ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

After reading an anonymous editorial that suggested vigorous exercise like running and skiing might contribute to increased emergency room visits, a City assemblyperson proposed, and the assembly passed, an ordinance prohibiting "unreasonably dangerous cycling events". The ordinance provides for its enforcement in the following manner: no cycling event may be held except with written notice to the Municipal Attorney prior to the event on a form provided by the Municipal Attorney's office that collects the organizer's name and contact information, and the date, time, and location of the event. No other materials are to be submitted with the notice. The Municipal Attorney, at his or her discretion, may then issue a civil cease and desist order to halt the organization of the event. If an organizer or any other interested party wishes to dispute the determination or be heard, he or she may resubmit the notice with any additional information that should be considered, to the Municipal Attorney, who then will adjudicate the dispute. The ordinance includes a timeline for these submissions and evaluations, under which it is possible for the final determination to be issued after the scheduled date of the event.

Cary Claimant has owned and operated a bicycle shop in City for 15 years, and has organized the Solstice Ride since its inception five years ago. The Solstice Ride is a cycling race that takes riders around City in a 25-mile loop on the same day as the winter solstice. The event advertises that it will promote fitness and winter cycling, which Cary believes should be a more widespread winter activity in City, but Cary's primary purpose in organizing the event is increasing recognition for the store and increasing business. Cary believes that winter cycling, and the business it generates, must compete for interest in City with skiing and running, and that promotional events like the Solstice Ride permit it to do so. In the history of the race, no rider has ever been seriously injured. One bystander was taken to the hospital last year, however, for injuries related to exposure.

In compliance with the new ordinance, Cary notified the Municipal Attorney's office about the upcoming race prior to its scheduled date. Cary received a civil order from the Municipal Attorney's office directing that the Solstice Ride not be held this year as the Municipal Attorney deemed the race to be unreasonably dangerous. Cary resubmitted the notice, including with it a statement that the race had not resulted in any emergency room visits aside from the one bystander, and that advertisements for the race would advise observers to dress appropriately for the conditions. No one else submitted any information. Cary heard nothing further until the day after the winter solstice, when the Municipal Attorney telephoned Cary to advise that Cary had lost the dispute.

Cary has now sued City, claiming defects in the ordinance under Alaska's Constitution.

1. Discuss Cary's claim that City has contravened Alaska's Constitutional substantive due process requirements by prohibiting cycling events that the Municipal Attorney deems to be unreasonably dangerous in order to limit emergency room visits.

2. (a) Discuss Cary's claim that the City has contravened Alaska's Constitutional due process requirements by permitting the Municipal Attorney, rather than a court, to determine whether a proposed cycling event is unreasonably dangerous in the first instance.

   (b) Discuss Cary's claim that the City has contravened Alaska's Constitutional due process requirements by permitting the Municipal Attorney, rather than a court, to make the final determination of whether a proposed event is unreasonably dangerous.

3. Discuss Cary's claim that the City has contravened Alaska's Constitutional equal protection requirements by prohibiting only cycling events, rather than any dangerous activity including running and skiing events.

GRADERS' GUIDE
*** * * QUESTION NO. 1 * * ***
SUBJECT: CONSTITUTIONAL LAW

This question requires examinees to evaluate the application of Alaska's Constitutional due process clause for both substantive and procedural due process in both adjudicative and non-adjudicative settings, and Alaska's equal protection clause.

QUESTION 1: Discuss Cary's claim that City has contravened Alaska's Constitutional due process requirements by prohibiting cycling events that the Municipal Attorney deems to be unreasonably dangerous in order to limit emergency room visits. (30 pts)

Grader's Guide: Examinees should recognize that this claim presents a question of substantive due process. Whether a law limiting the rights of an individual is permissible depends on the importance of the right at stake: if it is fundamental, the state action must be the least restrictive means to advance a compelling state interest. If the right is less than fundamental, the state action need only bear a close and substantial relationship to a legitimate governmental purpose. Here, the right to organize a race is probably less than fundamental, and limiting a potentially dangerous outdoor sport bears a close and substantial relationship to the legitimate purpose of limiting injury and expense associated with ER visits. The ordinance probably does not violate the Alaska Constitutional requirement of substantive due process.

"Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose."[1] It is not the Court's role to determine whether the legislation is well-advised; instead, the substantive due process guarantee assures only that a legislative body's decision is not arbitrary but is based on some rational policy.[2] To analyze whether the due process clause of the Alaska Constitution is violated by the substance of a law (as opposed to the procedure for enforcing it,) 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."[3] If the individual right at issue is something less than fundamental, then we "begin[] with the presumption that the action of the legislature is proper. The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. … [I]f any conceivable legitimate public policy … is offered by

[1] Premera Blue Cross v. State, Div. of Ins., 171 P.3d 1110, 1124 (Alaska 2007) (quoting Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974)).
[2] State, Dept. of Revenue, Child Support Enforcement Div. v. Beans, 965 P.2d 725, 727 (Alaska 1998).
[3] *State v. Planned Parenthood of Alaska*, 171 P.3d at 577, 581 (Alaska 2007).

those defending [it], the opponents of the measure must disprove the factual basis for such a justification."[4]

Cary's right to organize a race is probably not fundamental. Although Cary may argue that the right of like-minded individuals to peaceably assemble is a Constitutionally protected right, and therefore likely fundamental, nothing in the facts suggests that the Solstice Ride is intended to be or in fact has served as the assembly of like-minded individuals. It is intended to be a fun promotional event for Cary's business and the industry in which that business operates. Nor does the organization of the event implicate Cary's right to earn a living - the organization of the race is a side-line, and not part of Cary's normal business (which Cary was able to run *without* the race for a decade prior to organizing the first Solstice Ride). Thus, the right to organize the Solstice Ride is likely not a fundamental right.

If the right to organize the race *were* to be determined to be fundamental, the ordinance would be subject to strict scrutiny. Under this standard, City would have to demonstrate that the ordinance is the least restrictive means to accomplish a compelling governmental interest. The interest of which the ordinance appears to be in service under the facts set out here is protecting the health and safety of citizens, a goal that may well be compelling. But the means chosen are not the least restrictive. As Cary suggested in the resubmission package to the Municipal Attorney, given that the only injury to arise in the history of the event was exposure-related, the City's goals could likely be accomplished simply by admonishing attendees to equip themselves appropriately for the conditions.

Where, as is likely here, the individual right at issue is not fundamental the means-ends fit need not be so close. Indeed, under the minimal substantive due process test for enactments targeting non-fundamental rights, the legislative body need not even have based the enactment on actual evidence; it can rely instead on a chain of rational inferences.[5] It seems rational that unreasonably dangerous cycling events might lead to increased injuries to City citizens. Moreover, although an anonymous newspaper editorial may be a suspect source it at least serves as the opinion from a single individual. That is more than enough to meet the liberal substantive due process requirement.

QUESTION 2(a): Discuss Cary's claim that the City has contravened Alaska's Constitutional due process requirements by permitting the Municipal Attorney, rather than a court, to determine whether a proposed cycling event is unreasonably dangerous. (25 pts)

[4] Concerned Citizens of S. Kenai Peninsula, 527 P.2d at 452.

[5] See State v. Niedermeyer, 14 P.3d 264, 268 (Alaska 2000) (providing that an enactment that would revoke a driver's license did not contravene substantive due process requirements, even absent affirmative evidence of a nexus between the prohibited conduct and the desired result).

Grader's Guide: Because this part of Question 2 raises a question concerning non-adjudicative procedural due process, examinees should analyze the claim under the Mathews v. Eldridge, interest/risk/burden test. Applicants will weigh the factors differently.

Alaska has split the procedural due process analysis into two parts. In adjudicative proceedings (addressed below,) individuals are generally entitled to at least an opportunity to be heard. Alaska uses the familiar test from Mathews v. Eldridge, to determine whether an enactment provides sufficient non-adjudicative process.[6] That test requires the decider to do three things: first, it must identify the private interest affected by the official action; second, it must evaluate the risk of erroneous deprivation and the value of any additional procedural safeguards; finally, it must balance the risk and interest against the additional financial and administrative burden on the state of providing alternative procedures.[7] Here, the non-adjudicative procedure is minimal: the Municipal Attorney simply looks at a notice about the event and then decides in its sole discretion whether the event looks unreasonably dangerous.[8]

As an initial matter, Cary may contend that the ordinance is defective because the prohibition on "unreasonably dangerous" activity is vague. Although the Courts use a three-factor test for vagueness in the case of criminal statutes (under which this language may well be prohibited), the constitutional bar in a case like this one, if any, is likely very low.[9] In civil cases where fundamental rights are not at stake, likely all that is required is that the enactment not be "so conflicting and confused that it cannot be given meaning in the adjudication process."[10] The provision probably meets this low threshold - although "unreasonably dangerous" does not draw a bright line dividing events that will be prohibited from those that will be permitted, it is at least suggestive of a familiar standard.

A. Private Interest At Stake

Here, the private interest at stake is Cary's right to organize a race. As noted above, the right is probably not fundamental. The primary value of the right to Cary is that it may increase business to the bike shop - it is an economic interest, and an indirect one at that. Moreover, nothing in the facts suggests that Cary cannot accomplish the same purpose in a different manner (for instance, with standard advertising).

