HJR

32

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HJR 32 Constitutional Amendment Relating to Marriage

SPONSOR STATEMENT

HJR 32 is offered in response to the recent Supreme Court ruling of October 28, 2005. The ruling stated and ended with the premise that same sex couples are equal to married couples with regard to receiving health benefits from public employment. The conclusion of the court is that spousal limitations are unconstitutional

I will argue that the people of Alaska in a constitutional amendment vote in November 1998 by a 68% margin thought the issue of marriage and its benefits for same-sex couples was settled. Also, I will argue that the plaintiffs in Brause v. Bureau of Vital Statistics treated marital status and marital benefits, as inseparable thereby recognizing that marriage is a special relationship is society and law.

AS 25.05.013(b) passed by the Alaska Legislature in 1996 prohibits any public employer from extending marriage benefits to same-sex partners so the constitutional language in HJR 32 is consistent with the will of the legislature, which is consistent with the 1998 vote of the people of Alaska.

AS 18.80.220(c) is a law ignored by the court. This is under "unlawful Employment Practices" which grants an exception to employers who "provide greater health and retirement benefits to employees who have a spouse or dependent children" enacted in the 1996. Showing the public good of marriage benefits as a societal value for the health of family's in Alaska.

As a Representative Democracy it falls on us to refer this to those who answer to "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." Alaska Constitution Article 1, sec.2.

Amending our constitution is a weighty matter and should not be done lightly I my view. My interest is asking the people of Alaska if they agree with their Supreme Court, and if not, should we amend the constitution to better reflect the people's view. I appeal to you with Article 1, Section 2. This is our only recourse in answering this huge sociological question for those of us who disagree with the courts conclusion.

ALASKA STATE LEGISLATURE
SENATE FINANCE COMMITTEE
March 9, 2006

TESTIMONY OF KEVIN G. CLARKSON, ESQ. REGARDING SJR 20

INTRODUCTION

I would like to thank the Co-Chairs of the Committee, Senator Green and Senator Wilken, the Vice Chair of the Committee, Senator Bunde, and the members of the Committee, Senators Dyson, Hoffman, Olson, and Stedman, for the opportunity to speak today regarding SJR 20, a proposed amendment to the Alaska Constitution to preserve the attributes, benefits and privileges of marriage to married couples.

By way of introduction, I was legal counsel for the Alaska Legislature in 1998 in the legal action that related to whether the Marriage Amendment, Art. I, Section 25 of the Alaska Constitution, would remain on the general ballot so that the People of Alaska could vote to ratify it. I also represented the Alaska Legislature in the original same-sex marriage case itself, and I was one of the primary drafters of the Marriage Amendment.

HISTORICAL BACKGROUND

In order to understand the significance of SJR 20 it is essential to understand the history that has lead up to its introduction in the Legislature at this time. Relevant history includes events in the United States Congress, the Lower forty-eight states, and also in Alaska.

I. The Federal Defense of Marriage Act

In 1996, Congress adopted the federal Defense of Marriage Act (DOMA). Pub. L. 104-199, 100 Stat. 2419 (Sept. 21, 1996). Congress passed DOMA because of a decades-long assault that had been made in various courts challenging the definition and constitutionality of marriage, and particularly in response to a Hawaii court decision that suggested there might be a right to same-sex "marriage" in the Hawaii Constitution. The legislative history of DOMA reflects a congressional concern about the effect that legalizing same-sex "marriage" in Hawaii would have on other states, federal laws, the institution of marriage, traditional notions of morality, and state sovereignty. H.R. Rep. No. 104-664 at 1-18 (1996), reprinted in 1996 U.S.C.C.A.N. 2905-23.

DOMA has two sections, one defining "marriage" for purposes of federal law, and the other affirming federalism principles under the authority granted by Article IV, Section 1 of the Constitution, the Full Faith and Credit Clause. The first section states that for purposes of federal law, marriage means a legal union between a man and a woman.

