

#18-8191  
IN THE SUPREME COURT FOR THE UNITED STATES

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Marianne E. Burke,  
Petitioner

v.

Raven Electric, Inc. and Liberty Mutual Insurance Co.,  
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI  
PROCEEDING *IN FORMA PAUPERIS*

TO THE ALASKA SUPREME COURT, ON APPEAL FROM THE ALASKA  
WORKERS' COMPENSATION APPEALS COMMISSION

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***BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI***

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Alaska Statutes

#### Sec. 23.30.040. Second injury fund.

(a) There is created a second injury fund, administered by the commissioner. Money in the second injury fund may only be paid for the benefit of those persons entitled to payment of benefits from the second injury fund under this chapter. Payments from the second injury fund must be made by the commissioner in accordance with the orders and awards of the board.

(b) If an employee suffers a compensable injury that results in temporary total disability, temporary partial disability, permanent partial disability, or permanent total disability, the employer or insurance carrier shall contribute to the second injury fund. The contribution shall be made annually at the time of the report filing required by AS 23.30.155 (m). The amount of the contribution is the product of the compensation to which the employee is entitled for temporary total disability, temporary partial disability, permanent partial disability, or permanent total disability and the applicable contribution rate set out in column A of this subsection. Payment need not be made to the second injury fund if the total contribution under this subsection is less than \$20. By December 15 of each year the commissioner shall determine and make available to the public the applicable contribution rate for the following calendar year according to the reserve rate of the second injury fund in column B of this subsection:

Column A	Column B
Second Injury Fund Reserve Rate	
Contribution At Least But Less Than	
(Percent)	(Percent)
6 0 50	
5 50 75	
4 75 100	
3 100 125	
2 125 150	
1 150 175	
0 175	

(c) If an employee suffers a compensable injury that results in death and the employee is not survived by a widow, widower, child, or dependent relative eligible to receive death benefits under AS 23.30.215, the employer or insurance carrier shall pay \$10,000 to the second injury fund.

(d) The board may refund a payment made into the second injury fund if the employer or insurance carrier shows that it made the payment by mistake or

inadherence, or if it shows there existed at the time of the death of the employee a beneficiary entitled to benefits under AS 23.30.215.

(e) *[Repealed, Sec. 27 ch 93 SLA 1982].*

(f) All amounts collected as civil penalties under AS 23.30.155(c) shall be paid into the second injury fund.

(g) The attorney general may investigate claims and hire expert witnesses necessary to prevent fraudulent or excessive claims for money in the second injury fund.

(h) Administration expenses of the state under this section and AS 23.30.205 must be paid from the second injury fund.

(i) The amount of a payment to the second injury fund and the conditions under which a payment is required of an employer or insurance carrier must be in accordance with the version of (b) of this section in effect on the date that the injury to the employee occurred.

## Article 02. DUTIES OF EMPLOYER

### Sec. 23.30.045. Employer's liability for compensation.

(a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215. If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor, as applicable.

(b) Compensation is payable irrespective of fault as a cause for the injury.

(c) For a person eligible for vocational rehabilitation service under this chapter or AS 23.15.080 who is placed with an employer for service at the request of the rehabilitation administrator or division of vocational rehabilitation to provide on the job training, work readiness, work therapy experience, or work sampling, the liability set out in (a) of this section applies to the state rather than to the employer. However, an employer may elect to assume the liabilities in (a) of this section.

(d) A contract may not be awarded by the state or a home rule or other political subdivision of the state unless the person to whom the contract is to be awarded has

submitted to the contracting agency proof, furnished by the insurance carrier, of current coverage by workers' compensation insurance from an insurance company or association authorized to transact the business of workers' compensation insurance in this state or proof, furnished by the board, of a current certificate of self-insurance from the board. The person to whom the contract is awarded shall keep the workers' compensation insurance policy in effect during the life of the contract with the state or political subdivision. If the state or the political subdivision of the state fails to obtain proof of coverage or self-insurance or to protect itself under (e) of this section, and an employee of the contractor is injured during the term of the contract, the state or the political subdivision is liable for workers' compensation to the employee if the employee is unable to recover from the employer because of the employer's lack of financial assets. The state or the political subdivision is not liable, however, to the employee for workers' compensation if the employee can recover from the employer under (a) and (b) of this section.

(e) When a contracting agency of the state or a political subdivision receives notice that the workers' compensation insurance policy of an employer to whom the agency has awarded a contract has been cancelled due to nonpayment of a premium, without being replaced by a comparable policy, the agency may either terminate the contract with the employer or continue the premium payments on behalf of the employer in order to keep the policy in force during the life of the agency's contract. If the agency chooses to keep the policy in force, it may deduct its payments from the contract price or bring an action against the employer to recover the amount of the payments. When the contracting agency receives notice that the board has revoked a certificate of self-insurance held by a person to whom a contract has been awarded, the agency may terminate the contract. This subsection does not limit the causes of action or remedies that the state or political subdivision may have against the employer.