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[6] Laidlaw Transit, Inc. v. Anchorage Sch. Dist., 118 P.3d 1018, 1026 (Alaska 2005). Applicants may assert that the minimum process that is due is notice and an opportunity to be heard, and that this should prove the starting point of the analysis. This is true in adjudicative proceedings. Hickel v. Halford, 872 P.2d 171, 179-80 (Alaska 1994). But in non-adjudicative proceedings, this minimum threshold does not apply and the appropriate analysis begins and ends with the Mathews test. Laidlaw, 118 P.3d at 1027. The adjudicative due process concern will be addressed further below.

[7] Id. at 1026.

[8] The resubmission process is discussed below, in 2(b).

[9] See Williams v. State, Dep't. of Revenue, 895 P.2d 99, 105 (Alaska 1995).

[10] Id.

B. Risk of Erroneous Deprivation

After identifying the private interest at stake, the decider must next determine the risk that the private interest will be erroneously deprived for the want of a better procedure. Here, there is a substantial likelihood that events will be erroneously disallowed for want of a better procedure. There is no requirement in the ordinance's procedure that the Municipal Attorney be given or obtain any information whatsoever about the risks and safety measures employed in the event, or information upon which the Municipal Attorney could base a determination that the event is dangerous or safe. As such, the decision-making is likely to be done with almost no reliable information, subject to the whim and prejudice of the Municipal Attorney.

C. Burden of Additional Procedural Safeguards

Finally, in order to evaluate whether the existing procedural safeguards are adequate, the decider must determine the burden to the government of implementing additional safeguards. Here, not very much at all would be required in order to provide additional safeguards at least sufficient to address the information void in which the Municipal Attorney's decision is made. For instance, the ordinance could require that the notice of the event identify how many people are expected to participate in the event (based on historical numbers, if any are available, or other evidence if not,) the number of those who may be injured (again, based on historical numbers or other evidence,) and the severity of any expected injuries. This would not place much, if any, additional cost or burden on City but could dramatically improve the quality of decision-making.

Taking the factors together, the non-adjudicative process provided by the ordinance is probably inadequate. At a bare minimum, event organizers are likely entitled to have the Municipal Attorney consider more complete, and more relevant, information before rendering a decision as to the reasonability of any dangers posed by the event.

QUESTION 2(b): Discuss Cary's claim that the City has contravened Alaska's Constitutional due process requirements by permitting the Municipal Attorney, rather than a court, to adjudicate disputes concerning the issuance of a cease and desist order as part of the resubmission process. (15 pts)

Grader's Guide: This second part of Question 2 raises a question concerning adjudicative procedural due process. Examinees must determine whether the resubmission process is adjudicative. It likely is. They must then evaluate whether the minimum adjudicative process has been provided. Here it has not – the decision-maker is interested in the dispute to be decided, and the hallmarks of a fair trial are absent. Moreover, there was no hearing, or even a mechanism for a hearing, which the Constitution likely required.

An adjudicative proceeding, at a minimum, has the following characteristics: 1. a dispute exists; 2. a document reflecting the existence of the dispute is served from one party on the other party; and 3. the document

sets in motion prescribed mechanisms by which the dispute will ultimately be resolved.[11] But not every proceeding with these characteristics is an "adjudicative proceeding" for due process purposes: if the proceeding is better characterized as a legislative, executive, or administrative proceeding then it will be treated as such notwithstanding that it has some of the characteristics of an adjudicative proceeding.[12] Not all adjudicative proceedings require all of the formality and trappings of court - instead, the minimum that is necessary is an impartial decision-maker, notice and the opportunity to be heard, procedures consistent with the essentials of a fair trial, and a reviewable record.[13]

Here, no dispute existed at the time Cary filed the first notice of the Solstice Ride. After the cease and desist order issued, however, Cary's resubmission of the notice with additional information conformed to the characteristics of an adjudicative proceeding. Cary disputed the Municipal Attorney's determination and the facts that underlay it and gave notice of the dispute, setting off a procedure that ended in a final determination. The final determination was not legislative or administrative - it did not result in new policies or regulations for the Municipal Attorney's office, or amount to a merely clerical change. Nor was it executive: the purpose of the resubmission process, as judged by the information that was permitted and required to be submitted, was to give affected parties the opportunity to dispute whether the event was unreasonably dangerous. Thus, the resubmission process is probably an adjudicative proceeding, and at least the minimum adjudicative due process is required.

It was not provided. The decision-maker of the resubmission process is also one of the disputants, the Municipal Attorney. Aside from offering initial evidence, the event organizer has no opportunity to be heard. In particular, he or she has no opportunity to respond to information or evidence submitted by other parties, including by the Municipal Attorney. The procedures are not consistent with a fair trial - the organizer has no opportunity to examine opposing witnesses, for instance, and no notice of what evidence must be confronted. Moreover, the process does not result in a reviewable record. For instance, there is no requirement that the final decision be written: in Cary's case, it was not but was delivered telephonically.

