SCR

25

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/2/98 FURTHER:

Date of 5-Day Notice: 3-5-98
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3-10-98

Judiciary Committee considered SENATE CONCURRENT RESOLUTION NO. 25

Urging an appeal and an expeditious decision on the appeal of a case concerning marriage.

and recommends:

[X] be **replaced** with ____ CS FOR SCR 25 (JUD)

[ ] adopt **previous** ____ CS ____ ( )

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____ Committee

[ ] further referral to the ____ Committee

Senate Bill:
[✓] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR ____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Ken Rhodes	✓	J. Ellis		X	
Mike Miller	✓				
Pearce	✓				
CHAIR: Kevin L. Taylor	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
S (JUD) SCR & CS	3/10/98	0	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

No. 1

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL Bill Version: CS SCR 25 (JUD)
(S) Publish Date: 3-10-98

Revision Date (Note if correction)
Title: APPEAL OF MARRIAGE DECISION
Sponsor: SENATE RLS
Requester:

Dept. Affected: DOA OF LAW
BRU: CIVIL DIVISION
Component:
Component Senal No.:

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: KIMBERLY A. BENNETT
Phone: 465-3717
Division: SENATE JUDICIARY COMMITTEE
Date: 3-9-98
Approved by: R L T
Agency:
Date:

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LAUTERBACH
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CS FOR SENATE CONCURRENT RESOLUTION NO. 25(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

A RESOLUTION

Urging an appeal and an expeditious decision on the appeal of a case concerning marriage.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS marriage has been the foundation of civilization for thousands of years in cultures around the world, and it is the single most important social institution; and

WHEREAS marriage is defined in all 50 states as the legal union of a man and a woman, and two sexes must be present for it to be marriage; and

WHEREAS marriage connotes social, economic, and spiritual union; and

WHEREAS marriage is an independently quantifiable good for society; hence the state has an interest in preserving and protecting the special status of marriage; regardless of religious beliefs; and

WHEREAS the Alaska State Legislature in 1996, through passage of Senate Bill 308, confirmed the definition of marriage in Alaska as being the union of one man and one woman; and

WHEREAS a strong majority of Alaskans understand and agree with this definition of marriage; and

Alaska State Legislature

Senator Gary Wilken, Chairman
Senator Loren Leman, Vice Chairman
Senator Lyda Green
Senator Jerry Ward
Senator Johnny Ellis

State Capitol
Room 510
Juneau, Alaska 99801
(907) 465-3762

Senate Committee on
Health, Education and Social Services

Sponsor Statement - Senate Concurrent Resolution 25

"Urging an appeal and an expeditious decision on the appeal of a case concerning marriage."

SCR 25 expresses the Legislature's support for the traditional definition of marriage as a legal union of one man and one woman, and urges the Governor, through the Dept. of Law, to utilize all available resources to appeal Superior Court Judge Peter Michalski's Feb. 27 ruling in the case of *Brause and Dugan vs. State of Alaska.*

In his decision, Judge Michalski effectively ruled that the state's policy of issuing marriage licenses only to opposite-sex couples is unconstitutional unless the state can demonstrate a compelling governmental interest (the "strict scrutiny" test) for denying marriage licenses to same-sex couples.

The judge's decision to impose the strict scrutiny test is a logical extension of an illogical finding: namely, that the right to *privacy* found in Section 22 of Alaska's constitution demands that the state provide *public* recognition of an individual's *personal* choice of a life partner.

The legislative history of the privacy amendment approved by voters in 1972 clearly shows the amendment was not intended to legalize homosexual marriage. Judge Michalski's ruling is a capricious exercise in nihilism, ignoring both legislative intent and thousands of years of legal and cultural history informing our understanding of what marriage is.

The ruling was prompted by the case of a same-sex couple seeking a marriage license, but the judge's legal reasoning could invalidate other laws relating to marriage, including prohibitions on polygamy and restrictions based on age and consanguinity.

No state in the U.S. and no country in the world recognizes marriage between individuals of the same sex. Legalization of same-sex marriage in Alaska would place this state's laws in conflict with the laws of all 49 other states and also the laws of the federal government, which define marriage as a union that can be entered into only by one man and one woman.

SCR 25 reaffirms the clear public policy statement made by the Legislature in 1996 when it overwhelmingly approved SB 308, an act that clarified what has always been the legal practice in Alaska by defining marriage as a union of one man and one woman.