(f) In this section,

(1) "contractor" means a person who undertakes by contract performance of certain work for another but does not include a vendor whose primary business is the sale or leasing of tools, equipment, other goods, or property;

(2) "project owner" means a person who, in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work;

(3) "subcontractor" means a person to whom a contractor sublets all or part of the initial undertaking.

### **Sec. 23.30.055. Exclusiveness of liability.**

The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. In this section, "employer" includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045 (a), is liable for or potentially liable for securing payment of compensation.

### **Sec. 23.30.215. Compensation for death.**

(a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:

(1) reasonable and necessary funeral expenses not exceeding \$10,000;

(2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased:

(A) 80 percent for the widow or widower with no children;

(B) 50 percent for the widow or widower with one child and 40 percent for the child;

(C) 30 percent for the widow or widower with two or more children and 70 percent divided equally among the children;

(D) 100 percent for an only child when there is no widow or widower;

(E) 100 percent, divided equally, if there are two or more children and no widow or widower;

(3) if the widow or widower remarries, the widow or widower is entitled to be paid in one sum an amount equal to the compensation to which the widow or

widower would otherwise be entitled in the two years commencing on the date of remarriage as full and final settlement of all sums due the widow or widower;

(4) if there is no widow or widower or child or children, then for the support of father, mother, grandchildren, brothers, and sisters, if dependent upon the deceased at the time of injury, 42 percent of the spendable weekly wage of the deceased to such beneficiaries, share and share alike, not to exceed \$20,000 in the aggregate;

(5) \$5,000 to a surviving widow or widower, or equally divided among surviving children of the deceased if there is no widow or widower.

(b) In computing death benefits, the spendable weekly wage of the deceased shall be computed under AS 23.30.220 and shall be paid in accordance with AS 23.30.155 and subject to the weekly maximum limitation in the aggregate as provided in AS 23.30.175, but the total weekly compensation may not be less than \$75 for a widow or widower nor less than \$25 weekly to a child or \$50 for children.

(c) All questions of dependency shall be determined as of the time of the injury, or death.

(d) Compensation under this chapter to aliens not residents, or about to become nonresidents, of the United States or Canada is the same in amount as provided for residents, except that dependents in a foreign country are limited to widow or widower and child or children, or if there is no widow or widower and child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for a period of one year before the date of injury. The board, at its option, or upon the application of the insurance carrier, may commute all future installments of compensation to be paid to an alien dependent who is not a resident of the United States or Canada by paying or causing to be paid to the alien dependent one-half of the commuted amount of the future installments of compensation as determined by the board.

(e) Death benefits payable to a widow or widower in accordance with (a) of this section shall abate as that person ceases to be entitled and does not inure to persons subject to continued entitlement. In the event a child ceases to be entitled, that child's share shall inure to the benefit of the surviving spouse subject to adjustment as provided in (f) of this section.

(f) Except as provided in (g) of this section, the death benefit payable to a widow or widower shall terminate 12 years following death of the deceased employee.

(g) The provisions of (f) of this section do not apply to a widow or widower who at the time of death of the deceased worker is permanently and totally disabled. The

death benefits payable to a widow or widower are not subject to reduction under (f) of this section after the widow or widower has attained the age of 52 years.

(h) In the event a deceased worker is survived by children of a former marriage not living with the surviving widow or widower, then those children shall receive the amount being paid under a decree of child support; the difference between this amount and the maximum benefit payable under this section shall be distributed pro rata to the remainder of those entitled.

(i) In the event the total amount of all benefits computed under (a)(2) of this section exceeds the maximum benefit provided in AS 23.30.175, the maximum benefit under AS 23.30.175 shall be prorated among entitled survivors.

## **QUESTIONS PRESENTED FOR REVIEW**

1. Did the Alaska Supreme Court, Alaska's court of last resort, decide an important federal question in a way that conflicts with prior decisions of this Court when it upheld the provision of the Alaska Workers' Compensation Act limiting payment of death benefits to statutory beneficiaries who were dependent upon the deceased at the time of death?

2. Did the Alaska Supreme Court decide an important federal question in a way that conflicts with prior decisions of this Court when it held that Petitioner Burke's constitutional rights were not violated by the provision of the Alaska Workers' Compensation Act limiting payment of death benefits to statutory beneficiaries' dependent upon the deceased at the time of injury?

## LIST OF PARTIES

Petitioner Burke's list of parties is incorrect, inasmuch as she erroneously lists counsel of record as being parties.

The parties to the proceeding before the Supreme Court of the State of Alaska, whose judgment is sought to be reviewed, were as follows:

1. Marianne Burke, Petitioner herein, mother of Abigail Caudle (deceased), Employee;
2. Raven Electric, Inc. (Employer) and its workers' compensation insurer, Liberty Mutual Insurance Company, Respondents herein.

