends, which would then revert back into the general PFD fund. The super-dividend would work in tandem with the modified thirty-days-in-five-years presumption set forth above: eligibility is preserved only if the applicant has returned to the state for at least thirty days during her five-year absence unless unavoidable circumstances are shown.<sup>345</sup> However, for purposes of the super-dividend, the tricky issues of whether the applicant intended to return to Alaska would not factor into the analysis until the applicant actually does or does not return to Alaska, as the case may be, thereby proving or disproving her erstwhile subjective intent to do so.<sup>346</sup>

Precedent from administrative hearings already supports the idea that actually returning to Alaska nips an argument of ineligibility in the bud. For instance, Mr. T. was awarded a PFD because “Mr. T. did move back to Alaska in 2004. This is strong evidence, of his intent to return during his absence.”<sup>347</sup> However, is it correct to assert that an action which occurred post-application can be evidence of an applicant’s state of mind as of the time he filed for his PFD? It would be more proper to say that the future action confirmed the applicant’s prior intent, yet ALJs have no framework through which to analyze an actual return to Alaska and must instead cram such evidence awkwardly into the catch-all provision, “any other factors demonstrating the individual’s intent.”<sup>348</sup> Contemplating this dilemma, one ALJ creatively employed a meteorological metaphor:

It is plain to see, however, that the R.s have in fact already returned to Alaska to remain indefinitely and make their home, making conjecture about the likelihood of such a return an unproductive exercise. The rule incorrectly projects the unlikelihood of an occurrence that has already occurred. The result is akin to using the best available scientific methods to predict rain for yesterday, when everybody remembers a clear sunny day.<sup>349</sup>

A super-dividend escrow fund would eliminate the need for ALJs to divine something as nebulous and corrigible as an individual’s intent to

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<sup>344</sup> ALASKA STAT. § 43.23.008(c) (2007), *repealed by* H.B. 52, 28<sup>th</sup> Leg., Reg. Sess. (Alaska 2013).

<sup>345</sup> *See supra* Section III.A.1.

<sup>346</sup> *See* *Heller v. Dep’t of Revenue*, 314 P.3d 69, 79 n.41 (Alaska 2013) (recognizing that “an applicant’s intent to return can be accurately assessed only in hindsight in many cases.”).

<sup>347</sup> R.T. and his child C.T., OAH No. 05-0409-PFD 1, 3 (Alaska Dep’t of Revenue Nov. 18, 2005); *see also supra* notes 172–75 and accompanying text.

<sup>348</sup> ALASKA ADMIN. CODE tit. 15, § 23.163(g)(7) (2010) (ending the list of factors to be considered when rebutting the thirty-days-in-five-years presumption).

<sup>349</sup> *See* *M & A.R.*, OAH No. 06-0228-PFD 1, 3–4 (Alaska Dep’t of Revenue Aug. 25, 2006) (holding the thirty-days-in-five-years presumption rebutted even though the seven factors pointed toward ineligibility because of the applicant’s actual return to Alaska); *see also* discussion of this administrative hearing *supra* notes 196–201.

return to Alaska and remain indefinitely. No longer would ALJs weigh past ties to Alaska to determine the probability of an applicant returning to Alaska; rather, they would apply the same test to all Alaskans – one’s equity as a long-time Alaskan would all but drop out of the analysis. Soldiers and students would bear the brunt of this proposed rule change; however, in deciding whether to return to Alaska, the super-dividend, which could combine ten dividends for an approximate total of \$15,000 per applicant,<sup>350</sup> would provide a huge incentive: soldiers would have start-up money to finance the acquisition of an Alaskan home, and students would have cash on hand to offset the cost of educational loans. Many bright, young Alaskans who pursued out of state educations would think twice before passing up the super-dividend to start a career elsewhere.