Prepared by Mike Pauley, Aide to Senator Loren Leman, Vice-Chair Senate HESS Committee (465-3841)
Last Updated: March 9, 1998

Alaska State Legislature

State Capitol
Room 423
Juneau, Alaska 99801-1182
907-465-3762

Senate Committee on Health, Education and Social Services

Sponsor Statement -- SB 308

An Act clarifying a statute relating to persons who may legally marry; relating to same-sex marriages; and providing for an effective date.

Senate Bill 308 amends the existing statute governing marriage in Alaska, to clarify that marriage is a civil contract entered into between "one man and one woman". The current statute uses the gender-neutral term "person". In light of recent litigation on the subject of same-sex marriages, including the case *Brause and Dugan v. State of Alaska*, the existence of such ambiguous language in statute is problematic.

In a March 31, 1995, written opinion the Department of Law expressed that only marriages between persons of the opposite sex would likely be recognized by the courts as authorized under current law, despite the gender-neutral language in the statute. This opinion is based on the fact that the original Alaska Marriage Code of 1963 specified that marriage is a contract entered into by a "man" and a "woman". The change to "person" in 1974 was the result of a revisor of statutes bill. There was no intent by the legislature to change the definition or requirements for marriage in a substantive way.

Nevertheless, the Department of Law acknowledged in its opinion that the existing language is problematic: "Using hindsight, we would have to say that the 1974 revisor's bill should not have amended AS 25.05.011 in the way that it did. First, the change to sex-neutral language *can be viewed as making a major substantive change in the law*, inappropriate for a revisor's bill." [emphasis added] In order to eliminate ambiguity, SB 308 restores the traditional language in the marriage definition.

SB 308 also adds new language to the marriage statute stating that same-sex marriages recognized by other states or foreign countries are void in Alaska. This language is in response to the 1993 decision of the Supreme Court of Hawaii in *Baehr v. Lewin*, in which the court ruled that it may be unconstitutional for Hawaii to disallow same-sex marriages, absent a compelling interest by the state.

SUPPORTING
DOCUMENTS

The case was remanded to the lower court which will rule on the case in July or August 1996.

The prospect of same-sex marriages being allowed in Hawaii or other states raises the possibility that Alaska would have to recognize such marriages if the "couples" moved to Alaska. Absent a strong legal policy in Alaska which excludes same-sex marriages, the courts could find that a marriage valid in one state is valid in all states. The people of Alaska have not chosen, either directly or through their elected representatives, to recognize same-sex marriages. The issue of same-sex marriages is one that should be decided by Alaskans, not by a court in Hawaii or any other state.

A third component of SB 308 states that a "same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage." This language precludes the state from recognizing same-sex "domestic partnerships" which are not legal marriages, but could be deemed to be entitled to the benefits of marriage, especially in the context of employee benefits.

TONY KNOWLES
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 6, 1996

The Honorable Drue Pearce
President of the Senate
State Capitol, Room 111
Juneau, AK 99801-1182

The Honorable Gail Phillips
Speaker of the House
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Drue and Gail,

Under the authority of art. II, sec. 17, of the Alaska Constitution, I have allowed the following bill to become law without my signature:

Senate Bill 308
"An act clarifying a statute relating to persons who may legally marry; relating to same-sex marriages; and providing for an effective date."

This bill, passed by an overwhelming bipartisan majority, merely restates present Alaska law regarding who may legally marry in this state. The Alaska Marriage Code allows marriage only between a man and a woman. The history of the statute makes it clear this is the law in Alaska. In addition, I have been advised by the attorney general this bill is not necessary to maintain the current nonrecognition in Alaska of a same-sex marriage lawfully performed in another state. There is no confusion about the current marriage code or my Administration's resolve to support it. At my direction, the state is currently defending this position in court.

Passage of this bill, however, does raise serious concerns. Since it does nothing to change current law, the primary motivation behind the bill apparently was to trigger a divisive and derogatory debate aimed at one segment of our society. This legislative exercise is little more than a thinly disguised ploy to pit Alaskans against one another for political advantage.

I believe it is my responsibility to call upon Alaskans to reject the manipulation and opportunism of those who would divide us through intolerance. I continue to believe our role as public servants is to raise the level of our horizons, to provide opportunities for all Alaskans, to treasure our diversity and to respect our differences as individuals.