The Alaska Supreme Court, by Order dated December 30, 2016, requested supplemental briefing on a question relating to certain 2004 amendments to the Alaska Workers' Compensation Act and requested the participation of the State of Alaska and of an *amicus curiae*, Eric Croft, in briefing the question, due to Burke's self-represented status. As the Alaska Supreme Court noted in its Opinion, at fn. 28, it chose not to reach the merits of the issues addressed in the State's and *amicus's* briefing.

## JURISDICTION

Petitioner seeks to invoke this Court’s federal question jurisdiction, asserting that the Alaska Supreme Court either decided an important question of federal law that has not been, but should be, settled by this Court, or that the Alaska Supreme Court decided an important federal question in a way that conflicts with relevant decisions of this Court. Petition at p. 10. As discussed more fully below, neither basis for this Court’s exercise of its discretionary jurisdiction exists.

Indeed, the issues decided by the Alaska Supreme Court principally involve construction of the Alaska Workers’ Compensation Act and to a lesser extent, of the Alaska state constitution and, as such, are matters of state law alone. To the extent matters of federal constitutional law were addressed by the Alaska Supreme Court and are raised in Petitioner’s petition, it is sufficient to point out that each and every “federal question” Petition asserts here was addressed and squarely rejected by this Court over one hundred years ago in *New York Central Railroad Co v. White*, 243 U.S. 188 (1917). Each of Petitioner’s arguments is, in fact, a matter of settled law that is contrary to her position. The Petition raises no issue of unsettled federal or constitutional law, the state court decision below does not conflict in any respect with decisions of this Court, and no basis for granting a writ of certiorari exists.

## **STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS**

Petitioner Burke is the mother of Abigail Caudle, a 26-year-old apprentice electrician who died in 2011 as the result of an electrocution accident while working for Respondent-employer Raven Electric, Inc. At no time relevant to this action was Petitioner Burke the personal representative of Caudle's estate. It is undisputed that at time of her death, Caudle was unmarried and had no children or other dependents.

Respondent Raven Electric and its workers' compensation insurer, Liberty Mutual Insurance Company, accepted Caudle's death as a work-related injury. In accord with the Alaska Workers' Compensation Act, Raven Electric paid all benefits due as a result of the death including medical costs, \$10,000 in funeral expenses as specified in AS 23.30.215(a)(1), and the Second Injury Fund contribution of \$10,000 specified in AS 23.30.040(c).

Two years after Caudle's death, her mother, Petitioner Burke, filed a Workers' Compensation Claim with the Alaska Workers' Compensation Board purporting to seek "death benefits." In her handwritten accompaniment to the Board's claim form, Burke wrote that she wanted "some justice to be done to Raven Electric" and also wrote that she had "gotten the run around from all the lawyers" she had talked to. Similarly, in a letter sent a few days later to the Board and various political figures, Burke acknowledged that she had spoken with "about ten" attorneys in an effort to "find a lawyer to give me justice" and admitted that she was advised by each that she could not bring a civil suit against Raven Electric due to the exclusive liability provision of the Alaska Workers' Compensation Act.

Raven Electric answered Burke's claim, admitted that Caudle had sustained a fatal injury in the course of her employment, and further stated that "all workers' compensation benefits due as a consequence of the injury and death have been paid." Raven Electric denied that Burke was entitled to any death benefits, citing the provision of the Act that provides for payment of benefits "to a deceased employee's mother only if the mother was 'dependent upon the deceased at the time of injury'." See, Alaska Statute 23.30.215(a)(4).

To probe whether Burke might qualify for statutory death benefits under the Act, Raven Electric sought to discover whether Burke could demonstrate financial dependence on Caudle such that Burke met the legal standard for a death benefits beneficiary. Alaska Statute 23.30.215(a)(4) and (c). Burke refused to execute releases and filed a Petition for Protective Order with the Alaska Workers' Compensation Board. In that petition, Burke wrote, "we want a huge liability to Raven Electric so that this helps to defer [sic] Raven from poor work safety procedures, as well as, hopefully, send a message to other electrical companies . . ."

Burke's Petition for Protective Order was set for a hearing before the Alaska Workers' Compensation Board. As evidence for that hearing, Burke filed a large volume of documents with the Board, including records pertaining to the Alaska State OSHA investigation of Caudle's workplace accident, as well as several pages of comments from unidentified or anonymous users on the *Anchorage Daily News* newspaper website, commenting on an article about Caudle's death.

Raven Electric then filed two Petitions with the Board: A Petition to Exclude Evidence objecting to the State OSHA materials and online newspaper comments on the basis of relevance, and a second Petition seeking either dismissal of Burke's claim for her failure to provide signed releases or an order compelling her signature.