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word marriage means only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. 7 (1997). The second section reaffirmed the power of the states to make their own decisions about marriage:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996), codified at 28 U.S.C. 1738C (1997).

By way of DOMA, all of the various attributes, benefits, and privileges of marriage that are created or assigned by federal law, are assigned or provided only to (1) "marriages," which are limited to only legal unions between one man and one woman as husband and wife and (2) "spouses," which is defined as a person of the opposite sex who is a husband or a wife. None of the various attributes, benefits and/or privileges of marriage that exist under federal law are available to any unmarried couples, whether same-sex or opposite sex.

II. The Alaska Marriage Amendment

The Alaska Marriage Amendment, Art. I. Section 25, was ratified by the People, on a vote of 68%-32% in November, 1998. The Alaska Marriage Amendment can be said to have its origin in reaction to a specific judicial decision. The Marriage Amendment was ratified in response to a decision by a state superior court judge in a case called Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998). On February 28, 1998 this superior court judge ruled that the Alaska Constitution provided a fundamental right to marry someone of the same sex.

A. The Evolution of Alaska's Marriage Statute

The origin of Alaska's marriage statute, AS 25.05.011, is a territorial law: "Marriage is a civil contract, which may be entered into by males of the age of twenty-one years, and females of the age of eighteen years."[1] After statehood in 1959, this law was slightly revised to read: "Marriage is a civil contract requiring both a license and solemnization which may be entered into by a male

[1] *See* Alaska State Legislature Legislative Research Agency, *Memorandum on Legislative History of AS 25.05.011* (March 8, 1995).

who is 21 years of age or older with a female who is 18 years of age or older."[2] In 1970, the statute was modified to reduce from "21" to "19" the age at which a man could marry."[3] Up to this point in time Alaska's marriage statute clearly restricted marriage to one man and one woman.

Something very interesting, and also very unintended, occurred in 1974. The Alaska Revisor of Statutes[4] set upon the task of rendering Alaska's Statutes "gender neutral" in language and in the process made two unintended substantive changes to the marriage statute, one clear and express and the other implicit. The express substantive change which the Revisor of Statute's made was to change the age of permissible marriage for both genders to "19" from the previous "19" for men and "18" for women.[5] The second substantive change, which was only implicit in effect was to eliminate the words "man" and "woman" from the statute and insert the word "person" in their place. While this "gender neutrality" goal may have seemed "noble" and "appropriate" in the context of the codification of Alaska's statutes, from the standpoint of the substantive meaning and effect of the marriage law the result was drastic. By eliminating the words "man" and "woman" from the marriage statute the Revisor's "gender neutral" language had the appearance of changing Alaska's definition of marriage to a civil contract which could be entered into between any two "persons" (presumably of any combination of either gender) age 19 years or older.[6]

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[2]Sec. 1, ch. 58, SLA 1963 (enacting AS 25.05.011).

[3]Sec. 9, ch. 245, SLA 1970.

[4]The Revisor of Statutes is given the responsibility to codify Alaska's statutes and to make technical changes for purposes of clarity. AS 01.05.036. The Revisor of Statutes submits bills to the Alaska Legislature which encompass many subjects, which are supposed to address only technical or grammatical changes to the statutes, and which are not supposed to make substantive changes to the meaning and effect of the law. In fact, because Revisor's bills address multiple subjects throughout the Alaska statutory scheme, if Revisor's bills did propose substantive changes to the meaning and effect of the laws then the Revisor's bill would very likely violate the single-subject requirement of Article II, section 13 of the Alaska Constitution. This conclusion is bolstered by the fact that Article II, section 13 contains language which exempts bills "codifying, revising, or rearranging existing laws."