There is a more direct analytical avenue that reaches the same result. The Alaska Supreme Court has held that, where there has been state action that acts to deprive an individual of an interest that is sufficiently important to warrant constitutional protection, a hearing is "normally one of the basic components of due process".[14] The Court has found an exception to the hearing requirement when there are no substantial issues of material fact to be

[11] Laidlaw Transit v. Anchorage School Dist., 118 P.3d 1018, 1023 (Alaska 2005) (citing Hickel v. Halford, 872 P.2d 171, 175 (Alaska 1994)).
[12] See id. (treating a bid dispute hearing as a non-adjudicative proceeding).
[13] Nash v. Matanuska-Susitna Borough, 239 P.3d 692, 699 (Alaska 2010).
[14] White v. State, Dep't of Natural Resources, 984 P.2d 1122, 1126 (Alaska 1999).

decided.[15] But here, the entire purpose of the resubmission process was to decide a disputed question of material fact, that being whether the Solstice Ride was "unreasonably dangerous." Cary offered substantial evidence that it was not, in the form of historical data showing the likelihood of injury to be very low. But the resubmission process provided no opportunity for a hearing on that issue.

The procedure for handling resubmissions was defective and did not comport with the due process requirements under Alaska's Constitution for adjudicative proceedings.

QUESTION 3: Discuss Cary's claim that the City has contravened Alaska's Constitutional equal protection requirements by prohibiting only cycling events, rather than any dangerous activity including running and skiing. (30 pts)

Grader's Guide: This question should be analyzed under Alaska's equal protection clause. There are two parts to this analysis. First, it must be determined whether the Equal Protection Clause applies at all. Then, under Alaska's sliding-scale equal protection analysis, the decider balances the disparate classification against the means/ends fit of the law.

Equal protection claims under the Alaska Constitution are analyzed on a sliding scale that places a higher or lower burden on the government to justify a classification depending upon the relative importance of the individual right involved.[16] As a threshold matter it first must be determined whether the enactment under consideration actually treats similarly situated individuals differently.[17] In order to do so, the decider must first examine "the state's reasons for treating the groups differently."[18] An enactment based on a non-suspect classification will survive as long as a "legitimate reason for the disparate treatment exists" and the enactment "bears a fair and substantial relationship to that reason."[19] A law based on a suspect classification or that infringes a fundamental right will survive only if it is "necessary" to achieve a "compelling state interest."[20] This determination is very similar to the test for substantive due process, but it applies a higher standard.[21]

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[15] Id.
[16] Bridges v. Banner Health, 201 P.3d 484, 493-94 (Alaska 2008).
[17] Glover v. State, Dep't. of Transp., 175 P.3d 1240, 1257 (Alaska 2008) (citing Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 397 (Alaska 1997)). Cf. Bridges, 201 P.3d at 494 (holding that there was no need to apply equal protection analysis when statute did not facially discriminate, and treated different types of specialists similarly in practice).
[18] Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors, 205 P.3d 326, 341 (Alaska 2009) (quoting Pub. Employees' Ret. Sys. v. Gallant, 153 P.3d 346, 349 (Alaska 2007)).
[19] Id.
[20] Id.
[21] See Premera, 171 P.3d at 1124-25; Schiel v. Union Oil Co. of California, 219 P.3d 1025, 1036, n.70 (Alaska 2009).

Here, the ordinance treats Cary and other cycling event organizers differently from organizers of other types of events, including skiing and running races. This is not a suspect classification, and as discussed above no fundamental right is implicated. But this ordinance probably cannot pass even the relatively low level of scrutiny applied in such instances. The facts offer no reason whatsoever for concluding that a cycling event is more likely to result in injuries, or serious injuries, than other kinds of events. Common sense suggests the opposite - the speeds attained in a downhill skiing event, for instance, might be higher than those in a winter cycling race, and the exposure risks to participants and bystanders might be higher for a winter running marathon (which the ordinance would not regulate) than for a summer bike swap (which it might). Furthermore, there is no reason to believe that limiting cycling events will result in less administrative burden than limiting other kinds of events. And no evidence is offered to indicate that a legitimate purpose for the division between cycling and other kinds of events exists. While a chain of rational inferences and a single anonymous editorial may be sufficient evidence for substantive due process purposes, they are unlikely to be taken as sufficient for equal protection, and in any event the anonymous editorial specifically mentioned skiing and running and not cycling. No legitimate reason for the disparate treatment is likely to be found on these facts.

Moreover, the ordinance does not offer one process for cycling enthusiasts and another for skiing enthusiasts. Instead, it simply limits cycling events while placing no limit whatsoever on any other kind of event. Thus, even if a legitimate reason for treating cycling event organizers differently from other kinds of promoters could be found, it is unlikely that this ordinance bears a fair and substantial relationship to such reason. As such, the ordinance likely violates the equal protection clause of the Alaska Constitution.