But the super-dividend escrow account would not be without problems. Alaskans would invariably argue – just as the Zobels did over three decades ago – that the super-dividend unconstitutionally creates two classes of Alaska residents, those within the state who, more often than not, receive annual PFDs and those outside of it who do not, in contravention of the Fourteenth Amendment’s guarantee of equal protection.<sup>351</sup> Absentee Alaskans may also argue that their constitutionally recognized right to travel has been violated.<sup>352</sup> However, the current PFD system, continually upheld by the Alaska Supreme Court,<sup>353</sup> already creates two classes of Alaska residents: the eligible permanent residents and the ineligible and, for want of a better term, nonpermanent residents. The super-dividend would merely make this distinction more congruous with one of the legitimate state interests purportedly furthered by the PFD program: stemming population turnover.<sup>354</sup>

The well-established constitutional analysis articulated by the Alaska Supreme Court when faced with an equal protection claim that a PFD was unlawfully withheld proceeds as follows: (1) “A dividend is merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis;”<sup>355</sup> (2) “Equal protection claims concerning their denial are reviewed under minimum scrutiny;”<sup>356</sup> (3)

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<sup>350</sup> See PFD PAYMENT SUMMARY, *supra* note 157 (showing PFDs as low as \$331.29 in 1984 and as high as \$2,069 in 2008).

<sup>351</sup> See discussion *supra* Section II.B.

<sup>352</sup> Such claims have been unanimously denied by Alaska courts, which have found that under the right to travel analysis, “the State’s purpose in awarding PFDs only to permanent residents outweighs the minor infringement on the [challenger’s] choice of seasonal residences.” *Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 734 n.13 (Alaska 1995). Furthermore, “[e]ligibility for PFDs includes meeting a definition of residency tied to physical contact to the state, which may be more difficult to meet than the definition of residency for other purposes.” *Id.* at 733 n.12.

<sup>353</sup> See discussion *supra* Section II.D.

<sup>354</sup> *Ross v. State*, 292 P.3d 906, 910 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013).

<sup>355</sup> *State v. Anthony*, 810 P.2d 155, 158 (Alaska 1991).

<sup>356</sup> *Church v. Dep’t of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999).

“Our review is therefore limited to considering whether this regulation was designed to achieve a legitimate governmental objective and whether it bears a fair and substantial relationship to accomplishing that objective;”<sup>357</sup> and (4) The super-dividend escrow account “bears a fair and substantial relationship to the goal[] of limiting the dividend to permanent Alaska residents.”<sup>358</sup> The link between the third and fourth step would note that stemming population turnover is a legitimate state objective, which is then subsumed, like the other legitimate state objectives, into the larger rubric of limiting the dividend to permanent Alaska residents, an oft-cited rationale for the PFD program.<sup>359</sup>

It may also be argued that the super-dividend would encourage fraud. Long-absent Alaskans, seeking a windfall, might return to the state just long enough to establish eligibility, claim the super-dividend, and then move back to their out of state residences. It would be hard to fashion a rule to guard against this scenario without running up against more constitutional problems. Perhaps those eligible for super-dividends could be required to re-establish residency in Alaska for two years before receiving their dividends, but courts may find that this restriction does not rationally relate to the state’s objective of thwarting fraud. Alternatively, the PFDD could condition the super-dividend on the recipient’s promise to remain PFD-eligible for a certain period of time, but this provision too might prove unworkable. The super-dividend could also be made to augment each successive PFD to which the applicant is entitled, with the proviso that, so long as the applicant remains in the state for three or four or five years before leaving, the whole super-dividend will be disbursed. But this solution may impose a costly administrative burden on the PFDD.

In the end, Alaskans may just have to trust that their fellow Alaskans who seek super-dividends will have good intentions while realizing that the current penalty for PFD fraud – the defrauder “may have to repay all the Permanent Fund Dividends ever received, and forfeit the right

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<sup>357</sup> Harrod v. State, 255 P.3d 991, 1001 (Alaska 2011) (stating that “[w]e have reviewed and upheld the purpose and means served by PFD eligibility schemes in numerous cases.”).

<sup>358</sup> Ross, 292 P.3d at 913, *superseded by statute*, ALASKA STAT. § 43.23.008 (2013).

<sup>359</sup> See, e.g., Church, 973 P.2d at 1130 (noting that “[t]he objective of the challenged statutes and regulations is to ensure that only permanent residents receive dividends.”); Brodigan v. Alaska Dep’t of Revenue, 900 P.2d 728, 732 (Alaska 1995) (stating that “the Department must be able to reasonably define statutory terms to insure that the permanent fund is protected for the legitimate claims of permanent residents.”); Dep’t of Revenue, Permanent Fund Dividend Div. v. Cosio, 858 P.2d 621, 628 (Alaska 1993) (noting that “permanent fund dividends should encourage persons to maintain their residence in Alaska and to reduce population turnover . . . . To this end, the legislature has specifically limited dividend eligibility to permanent residents of the state.”) (internal quotation marks deleted); see also McGreal, *supra* note 79, at 274 (describing the Alaska Supreme Court’s equal protection analysis as “incomplete, conclusory, or contradictory” and reasoning that it may serve only as a guise under which the court “register[s] its agreement or disagreement with particular statutes.”). The court clearly agrees with the PFD statutes.

to all future dividends” – already serves as a powerful deterrent.<sup>360</sup> Evidence that an applicant, before applying for a super-dividend, intended to leave the state permanently upon receiving the super-dividend would establish fraud.

