IN THE SUPREME COURT OF THE

STATE OF ALASKA

MOLLY HOOTCH, a minor, by her father and next friend, JAMES HOOTCH, et al., Appellants, v. ALASKA STATE-OPERATED SCHOOL SYSTEM, a State Corporation, et al., Appellees.	File No. 2157

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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The American Civil Liberties Union is a nationwide, non-partisan organization with over 275,000 members in the United States. The Alaska Civil Liberties Union is the ACLU's Alaska affiliate and has over 450 members throughout the State of Alaska. The ACLU is dedicated to defending the fundamental rights of all Americans.

In this case, the State of Alaska has placed two fundamental rights in conflict by its requirement that native children leave their villages and families in order to receive secondary educational opportunities. For the most part, this has meant that native children have had to choose either to forego a secondary education or to live in a foster home or boarding school in a larger city. The ACLU has determined to oppose this policy of the State of Alaska because it thus unduly interferes with the fundamental rights to privacy, freedom of association and cultural integrity in family life as a condition to implementation of the fundamental right to education.

The Indian Rights Committee of the ACLU National Board has voted to support the filing of this brief, and the Mountain States Regional Office has prepared the brief, as staff counsel for the Committee. The Alaska CLU has joined in the brief. Letters of consent to the filing of the brief have been filed with the Clerk of the Court.

I.

THE FIRST, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE CONSTITUTION OF THE STATE OF ALASKA ESTABLISH A FUNDAMENTAL RIGHT TO PRIVACY, FREEDOM OF ASSOCIATION AND CULTURAL INTEGRITY IN FAMILY LIFE.

The Appellants and the other Amici have ably demonstrated the extent of the invasion of the fundamental rights of the native Appellants occasioned by the state's requirement that native children leave their homes and families and live with strangers in a distant city as a condition to providing education beyond the sixth grade. The case at bar has no relation to "neighborhood school" or bussing controversies, since no school integration plan has ever envisioned the extent of invasion of protected freedoms of family life encountered in the case at bar.

The case of Griswold v. Connecticut, 381 U.S. 479, is the seminal case of modern times, in a line of cases most recently summarized and augmented by the Supreme Court in its abortion decision, Roe v. Wade, 410 U.S. 113 (1973), recognizing an implied or "penumbral" right to privacy of family life. This cluster of rights has been variously identified:

> ...in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras. See Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id., at 460 (White J., concurring); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486 (Goldberg, J., concurring)."
>
> 410 U.S. at 129.

Indeed, the Supreme Court authoritatively and decisively summarized the emerging law of privacy in setting forth the basis for its recognition and extention in Roe:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-485 (1965); in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967), procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942), contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972); id. at 460, 463-465 (White, J., concurring), family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.
>
> Id. at 152, 153.

Thus, this cluster of rights has been explicitly recognized by the United States Supreme Court. Moreover, special recognition has been given to the nexus between the emerging right to privacy and the educational process. Wisconsin v. Yoder, 406 U.S. 205, 217-219 (1972); Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J. dissenting); Prince v. Commonwealth of Massachusetts, 321 US. 158, 166 (1944); Pierce v. Society of Sisters, 260 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Even the recent case of San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), affirmed this nexus in its deference to local administrative and fiscal autonomy. Amicus urges that this Court note the Supreme Court's determination to recognize the emerging right of family privacy as it relates to the coercion worked by the State of Alaska in the case at bar.

The Court should also note the thrust of the Alaska constitutional provisions concerning privacy. Privacy has been viewed as a peculiar province of state protection. As Mr. Justice Stewart said in Katz v. United States, 389 U.S. 347, 350-351 (1967):

> A person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual states.

See "Project Report: Toward an Activist Role for State Bills of Rights," 8 Harv. Civ. Rts. Civ. Lib. L. Rev. 271, 301-302 (1973).