Sincerely,

Tony Knowles
Governor

Alaska State Legislature

Senator Drue Pearce
President of the Senate

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Bill Defining Marriage as a Man/Woman Partnership Becomes Law

For Immediate Release: May 6, 1996

Contact: Senator Loren Leman (907) 465-2095
Senator Lyda Green (907) 465-6600
Rep. Norman Rokeberg (907) 465-4968

JUNEAU - Senate Bill 308 amending the Alaska marriage law to clarify marriage as a civil contract between "one man and one woman," became law Monday.

Senator Lyda Green, Chairman of the Senate Hess Committee, noted she was pleased this legislation has become law because it not only had strong support from both bodies in the Legislature, but it upholds the traditional Alaska family.

"This bill doesn't just restate present Alaska law regarding who may legally marry, as the Governor claimed in his transmittal notice," said Senator Green. "It clarifies the definition of marriage in State statute to eliminate future confusion as marriage laws are challenged in other states."

Senator Loren Leman (R-Anchorage), remarked that while he was pleased SB 308 became law, he was disappointed that the Governor did not exhibit stronger leadership by signing the bill.

"If the Governor cared enough about the bill to contact us, he would have found out that the true motivation behind the bill was not to trigger a divisive and derogatory debate, but to restore traditional language and add a full faith and credit provision so that same-sex marriages entered into in other states are void in Alaska.

"Full faith and credit means that laws passed in one state must be respected by another," said Senator Leman.

"A court decision expected later this year in Hawaii may legalize same sex marriages in that state and other states are revisiting their marriage laws in preparation for the court decision," said Senator Leman.

-more-

"Absent this legislation, the Hawaii court decision could force Alaska to recognize same-sex marriages," said Representative Norman Rokeberg who introduced identical legislation last year in the House. "This is a policy call that should be decided by the legislature of Alaska, not a court in another state."

Rokeberg said that while this is a policy that the State of Alaska currently enforces, ambiguity exists because the current statute uses the gender-neutral term "person" instead of man and woman. The existence of such ambiguous language is problematic and has led to litigation on the subject of same-sex marriages.

Rokeberg noted that in 1974 a revisor of statutes bill made "gender Neutral" the entire body of Alaska law, and in doing so, took out the reference to man & woman and replaced it with "person."

SB 308 also prohibits "same-sex relationships" to be entitled to the benefits of marriage. This language precludes the state from recognizing same sex or heterosexual "domestic partnerships" which are not legal marriages, but could be deemed to be entitled to the benefits of marriage, such as employee benefits.

"This law was not meant to be divisive. It was meant to clarify the statutes and make sure that the family, as a unit, is recognized in Alaskan law as the foundation of our society. This is important and something we need to protect legally," said Rokeberg.

"I believe the Alaska Legislature made the right call when it supported this bill," Leman said.

###

Broadcast Note: Audio actualities are available by calling 1-800-478-6540.

SB308

THE NATIONAL LEGAL FOUNDATION

6477 COLLEGE PARK SQUARE, SUITE 306
VIRGINIA BEACH, VIRGINIA 23464
(804) 424-4242 • FAX: (804) 420-0855

April 4, 1996

OPINION LETTER

It is the opinion of the National Legal Foundation that Senate Bill 308 is constitutional under both the United States and Alaska Constitutions.

No federal or state court has ever found any law or policy denying homosexuals the right to marry (or limiting marriage to one man and one woman) to be unconstitutional on federal equal protection or due process grounds. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995); *McConnell v. Nooner* 547 F.2d 54 (8th Cir. 1976); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 409 U.S. 810; *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993); *In re* Estate of Cooper, 592 N.Y.S.2d 797 (App. Div. 1993), *appeal dismissed*, 624 N.E. 2d 696 (N.Y. 1993); *DeSanto v. Barnsley* 476 A.2d 952 (Pa. 1984); *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A. 2d 204 (App. Div. 1976); *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974); *Jones v. Hallahan*, 501 S W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W. 2d (Minn. 1971) *appeal dismissed*, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 325 N.Y.S. 2d 499 (Supp. Ct. 1971).

It is critical to note that in *Baker v. Nelson, Id.*, the homosexuals who were denied the right to marry argued, among other things, that this practice violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court of Minnesota held that "the equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 187. Even more crucial is the fact that the United States Supreme Court dismissed the appeal "for want of a substantial federal question." 409 U.S. 810. The Due Process and Equal Protection claims did not carry any weight with the U.S. Supreme Court.