Although this Comment advocates that a more compelling state interest for the PFD scheme be articulated because the ones the state now recites barely relate to the classifications it makes, it is nonetheless well within the bounds of Alaska Supreme Court precedent to surmise that the proposed super-dividend escrow account would withstand an equal protection challenge.<sup>361</sup>

#### IV. PROPOSING A NEW LEGITIMATE STATE INTEREST FOR THE PFD PROGRAM

Much of the confusion in the law of PFD eligibility can be traced to the goals that the PFD program purports to serve – (1) equitably distributing the state’s wealth to Alaskans, (2) stemming population turnover by encouraging people to stay in Alaska, and (3) furthering democratic involvement in the fund – all of which were also goals sought to be furthered by the original and unconstitutional PFD scheme.<sup>362</sup> But do these goals logically explain the workings of the PFD program in a clear and satisfactory manner?

Put yourself in the shoes of someone like Mr. and Mrs. Brodigan, who moved to Alaska in 1962, but were denied their 1990 PFDs because they traveled to the lower forty-eight on doctor’s orders to take in the warmer, more therapeutic climate.<sup>363</sup> You apply for your dividend, note on the form that your absence was for a legitimate medical purpose, and then find out that your application has been denied. The PFDD commissioner offers to explain the reason for your denial in terms of the goals of the PFD program. He tells you that Alaska’s vast oil wealth must be equitably distributed to Alaskans and that, at least this year, you were not Alaskan enough to qualify. You become angry and perhaps threaten to bring suit –

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<sup>360</sup> *Fraud*, STATE OF ALASKA, DEP’T OF REVENUE, PERMANENT FUND DIVIDEND DIV., <http://www.pfd.state.ak.us/Fraud/index> (last visited Nov. 26, 2014); *see also* ALASKA STAT. § 43.23.035(a) (2007).

<sup>361</sup> At least according to Alaska courts, any challenge that cannot survive its equal protection analysis would necessarily break apart against a federal constitutional challenge. *Malabed v. N. Slope Borough*, 70 P.3d 416, 420 (Alaska 2003) (noting that “[w]e have long recognized that the Alaska Constitution’s equal protection clause affords greater protection to individual rights than the United States Constitution’s Fourteenth Amendment.”).

<sup>362</sup> *Zobel v. Williams*, 457 U.S. 55, 61 & n.7 (1982) (citing 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982)).

<sup>363</sup> *See Brodigan v. Alaska Dep’t of Revenue*, 900 P.2d 728, 729, 735 (Alaska 1995); *see also* discussion of this case *supra* Section II.D.2.

after all, you have been in Alaska since before Sarah Palin was born.<sup>364</sup> equity demands you be paid a dividend. The commissioner then tells you that the PFD program works to stem the state's population turnover; you remember reading somewhere that Alaska's population turnover is one of the highest in the nation<sup>365</sup> and become annoyed. Then the commissioner tells you that the PFD program is meant to encourage Alaskans to become more involved in its management. You look at him blankly and think that the only time citizens become involved is when the legislature threatens to use PFD funds for anything other than a cash handout.<sup>366</sup> Would it not make more sense to justify the PFD program on the equal protection grounds that it makes eligibility determinations in order to retain Alaskan wealth within the local economies of Alaska?

An average Alaskan – even a long-time resident like Mr. Brodigan – may have found the denial of a PFD easier to comprehend when framed in terms of Alaska's economy. Many of the suits contesting the denial of a PFD are not about the money – after all, PFDs average only about \$1,100<sup>367</sup> – but rather, because the PFD has become a proxy for political belonging, these suits grow out of a sense of indignation at not being adjudged Alaskan enough. The next time a PFD case makes it into Alaska's court system, the Department of Revenue should articulate an additional goal for the PFD program – to keep Alaskan money in Alaska – and thereby better align eligibility classifications with the practical effects of the program itself. By allowing the nexus between the program's goals and its implementation to turn on money rather than on a person's actions, the PFDD would make it easier for Alaskans to understand why they were denied a dividend without riling their sense of state identity.

