



THE STATE
of **ALASKA**
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The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: *Constitutionality of Alaska Hire*

Dear Governor Dunleavy:

You have asked for a legal opinion on whether section AS 36.10.150 of the State's resident preference law, known as Alaska Hire, is consistent with the United States and Alaska Constitutions. Simply stated, Alaska Hire requires certain private employers to hire a fixed percentage of qualified Alaskans, or face fines or imprisonment.¹ As explained below, I have concluded that Alaska Hire violates both the U.S. and Alaska Constitutions, and that the State should stop enforcing its provisions.

I. Short answer

Alaska Hire violates the U.S. Constitution's Privileges and Immunities Clause² and the Alaska Constitution's Equal Rights, Opportunities, and Protection Clause ("Equal Protection").³ Excluding nonresidents in order to economically benefit residents is not a legitimate state purpose under the federal Privileges and Immunities Clause⁴ or Alaska's

¹ AS 36.10.005-.990; AS 36.10.100(b).

² U.S. Const. art. IV, § 2, cl. 1.

³ Alaska Const. art. I, § 1.

⁴ *Robison v. Francis*, 713 P.2d 259, 266 (Alaska 1986).

Equal Protection Clause.⁵ Both the U.S. Supreme Court and the Alaska Supreme Court have struck down previous versions of Alaska Hire statutes because the State could not provide a legitimate reason justifying discrimination against nonresidents.⁶ Because the purpose of AS 36.10.150 is to economically benefit Alaska residents at the expense of nonresidents—and because it is not sufficiently tailored to the problem it seeks to address—the current version of Alaska Hire is unconstitutional and should not be enforced.

II. History of Alaska Hire laws and treatment by the courts

Since attaining statehood, Alaska has enacted three resident hiring preference laws, all referred to as “Alaska Hire.”⁷ In 1960, the State enacted Alaska Hire for public works contracts (subsequently amended in 1986), and in 1972 the State enacted a hiring preference for contracts that were “a result of” the State’s oil and gas leases.⁸ Despite its popularity among some Alaskans, Alaska Hire has not fared well in the courts.

The U.S. and Alaska Supreme Courts have considered the various iterations of Alaska Hire in three major cases: *Hicklin v. Orbeck*,⁹ *Robison v. Francis*,¹⁰ and *State, By and Through Departments of Transportation and Labor v. Enserch Alaska Construction, Inc.*¹¹ In each case, the court held that Alaska Hire violated either the U.S. Constitution or the Alaska Constitution.

In *Hicklin v. Orbeck*, the U.S. Supreme Court reviewed the 1972 version of Alaska Hire, which required all contracts related to the State’s oil and gas leases to include a resident hiring preference provision.¹² The Court held that Alaska Hire violated the Privileges and Immunities Clause of the U.S. Constitution, which essentially restricts States from discriminating against out-of-state residents, because Alaska could not show that nonresidents were a “peculiar source” of the unemployment problem the statute

⁵ *State, By & Through Dep’ts of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 634 & n.19 (Alaska 1989).

⁶ *Id.*; *Robison*, 713 P.2d at 266; *Hicklin v. Orbeck*, 437 U.S. 518, 526–27 (1978).

⁷ Ch. 33, SLA 1986; Ch. 94, SLA 1980; Ch. 177, SLA 1960.

⁸ Sec. 5, ch. 33, SLA 1986; Sec. 1, ch. 191, SLA 1972, Sec. 1a, ch. 177 SLA, 1960.

⁹ 437 U.S. 518 (1978).

¹⁰ 713 P.2d 259 (Alaska 1986).

¹¹ 787 P.2d 624 (Alaska 1989).

¹² *Hicklin*, 437 U.S. at 521 (analyzing AS 38.40 (“Local Hire Under State Leases”) (repealed 1980)).

sought to remedy.¹³ The Court further held that Alaska Hire’s scope was impermissibly broad because the hiring preference applied not only to employers directly involved with the State, but to “all employment which is a result of oil and gas leases.”¹⁴ The Legislature repealed this version of Alaska Hire in 1980.¹⁵