Furthermore, no court until the Hawaii Supreme Court had ever expressed any concerns on state constitutional grounds either. See cases cited above. It is important, therefore, to examine the concerns expressed in the Hawaii case, *Baehr v. Lewin*.

First of all, the Hawaii court declared that "the right to privacy does not include a fundamental right to same-sex marriage." Id. at 55 (emphasis added). We believe that the Alaska courts would come to the same conclusion, relying on the same federal cases for guidance (although they are not limited to these cases as guidance). The Hawaii court relied on *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Maynard v. Hill*, 125 U.S. 190 (1888) to correctly conclude that: "The foregoing case law demonstrates that the federal construct of the fundamental right to marry--subsumed within the right to privacy implicitly protected by the United States Constitution--presently contemplates unions between men and women." *Baehr* at

56. The court then concluded that there was no fundamental right to same-sex marriage under the Hawaii Constitution either.

Because the right of privacy arises from a due process context, the Hawaii court, quoting *Zablocki*, also held that there was no federal or state due process problem: "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due process Clause." *Baehr* at 55. Since there was no violation of the right to privacy, there was no violation of due process.

The National Legal Foundation believes that the Senate Bill 308 is constitutional in light of the above brief analysis of the equal protection, due process, and privacy issues under the United States Constitution and and under the due process and privacy provisions of Article 1, Sections 1, 3, 7, and 22 of the Alaska Constitution. Furthermore, the National Legal Foundation believes that the Alaska courts would adopt a similar analysis. Any other analysis would fly in the face of every other federal and state court that has ever addressed the issue, including the Hawaii Supreme Court in *Baehr*.

It is true however, that the Hawaii Supreme Court remanded the case to the trial court. It did so because it believed the trial court had erred in granting judgment on the pleadings. *Baehr* at 52-55. The supreme court held that the trial court had erred in applying a rational basis test to the Hawaii marriage statute and remanded case with instructions to apply strict scrutiny. *Id.* at 59-68

It is critical to notice two things. First, the Hawaii Supreme Court went through unconvincing logical contortions to reach the conclusion that strict scrutiny was the proper standard. *Id.* The court analogized its case to *Loving v. Virginia*, 388 U.S. 1 (1967), a case involving Virginia's miscegenation laws: Since the miscegenation laws are unconstitutional because they discriminate on the basis of race, so Hawaii's marriage law must be unconstitutional because it discriminates based on sex. This is a leap of logic that other courts have rejected. Race-based classifications are invidiously discriminatory; sex-based classifications are not because marriage requires by definition a male and a female. In *Singer, supra*, the court made such a statement about the plaintiff's sex discrimination claim and in *Baker, supra*, the court explicitly distinguished *Loving*, rejecting the very argument the *Baehr* court proffered.

Alos, the *Baehr* court was forced to acknowledge that the appellant homosexuals were not a "suspect class" but the court would nonetheless consider sex a "suspect category." The court admitted it had never so held before. *Baehr* at 67.

The dissenting opinion thoroughly points out why strict scrutiny should not be applied. *Id.* at 70-74. No fundamental right is involved, the law is not invidiously discriminatory, and no suspect class is involved. *Id* at 72. The dissent adopted the view of the *Singer* and *Baker* courts: The law does not discriminate on the basis of sex since "the statute applies equally to *all*

unmarried persons, both male and female, who desire to enter into a legally recognized marriage." *Id.* (emphasis originai).

Second and more important than the fact that the Hawaii Supreme Court erroneously applied the strict scrutiny standard, is the fact that the Alaska courts will not have the opportunity to apply this standard. As the Hawaii Supreme Court noted, under its state constitutional jurisprudence, "Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a rational basis' test." *Id.* at 63 (citations omitted). However, in Alaska the case is otherwise. The Alaska courts do not use a strict scrutiny test for statutes not affecting a fundamental right. A statute must only pass the rational basis test: "Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Hilbers v. Municipality of Anchorage*, 611 P.2d 31 (Alaska 1980).

The following points from our earlier discussion are germane here. Rational basis is the proper standard since no fundamental right is involved. All persons similarly circumstanced are treated alike. Also implicit in the fact that every court to ever address the issue of same-sesx marriage (until the *Baehr* court) has denied the homosexuals' challenges to these laws is the acknowledgment that there is a rational basis for prohibiting same-sex marriage. Various reasons are cited in *Zablocki, supra*; *Skinner supra*; *Meyer supra*; and *Maynard supra*. Perhaps the two most common reasons cited in these cases are that the "traditional" family is the nucleus of society; and the procreative aspect of male-female marriages.