#### A. *The Current Legitimate State Interests served by the PFD program*

The first interest that the PFD program purports to serve merely provides a convenient cover under which courts judging the program's constitutionality are free to employ circular logic. This purpose is: “to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans.”<sup>368</sup>

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<sup>364</sup> See *Sarah Palin's Biography*, PROJECT VOTE SMART, <http://votesmart.org/candidate/biography/27200/sarah-palin> (last visited Nov. 26, 2014) (noting that Alaska's former governor and one-time vice presidential nominee was born in 1964).

<sup>365</sup> See Hunsinger, *supra* note 335, at 4.

<sup>366</sup> Associated Press, *War of words heats up between Alaska Dems, GOP as election nears*, FAIRBANKS DAILY NEWS-MINER (Oct. 30, 2012, 5:40 PM), [http://www.newsminer.com/article\\_54b9dbec-f5b8-5149-a54a-1b410bb0d3b5.html](http://www.newsminer.com/article_54b9dbec-f5b8-5149-a54a-1b410bb0d3b5.html) (stating that “‘I don't know what he meant, but if I was a normal person listening to that (news conference), I'd say, ‘Sounds like to me he wants to spend my permanent fund,’ . . . .”).

<sup>367</sup> See PFD PAYMENT SUMMARY, *supra* note 157.

<sup>368</sup> *Zobel v. Williams*, 457 U.S. 55, 61 n.7 (1982) (quoting 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982)).

This purpose makes it clear that any legislative attempt to give *all* the state's oil wealth to its citizens would not rationally relate back to this purpose – neither would doling out some of the state's wealth to Texans. This much is clear, but the stated purpose simply begs the question of who the people of Alaska are, which has allowed the legislature to create the concept of the permanent resident, someone who may receive PFDs yet who is distinct from an Alaska resident who may or may not receive a PFD but can, for instance, cast a vote in Alaska or enjoy the other incidences of state citizenship.<sup>369</sup> This purpose stood behind the first unconstitutional PFD program, which disproportionately rewarded long-time Alaskans, just as it stands behind the current program.<sup>370</sup> The way this purpose is phrased has lulled Alaska courts into accepting whatever result the program achieves as necessarily synonymous with its purpose: “any law can be defined as intended to accomplish what it actually accomplishes.”<sup>371</sup> The courts and the legislature have failed to satisfactorily answer the relevant equal protection question: “why one group has a greater equitable claim over another.”<sup>372</sup> To answer this question some entity – a court, the legislature, the PFDD – needs to articulate a rational state interest at work in allocating PFDs to certain Alaska residents but not others. And a legitimate state interest cannot discriminate, no matter how convolutedly it may do so through interlocking and successive statutory and administrative reiterations of the same self-favoring sentiment that so offended the *Zobel* Court.<sup>373</sup>

The second legitimate state interest that the PFDD asserts its eligibility scheme furthers is the prevention of population turnover in order to cultivate a stable Alaskan citizenry. However, there is a fundamental tension between this stated objective and the constitutional right to travel. In theory, the Alaska Supreme Court recognizes that the right to travel merits heightened scrutiny in an equal protection analysis,<sup>374</sup> but in practice, owing to Alaska's unique sliding scale approach to equal protection,<sup>375</sup> the

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<sup>369</sup> See *infra* note 383.

<sup>370</sup> See *Ross v. State*, 292 P.3d 906, 910 (Alaska 2012), *superseded by statute*, ALASKA STAT. § 43.23.008 (2013), (quoting *Zobel v. Williams*, 457 U.S. at 61 n.7 (quoting 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982))) (listing PFD's purposes); *Church v. Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999) (citing *Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 627 (Alaska 1993)) (listing same purposes).

<sup>371</sup> *McGreal*, *supra* note 79, at 244–45.

<sup>372</sup> *Id.* at 244.

<sup>373</sup> See *supra* discussion at Section II.A.; see also discussion of Mr. Paschall's testimony, *supra* Section III.A.2.

<sup>374</sup> *State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983) (noting that “[a]s legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale.”).

