

## ESSAY QUESTION NO. 5

### Answer this question in booklet No. 5

Alaska experienced an increase in violent crime involving the use of all-terrain vehicles (ATV's). Most of those crimes were committed by people under the age of 21. The vast majority of the ATV's used in the crimes were three-wheel ATV's.

Alaska responded to the increase in violent crime by enacting a statute that provided that "No person under 21 years of age may possess any all-terrain vehicle." The statute's only penalty for a violation is the forfeiture of any ATV found in the possession of a person under 21.

Although there was an increase in violent crime committed by people under 21, the number of people committing the crimes composed a very small percentage of the total number of people under 21. Moreover, the percentage of people under 21 possessing four-wheel ATV's who used those ATV's to commit crimes was also very small. Several ATV groups have publicly denounced the statute and stated that their younger members will never give up their ATV's.

Hunter and Cousin lived in Anchorage and decided to go moose hunting. Hunter was just under 21, while Cousin was just over 21. They both brought their four-wheel ATV's with them. While hunting, a law enforcement officer saw Hunter and Cousin with their ATV's. The officer legally stopped them and checked Hunter and Cousin's age. The officer seized Hunter's ATV because Hunter was under 21 years of age. The officer made a mistake calculating Cousin's age and seized his ATV also. The officer told Hunter and Cousin that they could contest the seizure at a hearing in two weeks.

At the hearing, Hunter and Cousin appeared with a lawyer and presented evidence. Cousin demonstrated that the officer had made a mistake, and the hearing officer gave him his ATV back. The hearing officer would not give Hunter his ATV back because he was under 21 years of age.

Alaska sold Hunter's ATV along with the other ATV's that it had seized from people under 21. The sale of the ATV's raised a lot of revenue for Alaska.

Discuss any challenges that Hunter could make to the seizure of his ATV under the Alaska Constitution.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 5 \*\*\*

#### SUBJECT: CONSTITUTIONAL LAW

##### I. Procedural Due Process – 35%

Hunter may have a procedural due process claim. Alaska seized his ATV without holding a pre-deprivation hearing first. Hunter had a post-deprivation hearing, but a court could conclude that a post-deprivation hearing was not sufficient.

Article I, Section 7 of the Alaska's Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." The Alaska Supreme Court has consistently held that the government must provide a pre-deprivation hearing unless there is some emergency requiring an immediate seizure. *Hoffman v. State, Dept. of Commerce and Economic Development*, 834 P.2d 1218, 1219 (Alaska 1992); *Waiste v. State*, 10 P.3d 1141, 1145 (Alaska 2000). The supreme court will uphold a post-deprivation hearing if all or most cases in a class involve an exigency justifying an immediate seizure. *Waiste*, 10 P.3d at 1145-46.

The Alaska Supreme Court uses the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether the state's interest justifies a blanket exception to the requirement for a pre-deprivation hearing. The *Mathews v. Eldridge* test requires the court to balance three factors: (1) the private interest at risk, (2) the degree to which an adversarial hearing, as opposed to an *ex parte* hearing, will reduce the risk of erroneous deprivation, and (3) the state's interest, including that in avoiding any additional burden imposed by a pre-deprivation hearing. *Waiste*, 10 P.3d at 1148.

##### A. Hunter's Private Interest

Hunter's private interest is his property interest in owning and possessing his ATV. There is no evidence that Hunter needs or uses the ATV for anything other than a recreational activity. The court gives more weight to property that is necessary to generate a person's income. *Waiste*, 10 P.3d at 1151. Some examinees may discuss subsistence hunting which is arguably deserving of the same heightened solicitude, but the facts do not raise the issue. Both Hunter and Cousin live in Anchorage.