The Board heard the Petitions on February 19, 2014. Raven Electric argued that it was entitled to a signed IRS release from Burke in order to investigate whether Burke was financially dependent on Caudle at the time of Caudle's death, since financial dependency at the time of death is the sole basis on which Burke could validly claim death benefits. *See*, AS 23.30.215(a)(4), (c). Burke argued that she should not have to sign the IRS releases because she did not want her claim "pigeonholed" into only economic dependency, and because she was concerned that her claim could be dismissed if she was required to "provide taxes and it doesn't show dependency."

With respect to its Petition to Exclude Evidence, Raven Electric argued that many of the documents Burke had filed with the Board contained hearsay, were unauthenticated, were altered through handwritten comments and marginalia, or were not relevant to any issue properly before the Board and arising under the Act. Burke responded that she was seeking to prove "gross negligence" on the part of Raven Electric, wanted a lump-sum settlement for what she termed "value of life" damages and wanted to introduce the OSHA documents and the online newspaper comments to prove Raven Electric's "gross negligence."

In its Interlocutory Decision and Order (Dec. No. 14-0029, March 7, 2014), the Board discussed the principles of law that govern its proceedings and observed that it derives its authority and jurisdiction from the Alaska Workers' Compensation Act and the Alaska Administrative Procedure Act. Citing *Far North Sanitation, Inc. v. APUC*, 825 P.2d 867, 870 (Alaska 1992), the Board noted that like all administrative agencies, it "can only adjudicate a dispute if it has been given explicit adjudicatory authority by statute." The Board also noted that neither it nor the Commission has any jurisdiction "to hear any action outside of a workers' compensation claim," citing *AKPIRG v. State*, 167 P.3d 27, 37 (Alaska 2007). The Board referenced fundamental principles of workers' compensation law, stating,

The Alaska Workers' Compensation Act creates a system through which employers compensate employees injured on the job, irrespective of fault or injury. *Nickels v. Napolilli*, 29 P.3d 242, 247 (Alaska 2001). Workers' compensation statutes base damages entirely on wages, essentially eliminating *all* noneconomic damages. *C. J. v. State, Dept. of Corrections*, 151 P.3d 373, 382 (Alaska 2006) (emphasis in original).

The right to workers' compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and for the most part, fault, are not in issue and cannot affect the result. Tort litigation is an adversary contest to right a wrong between contestants; workers' compensation is a system, not a contest, to supply security to injured workers. 1 Larson, *The Law of Workmen's Compensation*, Sec 1.03-1.04 (2008).

In its Findings and Conclusions, the Board made note of Burke's assertions regarding her claim, finding that she "has not asserted she was financially dependent on Abigail [Caudle] at the time of her death." The Board continued, "Since [Burke] is not claiming financial dependency on Abigail at the time of her death, and dependency at the time of death is the relevant dependency, tax records pertaining

to Claimant or Abigail are not relevant.” Turning next to Raven Electric’s Petition to Exclude Evidence, the Board held that Raven’s arguments as to hearsay, improper annotation and redaction “are well-taken.” Reiterating the legal principle that compensation under the Act is payable irrespective of fault, the Board observed that Raven Electric and its insurer had accepted the compensability of Caudle’s death and had paid death benefits in accordance with the Act.

After considering the parties’ arguments as to the nature and scope of the issues properly before it, the Board stated, “the sole issue remaining to be decided in this case is whether [Burke] is entitled to additional death benefits in connection with Abigail’s June 20, 2011 death where [Burke] has not alleged financial dependency at the time of death.” The Board granted Raven Electric’s Petition to Exclude, holding that none of the challenged evidence was relevant to this issue. The Board also held that to the extent Burke raised constitutional challenges to the Act, it lacked jurisdiction to decide those constitutional claims.

Raven Electric then filed a Petition to Dismiss Burke’s claim, asserting that Burke failed to state a claim under the Act because “absent proof of financial dependency, the Act does not allow for an award of death benefits compensation.” Raven Electric sought a hearing on its Petition to Dismiss.

At a prehearing conference held on May 7, 2014, an oral hearing before the Board on Raven Electric’s Petition to Dismiss was set for July 30, 2014. Burke subsequently opposed the setting of a hearing. At a further prehearing conference on July 8, 2014, the parties discussed the scope of the issues to be heard, as articulated

by the Board in its Interlocutory Decision and Order. The parties also discussed the basis for Burke's opposition to proceeding with the previously-scheduled hearing. The hearing panel Chair found no good cause to cancel or delay the July 30, 2014 hearing.

In anticipation of the hearing, Raven Electric and Burke each filed documentary hearing evidence and a hearing brief. As her hearing evidence, Burke filed an additional, un-annotated copy of the Alaska OSHA file. Raven Electric filed an Objection, asserting that the Board had previously excluded the OSHA documents as irrelevant in its March 7, 2014 Interlocutory Decision and Order.