In addition, the United States Supreme Court has stated that "majority sentiments about the morality of homosexuality" are adequate grounds upon which to base a statute *Bowers v. Hardwick* 478 U.S. 186,196 (1986).

The National Legal Foundation believes that the Senate Bill 308 is constitutional in light of the above brief analysis of equal protection issues under Article 1, Sections 1 and 3 of the Alaska Constitution. Furthermore, the National Legal Foundation believes that the Alaska courts would adopt a similar analysis based on their required use of the rational basis test.

In summary, the National Legal Foundation believes Senate Bill 308 to be completely constitutional and further believes that the Alaska courts would so find.

Not withstanding the clear weight of evidence that Senate Bill 308 is constitutional, two arguments are sometimes advanced which purport to show that the bill may be unconstitutional Both of those arguments are fallacious.

First, the idea is advanced that S.B. 308 would violate the Full Faith and Credit Clause of the United States Constitution. This is simply untrue. The United States Supreme Court has declared that:

> Prima facie, every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the Full Faith and Credit Clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the Full Faith and Credit Clause . . . .

Alaska Packers Association v. Industrial Accident Commission of California, 294 U.S. 323, 547-48 (1935).

In *Pacific Employers Insurance Company v. Industrial Accident Commission*, 306 U.S. 493 (1939) the Supreme Court further explained:

> the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. . . .
>
> This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of on estate, that of the forum, by the statute of another state. Bur there would seem to be little room for the exercise of that function when the statute of the forum is the expression of domestic policy, in terms declared to be exclusive in its application to persons and events within the state.

Id. at 502-503.

Thus, as even advocates of same sex marriage concede, the matter is reduced to a choice-of-laws issue. See, e g., Barbara J. Cox, *Same-Sex Marriage and Choice-Of-Law: If we Marry in Hawaii, are we still Married When we Return Home?* 1994 WIS. L. REV. XXX: 1033 and Deborah M. Henson, *Will Same-Sex Marriages be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin* 32 University of Louisville Journal of Family Law 551.

The United States Supreme Court will only invalidate a state's choice-of-law doctrine if it is "arbitrary or fundamentally unfair" because there is no "significant contact or significant aggregation of contacts, creating state interests." *Allstate Insurance Co. v. Hague*, 449U.S 302 (1981). Because this is inherently not the case in the situation in which a couple seeks to have

their marriage recognized by the forum state, states are free to adopt whichever doctrine they chose. Henson, *supra*. States, including Alaska, that follow the Restatement (Second) of Conflict of Laws (1971) are free to refuse to recognize foreign marriages which violate their strong public policy. Cox, *supra*, 1094-96.

Without Senate Bill 308, Alaska might be hard pressed to prove a strong public policy against same-sex marriage and could be forced by its own courts to recognize these marriages. However, if the bill is enacted, the Alaska courts would be able to refuse to recognize them without any Full Faith and Credit problems.

The second argument advanced against the unconstitutionality of S.B. 308 is that it would infringe the fundamental right to interstate travel. Again, this is untrue. Opponents of S.B. 308 know that they must implicate a fundamental right in order to force this legislation to be subjected to a strict scrutiny standard (see discussion above). However, invoking interstate travel in this context simply will not work.

Interstate travel jurisprudence is notoriously confusing. There was a time when the United States Supreme Court used this right as a means to strike a wide variety of state statutes. See, Gregory B. Hartch, Comment, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 William Mitchell L. Rev. 457 (1995) Thus, suggesting this right as an avenue of attack on the bill may make sense to its opponents.

However, things have changed. In *Bray v. Alexandria Women's Health Clinic*, 122 L. Ed. 2d 34 (1993), the United States Supreme Court clarified the limitations of the right to interstate travel. It "protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." Id. at 51 (citations omitted). Certainly, S.B. 308 erects no actual barriers to entering the state and it ensures that interstate and intrastate travelers will be treated equally, not differently--neither can gain recognition of a same-sex marriage. This is in direct contrast to the oft-cited right to travel cases *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Dunn v. Blumstein*, 405 U.S. 330, (1972) which struck down state statues that contained residency requirements because they discriminated against those who had recently traveled to the state.

In conclusion, the National Legal Foundation not only believes that Senate Bill 308 is constitutional, but also finds no validity to the arguments advanced by opponents of the bill.