<sup>375</sup> See *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980) (holding that “[W]e will no longer regard all durational residency requirements as automatically triggering strict scrutiny and requiring a showing that such a classification is absolutely necessary to promote a compelling state interest. Instead, we will balance the nature and extent of the infringement on [the right to travel] caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.”), *rev'd* 457 U.S. 55 (1982); see also *supra* note 79.

right to travel in the context of PFD eligibility has always been treated under minimal scrutiny.<sup>376</sup> Even though ample precedent supports the proposition that the right to travel is not violated by the PFD's eligibility requirements,<sup>377</sup> it makes little sense to continue framing one of the PFD program's main goals in direct opposition to the right to travel, thereby leaving it all the more open to constitutional challenges.

Finally, the third purported state interest served by the PFD program – “to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund”<sup>378</sup> – has only been discussed at length in one Alaska case.<sup>379</sup> The *Cosio* Court reasoned that “[t]he dividend program was intended to create a constituency in the voting public which would favor reinvestment of permanent fund earnings rather than using such earnings to finance new government programs or to defray the expenses of existing ones.”<sup>380</sup> It was imagined that such a constituency would always favor a direct disbursement of dividend funds rather than allowing PFDs to subsidize the operation of the state government.<sup>381</sup> However, simply giving certain residents a sum of money each year does not mean that those residents will then always vote to continue receiving PFDs. Some of the constituency may instead vote to use the PFD monies to fund a proposed state-wide early education initiative, for instance – yet other voters might see fit to change the dividend payout formula so that more money remains available in the future when oil reserves begin to dwindle.<sup>382</sup> If this is the program's purpose, then it is over-inclusive in that it assumes all PFD-eligible voters want to continue receiving PFDs rather than spending or saving the money. The current PFD program, if meant to implement this third state interest, is also under-inclusive: even Alaskans who are ineligible to receive dividends may cast a vote that bears on the future of the PFD program.<sup>383</sup>

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<sup>376</sup> See *Heller v. Dep't of Revenue*, 314 P.3d 69, 83 (Alaska 2013).

<sup>377</sup> See *Schikora v. State*, 7 P.3d 938, 945 (Alaska 2000) (citing *Church v. Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999) (stating that “Schikora's claims that the PFD eligibility regulations ‘prohibit’ or ‘have a chilling effect’ on interstate travel are entirely conclusory and unsubstantiated in the record. In contrast, the benefits of accurately distributing PFDs to bona fide residents are obvious and are supported by precedent.”)).

<sup>378</sup> *Ross v. State*, 292 P.3d 906, 910 (Alaska 2012) (quoting *Zobel v. Williams*, 457 U.S. 55, 61 n.7 (1982) (quoting 1980 Alaska Sess. Laws, ch. 21, § 1(b) (repealed 1982))).

<sup>379</sup> See *Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 628–29 (Alaska 1993).

<sup>380</sup> *Id.* at 628 (citing *Williams v. Zobel*, 619 P.2d 448, 462 (Alaska 1980), *rev'd* 457 U.S. 55 (1982)).

<sup>381</sup> *Id.*

<sup>382</sup> See generally Scott Goldsmith, *Maximum Sustainable Yield: FY 2015 Update*, INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, UNIVERSITY OF ALASKA ANCHORAGE 1, 9 & n.vii (Jan. 2014), [http://www.iser.uaa.alaska.edu/Publications/webnote/2014\\_01-WebNote16-MaximumSustainableYield.pdf](http://www.iser.uaa.alaska.edu/Publications/webnote/2014_01-WebNote16-MaximumSustainableYield.pdf).

<sup>383</sup> Compare ALASKA STAT. § 15.05.010 (2007) (stating that “[a] person may vote at any election who . . . has been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election.”) with ALASKA ADMIN. CODE tit. 15 § 23.143(c) (2013) (stating that “[t]he department will not consider external indicators . . . [such as voter registration, proof of home

Although the current PFD program has never been struck down when faced with an equal protection challenge, or, for that matter, any number of constitutional challenges,<sup>384</sup> that does not necessarily mean that the legitimate state interests behind the PFD program have a fair and substantial relation to the eligibility classifications it implements. The program may be enshrined in protectionist precedent simply because of its popularity.<sup>385</sup> For the sake of the constitutionality of its future, a new legitimate state interest that more accurately represents the actual effects of the program should be announced, namely: the furtherance of Alaska's economic health for the general welfare of all Alaskans.