After *Hicklin*, state officials expressed concern over the constitutionality of the initial 1960 version of Alaska Hire, which applied to public works contracts. In 1982, Attorney General Wilson L. Condon issued an Attorney General Opinion advising Department of Labor Commissioner Edmund N. Orbeck that Alaska Hire was, on balance, likely consistent with the Privileges and Immunities Clause.¹⁶ Attorney General Condon reasoned that courts would probably apply a less rigorous standard of review to Alaska Hire’s public works contract provisions under a “market participant” exception to the Privileges and Immunities Clause,¹⁷ though he also noted that the validity of the market-participant exception was uncertain.¹⁸ And as neither the Alaska Supreme Court nor the U.S. Supreme Court had specifically addressed the market-participant argument, Alaska Hire was presumed to be constitutional.¹⁹

The Alaska Supreme Court later rejected the market-participant argument in *Robison v. Francis*.²⁰ The Court reasoned that any deference due to the State as a market participant was outweighed by the “pervasiveness and intensity of the discrimination” mandated by Alaska Hire.²¹ The Court accordingly held that the public works contract provision of Alaska Hire suffered from the same defects the U.S. Supreme Court identified in *Hicklin*.²²

The State of Alaska responded to the *Robison* decision in two ways. First, the people of the State ratified Article I, Section 23 of the Alaska Constitution, authorizing

¹³ *Id.* at 526.

¹⁴ *Id.* at 529 (quoting AS 38.40.050(a) (1977)).

¹⁵ Sec. 36, ch. 94, SLA 1980.

¹⁶ 1982 Op. Alaska Att’y Gen. No. 4 (June 17), 1982 WL 43792.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 5–8.

¹⁹ *Id.* at 19–20.

²⁰ 713 P.2d 259 (Alaska 1986).

²¹ *Id.* at 266.

²² *Id.*

resident preferences “to the extent permitted by the U.S. Constitution.”²³ Second, and within months of the *Robison* decision, the Legislature enacted the current version of Alaska Hire, AS 36.10.²⁴

With this latter statutory change, the Legislature sought to remedy Alaska Hire’s shortcomings by requiring the Commissioner of the Department of Labor and Workforce Development to make detailed factual findings before the hiring preference could take effect.²⁵ The Commissioner could determine that an area of the State was an “economically distressed zone” or a “zone of underemployment” and was therefore entitled to a regional hiring preference.²⁶

Unfortunately for Alaska Hire, the creation of resident preference zones within the State ran afoul of the Alaska Constitution’s Equal Protection Clause. In 1987, the Commissioner determined that the Northwest Arctic Borough was an “economically distressed zone” under AS 36.10.160.²⁷ Alaskans residing in Fairbanks but working in the Northwest Arctic Borough sued to enjoin the Commissioner’s determination.²⁸ In *State, By and Through Departments of Transportation and Labor v. Enserch Alaska Construction, Inc.*, the Alaska Supreme Court held that Alaska Hire’s underlying objective—“economically assisting one class over another”—was “not a legitimate legislative goal.”²⁹ The Court thus concluded that Alaska Hire violated Alaska’s Equal Protection Clause.³⁰

The Alaska Supreme Court’s decision in *Enserch* invalidated the “economically distressed zone” provision of Alaska Hire (AS 36.10.160) but did not consider the “zone of underemployment” provision (AS 36.10.150). In April 1988, before the Court decided *Enserch*, the Commissioner of the Department of Labor and Workforce Development designated the entire State a “zone of underemployment” due to abnormally high levels of unemployment.³¹ In 1990, after the Court decided *Enserch*, Attorney General Doug

²³ Alaska Const. art. I, § 23. See section III.A. below for further discussion.

²⁴ Sec. 5, ch. 33, SLA 1986.

²⁵ AS 36.10.150; AS 36.10.160; *Enserch*, 787 P.2d at 625–26.

²⁶ AS 36.10.150–.160.

²⁷ *Enserch*, 787 P.2d at 628.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Memorandum from Doug Baily, Att’y Gen., to Jim Sampson, Comm’r, Dep’t of Labor 2 (Jan. 30, 1990).

Baily advised Labor Commissioner Jim Sampson that *Enserch* prohibited the regional application of AS 36.10.150, but did not prohibit the Department’s statewide application of AS 36.10.150.³² Notably, the Attorney General’s analysis was strictly limited to the *Enserch* opinion, and did not consider whether the state-wide designation would offend the U.S. Constitution’s Privileges and Immunities Clause. Since receiving this opinion, the Department of Labor and Workforce Development has consistently designated the entire State as a “zone of underemployment.”