##### B. The State's Interest

Given that the state has outlawed the possession of ATV's by people under 21, the state has a strong interest in preventing the removal, concealment, or destruction of the ATV's. In *Waiste*, the state seized a fishing boat for fishing in closed waters. The court concluded that the state had a significant interest in

seizing fishing boats without holding pre-deprivation hearings because the class of commercial fishing violators posed a risk of removing, concealing, or selling their boats to avoid forfeiting them. *Waiste*, 10 P.3d at 1149. The public pronouncements of the various ATV owner's groups indicates that there is a significant risk that young ATV owners will conceal, remove, or sell their ATV's before they turn them over to the state.

In *Waiste*, the court rejected the argument that a pre-deprivation hearing would impose a burden on the state because the forfeiture statutes at issue required an immediate post-deprivation hearing. *Id.* at 1150. The court concluded that the additional burden in requiring the adversarial hearing prior to the seizure was not significant. *Id.*

### **C. The Risk of an Erroneous Deprivation**

The lack of a pre-deprivation hearing increases the risk of an erroneous deprivation. The facts demonstrate this, for the officer seized Cousin's ATV by mistake. A pre-deprivation hearing would ameliorate the risk of a similar mistakes.

### **D. Balancing the Factors**

The facts tend to favor weighing the balance in favor of the state's post-deprivation hearing. In *Waiste*, the court concluded that the risk that fishing violators would hide or sell their boats justified *ex parte* hearings to seize the boats. *Id.* at 1152. ATV's are easier to transport, conceal, and sell, than fishing boats and several ATV owners groups have indicated that their younger members will not give up their ATV's.

An argument could be made that the facts favor Hunter, for the fishers in *Waiste* were involved in criminal conduct. The facts indicate that most people under 21 do not commit violent crime and that most people under 21 who possess four-wheel ATV's do not use them to commit crimes. This argument is not particularly strong because it is really aimed at the reasonableness of the statute rather than the level of process required.

## **II. Takings Clause – 15%**

Hunter may have a claim under the takings clause depending on whether the court views the seizure of the ATV as an exercise of police power or not. Article I, Section 18 of the Alaska Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.” The protections of the takings clause extend to personal property as well as real property. *Waiste*, 10 P.3d at 1154. Alaska's takings clause offers broader protection than the federal clause. *Id.* Alaska's clause also ensures compensation for temporary takings as well as permanent takings. *Id.*

The Alaska Supreme Court recognizes two instances of *per se* taking: (1) when there has been a physical invasion of the property and (2) where a regulation denies a person all economically feasible use of the property. *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001). But not all acquisitions of private property by the state are takings. *Waiste*, 10 P.3d at 1154. The confiscation of private property through an exercise of the government's police power is not a taking requiring just compensation. *Id.*

In *Waiste*, the government seized the plaintiff's fishing boat because it suspected him of illegally fishing in closed waters. The supreme court held that the plaintiff was not entitled to compensation for the temporary seizure of his fishing boat because the seizure of property suspected of having been used to break the law falls squarely within the government's police power. *Id.* at 1155.

The seizure of the ATV in the question has aspects of both a taking and an exercise of police power. On one hand, it looks like an exercise of police power because Alaska has made it illegal for people under 21 to possess ATV's. The officer confiscated the ATV and the hearing officer upheld the seizure because Hunter was under 21. On the other hand, Hunter did not engage in any criminal conduct, for there was no penalty associated with his possession of the ATV other than its forfeiture. Similarly, there is no evidence that he used the ATV to engage in any criminal activity. This distinguishes his situation from the plaintiff in *Waiste*. By the same token, the fact that Alaska raised a lot of revenue by confiscating and selling ATV's suggests that the taking was for the benefit of the public.

### **III. Equal Protection – 40%**

Hunter may have a claim based on equal protection. Article I, Section 1 of the Alaska Constitution provides that "all persons are... entitled to equal rights, opportunities, and protection under the law."

Equal protection analysis begins with the question of whether two similarly situated groups are being treated disparately. *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 270 (Alaska 2003). Hunter has a good argument that he is part of a group that is being treated disparately because the law distinguishes between people under 21 years of age and those 21 and over.

