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Equal Protection and Property Qualifications for Appointment to the Haines Borough Port and Harbor Advisory Committee

An equal protection argument respectfully submitted to the Mayor and Members of the Borough Assembly of Haines, Alaska.

by Haines Borough, Alaska resident
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SUMMARY

The Haines Borough provides port and harbor facilities that are designed for residents, visitors and businesses alike to access the navigable waters of northern southeast Alaska. To assist with the management of these facilities, the borough provides for a seven member Port and Harbor Advisory Committee (PHAC) “comprised of three commercial vessel owners, two noncommercial vessel owners, one tariff regulated company owner or representative, and a community member at large who has a business related to harbor activities.” *Haines, Alaska, Borough Code § 16.08.010 (B)*. The PHAC is tasked “to deliberate over matters concerning the construction, improvement, maintenance, use, operation, and regulation of borough port and harbor facilities, and make recommendations regarding these issues to the assembly.” *Haines, Alaska, Borough Code § 16.08.010 (C)*.

The main contention of this paper is that the Haines Borough is violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by requiring a resident to own specific types of property to qualify for appointment to the PHAC. The property qualification in HBC § 16.08.010 (B) constitutes a government classification that discriminates on its face. This discriminatory government classification deprives otherwise qualified residents of the “constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications”. *Turner v. Fouche*, 396 U.S. 346, 347 (1970). The Haines Borough fails to have the sufficient justification, as demanded by the Equal Protection Clause, to deprive otherwise qualified residents of this federal constitutional right.

The remedy here is simple. The borough must remove all references to the ownership of property specified in HBC § 16.08.010 (B). Instead, qualifications should be based on relevant criteria such as a resident’s experience, expertise, or demonstrated interest to more appropriately accommodate the borough’s compelling interest in public safety. Doing so will realign HBC § 16.08.010 (B) to the Equal Protection Clause.

PREFACE

The following equal protection argument is my attempt at highlighting an issue that I believe affects the ability of the people of the Haines Borough to effectively govern the affairs that affect their lives. I believe the property qualification in HBC § 16.08.010 (B) speaks to the dangers of government institutions that fail to fairly represent all members of the community. Property qualifications result in government institutions that underrepresent the people they serve. Underrepresentation strikes at the root of representative democracy by negatively affecting the ability of elected officials to gauge the will of the people as a whole.

Accordingly, I am submitting this paper to the Mayor and members of the Haines Borough Assembly on behalf of the following:

- Residents who may be interested in serving the public as a member of the PHAC, but are ineligible simply because they do not own the property specified in HBC § 16.08.010(B); and
- Individuals who believe that all residents of the borough have a legitimate stake in Haines ports and harbors, regardless of whether they own the property specified in HBC § 16.08.010 (B) or not; and
- Residents who believe that property qualifications for appointment to government bodies are inconsistent with American representative democracy.

I must state at the outset that I am by no means an expert in legal matters. That being said, I have invested a significant amount of time researching equal protection analysis after first coming across this property qualification in Haines Borough Code. The project has required many hours of study in American history, political science, constitutional law, and legal argumentation in preparation. My goal has been to present a well-reasoned and readable argument with accurate citations and sources. Ultimately, I feel it important to not only state my contention that the property qualification in HBC § 16.08.010 (B) violates the Equal Protection Clause, but also to illustrate why it does so.

I would like to extend my appreciation to a few individuals. First, I must acknowledge the work of Akhil Reed Amar, Sterling Professor of Law and Political Science at Yale University. This argument has partially evolved from a free online Constitutional Law class taught by professor Amar that I completed in the spring of 2014. This class, along with his two books *America's Constitution: a Biography* and *America's Unwritten Constitution*, has been highly instructive.

I would also like to thank Dana Hallett for his editing contributions to this work. His time and assistance in reviewing this piece and making it accessible to the reader was invaluable.

Most of all, however, I must thank my wife, Lisa, for her patience and understanding. Without her support, this effort would not have been possible.

Michael Denker

*“that we here highly resolve ... that government of the people, by the people, and
for the people, shall not perish from the earth.”*

Abraham Lincoln, Gettysburg Address, November 19, 1863

“All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.”

Alaska Constitution, Art. I, § 2 – Source of Government

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ISSUE PRESENTED FOR REVIEW

**WHETHER THE HAINES BOROUGH IS VIOLATING THE
EQUAL PROTECTION CLAUSE OF THE FOURTEENTH
AMENDMENT OF THE UNITED STATES CONSTITUTION BY
REQUIRING A RESIDENT TO OWN SPECIFIC TYPES OF
PROPERTY TO QUALIFY FOR APPOINTMENT TO THE PORT
AND HARBOR ADVISORY COMMITTEE (PHAC).**

BACKGROUND

The Haines Borough borders the navigable waters of northern Southeast Alaska. Residents, visitors and businesses alike use these navigable waters to travel, engage in interstate commerce, and access natural resources. *Haines Borough 2025 Comprehensive Plan*, pg. 23, 30-31; *See 33 CFR 329.4*, (Definition of “navigable waters”). These waters are essential to the social, cultural, subsistence and economic well being of the region. *Id.*

The Haines Borough provides port and harbor facilities that are designed to provide access to the navigable waters of northern Southeast Alaska. These public facilities include the Haines Small Boat Harbor, the Port Chilkoot Dock, the Lutak Dock, the Letnikof Cove Small Boat Harbor and Launch Ramp, and Swanson Harbor. *Id.*, Pg. 121-128. Haines port and harbor facilities include a deep-water port, breakwaters, floating docks, boats slips, tidal grids, launch ramps, an icehouse, fuel dispensary, a cruise ship dock, restrooms, pedestrian access ramps, a freight dock, and a seaplane float. *Id.*, Pg. 121. The facilities “support commercial and subsistence fishing, recreation and tourism”, and are “capable of handling containerized cargo (break and bulk), manual loading and unloading operations, petroleum products transshipment and passenger operations.” *Id.*, Pg. 122-123.

Title 16 of Haines Borough Code governs local port and harbor facilities and infrastructure. The primary purpose of Title 16 is “to protect the lives, health, safety and well-being of the residents of the Haines Borough and those persons

who have property in or use or work upon the vessels using the borough port and harbor facilities or who make sales and deliveries of goods and merchandise to vessels therein or who use the facilities for mooring commercial or pleasure vessels.” *Haines, Alaska, Borough Code § 16.04.020*. Secondary to public safety is “to protect the property of such vessel owners by regulating the borough port and harbor facilities to ensure the widest possible public use thereof”; “to prevent the maintenance of nuisances and fire and health hazards”; and “to make reasonable charges for the use of certain facilities” so that the borough may pay the costs of operating the facilities from these revenues. *Id.*

To assist with the management of local ports and harbors, Haines Borough Code provides for a seven-member Port and Harbor Advisory Committee (PHAC). *Haines, Alaska, Borough Code § 16.08.010 (B)*. The PHAC is “comprised of three commercial vessel owners, two noncommercial vessel owners, one tariff regulated company owner or representative, and a community member at large who has a business related to harbor activities.” *Id.* The PHAC is tasked to “deliberate over matters concerning the construction, improvement, maintenance, use, operation, and regulation of borough port and harbor facilities, and make recommendations regarding these issues to the assembly, either directly or through the manager or harbormaster.” *Haines, Alaska, Borough Code § 16.08.010 (C)*.

There are two separate requirements to qualify to be considered for appointment to the PHAC. First, a person must meet the residency requirements

that pertain to all borough committees, boards and commissions. This entails “maintain[ing] the persons principle place of residence within the corporate boundaries of the borough...for at least 30 days” immediately preceding appointment, and “physically occupy[ing] said residence” for those 30 days. *Haines, Alaska, Borough Code § 2.60.020*. Provided these residency requirements are satisfied, to qualify for appointment to the PHAC a person must then own a “commercial vessel”, a “non-commercial vessel”, a “business related to harbor activities”, or own or represent a “tariff regulated company”. *Haines, Alaska, Borough Code § 16.08.010 (B)*. Satisfying both of these requirements allows a person to qualify to be considered for appointment to the PHAC.