Alaska State Legislature has itself explicitly recognized the constitutional right of parents to the care and custody of their own children, and has provided that this right cannot be infringed, except upon a showing that the parents have somehow, through their own fault, failed in their legal duty to provide for their children. Alaska Annotated Code, Title 47, Chapter 10, pertaining to "Delinquents and Wards of the Court," specifically sets forth the limited factual circumstances under which the State of Alaska has recognized that parents can be deprived of their constitutional right to retain custody and supervision over the upbringing of their children.

Since the state has thus provided an exceptional procedure for depriving parents of their right to privacy of family life, Amicus would submit that it has implicitly recognized the fundamentality of the rights at stake. How then can the mere convenience of the state in not providing secondary educational facilities serve as the basis for invading that same right? There is no less coercion involved in the state's policy of making access to education dependent on the waiver of the right to privacy of family life than in the state's general custody regulation, and Amicus submits that the inconsistency between the two policies shows conclusively the defects of the former.

The Alaska Supreme Court has recognized the right of privacy, as derived from the concept of liberty; Breese v. Smith, 501 P.2d 159 (Alaska, 1972):

> ...the term "liberty" is an illusive concept, incapable of definitive comprehensive explication. Yet at the core of this concept is the notion of total personal immunity from governmental control: the right "to be let alone." See, E. Griswold, The Right to be Let Alone, 55 N.W.U.L. Rev. 216 (1960).
> Id. at 168.

The Court then concluded that the "right to be let alone" is a fundamental right under Article I, Section 1 of the Constitution of the State of Alaska; Id. at 168, 171. The Court held that the defendant school authorities had failed to demonstrate any compelling state interest to justify interference with this fundamental right of privacy, specifically the plaintiff's right to wear his hair to his personal taste. This decision was also based on Article VII, Section 1 of the Alaska Constitution: "which guarantees to all children of Alaska a right to public education;" Id. at 167. Although this case could easily be disposed of as a "hair" case, the Court in Breese was obviously concerned with any encroachment on the right of privacy:

> We are not unmindful of Justice Brandeis' warning in Olmstead v. U.S., 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (dissenting opinion), that good faith and lofty motivations often conceal the greatest danger to liberty:
>
> > Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious

> encroachment by men of zeal, well-meaning but without understanding. 277 U.S. at 479.
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> Id. at 171, 172, ftnt. 55.

II.

THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLES I AND VII OF THE CONSTITUTION OF THE STATE OF ALASKA ESTABLISH A FUNDAMENTAL RIGHT TO PUBLIC EDUCATION.

As long ago as 1907, Justice Holmes declared education, because of its high and pervasive purpose, to be: "one of the first objects of public care;" Interstate Consol. Ry. Co. v. Massachusetts, 207 U.S. 79 (1907). In Meyer v. Nebraska, supra, education was given still greater consideration, as a matter of such "supreme importance" as to defeat restrictive state regulation. Twenty years ago, the United States Supreme Court recognized the fundamental importance of education and right to equal education in the landmark case of Brown v. Board of Education, 347 U.S. 483, 493 (1954), stating:

> Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate a recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Education plays an indispensable role in modern society. As a decisive influence on a child's development as a citizen and his participation in political and community life, the right to education must be carefully guarded. "Surely the right to an education today means more than access to a classroom;" Serrano v. Priest, 487 P.2d 1241, 1257 (Cal., 1971). The influence of the school is not confined to teaching basic skills, and education has a significant role to play in shaping the child's emotional and psychological make-up; Hobson v. Hansen, 269 F. Supp. 401, 483, (D. D.C. 1967), affd. sub nom Smuck v. Hobson, 408 F. 2d 125 (2nd Cir. 1969).

In the years since Brown, a long line of cases has been developed treating education as a "fundamental right" in the context of a Fourteenth Amendment equal protection analysis. These cases particularly focussed on the problem of racial segregation and discrimination. Aside from the desegregation cases following Brown, a number of recent cases have recognized education as a "fundamental right" and have stated that any classification restricting the right must be closely scrutinized; e.g., Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 172 (1972); Wisconsin v. Yoder, supra; Hobson v. Hansen, supra; Serrano v. Priest, supra; and Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, 213-214 (N.J., 1972). Similarly, a number of courts have upheld a general right to education and held that handicapped children have an equal right to education; e.g., Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D. D.C. 1972).