The Board addressed Raven Electric's Objection as a preliminary matter at the July 30, 2014 hearing. Burke again argued that she wished to rely on the OSHA file as evidence of "gross negligence" in support of her claim for wrongful death or "some type of value given for that life." Raven Electric argued that the Board had previously ruled that the OSHA file itself - with or without marginalia - was not relevant to Burke's entitlement to benefits under the Act and was not admissible because issues of fault are not part of a workers' compensation adjudication.

At hearing, the Board's hearing officer explained to Burke that the OSHA file and other materials she had filed as hearing evidence would not be physically removed from the Board's files but would be excluded from the evidence that the Board would consider since under the "no-fault" provision of the workers' compensation act, the documents were not relevant to the issues to be decided.

On the question of dismissal, Raven Electric argued at hearing that Burke's claim "is simply an impermissible wrongful death claim. Whether it is styled as damages for wrongful death or value of life, this is Ms. Burke's request to be awarded compensatory damages for her daughter's death." Raven Electric cited to the "no-fault" and exclusive liability provisions of AS 23.30.045 and .055 and summarized the historical basis for Alaska's workers' compensation laws, pointing out that workers' compensation benefits had been awarded to Alaskan workers even prior to statehood and had survived multiple challenges as to their validity and constitutionality. Raven Electric relied on Burke's failure to demonstrate financial dependence on Caudle and argued that Burke was therefore not a statutory death benefits beneficiary. Finally, Raven Electric countered Burke's argument that the Act impermissibly discriminates against workers with no dependents by providing for lower benefit amounts for such workers and thereby denies such workers the equal protection of the law, pointing out that the Alaska Supreme Court had rejected the identical argument in *Taylor v. Southeast-Harrison Western Corp.*, 694 P.2d 1160 (Alaska 1985).

In its Final Decision and Order dated August 15, 2014, the Board granted Raven Electric's Petition to Dismiss. It found that Burke provided no evidence that she was financially dependent on Caudle at the time of Caudle's death. The Board discussed several controlling legal principles and provisions of the Act including AS 23.30.045 "Employer's Liability for Compensation"; AS 23.30.055 "Exclusiveness of Liability"; and AS 23.30.215 "Compensation for Death." In addition to the Act, the

Board relied on controlling precedent from the Alaska Supreme Court, including *Taylor, supra*; *Ranney v. Whitewater Engineering*, 122 P.3d 214 (Alaska 2005) and *Harris v. Millennium Hotel*, 330 P.3d 330 (Alaska 2014), in which the Alaska Supreme Court wrote, “Compensating dependents of workers who die from work-related injury is . . . a purpose of the act: Death benefits are one type of indemnity benefit, and the statute requires some type of dependency for eligibility.”

The Board denied and dismissed Burke’s claim. Burke then appealed the matter to the Alaska Worker’ Compensation Appeals Commission. Following briefing and oral argument, the Appeals Commission issued a Final Decision (Dec. No. 215) on August 18, 2015, affirming the Board’s decision. The Appeals Commission agreed with the Board’s construction of the Alaska Workers’ Compensation Act, writing that the Act provides benefits, including death benefits, for “support” of “dependents”, that these terms signified financial dependency, and that Burke was not financially dependent on her daughter and thus not entitled to workers’ compensation benefits.

Burke appealed the Appeals Commission’s decision to the Alaska Supreme Court, the state court of last resort. Briefing on the appeal followed, and at the conclusion of routine briefing, the Court issued a request for supplemental briefs, asking the parties to address whether under certain circumstances, the amount of benefits provided under the Act could be so low as to deprive an injured worker or beneficiaries of a substantial remedy such that the Act violated a workers’ right of due process. The Court also asked that the parties address the question in the context of legislative amendments to the exclusive remedy provision that were enacted in

2004. Along with the existing parties, the Court invited the State of Alaska and an amicus curiae to brief the additional issues.

Following the conclusion of briefing and oral argument, the Alaska Supreme Court issued its Opinion on May 11, 2018, reported at 420 P.3d 1196 (Alaska 2018). The Court affirmed the Appeals Commission's decision that Burke was not entitled to any benefits under the Alaska Workers' Compensation Act. Material to the issues raised in Burke's Petition for Writ of Certiorari, the Alaska Supreme Court held that Burke's constitutional rights are not violated by the Act, and specifically held that "the Alaska Workers' Compensation Act does not violate Burke's rights to equal protection or due process."