SUMMARY OF ARGUMENT

It is the main contention of this paper that the Haines Borough is violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by requiring a resident to own specific types of property to qualify for appointment to the PHAC. The Fourteenth Amendment of the United States Constitution states the following:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*”

U.S. Const. Amend. XIV, § 1. (emphasis added)

To accommodate the requirements of a complete equal protection analysis, the following issues will be decided:

- Does the property qualification in HBC § 16.08.010 (B) constitute a government classification that discriminates?
- If a discriminatory government classification is determined to exist, does it deprive otherwise qualified residents of a federal constitutional right?
- If the property qualification in HBC 16.08.010 (B) does indeed deprive otherwise qualified residents of a federal constitutional right, does the Haines Borough have the sufficient justification demanded by the Equal Protection Clause to do so?

As will be demonstrated, the property qualification in HBC § 16.08.010 (B) violates the Equal Protection Clause on the merits of the issue. Therefore, to satisfy a complete equal protection analysis, a remedy will be provided as a conclusion. This remedy will advise the Haines Borough to remove all references of property ownership from the PHAC membership qualifications specified in HBC § 16.08.010 (B). It will then recommend that the Haines Borough include language in HBC § 16.08.010 (B) that bases qualifications for appointment on relevant criteria such as a resident's experience, expertise, or demonstrated interest to more appropriately accommodate the borough's compelling interest in public

safety. Doing so will realign HBC § 16.08.010 (B) to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I. THE PROPERTY QUALIFICATION IN HBC § 16.08.010 (B) CONSTITUTES A GOVERNMENT CLASSIFICATION THAT DISCRIMINATES ON ITS FACE.

The first step in an equal protection analysis is to determine whether a state or local municipality discriminated using a classification. Government classifications are “action[s] imposing a burden or conferring a benefit on one class of persons to the exclusion of others.” *Galloway, Russell W. Jr., Basic Equal Protection Analysis*, Santa Clara Law Review, Vol. 29 | No. 1, Article 4, Pg. 123 (1989). For the Equal Protection Clause to apply, a government classification must first be determined to exist so that its validity may be measured. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 59 (1973), Stewart, J., concurring, (“The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.”). The United States Supreme Court has stated, “Only when it is shown that the legislation has a substantial disparate impact on classes defined in a different fashion may analysis continue on the basis of the impact on those classes.” *Califano v. Boles*, 433 U.S. 282, 294 (1979).

A government classification can be either “facial” or “in effect”. *Yick Wo v. Hopkins*, 118 U.S. 356, 362-363 (1886); *See also Galloway*, Pg. 123. Government classifications are “Facial” if they are readily apparent in the wording of a statute. *See Galloway*, Pg. 123. A government classification is considered “in effect” if the provisions within a statute are neutral on the face of the law, “but [have] the effect of distributing burdens or benefits unequally.” *Galloway*, Pg. 123. The Equal Protection Clause does not apply should a government classification not have been determined to exist, either facially or in effect. *Id.*

A. The property qualification in HBC § 16.08.010 (B) qualifies as a discriminatory government classification because it treats residents unequally based solely on the ownership of property.

To begin this argument, it must first be decided whether the property qualification in HBC § 16.08.010 (B) qualifies as a discriminatory government classification. To do so, it must be determined whether the ordinance “has a substantial disparate impact on classes defined in a different fashion.” *Califano* at 294.

Government classifications are “action[s] imposing a burden or conferring a benefit on one class of persons to the exclusion of others.” *Galloway*, Pg. 123; *See also Rodriguez* at 59. The Court has stated that, as a general rule, “Class legislation, discriminating against some and favoring others, is prohibited.” *See Yick Wo* at 368, (quoting *Barbier v. Connolly*, 113 U.S. 27 (1885)).

Government classifications discriminate because they treat people unequally by distinguishing between individuals based upon some type of defining characteristic. The word “discriminate” originates from the Latin “discriminat”, meaning to ‘distinguish between’. “discriminate”, *Oxforddictionaries.com*. It refers to the “unequal treatment of persons, for a reason which has nothing to do with legal rights or ability.” “discrimination”, *Dictionary.law.com*. To discriminate is “to make a difference in treatment or favor on a basis other than individual merit.” “discriminate”, *Merriam-Webster.com*.

First, it is plainly apparent that the property qualification in HBC § 16.08.010 (B) establishes a scheme whereby residents are distinguished between two ‘classes’. The ordinance draws a distinction between those who own the property specified in HBC § 16.08.010 (B), and those who do not. To qualify for appointment to the PHAC, the borough requires that an otherwise qualified resident be the owner of a “commercial” or “noncommercial” vessel, be an “owner or representative” of a “tariff regulated company”, or own a “business related to harbor activities”. *Haines, Alaska, Borough Code § 16.08.010 (B)*. This requirement defines Haines residents “in a different fashion”, *See Califano* at 294, by using property ownership as the distinguishing characteristic.

Second, the property qualification confers the benefit of eligibility to one class of resident to the exclusion of others. Residents who do not own the property specified in HBC § 16.08.010 (B) are excluded from the ability to qualify for appointment to the PHAC. Only residents owning the property specified in

HBC § 16.08.010 (B) are conferred this benefit. Excluding otherwise qualified residents from the ability to qualify for appointment to the PHAC constitutes a “substantial disparate impact on classes defined in a different fashion.” *See Califano* at 294; *See also* “disparate”, *Merriam-Webster.com*, (“different from each other”). These two classes are treated substantially different from each other based on nothing more than the ownership of property.

Third, distinguishing between Haines residents and treating them unequally based solely on the ownership of property satisfies the definition of ‘discriminatory’. The Haines Borough’s unequal treatment is not based on legal rights or ability. “discrimination”, *Dictionary.law.com*; *See also* “discriminate”, *Oxforddictionaries.com*. The property qualification favors one class of resident over another “on a basis other than individual merit.” “Discriminate”, *Merriam-webster.com*. The result is otherwise qualified residents being arbitrarily excluded from the ability to be considered for appointment to the PHAC.

Therefore, the property qualification in HBC § 16.08.010 (B) constitutes a government classification that discriminates because it treats residents unequally based solely on the ownership of property.

B. The property qualification in HBC § 16.08.010 (B) discriminates “on its face” because it is explicitly worded in code.

The next issue to determine is whether the discriminatory government classification is “facial”, or “in effect”. *See Yick Wo* at 362-363; *See also Galloway*, Pg. 123. Recall that a “facial” classification “appear[s] on the face of”

a statute”, *Galloway* Pg. 123, and is plainly apparent in the wording of the code. Also recall that “in effect” means the government classification is neutral on its face, and only apparent in the government’s administration or application of the law. *Id.*

In this matter, the discriminatory government classification based on property ownership is plainly apparent in the wording of HBC § 16.08.010 (B). The ordinance’s use of the terms “owner”, “owner or representative”, and “has a business”, *See Haines, Alaska, Borough Code § 16.08.010 (B)*, arbitrarily divides residents into two classes; those who own the specified property, and those who do not. No further proof is required of the Borough’s intent with the classification. The explicitly worded language in HBC § 16.08.010 (B) is used to distinguish between residents based solely on the ownership of property for the expressed intent of determining qualifications for appointment to the PHAC.

Because this discriminatory government classification appears on the face of HBC § 16.08.010 (B), the Equal Protection Clause applies. *See Galloway*, Pg. 123. Therefore, the analysis may continue to determine if the borough is complying with equal protection standards.