A recent decision of the United States Supreme Court, San Antonio Independent School District v. Rodriguez, supra, seems to have restricted the "fundamentality" of the right to education, but inherent in the opinion was the Court's continued recognition of the "undisputed importance of education," and the case should not be read to reject the existence of a fundamental right to education under the United States Constitution.

In Rodriguez, the Court rejected the claim that the Texas system of reliance on local property taxation to finance public education violates the equal protection clause of the Fourteenth Amendment. The plaintiffs in Rodriguez argued that the Texas system results in substantial inter-district disparities in per-pupil expenditures due to the differences in the value of assessable property among school districts in the state, to the detriment of residents of districts having a low property tax base. The relief sought in that case was the equalization of educational funds between the various school districts in the state. The Supreme Court held that the strict scrutiny equal protection test was inapplicable in such a case because (a) no showing was made that the system operates to the disadvantage of the asserted suspect class, and (b) no showing was made that the system fails to provide each child with educational opportunities sufficient to acquire the basic minimal skill necessary for the enjoyment of the constitutionally protected rights of speech and of full participation in the political process. Under these circumstances, the Court held that the rational relation constitutional standard was applicable. Applying the latter standard, the Court held that the Texas system rationally furthers the legitimate state purpose of encouraging local control of education, and, therefore, satisfies the requirements of the equal protection clause.

The Supreme Court viewed Rodriguez as a unique case and prefaced its opinion accordingly:

> We are unable to agree that this case, which in significant aspects is sui generis, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause.
> 411 U.S. at 18.

Thus, on the basis of the Court's opinion and holding, it is Amicus' position that Rodriguez is clearly distinguishable from, and therefore not controlling of, the issues presented in the case at bar. Most importantly, the two criteria held to be lacking in Rodriguez are present here. Thus, Amicus would submit that the strict scrutiny test should be applicable to the instant case, since the Alaska State-operated School System is presently interpreting the state constitution and laws and its own regulations in a discriminatory manner, to the disadvantage of an identifiable suspect class based on race. The briefs of the Appellants and the Association on American Indian Affairs, Amicus Curiae, amply document that discrimination, which was not found by the Supreme Court in Rodriguez. Second, the strict scrutiny test should be applicable since this case presents a glaring example of a deprivation of the minimum education which would qualify as a fundamental right under Rodriguez. If the state's policy is viewed as a total deprivation of secondary educational opportunity, this conclusion is clear. And the state's requirement of the relinquishment of a fundamental right works just such a total deprivation.

Prior to the Rodriguez case, the phrase "fundamental right" was employed somewhat loosely. A number of courts, e.g., Van Dusart v. Hatfield, 334 F Supp. 870, 874 (D. Minn. 1971) and Jelliffe v. Bardon, 345 F. Supp. 773, 776 (D. Conn. 1972), had ruled, and a number of authorities, including Amicus, had argued,

that education was in and of itself a fundamental right, and that any regulation affecting education was to be strictly scrutinized. Rodriguez has partially laid this notion to rest.

Upon careful consideration, the wisdom of the Court's ruling is apparent. The width of corridors in school buildings, the color scheme in classrooms, the materials to be used in the construction of educational facilities, the number and location of drinking fountains--all of these matters "affect" education. Are such matters to be strictly scrutinized by the courts, and are differences between schools or educational systems to be upheld only where a compelling state interest can be shown? The Court, understandably, said no; relative differences within the public education system are ordinarily not proper subjects for strict judicial scrutiny.

However, the Supreme Court expressly left open the possibility that class discrimination, and especially racial discrimination, or total exclusion from publicly supported education, would require the application of the strict scrutiny test. The appellees in Rodriguez had argued that education was a fundamental right because it was intimately involved in the right to freedom of speech and the right to vote. The Court outlined this argument as follows:

> In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

> A similar line of reasoning is pursued with respect to the right to vote. Exercise of a franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate; a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.
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> 411 U.S. at 35, 36.