## ARGUMENT

### 1. Introduction and Summary of Petitioner's Constitutional Claims.

As the Alaska Supreme Court noted in its Opinion, Burke conflates arguments she makes on her own behalf -- principally concerning why she believes she is entitled to assert a claim and why she is entitled to some form of workers' compensation benefits or some other type of compensatory damages -- with claims that would more properly be asserted by Caudle's estate. As the Alaska Supreme Court notes, Burke was not the personal representative of Caudle's estate and thus can raise only claims she herself is entitled to assert, as Caudle's non-dependent parent. Burke's Petition to this Court poses many of the same problems inasmuch as arguments seemingly directed at a 'freedom of contract' theory as between employee and employer as not hers to assert.

Construing Burke's Petition generously in view of her unrepresented status, she seems to assert some claims that are strictly matters of state law, such as the Alaska Workers' Compensation Board's procedures for setting a hearing date. Issues such as this that arise strictly under state law are never a proper subject for this Court's exercise of jurisdiction. Burke's constitutional claims seem to fall into the following categories:

- A. That state workers' compensation laws are an "illegal agreement" between employer and employee, presumably impairing freedom of contract;
- B. That the exclusive liability provision of the Alaska Act is unconstitutional;
- C. That the inclusion of work-related deaths in state workers' compensation laws is somehow unconstitutional;
- D. That she was deprived of due process because she was not permitted to bring a civil action for wrongful death;
- E. That either she or her daughter were deprived of the equal protection of the law because the Alaska Act provides greater death benefits to a financially dependent spouse, children and/or other familial dependents than are provided for an unmarried worker with no dependents.

Each of these arguments fails. More importantly, and central to the question of whether Burke may invoke this Court's discretion to issue a writ of certiorari, every single constitutional argument raised by Burke in her Petition was considered and rejected over a hundred years ago in this Court's seminal case on the constitutionality

of state workers' compensation laws, *New York Central Railroad Company v. White*, 24 US 188 (1917.) There, as more fully discussed below, the Court upheld the State of New York's workers' (then "workmen's") compensation law against constitutional challenges based on theories of equal protection, due process, the right of states to enact workers' compensation laws generally, and freedom of contract. This Court expressly upheld the rights of states to enact workers' compensation laws as a valid exercise of their police power, and upheld the exclusive liability provision of New York's law, and found New York's law constitutional.

Thus, and simply put, Burke's Petition does not raise even a single issue that is not well-settled law by this Court. No aspect of the Alaska Supreme Court's decision or its treatment of the constitutional issues conflicts in any way with prior decision of this Court. The Petition for Writ of Certiorari should be denied.

2. The Relevant Provisions of the Alaska Workers' Compensation Act Amply Withstand Constitutional Scrutiny

In *New York Central Railroad v. White*, this Court had occasion to carefully consider the constitutionality of New York's early workers' compensation law, and found the law passed federal constitutional muster. It is poignant to note that the decision there, like the *Burke* case now at bar, arose in the context of a workplace death. Thus, as a threshold matter, Burke's contention that workers' compensation laws may not constitutionally encompass workplace deaths fails from the outset: New York's original workers' compensation law of a hundred years ago, like Alaska's workers' compensation law today, addresses both workplace injuries and deaths.

Alaska has also had workers' compensation laws in place, in some form, for over a hundred years. As the Alaska Supreme Court first noted in *Gordon v. Burgess Construction Company*, 425 P.2d 602, 603 (Alaska 1967) and noted again in *Haman v. Allied Concrete Products*, 495 P.2d 531, 533 (Alaska 1972), the first compensation act applicable to Alaska was enacted by the Alaska Territorial Legislature in 1915. Although the types of employment covered by the initial Alaska Workmen's Compensation Act were limited, "since its enactment it has always provided that the remedies provided therein were exclusive." *Gordon, supra*.

The original, 1915 version of the Act covered only mining employment. *Id.* The Act was amended multiple times by the Territorial Legislature to encompass expanding types of employment; significant expansions of coverage occurred in 1923, 1946, and 1953. By the time of the 1953 revision, coverage was extended to all employers of one or more employees, with very few exceptions. *Id.* Each version nonetheless provided that the remedies provided in the Act were exclusive of all other remedies.

When Alaska attained statehood in 1959, the existing Workmen's Compensation Act was repealed and a new Workmen's Compensation Act was enacted, drawn largely from the federal Longshore and Harbor Worker's Compensation Act. *Id.* at 603-604. Indeed, in its decision in the present case, the Alaska Supreme Court cited to *New York Central Railroad v. White* and noted that "New York's workers' compensation statute was found constitutional under the United States Constitution in 1917. New York's compensation law became the model

for the federal Longshore and Harbor Workers' Compensation Act, which in turn served as the model for Alaska's Act." *Burke*, 420 P.3d at 1202. Thus, this Court's analysis of the constitutionality of New York's workers' compensation law 1917 is directly dispositive of the constitutional challenges to Alaska's Act raised by Burke in the Petition. Her points are simply without merit.

A. Alaska's Act, Including the Exclusive Liability Provision, is Constitutional.

Since its enactment, and with extremely few changes in wording, the Alaska Workers' Compensation Act has contained an exclusive liability provision, found at AS 23.30.055, which provides that

The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death.

This exclusive liability language has been consistently upheld in Alaska and elsewhere, including by this Court, against a myriad of challenges, whether as a matter of legislative intent, statutory construction or constitutionality. The Alaska Supreme Court first upheld the exclusivity of the statehood-era Act's remedies in *Gordon v. Burgess Construction*, 425 P.2d 602 (Alaska 1967), in a suit brought under the Defective Machinery Act after the death of an employee. There, the Alaska Supreme Court held that the legislature's intent was indeed to make the remedies under the Workers' Compensation Act exclusive and "in lieu of all right and remedies

as to a particular injury whether at common law or otherwise.” *Gordon*, 425 P.2d at 605.

Discussing the “ultimate social philosophy behind compensation liability” as described by Professor Larson in his treatise, the Alaska Supreme Court wrote, “in substituting certainty of compensation for the hazards of litigation of work-connected injuries, it is too clear to require discussion that the act was intended to comprehend and govern all the interacting relations of employee, fellow employee and employer.”

*Gordon*, *supra*, citing *Frick v Horton*, 250 N.Y.2d 83, 85 (1964); *aff’d* 207 N.E.2d 618 (1965).

Five years later, in 1972, the Alaska Supreme Court was asked to overrule *Gordon* in *Haman v Allied Concrete Products*, 495 P.2d 531 (Alaska 1972). *Haman* was another attempt to assert a claim under the Defective Machinery Act, notwithstanding the exclusive liability provision of the Workers’ Compensation Act. The Alaska Supreme Court squarely reaffirmed its earlier holding in *Gordon*, noting that “industrial accidents involving the use of machinery or appliances are not unusual. The exception to the Alaska Compensation Act’s exclusive remedy provision urged by the Hamans would seriously undermine, if not engulf, the comprehensiveness of that system of compensation.” *Haman*, 495 P.2d at 535.

The foregoing discussion serves to illustrate the extent to which the Alaska Supreme Court’s consideration of Alaska’s Workers’ Compensation laws mirrors the analysis employed by this Court in *New York Central Railroad*. Identical considerations of the “grand bargain” between employers and employees, of the social

goals underpinning the legislative enactment of state workers' compensation laws, and indeed of the sovereign authority of states to enact such laws underlie the decisions of this Court and of the Alaska Supreme Court.

*New York Central Railroad* is controlling authority for the constitutionality of the Alaska Act's exclusive remedy provision (which prevents Burke from bringing a civil suit against Raven Electric) and for the authority of Alaska to enact its workers' compensation act and thus supersede both the earlier Defective Machinery Act and the common-law doctrines governing an employer's liability for injuries to an employee.

The Alaska Act, like the workers' compensation laws of other states and like the New York law under consideration in *New York Central Railroad*, is far more than simply an exclusive remedy for workplace injuries and deaths. It is, in fact, a comprehensive set of trade-offs, carefully designed to balance the rights and responsibilities of employees and employers. In *Suh v. Pingo Corp.*, 736 P.2d 342 (Alaska 1987), the Alaska Supreme Court expressly recognized "the unique system of rights, obligations, and procedures set out in the Workers' Compensation Act." *Suh*, 736 P.2d at 344. Elaborating on the balance struck by the Act, the Court in *Suh* wrote:

The primary goal of the Workers' Compensation Act is to provide workers with modest but certain compensation for work-related injuries, regardless of fault. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 438-40 (Alaska 1979.) The compensation scheme embodied in the Act is the injured worker's exclusive remedy against his employer. AS 23.30.055. The exclusiveness of the remedy reflects a quid pro quo exchange of rights and liabilities for both workers and employers. Workers gain an assured remedy without the burden of proving fault,

but lose the right to sue their employers in tort. . . This quid pro quo arrangement underscores a secondary goal of the Act: to be fair to employers as well as to workers.

B. Alaska's Act Does Not Impermissibly Impair Freedom of Contract

Burke asserts in her Petition that Alaska's workers' compensation law unconstitutionally impairs freedom of contract between employer and employee. As a preliminary matter, this argument is one that Burke lacks standing to assert, inasmuch as she is neither the employer nor the employee and was not the personal representative of Caudle's estate. On the merits, this argument, as with Burke's other alleged errors, raises no important federal question. This Court in *New York Central Railroad* acknowledged that New York's workers' compensation law "strikes at the fundamentals of constitutional freedom of contract," including contracts for personal employment, but went on to find that while "the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment . . . it is a reasonable exercise of the police power of the state." This is because, as the Court found, "the public has a direct interest in this as affecting the common welfare." *Id.*, at 206. Consequently, while an impairment of freedom of contract exists, it is not one that violates the federal constitution. This argument, then, cannot support issuance of a writ of certiorari.