**II. THE PROPERTY QUALIFICATION IN HBC § 16.08.010 (B)
DEPRIVES OTHERWISE QUALIFIED RESIDENTS OF A
FEDERAL CONSTITUTIONAL RIGHT.**

Because a government classification has been determined to exist, it must next be decided “whether the [government classification] operates to the

disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.” *See Rodriguez*, at 17. A classification is considered “suspect” if it is “based on race, ethnicity, [or] national origin.” *See Galloway*, Pg. 125. However, the Court also “treat[s] as presumptively invidious those classifications that...impinge upon the exercise of a fundamental right.” *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

Classifications determined to be invidiously discriminatory violate the Equal Protection Clause. *Rodriguez* at 17. Discrimination is considered “invidious” if it “treat(s) a class of persons unequally in a manner that is malicious, hostile, or damaging.” “invidious discrimination”, *Legal Information Institute, Cornell University*, law.cornell.edu/wex/invidious-discrimination. It is a type of discrimination that is “arbitrary, irrational and not reasonably related to a legitimate purpose.” *Black’s Law Dictionary*, 6th Ed., West Publishing Co., 1990; *See also Eaton v. State*, Del., 363 A.2d 440, 441; *McLaughlin v. Florida*, 379 U.S. 184, 191.

This section of the argument will demonstrate that the borough’s discriminatory classification based on property ownership does indeed deprive otherwise qualified residents of a fundamental constitutional right. As such, the property qualification in HBC § 16.08.010 (B) constitutes an invidious discrimination in violation of the Equal Protection Clause.

A. In *Turner v. Fouche*, the United States Supreme Court held that there is a “constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications.”

In *Turner v. Fouche*, the United States Supreme Court ruled on a case involving African American residents of Taliaferro County, Georgia, and a statutory scheme used to select juries and members of school boards. *Turner v. Fouch*, 396 U.S. 346 (1970). This statutory scheme “provide(d) for a county school board of five freeholders” that were selected by a grand jury drawn from a jury list selected by jury commissioners. *Id.*; “freeholder”, *Dictionary.com*, (a registered voter who owns local property and has been a local resident for a specified length of time.) The African American appellants challenged the constitutionality of the statutory scheme that required a resident to be a “freeholder” to qualify for selection to the county school board. *See Turner* at 346.

In it’s decision, the *Turner* Court held that there is “a constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications.” *Id* at 347. They stated, “On this record, the limitation of school board membership to freeholders violates the Equal Protection Clause of the Fourteenth Amendment.” *Id.* In the opinion of the Court, Mr. Justice Stewart expounded by saying “the State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.” *Id* at 362-363; *See also Carrington v. Rash*,

380 U.S. 89, 380 U.S. 91; *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 360 U.S. 50-51; *Pope v. Williams*, 193 U.S. 621, 193 U.S. 632.

The *Turner* Court determined the property qualification at issue “amounts to...invidious discrimination”. See *Turner* at 362-364. And while the Court was unable to say whether a property qualification could survive constitutional scrutiny in “other circumstances [that] might present themselves”, See *Turner* at 364, they nevertheless determined that this type of invidious discrimination infringed upon the appellant’s constitutional right to be considered for public service to this county school board. *Id.*

B. In *Chappelle v. Greater Baton Rouge Airport District*, the Court extended the constitutional right in *Turner* to include government bodies related to transportation.

Seven years after *Turner*, the United States Supreme Court ruled on another matter whereby the ownership of property was required for appointment to a municipal airport commission. In this case the appellant, Mr. E. C. Chappelle Jr., wanted to serve, upon appointment, as a commissioner on the Greater Baton Rouge Airport Commission. *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159 (1977). He was deemed “not qualified, since, at the time of his appointment, he owned no ‘property assessed in East Baton Rouge Parish.’” *Id.* at 159, (Mr. Justice Rehnquist, in dissent). The sole requirement for appointment to the commission was that “he own property, whether real or personal, that is assessed in the parish.” See *Chappelle* at 159.

The Court relied exclusively on *Turner* to rule this property qualification unconstitutional. *See Chappelle* at 159. Here the Court extended the constitutional right identified in *Turner* to government bodies outside of the specific merits of education. *See Turner* at 346-347; *See Chappelle* at 159. In doing so, the “constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications” was expanded to include consideration for appointment to government bodies related to transportation. *See Chappelle* at 159.

C. *Turner* and *Chappelle* apply here because the PHAC is a government body related to transportation.

In both *Turner* and *Chappelle*, at issue was the ability of an otherwise qualified person to be considered for public service on a government body of a public entity without classifications deemed invidiously discriminatory. *See Turner* at 346-347, (the selection of a school board in Taliaferro County, Georgia); *See also Chappelle* at 159, (the appointment of a person to an airport commission by the Parish Council of the Parish of East Baton Rouge, Louisiana). In *Chappelle*, however, the Court expanded the *Turner* ruling outside of education to include government bodies related to transportation. *Id.* Therefore, while both *Turner* and *Chappelle* apply to the property qualifications at issue here, they apply for different reasons.

First, the State of Alaska defines the PHAC as the same type of government body of a public entity that was addressed in both the *Turner* and *Chappelle*

rulings. To illustrate, Alaska Law defines “government body” and “public entity” as follows:

“Government Body” means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members.

Alaska Stat. § 44.62.310 (h)(1).

"Public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government.

Alaska Stat. § 44.62.310 (h)(3).

The PHAC plainly operates as a government body of a public entity. The meetings of the PHAC are part of a public process and must be properly noticed and open to the public. *See Alaska Stat. § 44.62.310 (e), (a); See also Haines, Alaska, Borough Code § 2.60.070.* The members of the PHAC provide a public service and are appointed according to a public process. *See Haines, Alaska, Borough Code § 2.60.055.* Thus, both *Turner* and *Chappelle* apply because the PHAC is a government body of a public entity as defined by the State of Alaska and the Haines Borough.

Unlike *Turner*, however, the *Chappelle* court extended this constitutional right to merits outside of education. Recall that in *Chappelle* the issue was the ability of a person to be considered for appointment to a municipal airport commission. *See Chappelle* at 159. Airports are facilities designed for a person’s

ability to access airspace. People use airspace to freely travel and engage in interstate commerce. Thus, *Chappelle* extended the constitutional right in *Turner* to government bodies related to transportation and interstate commerce.

The matter at issue here involves the ability of a person to be considered for appointment to a borough committee dealing with ports and harbors. Ports and harbors are facilities designed for a person's ability to access navigable waters. People use navigable waters to freely travel and engage in interstate commerce. Therefore, the municipal airport commission in *Chappelle*, and the borough's Port and Harbor Advisory Committee at issue here, both involve government bodies whose primary focus is on facilities designed to provide access to transportation and interstate commerce.

Therefore, both *Turner* and *Chappelle* apply because the PHAC is a government body of a public entity related to transportation and interstate commerce. As such, all Haines residents, including those who do not own the property specified in HBC 16.08.010 (B), have a constitutional right to be considered for public service on the PHAC without the burden of invidiously discriminatory qualifications.

D. The property qualification in HBC § 16.08.010 (B) constitutes an invidious discrimination in violation of the Equal Protection Clause.

It remains to be determined why and how the property qualification in HBC 16.08.010 (B) deprives otherwise qualified residents of this constitutional right. To settle this issue, focus must be drawn to the wording of the *Turner* decision.

The Court settled that there is “a constitutional right to be considered for public service *without the burden of invidiously discriminatory qualifications.*” *See Turner* at 347 (emphasis added); *See also Chappelle* at 159. Key to the wording here is the focus on “invidious discrimination”. Recall that discrimination is considered “invidious” if it “treat(s) a class of persons unequally in a manner that is malicious, hostile, or damaging.” “Invidious discrimination”, *Legal Information Institute, Cornell University*. Applying this definition to the matter at issue here is instructive.

First, property qualifications damage the effective representation of the excluded class. Property qualifications act as institutional barriers between otherwise qualified residents and their ability to serve as members of government bodies. These barriers deprive the excluded class of their ability to participate as members of government bodies in which they may have an interest. This negatively affects the excluded class by underrepresenting their interests at key points within the political process. Ultimately, underrepresentation permanently damages the ability of excluded classes to effectively influence policy and legislation as it moves through the political process.

Second, property qualifications intimidate by implying a sense of inferiority within the excluded class. Property qualifications imply that the excluded class has less to offer in the deliberations and decisions within the political process. The implication here is that the contributions from the excluded class are “of less importance, value or merit.” “inferior”, *Merriam-Webster.com*. This can have the

affect of alienating the disaffected class and creating discontent within the population.

Third, property qualifications create a hostile political atmosphere. Property qualifications function as “Keep Out” signs in the political process. They provide only one class of resident a voting seat at the table. Residents who would otherwise qualify are excluded from membership in key roles within the political process in which they may have an interest. This exclusion is offensive in nature by welcoming only one class of resident into positions of political power. This can lead to resentment in the community from those who are excluded.

Finally, property qualifications damage the legitimacy of the political process. Residents who are excluded from membership lose the ability to participate in setting agendas at key points in the political process. These residents also lose voting seats at the table during key points in the decision making process. In essence, the public process becomes a filter through which one class of resident is provided an unfair advantage at directing policy and legislation in matters affecting the entire community. This can drift policy and legislation away from the interests of the community. Thus, the filtering of public policy and legislation through favored classes dismantles the legitimacy of the political process.

The Court was correct to settle that the property qualifications in both *Turner* and *Chappelle* constituted an invidious discrimination in violation of the Equal Protection Clause. Property qualifications damage the effective representation of the residents who otherwise qualify, and intimidate by implying

a sense of inferiority within the excluded class. They also create a hostile atmosphere within the political process. Ultimately, this type of invidious discrimination dismantles the legitimacy of the political process.

Accordingly, the property qualification in HBC 16.08.010 (B) constitutes an invidious discrimination in violation of the Equal Protection Clause. The next section will further explore the arbitrary, irrational, and unreasonable nature of invidious discrimination. *See Black's Law Dictionary.*

III. THE HAINES BOROUGH FAILS TO HAVE THE SUFFICIENT JUSTIFICATION DEMANDED BY THE EQUAL PROTECTION CLAUSE TO DEPRIVE OTHERWISE QUALIFIED RESIDENTS OF THE FEDERAL CONSTITUTIONAL RIGHT TO BE CONSIDERED FOR PUBLIC SERVICE ON THE PHAC.

To determine whether or not there has been a violation of the Equal Protection Clause, one “must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.” *Williams v. Rhodes*, 393 U.S. 23, 393 U.S. 30 (1968). The United States Supreme Court has ruled that “whenever a state law infringes a constitutionally protected right, [the court] undertake[s] intensified equal protection scrutiny of that law.” *Attorney General of New York v. Soto-Lopez*, 476 U.S. 904 (1986); *See also Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 473 U.S. 440 (1985); *Martinez v. Bynum*, 461 U.S. 321, 461 U.S. 328, n. 7 (1983); *Plyler* at 202, 216-217, and n. 15; *Memorial Hospital v. Maricopa County*, 415 U.S. 258, 262 (1974); *Rodriguez* at 1, 16, and n. 39, 30-32,

40; *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 408 U.S. 101 (1972); *Dunn v. Blumstein*, 405 U.S. 335, 405 U.S. 342; *Shapiro v. Thompson*, 394 U.S. 634.

In fact, classifications that infringe upon a fundamental right must withstand “strict judicial scrutiny.” *Plyler* at 217. Equal Protection analysis must be “mindful that, where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.” *Harper v. Virginia Board of Elections*, 383 U.S. 668, 670 (1966), (Mr. Justice Douglas opinion of the Court); *Referenced also were Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Reynolds v. Sims*, 377 U.S. 561, 562 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Cox v. Louisiana*, 379 U.S. 536, 580-581 (1965) (Black, J., concurring). Strict scrutiny attempts to determine if sufficient justification exists to support the government’s classification. *See Galloway*, Pg. 123.

Ultimately, it must be proven that the discriminatory classification is “necessary to further a compelling interest.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995). This requires the discriminatory classification to be reasonable, necessary, and properly tailored to the government’s objective. *See Galloway*, Pg. 148-157; Gordon Harrison, *Alaska’s Constitution: A Citizen’s Guide*, Alaska Legislative Affairs Agency, Fifth Ed., Pg. 11-12. Where fundamental rights are involved, only classifications that can survive this strict judicial scrutiny will satisfy the demands of the Equal Protection Clause. And as

will be demonstrated, the borough's property qualification for appointment to the PHAC fails this analysis.

A. The property qualification in HBC § 16.08.010 (B) is improperly tailored to further the Borough's compelling interest in public safety.

One issue to determine here is whether HBC § 16.08.010 (B) is properly tailored to meet the borough's stated interest. This element of equal protection analysis is key where a fundamental right is involved.

The Equal Protection Clause was intended as a restriction on state or municipal actions "inconsistent with elemental constitutional premises." *Plyler* at 216. The Court has "treated as presumptively invidious those classifications that...impinge upon the exercise of a fundamental right." *Plyler* at 216-217. Such classifications affecting the exercise of a fundamental right requires government "to demonstrate that its classification has been precisely tailored to serve a compelling government interest." *Id.* at 217.

To be considered "precisely" or "narrowly" tailored, "there must be a sufficient nexus between the stated government interest and the classification created by [an] ordinance." *Nunez v. City of San Diego*, 114 F.3d 935 (1995); *Referenced from Plyler* at 216-217, 102; "nexus", *Merriam-Webster.com*, (a thing or place of greatest importance to an activity or interest.). This important element of equal protection analysis reconciles fundamental constitutional premises against the government classifications in question. *See Plyler* at 216-217. Ultimately, it must be determined whether the interest of greatest importance can be furthered by

the ordinance in question without classifications that are “presumptively invidious”. *Id.*

Therefore, to adhere to equal protection standards in this matter, the borough requires a compelling interest to justify the property qualification in HBC § 16.08.010 (B). This compelling interest is required because the ordinance infringes upon a federal constitutional right. And to determine what the boroughs compelling interest might be, one need look no further than Title 16 governing Haines ports and harbors.

The Haines Borough tasks the PHAC to “deliberate over matters concerning the construction, improvement, maintenance, use, operation, and regulation of borough port and harbor facilities, and make recommendations regarding these issues to the assembly.” *Haines, Alaska, Borough Code § 16.08.010 (C)*. However, to properly accommodate this task, all deliberations and decisions of the PHAC must necessarily comply with the purpose and construction of Title 16.

It is in the opening statement of Title 16’s purpose and construction that the borough identifies its compelling interest regarding local ports and harbors:

“The purpose of this title is to protect the lives, health, safety and well being of the residents of the Haines Borough and those persons who have property in or use or work upon the vessels using the borough port and harbor facilities or who make sales and deliveries of goods and merchandise to vessels therein or who use the facilities for mooring commercial or pleasure vessels.”

Haines, Alaska, Borough Code § 16.04.020, Purpose and Construction

This statement clearly identifies public safety as the borough's compelling interest. *Id.* The placement of this statement at the head of this section, along with general common sense, arguably leads to this conclusion.

To illustrate, consider the boroughs priority should a significant tsunami threaten local ports and harbors. In a tsunami, would the borough risk the lives of Haines residents to save property, or instead waive the protection of property to save the lives of Haines residents? It seems obvious here that Title 16 would mandate the borough to prioritize public safety over the protection of property.

Thus, the property qualification in HBC § 16.8.010 (B) must be reconciled against the borough's compelling interest in public safety to determine if it adheres to the Equal Protection Clause.

1. Basing qualifications for appointment to the PHAC on property ownership is unreasonable and wholly irrelevant to public safety.

Government classifications “must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without such basis.” *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *Referenced from Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155. This analysis must “reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.” *See McLaughlin* at 191.

Government classifications must also demonstrate relevancy to the purpose of the law. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The Equal

Protection Clause is offended “if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.” *Id.* This “traditional test” of relevancy is used to determine if there has been a denial of equal protection standards. *See Turner* at 362; *Referenced also were McGowan* at 420, 425-426; *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 556.

The property qualification at issue here fails this traditional equal protection test. First, it is unreasonable to consider that the ownership of property somehow qualifies a resident in public safety. Property ownership does not equate to experience or expertise in public safety.

Consider, for instance, a thirty-year resident of the borough who owns a commercial fishing vessel. There can be no doubt that this resident has a level of experience that more than qualifies for matters concerning public safety at Haines ports and harbors. However, consider if this thirty-year fisherman were to sell his boat to a person who moved to the Haines Borough from Oklahoma forty-five days earlier. If this happened, the thirty-year resident fisherman would no longer qualify for appointment to the PHAC. In fact, now the forty-five day resident from Oklahoma with no boating experience in local waters would qualify the moment the purchase was made. It is totally unreasonable to consider a forty-five day resident with no local boating experience more qualified in matters concerning public safety than a seasoned, thirty-year fisherman.

Second, property ownership is wholly irrelevant to matters concerning public safety. Personal qualifications such as experience or expertise are much

more relevant to public safety than whether a resident owns specific property. Consider the example of a retired port director who resides in the borough but does not own the property listed in HBC § 16.08.010 (B). This individual, through many years of port experience, more than qualifies in matters concerning public safety at local ports and harbors. However, because this highly experienced resident does not own the property specified in HBC § 16.08.010 (B), this person would fail to qualify to be considered for public service on the PHAC.

Proof of purchase is no valid qualification for matters involving public safety. Instead, personal attributes such as experience and expertise are qualifications much more reasonable and relevant. Thus, arguments that a resident must own property to participate responsibly in the deliberations and decisions of the PHAC are unreasonable and wholly irrelevant considering the borough's Title 16 mandate in public safety.

B. The property qualification in HBC § 16.08.010 (B) is unnecessary because property interests are adequately represented in Title 16.

The Court has ruled, “The State cannot choose means that unnecessarily burdens or restricts constitutionally protected activity.” *See Dunn* at 343. State or municipal laws that do infringe on constitutional rights “must be drawn with ‘precision’, and must be ‘tailored’ to serve their legitimate objectives.” *Id*; *Also referenced were NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967); *Shapiro* at 631. Government infringement of constitutionally protected fundamental rights such as political association, the

right to vote, and the right of ballot access, must satisfy strict judicial scrutiny by proving that the classification is “necessary to further a compelling government interest.” *See Dunn* at 330, 337, 342; *See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 174 (1979); *Storer v. Brown*, 415 U.S. 724 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Harper* at 663.

The property qualification at issue here is unnecessary given the existing property protections in HBC § 16.04.020. Haines Borough Code states that the secondary interest for the borough is, “to protect the property of such vessel owners by regulating the borough port and harbor facilities to ensure the widest possible use thereof.” *Haines, Alaska, Borough Code § 16.04.020*. Thus, property interests are adequately represented because they are explicitly codified within this section of code. *Id.*

A member of the PHAC must provide for property protection regardless if this member owns the property specified in HBC § 16.08.010 (B) or not. All deliberations and decisions of the PHAC must consider the protection of property to properly adhere to HBC § 16.04.020. Unfortunately, the addition of a property qualification for appointment to the PHAC appears as an attempt to ensure that property owners are represented over and above that of the community as a whole.

The fact that property is represented in HBC § 16.04.020 makes the property qualification for appointment to the PHAC unnecessary. More precise

means are available to properly tailor PHAC membership qualifications to the borough's stated interests identified in Title 16.

C. The advisory nature of the PHAC does not give the Haines Borough immunity from equal protection standards.

Another issue to determine is whether equal protection standards can be skirted if the PHAC merely makes recommendations and does not exact legislation on its own. In other words, can a municipality violate equal protection standards simply because a committee under its charge serves only in an advisory capacity?

It is relevant here that “a city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.” *Avery v. Midland County*, 390 U.S. 480 (1968). A municipality must provide the equal protection of the laws regardless of whether a government body enacts laws of its own, or serves only to recommend plans of action to a public entity vested with those general governmental powers. *Quinn Et. Al. v. Millsap Et. Al.*, 491 U.S. 95, 105 (1989). Arguments that claim the Equal Protection Clause “has no relevancy” because a governmental body is only empowered to make recommendations “reflects a significant misreading of (the) Court’s precedents.” *Quinn* at 104-106, *See also Kramer* at 629.

These Supreme Court decisions find a foothold here. Arguments that the Equal Protection Clause does not apply for appointment to government bodies that

merely advise and make no legislation on their own have been found to conflict with equal protection standards. *See Quinn* at 95, 105. There is a constitutional limitation against such actions that attempt to skirt equal protection standards. *See Quinn* at 95, 105; *See also Kramer* at 629.

The Court no doubt understands what is at stake when considering membership to these advisory bodies. To appreciate the significance, it is important to consider the meaning of the term “advisory”. The word “advisory” literally means “having the power or right to make suggestions about what should be done.” “advisory”, *Merriam-Webster.com*. To be granted advisory authority literally carries with it an implied political power that is not shared by other members of the community. Thus, the Court is correct to demand that equal protection standards be maintained even with advisory bodies.

Therefore, the Haines Borough is not “immunize(d)...from equal protection scrutiny” simply because the PHAC acts only in an advisory capacity. *See Quinn* at 95, 105. The members of these types of advisory bodies are empowered with rights that other residents of the Haines Borough do not share. All matters concerning the PHAC must necessarily align with the Equal Protection Clause, and this includes the member qualifications for appointment to the PHAC.

D. The PHAC does not qualify as a “limited purpose entity” because it provides an important government function concerning general public services related to transportation.

Another issue is whether a municipality such as the Haines Borough can withstand equal protection scrutiny if a government body serves a very specific purpose. In other words, can the borough skirt equal protection standards if the PHAC is considered what is called a “limited purpose entity”?

In *Salyer Land Co. v. Tulare Water District*, the United States Supreme Court ruled on a case whereby “only landowners [were] qualified to elect the district’s board of directors.” *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). The Court ruled on the constitutionality of a scheme whereby votes were “apportioned according to the assessed value of the lands.” *Id.* The appellants in this case claimed that the limitation of the franchise to landowners violated equal protection requirements. *Id.*

The Court held that “restricting the votes to landowners who may or may not be residents [did] not violate the principle...that governing bodies should be selected in a popular election in which every person’s vote is equal.” *Id.* They held that “since assessments against landowners [were] the sole means by which expenses...are paid”, that “it is not irrational to repose the franchise to landowners, but not residents.” *Id.* Thus, the Court here ruled the scheme was constitutional whereby only landowners could vote for the water district’s board of directors. *Id.*

However, it is relevant to consider the reasoning behind the Court's decision. The Court ruled the scheme constitutional because the district in question "provide[d] none of the general public services ordinarily attributed to a governing body." *See Salyer* at 719. They stated that the water district served a "special limited purpose" in this case. *Id.* at 728. This "special limited purpose" was defined to mean that the district "provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." *Id.* at 728-729; *See also Ball v. James*, 451 U.S. 355, 366 (1981) ("limited purpose" entity could not impose taxes, enact laws, maintain streets, or operate schools, health, or welfare services). They also stated that "there are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries." *Id.* at 729. Thus, the *Salyer* Court found rationale to provide exception to strict equal protection scrutiny for a person's right to vote for members of a district considered a "limited purpose entity". *See Salyer* at 728-730.

To begin the analysis, it must first be argued that the merits in *Salyer* involving the "right" to vote for members of a government body share no similarity with the argument being presented here. The matter at issue here involves the right to be considered for public service as a member of a government body, not the "rights" of those selecting the members to that government body. Nevertheless, justifications based on a "limited public entity" rationale could be inferred for placing restrictions on a political franchise, whether that franchise is

voting or whether it involves appointment to a government body acting in an advisory capacity.

However, regardless of whether this rationale is applicable or not, the PHAC does not qualify for a “limited purpose” exception to equal protection standards. First, the PHAC provides a vital public service assisting in the management of facilities designed to access transportation. Recall that the PHAC is tasked to deliberate and make recommendations on matters concerning local port and harbor facilities. *Haines, Alaska, Borough Code § 16.08.010 (C)*. These port and harbor facilities serve the vital government function of providing access to navigable waters that provides residents with the ability to freely travel, engage in interstate commerce, and access natural resources. Thus, it is plainly apparent that the PHAC does not meet the requirements of a “limited purpose entity” because Haines ports and harbors provide “general public service[s]” related to the access to transportation as defined by the *Salyer* Court. *See Salyer* at 728-729.

Second, local ports and harbors are designed to enhance the quality of life of Haines residents. Along with the ability to freely travel and engage in commerce, these facilities provide residents with the ability to recreate, subsistence and sport fish. Therefore, these local port and harbor facilities are central to the quality of life of the all residents of the borough.

Now recall that in *Salyer* the rationale for the equal protection exception was partially attributed to the fact that the water district had “no towns, shops, hospitals, or other facilities designed to improve the quality of life within the

district boundaries.” *Id.* at 729. Thus, *Salyer* clearly does not apply in the matter at issue here because the PHAC assists with the management of facilities that are central to the quality of life of the region.

Therefore, no justification can be inferred for the borough’s property qualification based on a “limited purpose entity” argument. The PHAC serves a vital government function because it assists with the management of facilities that provide a “general public service” related to the access of transportation. These facilities also enhance the quality of life of residents by providing them the ability to freely travel, engage in commerce, and access natural resources. Thus, the *Salyer* “limited purpose” exception does not apply in the matter at issue here.

E. The Haines Borough fails to recognize that all residents, regardless of property ownership, have a legitimate stake in Haines ports and harbors.

Another issue to consider is whether otherwise qualified residents who do not own the property specified in HBC § 16.08.010 (B) have a vested stake in Haines ports and harbors. Specifically, do all residents utilize the services of these facilities? Do these facilities serve a vital function to the residents and the community as a whole? Also, do all residents, regardless of whether they own the property specified in HBC § 16.08.010 (B) or not, contribute financially to Haines ports and harbors?

These are important questions to ask because the Court has ruled, “Any unjustified discrimination in determining who may participate in political affairs

or in the selection of public officials undermines the legitimacy of representative democracy.” *Kramer* at 626, Mr. Chief Justice Warren opinion of the court. This type of unjustified discrimination “always pose[s] the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.” *Id.* at 627.

This section of the argument will demonstrate that each resident of the Haines Borough, regardless of property ownership, is a legitimate stakeholder in Haines port and harbors. These facilities substantially affect the lives of all Haines residents, not merely those owning the property specified in HBC § 16.08.010 (B).

1. There is a strong public interest in facilities designed to exercise the constitutional rights to travel, engage in interstate commerce, and access natural resources.

The navigable waters of northern Southeast Alaska provide each resident, regardless of property ownership, with the ability to freely travel, engage in interstate commerce, and access natural resources. These freedoms are constitutional rights not predicated by conditions such as property ownership. Accordingly, all residents, regardless of whether they own property or not, have a strong vested interest in Haines ports and harbors.

The freedom to travel has long been recognized by the Court as a federal constitutional right. *See Corfield v. Coryell*, 6 Fed. Cas., 552 (1823); *Crandal v. State of Nevada*, 73 U.S. 35, 49 (1868); *Paul v. Virginia*, 75 U.S. 180 (1869); *United States v. Wheeler*, 254 U.S. 281 (1920); *United States v. Guest*, 383, U.S.

757 (1966); *Shapiro* at 629; *Saenz v. Roe*, 526 U.S. 489 (1999). The right to travel is “inherent in citizens of all free governments.” *See Wheeler* at 281. The Court has held that travel “occupies a position fundamental to the concept of our federal union.” *See Guest* at 383. As such, government actions are closely scrutinized that infringe on a person’s ability to freely travel. *See Corfield* at 552; *Crandal* at 49; *Paul* at 180; *Wheeler* at 281; *Guest* at 757; *Shapiro* at 629; *Saenz* at 489.

The freedom to engage in interstate commerce is also recognized as a federal constitutional right. *See Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891); *Western Union Telegraph v. Kansas ex rel. Coleman*, 216 U.S. 1, 26 (1910); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Dennis v. Higgins*, 498 U.S. 439, 446-450 (1991). In *Crutcher v. Kentucky*, Mr. Justice Bradley stated in the opinion of the Court, “to carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States.” *See Crutcher* at 57. This means, “Engaging in interstate commerce is a ‘right of constitutional stature’.” *See Crutcher* at 448, quoting *Garrity* at 493, 500 (1967). This right, originating with the Commerce Clause of the United States Constitution, *See U.S. Const., Art. 1, Sec. 8, Clause 3*, was “intended to benefit those who...are engaged in interstate commerce.” *See Crutcher* at 449.

Additionally, the Alaska Constitution provides for the right of each person to have equal access to the state’s natural resources. This article contains several clauses that constitutionalize this right. First, the article provides that “free access

to the navigable water of the state...shall not be denied any citizen of the United States or resident of the state.” *Alaska Const. Art. VIII Sec. 14*. Second, it states the “fish, wildlife, and waters are reserved to the people for common use.” *Alaska Const., Art. VIII Sec. 3*. Third, there shall be “no exclusive right or special privilege of fishery...created or authorized in the natural waters of the state.” *Alaska Const. Art. VIII Sec. 15*. Fourth, laws and regulations “shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.” *Alaska Const. Art. VIII Sec. 17*. Taken together, these clauses constitutionalize the management of the state’s natural resources “for the benefit of all the people.” *Owsichek v. State, Guide Licensing and Control Board*, 763 P.2d 495, (1988). Thus, in Alaska, everyone has a constitutional right for equal access to the state’s natural resources.

The constitutional rights to freely travel, engage in interstate commerce, and access natural resources are not predicated on conditions such as a person’s ownership of property. Accordingly, the ownership of property is not required for a person to use Haines ports and harbors. For example, not all residents own the boat they use when subsistence fishing, sport fishing, or recreating. Some residents borrow a friend or family member’s boat to subsistence fish. Others ride along in a friend’s boat to recreate or sport fish. And even though these residents do not own these small vessels, they nevertheless rely on Haines port and harbor facilities to exercise their constitutional rights to travel and access Alaska’s natural resources.

Also, some residents who do not own the property in HBC 16.08.010 (B) use Haines ports and harbors to make a living. Some are deckhands who work on commercial fishing vessels or small fast ferries and rely on ports and harbors for their livelihood. Others use port and harbor facilities so they can travel by small fast ferry to locations such as Skagway and Juneau to earn their living. These residents use and depend on port and harbor facilities to earn a living even though they do not own the property specified in HBC § 16.08.010 (B).

Port and harbor facilities also provide access to transportation for residents who own small, local businesses. These small business owners use port and harbor facilities to get their products aboard vessels used in interstate commerce. Other small business owners rely on the small fast ferries to transport visitors to and from Skagway and Juneau so they can shop in their stores. These small local businesses most likely do not qualify as being “directly related to harbor activities”, *See Haines, Alaska, Borough Code § 16.08.010 (B)*. Yet, they rely on ports and harbors for the health of their businesses.

These examples illustrate that even though a resident may not own the property specified in HBC § 16.08.010 (B), they nevertheless rely on Haines ports and harbors to exercise their constitutional rights. The constitutional rights to freely travel, engage in interstate commerce, and access natural resources are not predicated on a resident’s ownership of this property. They belong to each and every resident regardless of property ownership. As such, all residents have a

strong public interest in port and harbor facilities that provide such a vital government service.

2. All residents have a vested interest in public health and safety.

The primary purpose of Title 16 governing Haines ports and harbors is public safety. *See Haines, Alaska, Borough Code § 16.04.020.* The primary interest here involves the safety of “residents of the Haines Borough”, individuals “who have property in or work upon the vessels”, those “who make sales and deliveries of goods and merchandise to vessels”, and those “who use the facilities for mooring commercial and pleasure vessels.” *See Haines, Alaska, Borough Code § 16.04.020.* The Court has ruled that Public health and safety is a legitimate end of local and state regulation involving transportation issues. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 523-524 (1959); *S.C. State Highway Department v. Barnell Bros, Inc.*, 303 U.S. 177, 184 (1938); *Maurer v. Hamilton*, 309 U.S. 598, 611 (1940).

Even residents not owning the property specified in HBC § 16.08.010 (B) have a legitimate stake in public safety at Haines ports and harbors. Take, for instance, the spouse of a boat owner who has resided in Haines for 40 years and whose family commercial fishes to earn a living. This resident has a legitimate interest in the health and safety of their family members who regularly use Haines ports and harbors. And even though the spouse of this fisherman may not qualify

for membership to the PHAC, this person nevertheless has a valid, legitimate interest in public health and safety.

Consider also a resident who is an employee for a local company that uses Haines port facilities daily on the job. This person regularly is exposed to hazards associated with working around the local port. These hazards include slips, trips, and falls; working near frigid waters; and working around heavy equipment moving on the facility. Because this individual works daily on these borough port facilities, they have a legitimate interest in, and an intimate knowledge and experience of, the public safety aspects of local ports.

Public safety affects the entire community of Haines. The thought of the health and safety of family members, friends or neighbors being jeopardized by unsafe conditions is a matter of concern for each and every resident of Haines. It is a serious matter in which everyone in a small community has a legitimate stake, whether a resident owns the property specified in HBC 16.08.010 (B) or not.

3. All residents, regardless of property ownership, contribute financially to Haines ports and harbors.

Another issue to determine is whether the funding for Haines ports and harbors comes solely from the owners of the property listed in HBC § 16.08.010 (B), or whether this funding is spread throughout the community involving all residents of the borough. Funding is relevant because the Court has demonstrated that discriminatory classifications are inappropriate where the burden of financing public activity is spread throughout a municipal population.

For instance, in *Cipriano v. Houma*, the Court found unconstitutional a provision that only “property taxpayers have the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility system.” *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In this case the Court found “the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike.” *Id.* The Court here determined the classification “unconstitutionally excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted on as those who are permitted to vote.” *Id.*

This rationale was expanded in *City of Phoenix v. Kolodziejski*. This case revolved around an election where the issuance of general obligation bonds was proposed to finance various municipal improvements. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). This Arizona scheme permitted only “real property taxpayers” to vote on the issue. *Id.* The Court held this scheme unconstitutional stating, “the differences between the interest of property owners and nonproperty owners are not sufficiently substantial to justify excluding the latter from voting.” *Id.* They noted,

“half of the debt service requirements will be satisfied not from real property taxes, but from revenues from other local taxes paid by nonproperty owners as well as those who own real property. Not only do those person excluded from the franchise have a great interest in approving or disapproving municipal improvements, but they will also contribute, as directly as property owners, to the servicing of the bonds by the payment of taxes to be used for this purpose.” *Id.* at 209-210

Thus, the Court ruled this scheme violated the equal protection clause because both property and non-property owners paid these taxes. *See Phoenix* at 204.

These court rulings indicate that residents who fund a municipal activity have a right to participate in all aspects of the political process affecting these activities. These rulings correctly defend the tradition in American government of *no taxation without representation*. These decisions, along with the decisions in *Turner* in *Chappelle*, indicate that this defense is justified whether the issue involves the franchise of voting, or whether it involves the ability to be considered for public service on a government body.

Turning to the matter at issue here, this defense is appropriate because the funding for local ports and harbors is spread throughout the community, not just to the owners of the property specified in HBC 16.08.010 (B). To begin, Haines ports and harbors are funded through three public enterprise funds; the Boat Harbor Enterprise Fund, the Lutak Dock Enterprise Fund, and the Port Chilkoot Dock Fund. *See Haines, Alaska, Borough Code Chapter 3.19, Chapter 3.3, Chapter 3.33*. These funds provide for “the proper accounting and management of public funds derived from charges for services for utilization” of these three facilities. *See Haines, Alaska, Borough Code § 3.19.010, § 3.31.010, § 3.33.010*.

The operational revenue for these funds is derived from a variety of sources. The Boat Harbor Enterprise Fund receives its revenue from transient moorage, annual slip rentals, ramp fees, ice sales, fuel sales, miscellaneous revenue, and interest. *See Haines, Alaska, FY 15 Manager’s Budget, Pg. 19*. The

Lutak Dock Enterprise Fund receives its operational revenue from land sales proceeds and Lutak Dock fees. *See Haines, Alaska, FY 15 Manager's Budget*, Pg. 20. The Port Chilkoot Dock Enterprise Fund receives its operational revenue from Port Chilkoot usage fees and Port Chilkoot Dock parking permits. *Id.*, Pg. 21. These three enterprise funds are used to financially support the “activities necessary to provide such services includ[ing], but not limited to, administration, operations, maintenance, billing and collections” of Haines ports and harbors. *See Haines, Alaska, Borough Code § 3.19.020, § 3.31.020, § 3.33.020.*

Even residents who do not own the property specified in HBC 16.08.010 (B) directly fund the operations of the local harbor. Direct funding comes from items such as user fees and harbor fuel purchases. *Haines, Borough, FY 15 Manager's Budget*, at Pg. 19. As mentioned above, the residents paying these fees do not always own the vessels they operate. Recall that some residents borrow a friend or family members boat to subsistence fish, sport fish or recreate. Residents borrowing these vessels must ensure the daily ramp fee is paid prior to using the harbor facilities. They may also need to purchase fuel at the harbor fuel dock. The payment of these fees, services and products directly contributes to the operational funding of local harbor facilities.

Direct funding may also come from residents who lease commercial fishing vessels. These residents are required to pay for their slip rental or transient moorage. They also pay for the purchase of fuel and ice for their operations. These residents financially contribute to the operation, maintenance and

administration of Haines ports and harbors even though they do not own the property specified in HBC § 16.08.010 (B).

Additionally, funding for local port and harbor operations comes from the General Fund. This fund is “the operating fund of the borough.” *Haines, Alaska, Borough Code § 3.13.020 – Purpose*. For the 2015 Fiscal Year, Borough Manager David Sosa has “recommend[ed] a transfer of \$43,000 of Raw Fish Tax Revenues from [the General Fund] to [the Boat Harbor Fund] to help cover cash expenses related to support the fishing fleet.” *See Haines, Alaska, FY 15 Manager’s Budget, 2015 Manager’s Budget Transmittal Letter, Pg. 5*. This recommendation was required because, in his analysis, “The Harbor Enterprise Fund continues to struggle to raise enough revenue to pay its operating expenses.” *Id.* Thus, the General Fund will be relied on to partially subsidize the Harbor Enterprise Fund. This will result in less overall funding for general borough-wide operating expenses that affects all residents of the borough regardless of whether they own the property in HBC 16.08.010 (B) or not.

More significantly, however, are the funding sources used to pay for port and harbor capital improvement projects. Funding for port and harbor capital improvement projects originates from the Capitol Improvement Fund, state revenue generated from the Commercial Passenger Vessel Tax (CPV), and from legislative funding requests. *See Haines, Alaska, FY 15 Manager’s Budget, Haines, Alaska, Capital Improvement Projects (CIP) Six-Year Plan FY15-FY20, Pg. 1-4*. These funding sources pay for port and harbor capital projects such as

LED lighting systems, FSM management systems, nautical flagpoles, vehicles, snowplows for harbor pickup trucks, and the repair and repainting of bathrooms. *See Haines, Alaska, FY 15 Manager's Budget, Haines, Alaska, Capital Improvement Projects (CIP) Six-Year Plan FY15-FY20*, Pg. 1-4. They are also currently slated to pay for 'big-ticket' future infrastructure projects such as the South Portage Cove harbor expansion, Lutak Dock upgrades, Port Chilkoot Dock improvements, a Portage Cove drive-down dock facility, and a new Portage Cove shower restroom facility. *Id.*

Each and every resident of the borough contributes financially to pay for these capital improvement projects. For instance, all Haines residents pay sales tax when purchasing goods and services in the borough. These purchases include those made for food at the grocery store, lumber at the hardware store, or fuel at the gas station. When making these purchases, residents are assessed a 1.5% sales tax for "Capital Improvement Projects". *Stuart, Jila, Haines Borough Chief Fiscal Officer* (personal communication, August 21, 2014); *See also Haines, Alaska, FY 15 Manager's Budget*, Pg. 14. The borough then in turn uses these funds "for purchases and repairs" of port and harbor related infrastructure by transferring them into the Boat Harbor, Lutak Dock, and Port Chilkoot enterprise funds. *Id.*

Additionally, legislative funding from the State of Alaska is used to fund capital improvement projects. These state funds appear as legislative requests for major port and harbor infrastructure upgrades and repairs. *See Haines, Alaska, FY 15 Manager's Budget, Capital Improvement Projects (CIP) Six-Year Plan FY15-*

FY20, Pg. 1-4. These state funds are public and belong to the citizens of Alaska, including those residents not owning the property specified in HBC 16.08.010 (B).

Thus, all residents of the Haines Borough, including those not owning the property specified in HBC § 16.08.010 (B), are legitimate funders of Haines ports and harbors. Residents directly and indirectly contribute to pay for operational, administrative and maintenance requirements of these facilities. Every resident also provides significant financial support for major infrastructure upgrades and repairs, which originate from contributions such as sales taxes.

The fact that each and every resident contributes financially to these facilities demonstrates that all residents have a legitimate stake in Haines ports and harbors. Because all residents have a vested financial interest in local ports and harbors, all aspects of the political process must remain open to them to provide for equal participation and representation. Free, open and equal access to the institutions within this political process is essential to realizing the fundamental principle of *no taxation without representation*. And unfortunately, the property qualification in HBC 16.08.010 (B) clashes with this fundamental principle.

F. The property qualification in HBC § 16.08.010 (B) is a bad fit reconciled against the fundamental principles of representative democracy.

It remains to be determined whether the property qualification in HBC § 16.08.010 (B) reconciles against the form of government guaranteed to the residents of the Haines Borough. At this point it is appropriate to ask exactly what

this form of government is. To answer this question, a quick review of the founding documents of our borough, state and federal governments are instructive.

First, the United States Constitution “guarantees to each State in the Union a Republican Form of Government.” *U.S. Const. Art. IV, § 4, cl. 1*. By this the Framers understood to mean a government that “derives all its powers directly or indirectly from the great body of the people.” James Madison, *Federalist No. 39: “The Conformity of the Plan to Republican Principles”*, Independent Journal, January 16, 1788. The character of such government is representational in form, with power distributed between three separate branches. *See United States Const, Art. I (Legislative Powers), Art. II (Executive Powers), Art. III (Judicial Powers)*.

The Alaska Constitution is consistent with the federal form. Governmental powers in Alaska are also distributed between three branches. *See Alaska Constitution, Art. II (Legislative Powers), Art. III (Executive Powers), Art. IV (Judicial Powers)*. And once again, the character of Alaska government is representational in form.

In contrast to the federal constitution, however, the Alaska Constitution provides explicit textual detail as to the source of political power:

“All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.”

Alaska Constitution Art. I, § 2 – Source of Government

This explicit wording clearly articulates the American ideal of popular sovereignty inherent within our system of government.

Locally, the Haines Borough Charter reflects this ideology as well. In its opening statement, the Preamble and Bill of Rights indicates the Charter was established “to achieve common goals, to support individual rights, to form a more responsive government, and to secure maximum control of our own local affairs.” *Haines, Alaska, Borough Code, Charter Preamble and Bill of Rights*. It also guarantees to the people of the Haines borough “the right to a government of the people, by the people and for the people”. *Id.* These ideals are expressed “so that the citizens of the borough may retain control over the affairs of their government. *Id.*

These three founding documents clearly express fundamental principles essential to our American system of governance. This ideology – packaged around popular sovereignty, political equality, and political liberty - accurately defines the source of authority in American government. In the United States, we believe that the ultimate authority rests with “the people”.

Yet, identifying exactly who “the people” are has evolved since our nation’s founding. Initially, many were excluded from fully experiencing civil liberty, equality and justice. They were also excluded from full political participation and representation in government. This exclusion was based upon arbitrary classifications such as race, gender, wealth and the ownership of property.

However, the American people have evolved to fully embrace equality, justice and fairness for all persons. Reconstruction following the Civil War, the

progressive era of the early Twentieth Century, and the Civil Rights Movement have fulfilled the Framers' Constitutional argument that republican government "be derived from the great body of society, not from an inconsiderable proportion, or favored class of it." *See Madison, Federalist No. 39*. America has now come to realize the ideology behind the argument that "We the People" are:

"not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune."

James Madison, Federalist No. 57: "*The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation*", *The New York Packet*, February 19, 1788.

In America today, "We the people" literally means *not some more than others*.

Property qualifications, however, move us away from this ideological progress. First, property qualifications threaten political equality. Property qualifications arbitrarily allocate authority resulting in an unequal distribution of political power within government institutions. Unfair representation becomes inevitable, whereby "inconsiderable proportions" or "favored classes" are represented over and above "the great body of the people". The Supreme Court has recognized that constitutionality depends on government institutions that are "structured so as to represent fairly all the people." *See Kramer* at 628. Lines drawn between classes of individuals that lead to unfair representation "pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 627. As such, this type of exclusive, unfair representation threatens political equality.

Second, political liberty is threatened by property qualifications. Political liberty, or the ability of a person to freely participate in political affairs, demands no interference or obstruction from government in areas such as voting or holding public office. This is crucial so that “the people be afforded the opportunity of expressing their will on the multitudinous issues which confront them.” *Boucher v. Bomhoff*, 495 P.2d 77 (1972). Property qualifications interfere with a person’s ability to be considered for public service in government institutions so they can freely express their will on the issues that significantly affect their lives.

Ultimately, once political equality and political liberty come under threat, popular sovereignty within government institutions suffers. No longer are government institutions “derived from the great body of the society.” *See Madison, Federalist No. 39*. All policy and legislation bends away from the people as a whole. It becomes filtered through the “inconsiderable proportions” and “favored classes” of the population. This negatively affects the ability of elected officials to accurately gauge the will of the society as a whole.

Thus, the property qualification in HBC § 16.08.010 (B) ultimately calls into question the very type of government that has been guaranteed to the residents of the Haines Borough. Nowhere in the founding documents of this nation, this state, or the Haines Borough can “We the people” be interpreted to justify restrictions, exclusiveness or partial participation in political affairs. “We the people” implies free and full participation in government and the political process.

CONCLUSION

Requiring a resident to own specific types of property to qualify for appointment to the PHAC violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The property qualification in HBC 16.08.010 (B) constitutes a government classification that discriminates on its face. This discriminatory government classification deprives otherwise qualified residents of the “constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications.” *See Turner* at 347. The Haines Borough fails to have the sufficient justification as demanded by the Equal Protection Clause to deprive these residents of this federal constitutional right.

For these reasons, the Haines Borough must remove all references to property ownership in HBC § 16.08.010 (B). The borough should instead base qualifications for appointment to the PHAC on relevant criteria such as a resident’s experience, expertise, or demonstrated interest to more appropriately accommodate the borough’s compelling interest in public safety, along with the matters of concern listed in HBC § 16.08.010 (C). Doing so will realign HBC § 16.08.010 (B) to equal protection standards.

Respectfully submitted.

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