ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

The Alaska Legislature recently reviewed evidence that drug use and abuse among Alaska's youth is frequent, growing, and dangerous, partly because young people had found ways to conceal their drug use by using drugs when they were alone. The Legislature concluded that drug use among minors contributes substantially to the amount of juvenile crime committed in the state. Moreover, the Legislature concluded that this drug use could not be reduced except by prohibiting possession.

To combat these problems, the Legislature passed the "Just Say 'No' Act" (the "JSNA"). Aside from increasing drug education, the JSNA encourages minors to avoid using drugs, or at least wait until they are adults and can weigh the cost of using drugs, by providing that it is illegal for minors to possess any amount of marijuana in any place. It also raises the penalties for minors in possession, so that they are higher than the penalties for adults in possession of drugs. The Legislature voiced its intent to decrease drug use among minors and thereby decrease the rate of drug-related crime and injury.

Not long after the passage of the JSNA, Morrie and Arnie decided to grow small amounts of marijuana in the apartment that they share. Morrie is a minor and a few years younger than Arnie, who is an adult. The police raided the apartment pursuant to a valid warrant and discovered about three ounces of marijuana. The police arrested and have charged Morrie under the JSNA, but did not charge Arnie.

Morrie has challenged the application of the JSNA in his case, arguing that it violates his Alaskan Constitutional right to privacy, due process of law, and equal protection.

Discuss Morrie's challenge to the application of the JSNA under the Alaska Constitution on the basis of privacy, substantive due process of law, and equal protection.

GRADERS GUIDE

***** QUESTION NO. 5 *****

SUBJECT: CONSTITUTIONAL LAW

To answer this question requires consideration of three important areas of Alaska's Constitutional law.

1. Privacy

The right to privacy, like all Constitutional rights, may be curtailed in some instances. The question is whether the State provided appropriate process in depriving its citizen of their right. A determination of whether substantive due process was given requires analysis of the relative importance of the prohibited activity: that is, whether people have a fundamental right to enjoy the activity.

The standard for analyzing whether the Alaska Constitution's protection of privacy creates a fundamental right to enjoy an activity remains the standard set in *Ravin v. State*, 537 P.2d 494 (1975). *See State v. Planned Parenthood* ("Planned Parenthood II"), 171 P.3d 577, 581 (Alaska 2007) (citing and applying *Ravin*); *State v. Crocker*, 97 P.3d 93, (Alaska App. 2004) (*same*). Article I § 22 of the Alaska Constitution, created by amendment in 1972, provides explicitly that "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." A right to privacy has also been identified in Article I § 1 of the Alaska Constitution, which enumerates a fundamental right to "life, liberty, and the pursuit of happiness." *Breese v. Smith*, 501 P.2d 159 (Alaska 1972). Alaska's privacy clause applies to minors as well as adults. *State v. Planned Parenthood Alaska* ("Planned Parenthood I"), 35 P.3d 30, 41 (Alaska 2001). On the other hand, as discussed below the State may have a compelling reason to apply legislation to minors that does not exist for adults, so that a minor's right to privacy may be curtailed even though it exists and is fundamental in situations where an adults' could not. *Id.* at 38 – 41.

The Alaska Supreme Court has recognized a fundamental privacy interest in one's body, *Planned Parenthood II*, 172 P.3d at 581, one's appearance, *Breese*, 501 P.2d at 168, and in one's home. *Ravin*, 537 P.2d at 504. *See generally Sampson v. State,* 31 P.3d 88 (Alaska 2001). On the other hand, the Court has expressly refused to recognize a generalized right to consume substances or manufacture substances for consumption. *Ravin.* 537 P.2d at 502. The courts will find a fundamental constitutional right if such a right is found "within the

intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Sampson*, 31 P.3d at 92 (*quoting Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970). Privacy in one's home for an adult to possess and use small quantities of controlled substances has been found to be within the "intention and spirit." *Ravin*, 537 P.2d at 504. The correlative right for minors has not been addressed.

Under *Ravin* and its progeny, if Morrie were an adult he would have an expectation and right to enjoy privacy in his home to engage in non-commercial activities. Under *Planned Parenthood I* and *Breese*, although he is a minor Morrie has the same right. However, as discussed below, Morrie's right may be curtailed in situations that an adult's could not if the State has a compelling interest in protecting minors that does not extend to adults.

Although privacy in the home is a fundamental right under the Alaska Constitution, it does not extend to public or commercial use of substances, and it "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare." *Id.* The Courts have not expressly defined what use would be "commercial" for purposes of this analysis, but in the cases in which a "commercial" use has been found, the use has been the actual sale or distribution of marijuana. *See, e.g., Smith v. State*, 182 P.3d 651, 654 (2008). Here, there is no indication that the marijuana is being grown for commercial sale or distribution. Instead, only a few ounces were recovered. Alaska courts have held that a prohibition on more than four ounces of marijuana in the home is (at least presumptively) constitutional. *Noy v. State,* 83 P.3d 538, 543 (Alaska App. 2003). If what was recovered from the house is less than four ounces, it is probably a "small amount," and would not be evidence of a commercial use.

Finally, as a general rule the court has held that possession of a small amount of marijuana for personal use does not "interfere in a serious manner with the health, safety, rights and privileges of others or with the public welfare." Nothing in the facts indicates that Morrie's possession of marijuana departs from this general rule: the facts indicate only that Morrie and Arnie together grow and possess around three ounces in their home.