The Court ruled that these arguments were not persuasive regarding the factual situation in Rodriguez but stated that they might be controlling in cases involving a complete denial of educational services:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.
>
> Id. at 37.

Thus, the Court's decision in Rodriguez, taken together with its previous decisions in education cases, stands for the proposition that some education is a constitutionally mandated fundamental interest, since without education a citizen cannot meaningfully exercise constitutional rights, which in turn cannot be denied absent a compelling state interest. In Wisconsin v. Yoder, supra, the Supreme Court recognized that: "some degree of education is necessary to prepare citizens to participate

effectively and intelligently in our open political system," and that: "education prepares individuals to be self-reliant and self-sufficient participants in society." Yoder, supra, 406 U.S. at 221. See also Mr. Justice Marshall's dissent in Rodriguez, supra.

The present case involves an absolute denial of secondary educational opportunities to the members of the Appellant class. The choice between family and school for most children is effectively no choice at all. To choose to remain at home means to relinquish any secondary education. Can we say in these times that a primary education is sufficient to enable native children to exercise their constitutional rights? When even the State of Alaska specifies a compulsory school age of 16, except for those geographically isolated, principally the class of native Appellants?

In Rodriguez, the Supreme Court sought: "the key to discovering whether education is fundamental...in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. Eisenstadt v. Baird, supra; Dunn v. Blumenstein, 405 U.S. 330 (1972); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942);"411 U.S. at 33, 34. The Court then surmised that education was neither:"explicitly...or implicitly...protected;" Id. at 35. Although Amicus disagrees with the Court's rejection of an "implicit" right to education, the Court's appeal to "explicit" recognition is of particular importance to the Alaska Supreme Court. Article VII, Section 1 of the Constitution of the State of Alaska specifically provides that:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the state....

And this section has been interpreted by the Alaska Supreme Court as guaranteeing all children of Alaska a right to public education. Breese v. Smith, 501 P.2d 159 (Alaska, 1972).

In addition, Article I, Section 1 of the Alaska Constitution affirms that all persons in the state of Alaska are granted certain inherent and natural rights:

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.

Article I, Section 15 establishes a privileges and immunities clause for the state, and Article I, Section 7 declares that: "no person shall be deprived of life, liberty, or property, without due process of law." Since the state constitution explicitly guarantees a right to education, it becomes a fundamental right in Alaska, and Article I, Sections 1, 7, or 15 would require a compelling state interest to interfere with that right. The Alaska Supreme Court has a duty to develop constitutional privileges under the Alaska Constitution, and the Court has shown a noted willingness in the past to decide constitutional issues on state grounds; e.g., Roberts v. State, 458 P. 2d 340 (Alaska, 1969); State v. Browder, 486 P.2d 925 (Alaska, 1971); "Project Report: Toward an Activist Role for State Bills of Rights,"

8 Harv. Civ. Rts. Civ. Lib. L. Rev. 271, 317, 319, 323-324 (1973). As the Court has held, any encroachment on fundamental rights protected by the Constitution of the State of Alaska places a heavy burden on the government to demonstrate a compelling interest. Breese v. Smith, supra.

This approach, of declaring education to be a fundamental right under the state constitution, has been adopted in a recent post-Rodriquez decision by the Supreme Court of the State of North Dakota, following the lead of the California Supreme Court in Serrano, supra; In the Interest of G.H., Civil No. 8930 (North Dakota Supreme Court, April 30, 1973). See also Wolf v. Legislature of the State of Utah, No. 182646 (3rd District, Salt Lake County, Jan. 8, 1969); Doe v. Board of School Directors of Milwaukee, No. 377770 (Milwaukee Circuit Ct. Civ., 1970); McMillan v. Board of Education, 430 F.2d 1145 (2nd Cir. 1970), on remand 331 F. Supp. 302 (S.D.N.Y. 1972); Reid v. Board of Education, 453 F.2d 238 (2nd Cir. 1971). Thus, Amicus urges this Court to preserve: "the most important function of the state and local governments," Brown, supra, 347 U.S. at 493, and to declare education to be a fundamental right under the Alaska Constitution, whatever its status under the United States Constitution.