### *B. The In-state Economy as a Legitimate State Interest*

Numerous other jurisdictions, state and federal, allow a state's interest in the regulation of its own economic affairs to become a legitimate state interest under minimal equal protection scrutiny. This Section will detail those rulings in the hopes of illustrating how Alaska could better represent its PFD program. But first off, Alaska has already recognized this type of economic protectionism as a legitimate state interest.<sup>386</sup> In *Gallant*, a state worker who retired in Hawaii, and therefore was no longer eligible for the increased "cost-of-living allowance" paid to state retirees who remain in Alaska (a ten percent increase), brought an equal protection challenge against the state's retirement system.<sup>387</sup> The Alaska Supreme Court, overturning the lower court, found that the legislature acted rationally in desiring "retired public employees to remain in the state" – the court noted that these retirees:

[M]ake minimal demands on such big ticket government items as public education and law enforcement, they have

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ownership, and the like] established *less than six months* before December 31 of the qualifying year as evidence of the establishment of Alaska residency in time to qualify for the current year dividend.") (emphasis added) and ALASKA STAT. § 43.23.008(b) (2014) (noting that "[a]n individual may not claim . . . [certain] allowable absence[s] . . . unless the individual was a resident of the state for at least six consecutive months immediately before leaving the state."). See also *Heller v. Dep't of Revenue*, 314 P.3d 69, 87-88 (Alaska 2013) (Winfrey, J., dissenting) (arguing that hinging the availability of allowable absences on a six month residency requirement "treats new residents – those who have been Alaska residents for less than six months – differently from established residents" and therefore violates the equal protection clause of the United States Constitution).

<sup>384</sup> See *supra* Section II.D.

<sup>385</sup> See Scott Goldsmith, *The Alaska Permanent Fund Dividend: A Case Study in Implementation of a Basic Income Guarantee* 1, 6 (July 2010), [http://www.iser.uaa.alaska.edu/Publications/bien\\_xiii\\_ak\\_pfd\\_lessons.pdf](http://www.iser.uaa.alaska.edu/Publications/bien_xiii_ak_pfd_lessons.pdf). "The annual distribution soon became the most popular program of state government. Although the Permanent Fund balance, which ultimately determines the size of the PFD, is constitutionally protected, there is no such guarantee for the annual distribution. The legislature has the authority to change the formula at any time and could, by law, eliminate it entirely. Its only guarantee is its political popularity. No legislator would suggest a change in the formula that would reduce its amount or the share of Permanent Fund earnings allocated to the dividend for fear of losing the next and all subsequent elections." *Id.*

<sup>386</sup> See *Pub. Emps. Ret. Sys. v. Gallant*, 153 P.3d 346, 348, 354-55 (Alaska 2007).

<sup>387</sup> *Id.* at 348.



generally comprehensive health insurance, and they often positively contribute to society by volunteering in charitable and civic endeavors. *Further, retirees contribute to the economy when they remain in the state, spending the money that they have earned during their working lives.*<sup>388</sup>

Other courts have come to similar conclusions under widely divergent sets of facts. For instance, in an Ohio case, three corporations protested a statute that created a “joint economic development district” (“JEDD”) and that required them to pay a special income tax to offset the JEDD’s operation.<sup>389</sup> The corporations brought suit against the City of Akron for its role in collecting the special income tax, arguing that the tax violated state and federal guarantees of equal protection.<sup>390</sup> The Court looked to the purpose of the JEDD statute – “to facilitate economic development to create or preserve jobs and employment opportunities, and to improve the economic welfare of the people in the state” – and found it to be a legitimate “goal with which any governmental entity should be concerned.”<sup>391</sup>

In a Wyoming case, a tractor-trailer driver brought suit in negligence against the state highway department after it failed to repaint the white stripe demarcating the shoulder on a recently resurfaced highway, an omission which allegedly caused the driver to leave the road and jackknife his trailer.<sup>392</sup> The lower court found that the claim was barred by Wyoming’s sovereign immunity statute, but the truck driver appealed, arguing he was denied the equal protection afforded under Wyoming’s constitution which, among other guarantees, states that “[n]o law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.”<sup>393</sup> The Court reasoned that no fundamental right or suspect classification was at issue and therefore applied minimal scrutiny, under which the questioned statute “need only bear a reasonable relation to the legislature’s *legitimate interest in preserving the economic and social stability* of the state.”<sup>394</sup> The Court found no equal protection

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<sup>388</sup> *Id.* at 352–53 (emphasis added).