III. Legal analysis

The only Alaska Hire provision currently in force is the “zone of underemployment” preference. Under AS 36.10.150, a “zone of underemployment” is an area where: (1) the rate of unemployment is “substantially higher” than the national rate of unemployment; (2) a “substantial number” of residents have experience and training in occupations relevant to public works projects; (3) unemployment has “substantially contributed” to social and economic ills; and (4) the employment of nonresidents is a “peculiar source” of unemployment.³³ When issuing a “zone of underemployment” determination, the Commissioner also designates the percentage of work that must be performed by qualified residents of the zone.³⁴ Contractors performing non-federal public works projects in these zones must hire the designated percentage of qualified residents of the zone.³⁵ If a contractor instead hires nonresidents for those positions, then the state contracting agency withholds an amount of funds “that should have been paid to a displaced resident.”³⁶ Since 2015, the Commissioner has determined that the entire State of Alaska is a “zone of underemployment.”³⁷

Like the previous iterations of Alaska Hire that were invalidated by the courts, the “zone of underemployment” provision in AS 36.10.150 violates both the Privileges and Immunities Clause of the U.S. Constitution and the Equal Protection Clause of the Alaska Constitution, and it should not be enforced.

³² *Id.*

³³ AS 36.10.150(c).

³⁴ AS 36.10.150(b).

³⁵ AS 36.10.150(a); AS 36.10.180.

³⁶ AS 36.10.100(a).

³⁷ The Commissioner issued the most recent determination on June 13, 2019. Tamika L. Ledbetter, Comm’r, Alaska Dep’t of Labor & Workforce Dev., Alaska Employment Preference Determination (June 13, 2019), <http://labor.alaska.gov/lss/forms/2019-employment-pref-determination.pdf>.

A. Alaska Hire violates the Privileges and Immunities Clause of the U.S. Constitution.

Alaska Hire violates the Privileges and Immunities Clause of the U.S. Constitution. The Clause provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”³⁸ Federal and Alaska courts apply a two-part test to Privileges and Immunities Clause claims.³⁹ The court first decides whether the state law burdens one of the privileges or immunities protected by the Clause.⁴⁰ If it does, the court must then decide whether the state has proven a “substantial reason” to discriminate.⁴¹ A state’s “substantial reason” must include “some showing that nonresidents are ‘a peculiar source of the evil’ which the state’s action is meant to remedy.”⁴² Once a state demonstrates a substantial reason for discrimination, it must also show that the means employed by the challenged statute and the interests served by the statute are closely related.⁴³

The U.S. Supreme Court has long held that the Privileges and Immunities Clause “plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation.”⁴⁴ A state may therefore discriminate against non-residents in commerce, trade, or business only if a “substantial reason” justifies the discrimination.⁴⁵

³⁸ U.S. Const. art. VI, § 2, cl. 1.

³⁹ *Hicklin*, 437 U.S. at 525–26; *Robison*, 713 P.2d at 263.

⁴⁰ *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 383 (1978).

⁴¹ *Id.* at 387.

⁴² *Robison*, 713 P.2d at 263 (quoting *Noll v. Alaska Bar Ass’n*, 649 P.2d 241, 243 (Alaska 1982); *Hicklin*, 437 U.S. at 526–27).

⁴³ *Id.* at 264.

⁴⁴ *Hicklin*, 437 U.S. at 525 (quoting *Ward v. State*, 79 U.S. (12 Wall.) 418, 430 (1870)); see also *Enserch*, 787 P.2d at 632 (“For purposes of the federal privileges and immunities clause, the right to pursue a living in a particular line of work is a fundamental right.” (citing *Sheley v. Alaska Bar Ass’n*, 620 P.2d 640, 643 (Alaska 1980))).

⁴⁵ *Robison*, 713 P.2d at 263.

In *Hicklin v. Orbeck*, the U.S. Supreme Court struck down the 1972 version of Alaska Hire under this test.⁴⁶ The law violated the Privileges and Immunities Clause because the State did not show “that nonresidents were ‘a peculiar source of the evil’ Alaska Hire was enacted to remedy, namely, Alaska’s ‘uniquely high unemployment.’”⁴⁷ The Court noted that the record suggested high unemployment was primarily caused by the vast distances between rural Alaskan communities and a lack of job training.⁴⁸ The Court further held that even if the State had shown that nonresidents were a peculiar source of unemployment, the law would still fail because it was insufficiently tailored to that “evil”—it “simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference.”⁴⁹