2. Due Process

To analyze whether the due process clause of the Alaska Constitution is violated, the court will first measure the weight and depth of the individual right at stake "so as to determine the proper level of scrutiny with which to review the challenged legislation. If this individual right proves to be fundamental, we must then review the challenged legislation strictly, allowing the law to survive only if the State can establish that it advances a compelling state interest using the least restrictive means available." *Planned Parenthood II*, 171 P.3d at 581. "In cases involving the right to privacy, the precise degree to which the challenged legislation must actually further a compelling state interest and represent the least restrictive alternative is determined, at least in part, by the relative weight of the competing rights and interests." *Id.* If the individual right at issue is something less than fundamental, the State must "identify a legitimate governmental purpose and show that the challenged limitation bears a close and substantial relationship to that purpose" if the statute is to be upheld. *Sampson*, 31 P.3d at 91-92.

Here, Morrie's right is likely fundamental (just as it would be for an adult). Moreover, as *Ravin* and its progeny show, the State's interests in preventing marijuana use, protecting users, and enforcing its laws do not sufficiently further a compelling state interest to justify intruding into an adult's home to enforce a law against possession of marijuana. But those points do not end the inquiry.

"The [S]tate has a legitimate concern with avoiding the spread of marijuana use to adolescents who may not be equipped with the maturity to handle the experience prudently…" *Ravin*, 537 P.2d at 511. These "distinct government interests with respect to children may justify legislation that could not properly be applied to adults." *Id.* n. 69. But it is not at all clear whether, in all cases, this "legitimate concern" amounts to a "compelling purpose."

The Alaska Supreme Court has never articulated a test by which to determine whether a particular State concern amounts to a "compelling purpose" for due process and equal protection. It has held that "advancing the best interests of children" is a compelling purpose when considering an equal protection challenge to adoption and child-in-need-of-aid statutes. *Matter of Adoption of B.S.I.*, 779 P.2d 1222, 1226 (Alaska 1989). Protecting the public from certain kinds of crime (notably fraud) is a compelling purpose. *Caucus Distributors, Inc. v. State, Dept. of Commerce and Economic Development, Div. of Banking, Securities and Corporations,* 793 P.2d 1048, 1057 (Alaska 1990). More importantly, "the State has a special, indeed compelling, interest in the health, safety,

and welfare of its minor citizens and may properly take steps to safeguard minors from their own immaturity." *Planned Parenthood II*, 171 P.3d at 582.

The Legislative intent here is to decrease drug use among minors in order to protect them from injury and protect the public from crime, based on evidence that such problems are real and stem from private, solitary drug use by minors. That purpose is similar to advancing the best interest of the child, and to protecting the public from crime. Moreover, the State's intent to protect minors health and welfare from their own immaturity is explicitly a compelling purpose. Thus, it seems likely that a compelling purpose will be found in this case.

An enforceable prohibition against minors possessing or using drugs in their homes or other private places certainly bears a close and substantial relationship to the State's purpose. The facts here indicate that the means chosen, prohibiting possession, are the only means that will be effective. No less restrictive means will work. As to the scope of the prohibition, including less than all minors would not protect all minors. Thus, the State has likely chosen the least restrictive means to accomplish its compelling purpose, and the JSNA should pass due process muster.

3. Equal Protection

Alaskan courts analyze equal protection claims under a sliding scale approach which places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. *Glover v. State, Dep't. of Transportation*, 175 P.3d 1240, 1257 (Alaska 2008). If the right impaired by the challenged legislation is not very important, the State need only show that its objectives are legitimate and that the legislation bears a substantial relationship to its purpose. *Id.* At the other end of the continuum, legislation that impairs one of the most important individual interests will be upheld only if it furthers the State's compelling interest and if it is the least restrictive means available to achieve the State's objective. *Id.* Thus, the analysis is nearly identical to the due process analysis, except that the issue is not application of law to an individual but, rather, the disparate application of laws to two or more individuals. As a threshold matter, then, it must be shown that there is disparate treatment, as "[w]here there is no unequal treatment, there can be no violation of the right to equal protection of law." *Id.* (quoting *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 397 (Alaska 1997)) (internal quotations removed).

Here, the JSNA distinguishes between minors and adults in order to impair a minor's right to privacy, an unquestionably important individual right, and Morrie challenges that this classification does not equally protect adults and kids. Morrie's challenge is made more poignant by comparison to Arnie, who is in precisely the same factual circumstance as Morrie except that he is older than Morrie by a few years. A distinction that permits adults like Arnie to escape punishment for conduct that subjects minors like Morrie to increased penalties must be the least restrictive alternative to further a compelling state interest.

As discussed above, the State's interest in reducing drug use by minors and protecting them until they can make their own, informed choice is compelling. The question remains whether the classification is the least restrictive alternative (that is, whether this particular classification is necessary to accomplish the goal.) If the State were to criminalize all possession, including possession by adults, the prohibition certainly would not be narrowly tailored to reducing drug use by minors. Moreover, such a prohibition would not create the incentive for minors to wait until adulthood before deciding whether to use drugs. In short, a prohibition on marijuana possession irrespective of the classes of people involved simply would not work. Thus, this classification is necessary and the means are the least restrictive alternative that will accomplish the State's compelling purpose. The classification therefore likely passes equal protection muster and the JSNA should survive Morrie's challenge on that basis.