C. The Death Benefits Provision of the Alaska Act Does Not Violate the Due Process or Equal Protection Clauses of the Constitution

Burke asserts that she has been denied due process of law because she was not able to sue Raven Electric civilly and recover either a large compensatory damages

award or any punitive-style award which she seeks as a means to punish and/or deter Raven Electric and other employers. Burke also asserts that the death benefits provision of the Alaska Act (AS 23.30.215) violates her right to equal protection because it provides for greater workers' compensation benefits where an employee dies leaving dependents than are provided where, as in this case, the employee dies leaving no dependents.

Turning first to Burke's equal protection argument, it is apparent that it fails on the most basic element of the analysis: Burke compares employees who die leaving economically dependent family members with those who have no dependents, and the two groups are simply not similarly situated. As the Alaska Supreme Court pointedly stated,

For a viable equal protection claim to exist, similarly situated groups must be treated differently: '[w]here there is no unequal treatment, there can be no violation of the right to equal protection of the law.' The legal conclusion that two classes are not similarly situated necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes.

*Burke*, 420 P.3d at 1205. Further, as the Alaska Supreme Court noted, a court considering an equal protection challenge to a law that creates a distinction between classes of people must consider whether a valid and legitimate reason for disparate treatment exists, and where a legitimate reason is found, the court's inquiry is limited to determining whether the legislative line-drawing bears a fair and substantial relationship to that legitimate reason. *Id.*

The Alaska Supreme Court had previously upheld the legislature's distinction as to the amount of death benefits payable on behalf of workers who leave economic

dependents as compared with those who do not. In *Taylor v. Southeast-Harrison Western Corp.*, 694 P.2d 1160 (Alaska 1985), the Alaska Supreme Court upheld the exact same death benefits provision of the Alaska Act that Burke challenged below, finding that the legislature recognized the importance of replacing the deceased worker's income, which provided support for the worker's dependents, and that this laudable goal justified the Act's providing greater benefits on behalf of deceased workers with dependents. *Id.* at 1162.

This Court applied the essentially identical analysis to New York's early workers' compensation law in *New York Central Railroad*. That law also expressly provided for benefits payable upon a worker's death, and further provided that such benefits were payable only to the worker's dependents. *New York Central Railroad*, 24 U.S. at 193. This Court found no constitutional violation and upheld New York's workers' compensation law, including its limitations as to the amount of compensation and as to those entitled to receive it. Given the stated legislative goals of providing a certain and speedy remedy without the difficulty and expense of proving negligence and quantifying damages, the limitation on the total amount of compensation and the limitation of death benefits to "surviving wife, husband or infant children" was deemed constitutional. *Id.*, at 202. As a matter of settled law, then, the death benefits scheme contained in the Alaska Act, like the nearly identical scheme considered in *New York Central Railroad*, violates neither the Alaska nor the federal constitutional guarantees of equal protection.

Burke's due process arguments similarly fail. It is settled law that workers' compensation statutes such as New York's and Alaska's do not deprive either an employee or anyone claiming standing to sue for an employee's injury or death of due process of law. Burke claimed below that certain amendments to the Alaska Act enacted in 2004 deprived her of a right to sue Raven Electric ; but the Alaska Supreme Court pointed out that Burke was mistaken in her understanding of those amendments. *Burke*, 420 P.3d at 1205-1206. More broadly, and as the Alaska Supreme Court wrote,

[b]efore there can be a violation of due process, a person must have a substantive right that entitles her to a certain level of process in order to protect that right. But Burke does not have such a right. The legislature has limited the substantive rights available to nondependent family member of workers who die in work-related accidents, and the claims processing mechanism in the Act provided Burke an opportunity to challenge the constitutionality of the Act with respect to her own rights." *Id.* at 1204-1205, citations omitted.

The Alaska Supreme Court's analysis of Burke's due process claims is more brief, but is entirely consistent with this Court's lengthy exposition of the due process considerations contained in *New York Central Railroad*. There, neither the state's enactment of workers' compensation laws in contravention of common-law principles governing the employer-employee relationship, nor the limitations on compensation contained therein, nor the denial of a right to trial by jury were deemed to violate the right of due process contained in the federal constitution.

## CONCLUSION

Burke's Petition for Writ of Certiorari should be denied. As the foregoing discussion makes clear, every argument raised by Burke, and every constitutional

flaw she alleges, was addressed over a hundred years ago in this Court's seminal decision on the constitutionality of New York State's workers' compensation law. It is long-settled law that state workers' compensation laws in general, and the specific – but by no means unique – provisions of the Alaska Workers' Compensation Act that Burke challenges here, pass federal constitutional muster. The decision of the Alaska Supreme Court was fully in accord with prior decisions of this Court, and no writ of certiorari should issue.

Respectfully Submitted this 1<sup>st</sup> day April 2019.

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