The Alaska Supreme Court struck down the 1960 version of Alaska Hire for similar reasons in *Robison v. Francis*.⁵⁰ Not only did the Court hold that the State failed to show that nonresidents were a “peculiar source” of unemployment, but it also held that excluding nonresidents from public construction jobs for the purpose of economically benefiting Alaska residents was not a legitimate state purpose under the Privileges and Immunities Clause.⁵¹ The Alaska Supreme Court’s decision finds support in *McBurney v. Young*, a U.S. Supreme Court case involving a Privileges and Immunities Clause challenge to the Virginia Freedom of Information Act, which limited access to public records to Virginia residents.⁵² The Court distinguished the Virginia act’s “nonprotectionist aim” from *Hicklin*, where the “clear aim of [Alaska Hire] was to advantage in-state workers and commercial interests at the expense of their out-of-state counterparts.”⁵³ By focusing on whether the challenged statute’s aim was protectionist, the Court signaled that outright protectionism is not a legitimate government purpose under the Privileges and Immunities Clause.

Like the provisions struck down in *Hicklin* and *Robison*, Alaska Hire’s “zone of underemployment” preference violates the Privileges and Immunities Clause because—as the Alaska Supreme Court has already determined—its purpose is to economically

⁴⁶ 437 U.S. 518 (1978).

⁴⁷ *Id.* at 526.

⁴⁸ *Id.* at 526–27.

⁴⁹ *Id.* at 527.

⁵⁰ 713 P.2d 259 (Alaska 1986).

⁵¹ *Id.* at 266.

⁵² 569 U.S. 221, 225 (2013).

⁵³ *Id.* at 227–28.

benefit Alaska residents at the expense of nonresidents.⁵⁴ The Alaska Supreme Court has already held that this is not a legitimate government purpose under the Privileges and Immunities Clause.⁵⁵ The reasoning in *McBurney v. Young* strongly suggests that the U.S. Supreme Court agrees.⁵⁶ Despite the State’s best efforts to address Alaska Hire’s previous shortcomings, Alaska Hire’s primary purpose is and always has been protectionism; protectionism is not a valid purpose under the Privileges and Immunities Clause. As a result, I have concluded that the “zone of underemployment” preference is invalid under the U.S. Constitution.

Article I, section 23 of the Alaska Constitution does not save the statute. Section 23 provides: “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.*”⁵⁷ Because Alaska Hire violates the Privileges and Immunities Clause of the U.S. Constitution, the “zone of underemployment” preference is likewise impermissible under Article I, Section 23 of the Alaska Constitution.

B. Alaska Hire violates the Equal Protection Clause of the Alaska Constitution.

Alaska Hire violates the Equal Protection Clause because it does not serve a legitimate government purpose. Alaska’s Equal Protection Clause provides: “This constitution is dedicated to the principles . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law.”⁵⁸ The Clause requires the State “to treat those who are similarly situated alike.”⁵⁹

⁵⁴ See *Enserch*, 787 P.2d at 634 (discussing underlying purpose of “regional preference law” as embodied in AS 36.10.160). The Department of Labor and Workforce Development’s interpretation of the statute—designating all of Alaska as a “zone of underemployment”—clearly reflects the intent to benefit residents at the expense of nonresidents. Cf. 47 Or. Op. Att’y Gen. 243 (1995) (“[W]e do not believe that the state may use tax incentives to achieve indirectly the type of discriminatory hiring that the constitution prohibits the state from doing directly.”).

⁵⁵ *Robison*, 713 P.2d at 266.

⁵⁶ *McBurney*, 569 U.S. at 227–28.

⁵⁷ Alaska Const. art. I, § 23 (emphasis added).

⁵⁸ Alaska Const. art. I, § 1.

⁵⁹ *Titus v. State, Dep’t of Admin., Div. of Motor Vehicles*, 305 P.3d 1271, 1277 (Alaska 2013) (quoting *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994)).

The Alaska Supreme Court employs a three-step, sliding-scale test for alleged Equal Protection Clause violations. The Court first identifies the importance of the individual right involved.⁶⁰ The nature of the individual right is “the most important variable in fixing the appropriate level of review.”⁶¹ Second, the Court examines the purposes of the challenged law.⁶² Depending on the importance of the individual right at stake, the Equal Protection Clause “requires that the [S]tate’s interest fall somewhere on a continuum from mere legitimacy to a compelling interest.”⁶³ Finally, the Court evaluates the nexus between the goals of the challenged law and the particular means the State has employed to advance those goals.⁶⁴ In Alaska, a law “impairing the important right to engage in economic endeavor” is subject to close scrutiny—meaning that “the [S]tate’s interest underlying the enactment [must be] not only legitimate, but important, and . . . the nexus between the enactment and the important interest it serves [must] be close.”⁶⁵