[5]Sec. 92, ch. 127, SLA 1974. This change in the age of permissible marriage for women was a clear substantive change which exceeded the authority of the Revisor of Statutes. The change appears to have been motivated by the 1972 amendment to Article I, section 3 of the Alaska Constitution to prohibit discrimination on the basis of sex. The title of the Revisor's 1974 bill ("An Act making corrective amendments in the Alaska statutes as recommended by the revisor of statutes") suggests very strongly that the Revisor was exceeding his ("her?") statutory and constitutional authority.

[6]Sec. 92, ch. 127, SLA 1974. According to Representative Norman Rokeberg's Sponsor Statement regarding House Bill 227, Alaska's Defense of Marriage Act ("Little DOMA"), the 1974 Revisor's bill which made the legal age of consent for marriage the same age for both men and women (HB 817) was amended in the Senate Judiciary Committee to remove the words "man" and "woman" and replace them with the word "person." Representative Rokeberg reported in his Sponsor Statement regarding HB 227 that the amendment was the result of an effort championed by former Representative Genie Chance to "locate all terms relating to the sexes, and replacing them with gender neutral words." Sponsor Statement, Rep. N. Rokeberg, HB 227 (undated). Representative Rokeberg reported that he had discussed the matter with former Representative Chance, and that she confirmed that the amendment was not intended to repudiate the traditional definition of marriage as the union of one man and one

The statute was again modified in 1975, this time by the Alaska Legislature itself, to reduce the legal age of marriage to "18" for both men and women. Apparently unaware of the prior apparent substantive change, the Legislature retained the "gender neutral" language without the slightest comment.[7] The marriage statute remained unchanged and unchallenged in this form for the next twenty-one (21) years until 1996.

B. Related Gay Rights Controversies

Previous to the Marriage Amendment drama, a number of controversies regarding similar issues had already been played out in Alaska. The earliest case was decided in 1978. In 1976, the mayor of Anchorage deleted from a draft of the *1976-77 Anchorage Blue Book*, reference to the Alaska Gay Coalition.[8] The Coalition subsequently sued claiming their First Amendment speech rights had been violated because they were not allowed to access the public forum created by the *Blue Book*. The superior court initially granted the Coalition a temporary injunction prohibiting distribution of the *Blue Book*, but later decided against the Coalition after a trial.[9] The Alaska Supreme Court reversed, holding that the *Blue Book* was a public forum and that the mayor had improperly denied the Coalition its First Amendment rights because of disapproval of the Coalition's aims by not allowing their message to be printed in it.[10]

A few years later, the issue of "sexual orientation" was raised in a family law setting. In *S.N.E. v. R.L.B.*[11], a father sough to have the custody of his child changed so as to give him custody. The father alleged that the mother was a lesbian and that the child's best interests, therefore, demanded that he be the primary custodian of the child.[12] The superior court ruled in favor of the

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woman.

[7]Sec. 1, ch. 28, SLA 1975. The Legislature titled its 1975 bill amending AS 25.05.011(a) "An Act relating to the capacity of persons to consent to marriage," which suggests that the Legislature had no intent or notion that it was enacting a marriage statute which, by its plain language, appeared to allow same-sex marriage. The Legislature's lack of intent to allow same-sex marriage by way of the "gender neutral" language changes of 1974 and 1975 is bolstered by the fact that the Legislature retained the terms "husband" and "wife" in several places to refer to the parties to a marriage. See AS 25.05.041(b); AS 25.05.051. If the Legislature truly intended to adopt and confirm the Revisor's 1974 "gender neutral" change as a "substantive" revision of the definition of marriage so as to include same-sex partners, then the Legislature would have replaced the terms "husband" and "wife" from the marriage laws.

[8]*Alaska Gay Coalition v. Anchorage*, 578 P.2d 951 (Alaska 1978).

[9]Id. at 954.

[10]Id. at 960.

[11]699 P.2d 875 (Alaska 1985).