The recent United States Supreme Court opinion of Lau v. Nichols, 42 U.S.L.W. 4165 (January 21, 1974) should also be considered by the Court for guidance in the instant case. In Lau, the Supreme Court did not reconsider its decision in Rodriguez but did hold that Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000 (d), which bans discrimination based on "race... in any program...receiving federal financial assistance," required the San Francisco school system to provide students of Chinese

ancestry with a meaningful education. The Court required that the school system take affirmative steps to rectify language deficiencies of such students. The Alaska school system receives in excess of ten million dollars of federal aid annually. (See Plaintiffs' First Amended Complaint, p. 20, #77). Thus, it is particularly subject to the requirements of the Civil Rights Act. Since the Alaska school system as it presently operates discriminates on the basis of race, this practice must be rectified to comply with the Civil Rights Act. This Court should support the Appellants' interpretation of the relevant Alaska constitutional, statutory and administrative provisions, for to do otherwise would be to invite a direct conflict with the Civil Rights Act. States should be anxious to interpret their laws consistently with federal laws, especially where, as here, the implementing regulations, and especially 4 AAC 06.020(a), would seem to be dispositive. Rodriquez's assurance of the continued application of the strict scrutiny standard to class, and especially racial, discrimination, is decisive authority compelling the reading urged by the Appellants at bar.

III.

THEREFORE, THE STATE OF ALASKA CANNOT CONSTITUTIONALLY COMPEL NATIVE ESKIMOS, INDIANS AND ALEUTS TO LEAVE THEIR HOME VILLAGES AND FAMILIES AS A CONDITION TO PROVIDING SECONDARY EDUCATIONAL FACILITIES AND INSTRUCTION.

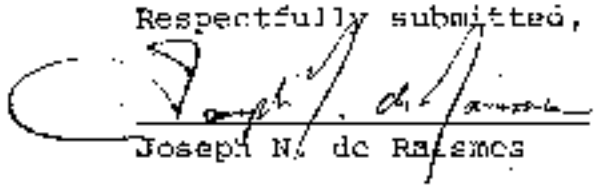
Since the right of privacy and the right to education are both fundamental rights under the United States Constitution and the Constitution of the State of Alaska, the State of Alaska may not compel native children to choose between them. In fact, even if the right to education should not be deemed to be "fundamental," the state may not provide that access to such an important benefit

be dependent on the waiver of the fundamental right to privacy of family life.

Amicus would submit that the Alaska Supreme Court has already decided this issue in holding that the right to education may not be made dependent on the waiver of privacy rights relating to the length or style of hair; Breese v. Smith, supra. Likewise, Articles I and VII of the Constitution of the State of Alaska establish the fundamentality of the rights at stake. There could be no stronger case for strict scrutiny of the state's actions than that presented by the case at bar. Thus, the summary judgement rendered by the court below must be vacated and strict scrutiny must be applied to the state's policy.

Amicus submits that the native Appellants' right to privacy of family life, encompassing guarantees of freedom of association and cultural integrity and other "penumbral" protections, must prevail in this case. Accordingly, the judgement should be vacated and reversed, and this Court should grant summary judgement to the Appellants on the basis of the record below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that true and correct copies of the foregoing Brief of the American Civil Liberties Union, Amicus Curiae were mailed, postage prepaid, to Ms. Josephine McPhetres, Clerk, Alaska Supreme Court, Pouch U, Juneau, Alaska 99801; Peter Partnow, c/o Office of Attorney General, State Capitol, Pouch K, Juneau, Alaska 99801 and Christopher Cook, P. O. Box 555, Bethel, Alaska 99559, this 23rd day of May, 1974

Pat Swalin