The Alaska Supreme Court has already held that the “economically distressed zone” provision of the current Alaska Hire law (AS 36.10.160) violates the Equal Protection Clause. In *Enserch*, the Court acknowledged that the “economically distressed zone” provision reflected the important goals of “reduc[ing] unemployment among residents of the state, remedy[ing] social harms resulting from chronic unemployment, and assist[ing] economically disadvantaged residents.”⁶⁶ Nonetheless, the “underlying objective” of Alaska Hire was “economically assisting one class over another”—an objective that the Court concluded was “illegitimate” and therefore impermissible under the Equal Protection Clause of the Alaska Constitution.⁶⁷

The Court in *Enserch* further explained that even if promoting the economic welfare of disadvantaged communities could be considered an important state objective “separate from the goal of benefitting the residents of a given area,” Alaska Hire would still violate the Equal Protection Clause because “the fit between that objective and the preference law is not close.”⁶⁸ Rather, given the broad criteria used to designate an

⁶⁰ *Jones v. State, Dep’t of Revenue*, 441 P.3d 966, 978 (Alaska 2019) (quoting *Ross v. State, Dep’t of Revenue*, 292 P.3d 906, 909 (Alaska 2012)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Enserch, Inc.*, 787 P.2d at 631.

⁶⁴ *Jones*, 441 P.3d at 978 (quoting *Ross*, 292 P.3d at 909); *Enserch*, 787 P.2d at 631.

⁶⁵ *Enserch*, 787 P.2d at 633.

⁶⁶ *Id.* at 634.

⁶⁷ *Id.* at 634 & n.19.

⁶⁸ *Id.* at 634.

economically distressed zone and the lack of priority given to the areas most affected by nonresident employment, the law was “seriously over- and under-inclusive.”⁶⁹

Alaska Hire’s “zone of underemployment” provision (AS 36.10.150) is unconstitutional for the same reasons. Both the “economically distressed zone” and “zone of underemployment” provisions serve the same, constitutionally illegitimate underlying purpose: “economically assisting one class over another.”⁷⁰ Because “the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region is not a legitimate legislative goal,”⁷¹ Alaska Hire violates the Equal Protection Clause.

Like the “economically distressed zone” provision struck down in *Enserch*, the “zone of underemployment” provision would still violate the Equal Protection Clause even if community aid were considered a legitimate legislative goal.⁷² The nexus between the Alaska Hire law and any community-aid goal is not close: the “zone of underemployment” provision fails to prioritize relief for the regions most affected by nonresident employment, and the criteria for designating a “zone of underemployment” are both over- and under-inclusive because they allow the Commissioner to grant a preference to less distressed zones while denying a preference to more distressed zones.⁷³ The Alaska Supreme Court in *Enserch* found it significant that the statute’s broad criteria allowed “the Commissioner at any time [to] designate many regions within the state as distressed zones.”⁷⁴ The “zone of underemployment” provision suffers from the same infirmity—as evidenced by the Department of Labor and Workforce Development’s current application of Alaska Hire, designating the entire state a “zone of underemployment.”

IV. Conclusion

As written, the State can apply Alaska Hire in two ways: (1) by designating the entire State a zone of underemployment, or (2) by designating discreet areas of the State zones of underemployment. I have determined that the former violates the Privileges and Immunities Clause by discriminating against nonresidents, and the latter violates the

⁶⁹ *Id.* at 634–35.

⁷⁰ *Id.* at 634 & n.19.

⁷¹ *Id.* at 634.

⁷² *Id.* at 634–35.

⁷³ *Id.* at 635; AS 36.10.150; AS 36.15.160.

⁷⁴ *Enserch*, 787 P.2d at 635.

Equal Protection Clause by discriminating between classes of Alaska residents.⁷⁵ *Hicklin*, *Robison*, and *Enserch* foreclose any meaningful argument to the contrary. Because it is unconstitutional, this law should no longer be enforced.

Sincerely,

Kevin G. Clarkson
Attorney General

⁷⁵ Compare *Hicklin*, 437 U.S. at 527–28 (Alaska Hire violates the Privileges and Immunities Clause by discriminating between Alaska residents and nonresidents), and *Robison*, 713 P.2d at 266 (same), with *Enserch*, 787 P.2d at 634 (Alaska Hire violates the Equal Rights, Opportunities, and Protection Clause by discriminating between residents of different regions of Alaska).