The Alaska Supreme Court uses a sliding scale to evaluate equal protection claims. *Premera Blue Cross v. State, Dept. of Commerce, Community & Economic*

*Development, Div. of Ins.*, 171 P.3d 1110, 1121 (Alaska 2007). The sliding scale is based on the court's evaluation of three variables. *Id.*<sup>1</sup>

**A. The First Variable - The Interest Impaired by Alaska's Statute**

First, the court must determine what weight it should give the interest impaired by the challenged statute. *Id.* The nature of the impaired interest is the most important variable because the state will have a greater or lesser burden to justify the statute depending on the weight given to the interest. *Id.*

The interest impaired by Alaska's statute is the right of people under 21 to possess ATV's. The Alaska Supreme Court has not yet had an opportunity to ascribe a weight to this interest. Hunter could argue that the right is fundamental or that it should be treated like gender and illegitimacy which receive intermediate scrutiny. But the court of appeals' decision in *Gibson v. State*, 930 P.2d 1300, 1302 (Alaska. App. 1997), suggests that the interest is at the low end of the scale, for the court concluded the state's "legitimate" interest in protecting the health and welfare of its citizens merited the infringement of individual rights. *Id.* (claim that prohibition against possessing firearms while intoxicated violated the state constitution's guarantee of the personal right to bear arms).

**B. The Second Variable - The Purpose of the Statute**

Second, the court must determine the purposes served by the challenged statute. *Id.* Depending on the importance of the impaired interest, the state may have to show that its objectives were legitimate, compelling, or somewhere in between. *Id.*

The purpose of the statute is to reduce violent crime committed by people under 21. In *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 266 (Alaska 2004), the court held that Anchorage had a compelling interest in curbing juvenile crime. It follows, therefore, that Alaska has a similar compelling interest in curbing violent crime committed by adults under 21 years of age.

**C. The Third Variable - The Particular Means Chosen**

Third, the court must evaluate the particular means employed to further the purposes of the statute. *Id.* At the low end of the scale, the court only requires a fair and substantial relationship between the means and the ends. *Premera*, 81 P.3d at 1111. The intermediate level of scrutiny applied to claims involving gender and illegitimacy requires a substantial relationship to the accomplishment of the statute's purpose. *Id.* At the high end of the scale, the purpose must be accomplished by the least restrictive alternative. *Id.*

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<sup>1</sup> Even though the supreme court calls its test a sliding scale, it has only identified three stops on the scale: relaxed scrutiny, intermediate scrutiny, and strict scrutiny. *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 270 (Alaska 2003).

The statute bears some relationship to its purpose. In theory, prohibiting young people from possessing ATV's will reduce violent crime because it will reduce their access to the means of committing the crime. On the other hand, the fit between the statute and its purpose is not very close. Most people under 21 do not commit violent crimes. Most of the crimes were committed with three-wheel ATV's, but the statute bans the possession of four-wheel ATV's as well. Yet very few people under 21 use their four-wheel ATV's to commit crimes. Alaska could have tailored the statute more narrowly by prohibiting people under 21 from possessing three-wheel ATV's. How closely the court scrutinizes the statute will determine the likely outcome of Hunter's challenge. The statute will likely survive the lower level of scrutiny because it has some rational relationship to its purpose. On the other hand, if the court applies strict scrutiny, the statute might fail because it is not tailored very narrowly and there are less restrictive alternatives. Application of intermediate scrutiny could yield either result depending on the emphasis that the court placed on closeness of the fit between the statute and its purpose.

#### **IV. Substantive Due process – 10%**

A statute violates substantive due process when it has no reasonable relationship to a legitimate government purpose. *Premera*, 171 P.3d at 1124. If a statute survives scrutiny under Alaska's equal protection clause, then it passes muster under substantive due process because equal protection scrutiny is stricter. *Id.* at 1124-25. Alaska's statute will probably pass muster because there is a reasonable relationship between the goal of limiting violence committed by young people with ATV's and prohibiting those young people from possessing the ATV's.