[12]Id. at 877.

father and the mother appealed. The Alaska Supreme Court reversed, holding that that there was no evidence that the mother's lesbianism "has or is likely to affect the child adversely" and that any perceived stigma on the child because of the mother's lifestyle could not justify a change of custody.[13]

In January 1993, the Anchorage City Assembly enacted an ordinance that banned discrimination based on sexual orientation in public employment over the veto of Mayor Tom Fink.[14] A group called Citizens to Repeal the Homosexual Ordinance immediately began collecting petition signatures to subject the matter to a vote in the April elections. Within a month, the group submitted 20,000 signatures, even though only 5,700 were needed.[15] The city clerked certified the initiative and a group of plaintiffs sued to challenge the certification.[16] The superior court denied a stay, but that decision was appealed to the Alaska Supreme Court which granted the stay on April 14, 1993.[17] Following the stay, the superior court found that the "referendum petition presented the ordinance in a biased and partisan light" because its title read. "Referendum Petition to Repeal a Special Homosexual Ordinance."[18] Focusing on the disagreement between the ordinance's opponents and supporters about whether or not the ordinance granted "special rights" the superior court held that the petition's characterization was misleading because of its partisanship.[19] The Alaska Supreme Court took this characterization as accurate and held that inaccurate referendum petitions are not "legally acceptable."[20] The basis for this decision was the court's belief that an inaccurate petition undercuts the screening function provided by the requirement that a referendum petition have a certain number of signatures to be certified.[21] Thus, the Alaska Supreme Court invalidated the petition and the ballot initiative was not the subject of a vote.[22]

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[13]Id. at 878.

[14]*Opinions in Anchorage Divided as Gay-Rights Measure Goes to Voters*, SEATTLE TIMES B4 (April 12, 1993).

[15]Id.

[16]*Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1215 (Alaska 1993).

[17]Id. at 1216.

[18]Id.

[19]Id.

[20]Id. at 1218.

[21]Id. at 1220.

[22]Interestingly, however, in the Municipal election in which the Referendum was to appear, the People of Anchorage voted to change the membership of the Municipal Assembly, rejecting several incumbents who had previously voted for the sexual orientation discrimination ordinance. Very shortly after the election, the newly constituted Anchorage Municipal Assembly voted to rescind the sexual orientation discrimination ordinance.

Just a year before the marriage amendment was adopted, the Alaska Supreme Court heard a case involving two employees of the University of Alaska who wanted health insurance for their same-sex partners.[23] The employees challenged the University's decision not to extend the benefits, claiming a violation of the state Human Rights Act's prohibition of marital status discrimination. The superior court ruled in favor of the plaintiffs and held that the University would have to either stop offering benefits for spouses, or provide benefits to the same-sex partners of employees. The University chose to offer the benefits.[24] While the appeal of the superior court's decision was pending, the Alaska Legislature amended the state discrimination law to allow employers to offer different benefits to employees with spouses and children than those without.[25] Thus, at thje conclusion of the appeal, the Alaska Supreme Court could only rule that the University had violated the pre-amendment act.[26]

Each of these decisions contributed to the highly charged atmosphere in which Alaska's marriage statute was challenged in the Brause case.

C. Alaska's Defense of Marriage Act

As referenced above, in early 1995, in addition to the Brause litigation filed in superior court in Anchorage and discussed below, which challenged the traditional opposite-sex definition of marriage, a separate action filed in Superior Court in Fairbanks[27] challenged the University of Alaska Fairbanks' ("UAF") policies limiting spousal benefits to the "husbands" or "wives" of its married employees. A superior court judge in Fairbanks set loose a firestorm when she ruled that UAF could not legally limit spousal benefits to traditional "husbands" and "wives," basing her decision in part upon the Revisor of Statutes' 1974 bill and Senate Judiciary Committee "gender neutral" amendment, tinkering with the marriage statute so as to eliminate the words "man" and "woman" from the definition of marriage and defining "marriage" as a civil contract between two "persons."

Suddenly at that time, the Alaska Legislature was aware of the potential substantive change (and to at least a portion of the Alaska Judiciary a very real substantive change) which had been made to the marriage statute. In March, 1995, