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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA ASSOCIATION OF)
CRIMINAL DEFENSE LAWYERS,)
JAMES H. CANNON, JAMES W.)
McGOWAN, AND REX L. BUTLER)

Plaintiffs,)

vs.)

Case No. 3AN-10-_____ CI

STATE OF ALASKA; DANIEL S.)
SULLIVAN, Attorney General for the)
State of Alaska, in his official capacity)

Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ MOTION
FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION AND FACTUAL BACKGROUND

COME NOW the Alaska Association of Criminal Defense Lawyers, James H. Cannon, James W. McGowan, and Rex L. Butler, Plaintiffs, who hereby respectfully move this Court for a temporary restraining order against the enforcement of the unconstitutional provisions of H.B. 324 (SCS CSHB 324(JUD)) / Chapter 19 SLA 10 (hereinafter, “the Bail Bill”)¹ while the Court schedules motion practice and a hearing to determine the appropriateness of a

¹ The bill and its textual changes are available through Westlaw at this citation: 2010 Alaska Laws Ch. 19 (H.B. 324).

1 preliminary injunction. Pursuant to Alaska Rule of Civil Procedure 65, Plaintiffs
2 ask that this Court issue: an order temporarily restraining defendants the State of
3 Alaska and Daniel S. Sullivan, in his official capacity as Attorney General for the
4 State of Alaska, and all of their officers, agents, servants, employees, and
5 attorneys, as well as those persons in active concert or participation with them
6 from engaging in the specific conduct detailed below until the Court may
7 consider Plaintiffs’ motion for a preliminary injunction at a later hearing.
8

9 Plaintiffs are simultaneously filing a Complaint for Declaratory and
10 Injunctive Relief seeking to prevent the defendants from implementing the
11 unconstitutional provisions of the Bail Bill, as well as to declare those provisions
12 unconstitutional. Plaintiffs are criminal defense attorneys and an organization of
13 criminal defense attorneys. As such, all plaintiffs regularly protect criminal
14 defendants’ constitutional rights. The Bail Bill attacks the constitutional rights of
15 criminal defendants—their clients. Consequently, the Bail Bill inhibits the
16 plaintiffs’ ability to effectively represent their clients and vindicate their
17 constitutional rights. Accordingly, the plaintiffs seek a temporary restraining
18 order and a preliminary injunction preventing defendants from implementing the
19 unconstitutional portions of the Bail Bill.
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22 Absent immediate court intervention, defendants’ future implementation of
23 the Bail Bill will begin violating numerous constitutional rights of the accused at
24 their bail hearings. The plaintiffs challenge more than the following five issues in

1 their complaint, but believe that these are the most pressing of their concerns and
2 that their harms cannot be undone at a later time—even by a preliminary
3 injunction. These issues include, but are not limited to the Bail Bill’s creation of:
4 (1) a rebuttable presumption against bail for some criminal defendants—thereby
5 violating the accused’s rights to release on bail and due process in violation of
6 article I, section 11 and article I, section 7 of the Alaska Constitution,
7 respectively; (2) a mandatory methamphetamine bond of \$250,000, unless the
8 accused waives his right against self-incrimination, thereby violating article I,
9 section 9, due process rights as guaranteed by article I, section 7, and rights
10 against excessive bails as provided by article I, section 12 of the Alaska
11 Constitution; (3) compulsory medical treatment provisions that violate the
12 accused’s right to privacy under article I, section 22 and due process under article
13 I, section 7 of the Alaska Constitution; (4) a compulsory work requirement
14 violating criminal defendants’ due process rights under article I, section 7; and (5)
15 (re)applying a blanket rule that all criminal defendants accused of a crime of
16 domestic violence may not return to their familial home for at least twenty days in
17 contravention of Alaska’s equal protection clause of article I, section 1.
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21 Unless ordered otherwise by this Court, these unconstitutional
22 portions of the Bail Bill will begin to infringe the rights of numerous criminal
23 defendants throughout the state. Moreover, the transitory nature of bail decisions
24 guarantees that many infringements caused by the Bail Bill can never be

1 adequately remedied later by a court. Injunctive relief is necessary to preserve
2 these constitutional rights, the status quo, and to protect the plaintiffs' ability to
3 effectively represent their clients.

4 **ARGUMENT**

5 This Court should grant plaintiffs' request for a temporary
6 restraining order to restrain enforcement of the amendments added by H.B. 324.
7 The balance of hardships in this action strongly favors the plaintiffs and their
8 clients. As the plaintiffs' complaint alleges, and as will be further discussed
9 below, the specific amendments effected by H.B. 324 will violate numerous
10 constitutional rights of the accused: namely, (1) criminal defendants' rights to
11 release on bail and due process²; (2) their right against self-incrimination and
12 excessive bails³; (3) individual privacy rights against compulsory medical
13 treatment⁴; (4) substantive and procedural due process rights against compulsory
14 work⁵; and (5) their rights to equal protection of the law.⁶ Plaintiffs' complaint
15 raises a number of other serious constitutional claims. However, given the
16 extraordinary nature of a Temporary Restraining Order, and out of respect for the
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21 ² H.B. 324, Sec. 5, p. 7, lines 15–21, forthcoming AS 12.30.011(d)(2) (July 1, 2010) (hereinafter,
"Presumption Against Bail").

22 ³ H.B. 324, Sec. 5, p. 9, lines 23–31, forthcoming AS 12.30.016(d) (July 1, 2010) (hereinafter,
"Mandated Methamphetamine Bond").

23 ⁴ H.B. 324, Sec. 5, p. 5, lines 18–22, p. 6 lines 23–26, forthcoming AS 12.30.011(b)(15 & 16) (July
1, 2010) (hereinafter, "Compulsory Medical Treatment").

24 ⁵ H.B. 324, Sec. 5, p. 5, lines 18–22, p. 6, lines 3–4, forthcoming AS 12.30.011(b)(6) (July 1, 2010)
(hereinafter, "Compulsory Work Requirement").

⁶ H.B. 324, Sec. 8, p. 12, forthcoming AS 12.30.027(b) (July 1, 2010) (hereinafter, "Domestic
Violence Home Restriction").

1 extremely limited amount of time the Court has to review these matters, the
2 plaintiffs only ask for immediate injunctive relief regarding these five violations.

3 On the one hand, the affected plaintiffs and their future clients are
4 presently faced with the irreparable harm of having their fundamental and
5 constitutional rights seriously infringed or impaired by the suspect provisions of
6 H.B. 324.⁷ The defendants, on the other hand, are well protected and do not need
7 any protection by this Court. Much like the plaintiffs’ complaint, the present
8 motion before this Court raises serious and substantial questions going to the
9 constitutionality of the defendants’ Bill and the actions they will take against
10 accused criminal defendants who are in no position to challenge the
11 constitutionality of their proceedings during the pretrial phase. These issues
12 certainly cannot be characterized as frivolous or obviously without merit.
13 Consequently, under the relevant decisions and tests adopted by the Alaska
14 Supreme Court, the plaintiffs’ respectfully request this Court to enter a temporary
15 restraining order against the defendants.⁸
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19 ⁷ Cf. *State v. Norene*, 457 P.2d 926, 929–31 (Alaska 1969) (holding that an allegation that
20 statutes unconstitutionally discriminated against plaintiffs provided valid basis for a preliminary
21 injunction: “It has always been the duty of courts to protect the property and liberty of the people
22 from unconstitutional state action”). See also *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02
23 (9th Cir. 2005) (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal
Practice and Procedure* § 2948.1 (2d ed. 2004) (“When an alleged deprivation of a
24 constitutional right is involved, most courts hold that no further showing of irreparable injury is
necessary.”)).

⁸ See *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (“The showing
required to obtain a preliminary injunction [or temporary restraining order] depends on the
nature of the threatened injury. If the plaintiff faces the danger of ‘irreparable harm’ and if the

1 In the alternative, even if this Court were to rule that the balance of
2 hardships does not favor the plaintiffs, the plaintiffs can nevertheless show a
3 strong likelihood of success on the merits of the case.

4 **I. THE BALANCE OF HARDSHIPS STRONGLY FAVORS THE**
5 **PLAINTIFFS**

6 For forty years, the Alaska Supreme Court has employed the
7 “balance of hardships” approach to motions for preliminary injunctive relief.⁹
8 This same test is to be applied by superior courts in deciding both motions for a
9 temporary restraining order, as well as for a preliminary injunction.¹⁰ The
10 supreme court has boiled down this balance-of-hardships approach to situations
11 where “(1) the plaintiff must be faced with irreparable harm; (2) the opposing
12 party must be adequately protected; and (3) the plaintiff must raise ‘serious’ and
13 substantial questions going to the merits of the case; that is, the issues raised
14 cannot be ‘frivolous or obviously without merit.’ ”¹¹ Hence, where injury to the
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20 opposing party is adequately protected, then we apply a ‘balance of hardships’ approach in
21 which the plaintiff ‘must raise “serious” and substantial questions going to the merits of the
22 case; that is, the issues raised cannot be “frivolous or obviously without merit.” ’” (quoting *State*
23 *v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992)).

22 ⁹ See *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970),
modified in other respects, 483 P.2d 198 (Alaska 1971).

23 ¹⁰ See *Alaska v. United Cook Inlet Drift Assoc.*, 815 P.2d 378, 378–79 (Alaska 1991).

24 ¹¹ *Messerli v. Department of Natural Resources*, 768 P.2d 1112, 1122 (Alaska 1989) (citing
and quoting *Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554
(Alaska 1975)), *abrogated on other grounds by Olson v. State, Dep't of Natural Res.*, 799 P.2d
289, 292 (Alaska 1990).

1 movant is certain and irreparable and harm to the non-movant relatively minor,
2 injunctive relief should usually be granted.¹²

3 **A. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief**

4 In this case, the balance of hardships weighs heavily in favor of the
5 plaintiffs given the irreparable harm they and their clients will suffer. The unique
6 nature of pretrial proceedings and conditions of release render plaintiffs
7 immediately and irreparably harmed by the challenged portions of the Bail Bill.
8 The provisions assault numerous protected rights of the Alaska Constitution: the
9 right to bail, the right to due process, the right to privacy, the right against
10 unreasonable searches and seizures, the right against excessive bails, the right
11 against self-incrimination, and the right to a speedy trial. Without an injunction,
12 it is inevitable that some criminal defendants will have some of these fundamental
13 rights infringed by H.B. 324.

14 Indeed, the Alaska Supreme Court has noted how challenges to bail
15 “involve important recurring issues of law which may be capable of evading
16 review.”¹³ Consequently, Alaska courts recognize the transitory nature of bail
17 proceedings and provides for expedited bail appeals.¹⁴ If constitutional
18 challenges regarding bail hearings and bail conditions are not heard promptly,
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23 ¹² *Alaska Pub. Utils. Comm’n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554
24 (Alaska 1975).

¹³ *Martin v. State*, 517 P.2d 1389, 1391 (Alaska 1974).

¹⁴ *See* Alaska R. App. P. 207.

1 they become moot as the criminal case moves to resolution and bail conditions
2 are removed. Constitutional violations that occur during bail cannot be remedied
3 after the fact. For instance, a defendant may be unjustly denied bail for his failure
4 to rebut the Bill's presumption against bail,¹⁵ have his privacy rights impinged
5 upon by the imposition of a medical treatment program or a mandatory work
6 requirement as condition of his bail, or may be coerced into incriminating himself
7 in order to avoid a \$250,000 bond due to the nature of the charges he faces. All
8 of these are very real harms contemplated by H.B. 324, and they are
9 constitutional harms that cannot be undone after they have already occurred.
10

11 Last year, over 30,000 misdemeanor and nearly 6,000 felony cases
12 were filed in the State of Alaska.¹⁶ Given these numbers, an unconstitutional
13 shift in bail proceedings stands to impact over 36,000 defendants annually. This
14 means that the issues raised in the plaintiffs' complaint will assuredly impact a
15 large number of accused criminal defendants. Hence, it is certain that the
16 aforementioned irreparable injuries will likewise occur.
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18 **B. Defendants Will Suffer No Injury If This Court Enjoins Enforcement**
19 **of the challenged provisions of H.B. 324**

20 The defendants, in contrast, will not suffer any serious injury if a
21 temporary restraining order is granted. It is certainly true that the defendants
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23 ¹⁵ See H.B. 324, Sec. 5, p. 7, lines 19-23 (creating a rebuttable presumption against a
24 criminal defendant accused of violating AS 28.35.032, the refusal to submit to chemical testing).

¹⁶ See Alaska Court System, *Annual Statistical Report 2009*, 86 & 29, respectively, available
at <http://www.courts.alaska.gov/reports/annualrep-fy09.pdf>.

1 have a need to enforce the law and to maintain the public’s safety with regard to
2 setting appropriate bail amounts and conditions. But even under an injunction,
3 the defendants would be free to enforce the laws and set appropriate bail
4 conditions through the applicable laws and burdens of proof—some of which
5 (such as the burden of proof during a bail hearing) have been in place since
6 Alaska was a territory.¹⁷ Thus, this Court would be on firm legal ground to
7 conclude that the criminal justice system under the status quo is neither unsafe
8 nor harmful.

10 **C. Plaintiffs Raise Serious and Substantial Questions Going to the Merits**
11 **of the Case**

12 Plaintiffs’ request for an injunction raises serious and substantial
13 questions going to the merits of the case; namely, whether the defendants’ H.B.
14 324 and its amendments satisfy fundamental tenets of due process, privacy, equal
15 protection, and the criminal law. These questions necessarily require an
16 interpretation of the Alaska Constitution—which are indisputably serious and
17 substantial—and therefore satisfy the standard required under the balance-of-
18 hardships test.¹⁸

23 ¹⁷ Carter, *Annotated Alaska Codes*, § 206 (1907) (“When defendant admitted to bail before
24 conviction, as a matter of right[:]. That if the charge be for any other crime than those mentioned
in the last section [first-degree murder, treason, or rape], *the defendant, before conviction, is*
entitled to be admitted to bail as a matter of right.” (emphasis added)).

¹⁸ See *Kluti Kaah Native Village of Copper Ctr.*, 831 P.2d at 1273.

1 **II. IN THE ALTERNATIVE, PLAINTIFFS CAN ESTABLISH A**
2 **CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS**

3 Because the harm to plaintiffs is great if the injunction is denied and
4 defendants are adequately protected if the injunction is granted, “it is no longer
5 necessary [for the plaintiffs] to demonstrate that there is a clear probability of
6 success on the merits.”¹⁹ Nevertheless, even if this Court determined it necessary
7 to evaluate the likelihood of success on the merits, plaintiffs can establish that
8 they would be likely to prevail on the merits of their claims.
9

10 **A. The Presumption Against Bail Provision**

11 **a. Denial of the Accused’s Right to Release on Bail under the Alaska**
12 **Constitution, Article I, § 11**

13 The Alaska Constitution states that “the accused is entitled . . . to be
14 released on bail, except for capital offenses where the proof is evident or the
15 presumption great.”²⁰ Even in capital cases, the drafters of the constitution
16 intended that liberty and freedom from detention would be the default rule, and
17 that in cases aside from capital offenses, the accused is entitled to his freedom.²¹
18 To this end, the Alaska Supreme Court has explicitly stated that “a legislative
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24 ¹⁹ See *Alaska Pub. Utils. Comm’n*, 534 P.2d at 553–54 (citing *Ohio Oil Co. v. Conway*, 279
U.S. 813, 815 (1929)).

²⁰ Alaska Const., art. I., sec. 7.

²¹ See 2 *Proceedings of the Alaska Constitutional Convention* 1344–45 (Jan. 6, 1956).

1 enactment expressly permitting the detention of persons without right to bail
2 would be unconstitutional unless a constitutional amendment were adopted.”²²

3 The Presumption Against Bail reverses this constitutional
4 equilibrium by requiring that, in certain cases, the accused should bear the burden
5 of protecting his liberty and right to bail. The statute creates a “rebuttable
6 presumption that no condition or combination of conditions will reasonably
7 assure the appearance of the person or the safety of the victims, other persons, or
8 the community.”²³ Should the accused fail to rebut this presumption (a likely
9 scenario given the relatively short nature of bail hearings and the accused’s
10 familiarity with his counsel), he would then presumably be held without bail—
11 directly defying the Alaska Constitution and the declarations of this state’s
12 highest court.
13

14
15 **b. Denial of the Accused’s Right to Due Process of Law under the**
16 **Alaska Constitution, Article I, § 7**

17 The Presumption Against Bail denies the accused’s right to liberty
18 without due process of law by compelling him, rather than the state, to bear the
19 burden of demonstrating that he is entitled to his liberty before trial. The Alaska
20 Constitution holds that “[n]o person shall be deprived of life, liberty, or property
21 without due process of law.”²⁴ Hence, when a law places substantial burdens on
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24 ²² *Martin*, 517 P.2d at 1397.

²³ H.B. 324, Sec. 5, p. 7, lines 19-21.

²⁴ Alaska Const., art I., sec. 7.

1 the exercise of a fundamental right, the state must articulate a compelling
2 government interest and demonstrate the absence of a less restrictive means to
3 advancing that interest.²⁵ Individual liberty, certainly implicated by pretrial
4 detention, is a fundamental right under the Alaska Constitution.²⁶

5 The Presumption Against Bail requires that, in a wide variety of
6 cases, the accused shall bear the burden of demonstrating that he is entitled to
7 bail—a fundamental right under the Alaska Constitution.²⁷ The state does not
8 provide any compelling interest or argument as to why it has selected these
9 particular offenses. Presumably, the interest is in community safety. If that is the
10 case, the state has the burden of demonstrating that its chosen course of action is
11 the least-restrictive one possible.²⁸ A bail proceeding that begins with the
12 presumption of detention does not force the state to demonstrate the necessity for
13 its procedure; rather, it compels the ill-prepared accused to make a quick case for
14 preserving the rights to which he is already entitled. The Presumption Against
15 Bail violates the accused’s due process rights by forcing him to preserve and
16 advocate for his right to bail, rather than forcing the state to so argue in the
17 negative.
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23 ²⁵ See, e.g., *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 245–46 (Alaska 2006).

24 ²⁶ See *Breese v. Smith*, 501 P.2d 159, 170 (Alaska 1972).

²⁷ Alaska Const., art I., sec. 11.

²⁸ See *Myers*, 138 P.3d at 246.

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B. The Mandated Methamphetamine Bond

a. Denial of the Accused’s Right Against Self-Incrimination under the Alaska Constitution, Article I, § 9

The Mandated Methamphetamine Bond, by requiring the accused to either accept a \$250,000 cash bond as a condition of bail or admit to having simply aided or abetted in the charged crime, forces the accused to decide between preserving his right against self-incrimination and accepting an excessive bail condition.

Under the Alaska Constitution, “No person shall be compelled in any criminal proceeding to be a witness against himself.”²⁹ The privilege extends not only to answers that would in themselves support a conviction, but also to those which might furnish “a link in the chain of evidence” leading to a conviction.³⁰

In the case of the Mandated Methamphetamine Bond, the incriminating statements sought are not merely those which might “furnish a link in the chain of evidence,” but a direct admission of guilt. That the accused is given the choice between asserting his right or accepting the bond is of no consequence: “[A] state may not impose substantial penalties because a witness elects to exercise his . . . right not to give incriminating testimony against

²⁹ Alaska Const., art. I, sec. 9.
³⁰ *McConkey v. State*, 504 P.2d 823, 826.

1 himself.”³¹ A “substantial penalty” in this context is one with grave consequence.
2 Economic consequences, like the loss of employment³² or disqualification from
3 future government contracts,³³ are substantial penalties. The loss of another
4 constitutionally-protected right is also a substantial penalty under this analysis.³⁴

5 The Mandated Methamphetamine Bond poses both economic and
6 constitutional-right penalties for those unwilling to incriminate themselves.
7 Obviously, the \$250,000 cash bond is a substantial economic hardship for nearly
8 all criminal defendants. Those unable to furnish this bond would be detained and,
9 therefore, deprived of their due process rights and right against excessive bail.
10

11 The coerced surrender of the right against self-incrimination is
12 unconstitutional regardless of the gravity of the government interest involved. In
13 *Lefkowitz v. Cunningham*, the Court invalidated a New York State statute that
14 applied to political-party officials who failed to waive their right against self-
15 incrimination at a tribunal, and would then be removed from their office. The
16 government’s desire to preserve the integrity of the political process was of no
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20 ³¹ *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

21 ³² *See Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (holding that a police officer could
22 not be compelled to surrender his right against self-incrimination, at threat of loss of
23 employment, in grand jury testimony).

23 ³³ *See Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) (holding that architects with occasional
24 government contracts could not be forced to surrender their right against self-incrimination at
25 threat of losing current and future (within five years) government contracts).

26 ³⁴ *Cunningham*, 431 U.S. at 808 (depriving officer of his First Amendment right to holding
27 position in a private political party for failure to surrender right against self-incrimination was
28 unconstitutional).

1 consequence.³⁵ The Court stated, “We have already rejected the notion that
2 citizens may be forced to incriminate themselves because it serves a
3 governmental need.” Thus, whatever public-safety need the State may assert for
4 H.B. 324’s Mandated Methamphetamine Bond, it may *not* compel the accused to
5 surrender his right against self-incrimination.

6 As with the previously mentioned circumstances, the Mandated
7 Methamphetamine Bond places substantial economic and constitutional-right
8 penalties on the accused by requiring a \$250,000 cash bond if he chooses to
9 exercise his right against self-incrimination and not admit to having aided and
10 abetted the crime with which he is charged.

11
12 **b. Denial of the Accused’s Right to Due Process of Law under the**
13 **Alaska Constitution, Article I, § 7**

14 The Mandated Methamphetamine Bond also denies the accused his
15 right to due process of law by compelling the choice between exercising due
16 process rights to present evidence and be heard at a bail hearing, and the right
17 against self-incrimination. The Alaska Supreme Court has held that a parolee
18 should not be forced to decide between exercising his due process rights at a
19 parole revocation hearing by asserting his defense, and preserving his right
20 against self-incrimination in regard to an impending criminal trial by remaining
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24 ³⁵ Government interests in maintaining an honest police force and civil service could
similarly not justify coerced surrender of the right against incrimination. *See Gardner*, 392 U.S.
at 279; *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280 (1968).

1 silent at the parole hearing.³⁶ The supreme court found that parolees are entitled
2 to certain due process rights at these hearings. These include, but are not limited
3 to: the opportunity to be heard and to present witnesses and evidence. The court
4 has always held these to be fundamental, “for it would serve neither the interest
5 of the state nor that of the parolee to revoke conditional liberty on the basis of
6 erroneous information.”³⁷

7
8 The accused are entitled to similar protections with regard to bail
9 hearings. Since 1966, judicial officers have been charged with imposing only
10 conditions that will reasonably ensure the accused’s appearance at trial and the
11 safety of the community.³⁸ Accordingly, the accused should at least be entitled
12 to be heard and to present evidence and witnesses at their bail hearings. The
13 Mandated Methamphetamine Bond denies the accused this right. In applicable
14 cases, the accused cannot exercise his due process rights and ensure that the least
15 restrictive bail conditions are imposed. Rather, he is compelled to incriminate
16 himself or accept a mandatory cash bond. The accused, then, has no real ability
17 to present his case as to which bail conditions would be appropriate.
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22 ³⁶ *McCraken v. Corey*, 612 P.2d 990, 997–98 (Alaska 1980).

23 ³⁷ *Id* at 993.

24 ³⁸ *See* H.R. 4-317, 2d. Sess., at 110–11 (Alaska 1966) (stating that bail restrictions should simply “assure that all persons, regardless of their financial status, *shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest*” (emphasis added)).

1 **c. Denial of the Accused’s Right Against Excessive Bail under the**
2 **Alaska Constitution, Article I, § 12**

3 The Mandated Methamphetamine Bond denies plaintiffs’ right
4 against excessive bail by indiscriminately imposing a \$250,000 cash bond,
5 without any demonstration as to the necessity of the condition, to all affected
6 defendants who will not surrender their right against self-incrimination.

7 The Alaska Constitution provides that “excessive bail shall not be
8 required.”³⁹ Bail conditions are excessive when they go beyond reasonably
9 assuring the accused’s appearance at trial or the safety of the community.⁴⁰
10 “Society’s interest in pretrial freedom for persons accused of crimes is strong.”⁴¹
11 A judge is required to weigh the specifics of each case to balance how to best
12 assure the accused’s appearance and the community’s safety. A blanket bail
13 condition outside of these bounds is excessive and therefore unconstitutional.
14

15 The blanket imposition of a \$250,000 bond on any person accused
16 of methamphetamine manufacturing, absent any consideration of the likelihood
17 that the accused will appear at trial or pose a danger to the community, plainly
18 violates his right against excessive bail. The nature of the defense itself cannot
19 determine the amount of bail to be set.
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23 ³⁹ Alaska Const., art I., sec. 12.

24 ⁴⁰ *See Doe v. State*, 487 P.2d 47. 51 (Alaska 1971); *see also Gilbert v. State*, 540 P.2d 485,
486 (Alaska 1975).

⁴¹ *Doe*, 487 at 51.

1 **C. Compulsory Medical Treatment**

2 **a. Denial of the Accused’s Right to Privacy under the Alaska**
3 **Constitution, Article I, § 22**

4 H.B. 324’s Compulsory Medical Treatment provisions infringe the
5 accused’s right to privacy by impairing his ability to make personal medical
6 decisions. Article I, section 22 of Alaska Constitution provides that the “right of
7 the people to privacy is recognized and shall not be infringed.”⁴² This right to
8 privacy is broader than the federal right and based upon Alaska’s strong historical
9 emphasis on individual liberty.⁴³

10 Alaska’s right to privacy encompasses the right to choose and reject
11 medical treatment. Medical decisions have always been thought of as extremely
12 personal; any imposition of medical treatment is a grave infringement on
13 individual liberty and, for this reason, the supreme court requires that the state
14 may involuntarily administer medicine in only very limited circumstances.⁴⁴ The
15 supreme court has found that the state may not administer psychotropic drugs to a
16 non-consenting mentally-ill patient without a judicial determination that
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⁴² Alaska Const., art. I, sec. 22.

20 ⁴³ See *Anchorage Police Dep’t Employee Ass’n v. Municipality of Anchorage*, 24 P.3d 547,
21 500 (Alaska 2001) (“Since the citizens of Alaska, with their strong emphasis on individual
22 liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to
23 privacy not found in the United States Constitution, it can only be concluded that the right is
24 broader in scope than that of the Federal Constitution.”); *Ravin v. State*, 537 P.2d 494, 504
(Alaska 1975) (“Our territory and now state has traditionally been the home of people who prize
their individuality and who have chosen to settle or to continue living here in order to achieve a
measure of control over their own lifestyles which is now virtually unattainable in many of our
sister states.”).

⁴⁴ *Myers*, 138 P.3d at 246.

1 medication is in the patient’s best interest and the least-intrusive method for
2 ensuring the patient’s safety.⁴⁵ This determination is to be made by a judicial
3 officer at a hearing where the patient has received notice and both sides have been
4 given an adequate opportunity to present evidence and witnesses.⁴⁶

5 The state may not compel pretrial defendants to submit to medical
6 treatment based on a determination that there may be *some* nexus between the
7 prescribed treatment and the accused’s likelihood of appearing at trial or the
8 safety of the community. The procedure must, at a minimum, meet the standards
9 applied to administering psychotropic drugs.

11 **b. Denial of the Accused’s Right to Due Process of Law under the**
12 **Alaska Constitution, Article I, § 7**

13 The Compulsory Medical Treatment provisions enable the
14 government to dictate and oversee the private medical decisions of the accused,
15 without providing the accused with adequate procedural protections
16 commensurate with the fundamental nature of the right involved. The Alaska
17 Constitution holds that “[n]o person shall be deprived of life, liberty, or property
18 without due process of law.”⁴⁷ The degree of procedural due process required in
19 any given case is contingent upon the private interest involved.⁴⁸ The more
20 fundamental the private interest involved, the more procedural safeguards
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⁴⁵ *See id.* at 239.

⁴⁶ *See id.* at 244.

1 required and the greater the demonstration the state must make of its compelling
2 interest.⁴⁹

3 In the context of administering drugs to prisoners, due process
4 requires, at a minimum, that the prisoner receive notice and be able to present
5 evidence and cross-examine witnesses.⁵⁰ Thus, even in cases where someone has
6 a diminished expectation of privacy, courts have found that due process at least
7 requires adequate notice and a hearing. With regard to an institutionalized
8 person's ability to challenge the administration of psychotropic drugs, the Alaska
9 Supreme Court has held that "due process requires that the petition provide
10 sufficient information about the proposed treatment plan for the respondent to
11 prepare to challenge the petition."⁵¹

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14 The Compulsory Medical Treatment provision provides less
15 procedural protections than either of these cases. The accused has no notice that
16 his liberty to make medical decisions may be foreclosed and, in the event that this
17 happens, what medical treatment plan might be imposed. He has no opportunity
18 to adequately prepare or to meaningfully protect his right to privacy and to make
19 medical decisions. If already-convicted prisoners, whose constitutional rights
20 have been diminished, are entitled notice and an ability to contest the state's
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23 ⁴⁷ Alaska Const., art I., sec. 7.

24 ⁴⁸ *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

⁴⁹ *See id.*

⁵⁰ *Washington v. Harper*, 494 U.S. 210, 235 (1990).

⁵¹ *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168, 188 (Alaska 2009).

1 involuntary administration of medication, certainly pretrial defendants are entitled
2 to at least that degree of procedural protection.⁵² The state simply cannot impose
3 such conditions without giving the individual greater protection and the
4 meaningful ability to protect his rights.⁵³

5 **D. The Compulsory Work Provision**

6 **a. Denial of the Accused’s Right to Due Process of Law under the**
7 **Alaska Constitution, Article I, § 7**

8 The Alaska Constitution guarantees that no one shall be deprived of
9 liberty without due process of the law.⁵⁴ Without advancing any compelling
10 governmental interest for doing so, the Compulsory Work provision deprives
11 pretrial defendants of their liberty by mandating that they maintain or seek
12 employment.

13
14 In our criminal law, no one may suffer punishment unless and until
15 they are found guilty. Even though convicted criminals have lessened
16 constitutional protections, state actions affecting their constitutional rights must at
17 least relate to a legitimate penological interest.⁵⁵ In *Bell v. Wolfish*, the Supreme
18 Court found that some abridgement of pretrial detainees’ liberty was necessary to
19 maintain security and order within the institution, but that prison conditions and
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24 ⁵² See *Harper*, 494 U.S. at 235.

⁵³ See *Bigley* at 187–88.

⁵⁴ See Alaska Const., art. I, sec. 7.

⁵⁵ See *Turner v. Safley*, 482 U.S. 78, 89 (1987).

1 treatment of pretrial detainees must not amount to punishment.⁵⁶ Thus, any
2 impingement of the accused's constitutional rights (in stark contrast to a
3 convicted prisoner's)⁵⁷ must further some compelling governmental interest and
4 the method chosen by the government to further that interest must be the least-
5 restrictive.⁵⁸

6 The Compulsory Work provision serves to punish and impinge the
7 liberty of pretrial defendants without advancing any compelling governmental
8 interest. But it is black letter law that pretrial defendants can suffer no
9 punishment from the hands of the state.⁵⁹ Therefore, the conditions of their
10 release must be related to an interest in securing their appearance at trial or in
11 community safety. Requiring that the accused maintain or seek employment is
12 not the least-restrictive means of ensuring his appearance at trial.

13 Additionally, the Supreme Court has stressed how the "right to
14 freedom before conviction permits the unhampered preparation of a defense, and
15 serves to prevent the infliction of punishment prior to conviction."⁶⁰ The
16 Compulsory Work Requirement directly restricts this freedom by limiting the
17 accused's ability to prepare his defense in whatever manner he chooses. Simply
18 put, if the State is allowed to manage how a pretrial criminal defendant may use
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23 ⁵⁶ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

24 ⁵⁷ *See Turner*, 482 U.S. at 89.

⁵⁸ *See id.*

⁵⁹ *See Bell*, 441 U.S. at 535.

⁶⁰ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

1 his time before trial, it could effectively prevent him from using that time to work
2 with his attorney and focus on rebutting the State’s case against him.⁶¹

3 **E. The Domestic Violence Home Restriction**

4 **a. Denial of the Accused’s Right to Equal Protection under the**
5 **Alaska Constitution, Article I, § 1**

6 The Domestic Violence Home Restriction violates the accused’s
7 right to equal protection under the law by denying him of his liberty interest in
8 living with his family. Indeed, the Alaska Court of Appeals has already ruled that
9 a large class of persons will have this fundamental right abridged based solely
10 upon the classification of the crime charged against them—not for any
11 compelling governmental interest.⁶²

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13 The Alaska Constitution guarantees the right to equal protection
14 under the law. Whether there has been a violation of equal protection hinges on a
15 three-part analysis: (1) the weight of the interest involved, (2) the state interest
16 advanced, and (3) the state’s interest in the particular means advanced, or the
17 possibility of other alternatives.⁶³ Generally, the greater the weight of the
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23 ⁶¹ *Cf. Williams v. State*, 151 P.3d 460, 469 (Alaska App. 2006) (“[A] ban on returning to the
24 residence while on pre-trial release may be more burdensome than the sentence the person [may] receive if he ultimately is convicted of domestic violence—a situation that might encourage a defendant to give up the right to trial and enter a plea.”).

⁶² *See id.* at 464–65.

⁶³ *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269–70 (Alaska 1984).

1 interest, the more compelling the state’s interest must be and the closer the means
2 must fit the end.⁶⁴

3 The Domestic Violence Home Restriction attempts to resuscitate a
4 statute that had previously been found to violate Alaska’s equal protection
5 clause.⁶⁵ That version of the statute required any person charged with a crime of
6 domestic violence to not be allowed to return to the victim’s home—even if it
7 was with his own family.⁶⁶ Because of its broad application, the court of appeals
8 found that “the statute [wa]s impermissibly overinclusive, in that it burden[ed]
9 individuals who [were] not similarly situated with respect to the purposes of the
10 statute.”⁶⁷ In essence, the statute disallowed a large class of persons from
11 returning to their residences even though they posed no threat of violence to the
12 victim.
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15 Notably, the court found that the accused has an important liberty
16 interest in “liv[ing] in his home with his wife and family while on pre-trial
17 release.”⁶⁸ The court agreed that the State undoubtedly has an interest in
18 protecting alleged victims of domestic violence, but found that the government
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22 ⁶⁴ *See id.*

23 ⁶⁵ *See Williams*, 151 P.3d at 465.

24 ⁶⁶ *Id.* at 463–64 (citing AS 12.30.027(b) (2006)).

⁶⁷ *Id.* at 464 (citing Laurence H. Tribe, *American Constitutional Law* § 16-4, at 1450 (2d ed. 1988)).

⁶⁸ *Id.* at 465.

1 had provided no evidence as to its legitimate or compelling interest in drawing
2 the affected class so broadly.⁶⁹

3 In this case, the Domestic Violence Home Restriction suffers from
4 the same constitutional infirmities as its predecessor. The amended statute within
5 H.B. 324 repeats the same overbreadth mistake by automatically denying all
6 persons accused of domestic violence crimes the liberty of returning to their
7 homes for at least twenty days, even in cases where a court is satisfied that the
8 accused poses no danger to the alleged victim and the victim expresses a desire
9 for the accused to return home. In *Williams*, however, the court of appeals noted
10 that “[a]t least two states restrict a person charged with domestic violence from
11 returning to the alleged victim’s residence for one to three days after the
12 incident—but the victim can waive that requirement.”⁷⁰ These measures were
13 “aimed at defusing a potentially violent situation,” and are far shorter than H.B.
14 324’s timeline.⁷¹

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17 And even after this twenty-day period, the condition may only be
18 removed if, among other things, the accused has never before been convicted of a
19 domestic violence crime against a person. Like the statute in *Williams*, a judge
20 will have no discretion to consider the nature of the previous offense, whether the
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22 ⁶⁹ *Id.* at 465–66 (“Given the importance of the right to live with a member of one’s family,
23 we will invalidate the classification if we find an insufficiently tight fit between the purposes of
24 the statute and the means used to accomplish those purposes and if less restrictive alternatives
are available.”).

⁷⁰ *Id.* at 469.

⁷¹ *Id.*

1 alleged victim is the same victim, the similarity to the current charge, or whether
2 there is any legitimate safety concern.⁷² Because of these substantial similarities
3 to the unconstitutional statute in *Williams*, the Domestic Violence Home
4 Restriction violates Alaska’s equal protection clause.

21 ⁷² *See id.* at 468–69 (“[O]ther jurisdictions have found less restrictive alternatives adequate
22 to protect the victims of domestic violence. The Model Code on Domestic and Family Violence,
23 which served as a blueprint for Alaska’s 1996 Domestic Violence Prevention and Victim
24 Protection Act (the law that authorized the residence restriction at issue in this case), contains no
blanket prohibition on a person charged with domestic violence returning to the residence of the
alleged victim. Rather, the Model Code *gives courts discretion to remove the accused from the
home if the court finds that doing so is necessary to protect the alleged victim.* Apparently no
other state follows Alaska’s rule.” (citations omitted) (emphasis added)).

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for a temporary restraining order to enjoin enforcement of these five changes effectuated by H.B. 324's amendments. This would halt their implementation for the next ten days, by which time this Court may have an opportunity to hear all of the parties on the possible issuance of a preliminary injunction.

DATED this 30th day of June, 2010.

Respectfully Submitted,

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