<sup>389</sup> *Desenco, Inc. v. City of Akron*, 706 N.E.2d 323, 536–37 (1999).

<sup>390</sup> *Id.* at 543–44. The corporations argued that the JEDD tax unconstitutionally distinguished between those in the township who had voted for the creation of the JEDD and those in the township (the corporations) who generated the revenue susceptible to the new tax without having voted to create the JEDD. *Id.* at 544. The court was quick to point out that the claim had no merit: corporations cannot vote. *Id.*

<sup>391</sup> *Id.*; see also *Nordlinger v. Hahn*, 505 U.S. 1, 6, 12 (1992) (holding that a property owner who protested California’s property tax assessment system because it capped rates for tenured homeowners while using recent appraisals to calculate rates for new home purchasers was not denied equal protection because “the State has a legitimate interest in local neighborhood preservation, continuity, and stability.”).

<sup>392</sup> *White v. State*, 784 P.2d 1313, 1314 (Wyo. 1989).

<sup>393</sup> *Id.* at 1314, 1317–18 (quoting WYO. CONST. art. 10, § 4).

<sup>394</sup> *Id.* at 1316 (emphasis added).

violation because the state legislature acted reasonably in passing the sovereign immunity statute by weighing the toll of such litigation against other pressing governmental concerns.<sup>395</sup>

Consider a New York case that upheld a statute, which drew distinctions based on one's state of residence for purposes of employment as a New York City firefighter.<sup>396</sup> Initially, residency requirements for that job mandated that the firefighter live in the borough he served, though the legislature added an exception so that a firefighter could reside within the city itself or any of its six outlying counties while remaining eligible for employment.<sup>397</sup> As it became apparent that the residency laws were routinely flaunted, the legislature enacted stricter standards; however, these standards proved too draconian, and the waiver at issue in this case was enacted, which the court explained as follows: "Violators of the residency requirements . . . are permitted to retain their current residences indefinitely if, and only if, they reside in this State. Similarly situated violators of the same statutes who live outside the State are required to leave their homes within one year or else lose their jobs."<sup>398</sup>

Against the out of state firefighters' equal protection challenge, the court applied a rational basis test because public employment was not a fundamental right.<sup>399</sup> Using this test, the court found that deterring absenteeism or tardiness could not be a legitimate state interest: many New Jersey firefighters were closer to their place of work than the New York firefighters,<sup>400</sup> nor could a state interest seeking to foster a sense of community be put forth since the in-state firefighters did not necessarily have to live in the borough they served.<sup>401</sup> However, the court did find an "obvious financial" state interest in requiring that New York City firefighters be state residents:

Public employees who reside in New York are more likely, as a class, to spend their money in New York. Further, public employees who reside in New York are more likely to own real estate here, and so pay property taxes, as well as resident State income tax. For these financial reasons alone, New York may doubtless seek to encourage its employees . . . to reside within the State . . . . *Economic self-interest,*

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<sup>395</sup> *Id.* at 1322; *see also* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (allowing a state to grant "special benefits to an intrastate industry" and stating that, "absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

<sup>396</sup> Winkler v. Spinnato, 134 A.D.2d 66, 67-68 (N.Y. App. Div. 1987), *aff'd*, 72 N.Y.2d 402 (1988), *cert. denied*, 490 U.S. 1005 (1989).

<sup>397</sup> *Id.* at 70.

<sup>398</sup> *Id.* at 72.

<sup>399</sup> *Id.* at 73-74.

<sup>400</sup> *Id.* at 75.

<sup>401</sup> *Id.*

*therefore, is a legitimate State interest which serves to justify the distinction between State residents and out-of-State residents.*<sup>402</sup>

Although the factual circumstances in the above cases vary, it is clear that Alaska could constitutionally articulate a new legitimate state interest – preserving and promoting its own economy – as one of the PFD program’s legitimate interests to which its eligibility classifications bear a fair and rational relationship. Although this step may be unnecessary due to the near sacrosanct status of the PFD program within Alaskan jurisprudence, an articulation of this new state interest would help to correct the disjointed connection between the current legitimate state interests and the laws defining eligibility. And, as this monetary connection gains recognition, those deemed ineligible may be better able to cope knowing that their Alaskan status was not at issue, only their ability to spend their Alaskan money in Alaska. If nothing else, this new state interest would provide a foundation on which to construct empirically driven arguments for the PFD program’s legitimacy, as opposed to the current subjective and conjectural ones.<sup>403</sup>

## V. CONCLUSION

So why all the excitement over a few incongruous administrative hearings and some cursory state constitutional law analysis? The PFD only averages around \$1,100 anyway,<sup>404</sup> and the oil that keeps the payouts coming may dry up by the middle of this century.<sup>405</sup> It is debatable whether the current PFD even buys roundtrip airfare from Anchorage to New York City anymore and perhaps slightly less unremarkable that the current PFD will almost surely buy a one-way ticket to Alaska from just about anywhere in the lower forty-eight.<sup>406</sup>

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<sup>402</sup> *Id.* at 75–76 (emphasis added); *see also* Lartnec Inv. Co. v. Ft. Wayne-Allen Co. Convention & Tourism Auth., 603 F. Supp. 1210, 1226–27 (N.D. Ind. 1985) (finding that a city and county tourism authority could grant a subsidy to one developer as opposed to another without violating federal equal protection rights because “the Authority’s subsidy is rationally related to Indiana’s legitimate interest in promoting local economic development.”); Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass’n, 110 F.3d 547, 555 (8th Cir. 1997) (finding that a state statute designed to limit the coverage of a state insurance company retroactively to state residents only did not offend due process because “[t]he state has a legitimate interest in regulating the insurance industry, *easing the economic burdens of its own residents*, and ensuring the economic life of an association created by its statute to protect its residents.”) (emphasis added); Johnson v. State Hearing Examiner’s Office, 838 P.2d 158, 185 (Wyo. 1992) (holding that “[i]t is apparent that the state has a valid interest in preserving the safety, health, morals, economic and social stability and general welfare of its citizens. The statutes involved here are rationally related to the legitimate state interests and do not deprive appellants of the equal protection of the laws.”).

<sup>403</sup> *See* Goldsmith, *supra* note 8, at 12.

<sup>404</sup> *See* PFD PAYMENT SUMMARY, *supra* note 159.

<sup>405</sup> *See* Scott Goldsmith, *Maximum Sustainable Yield: FY 2014 Update* INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, UNIVERSITY OF ALASKA ANCHORAGE 1, 6–8 (Jan. 2013), [http://www.iser.uaa.alaska.edu/Publications/webnote/2013\\_01\\_03-WebNote14-FY2014MSYupdate.pdf](http://www.iser.uaa.alaska.edu/Publications/webnote/2013_01_03-WebNote14-FY2014MSYupdate.pdf).

<sup>406</sup> *See supra* discussion notes 313–319 (discussing the eligibility of applicants whose intent to return to Alaska hinges on paying for a return trip with their PFDs).

But for Alaskans, the PFD symbolizes much more than its monetary value alone suggests; receiving a PFD means that you have made it in the state, that you now belong in a much more important way than you once did, that the state now values your presence, or it certainly would not make an investment in the possibility of your indefinite residency. In its current form, the PFD program is opaque to the point of tedium, biased toward long-time residents or those with ties to them, and likely survives by its sheer popularity and a sense that we permanent residents deserve what is annually given to us. These attributes infuse the PFD program with emotion. Why else would so many appeal the denial of such a relatively small sum of money? Recovering a wrongly withheld dividend would entitle you to barely enough money to cover your attorney fees, if that.<sup>407</sup> But being told that you are not what you think you are is not a particularly pleasant experience. If Alaskans are to make rational decisions about the PFD program's future, the histrionics have to be engineered out of the system. Condition the eligibility of an Alaskan absent for over a year on her actual return to the state and not on her equity as a long-time Alaska resident. Tell Alaskans that the reason for this change is to protect the economic self-interest of the state in which they claim residency. Implementing more objective criteria for the determination of PFD eligibility will not only better comport with the current goals of the PFD program, but will also allow for calmer, cooler decision-making moving forward.

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<sup>407</sup> Alaska R. Civ. Proc. 82(b)(1) (establishing the amount of attorney's fees prevailing party can recover from the opposing party when the court awards a monetary judgment).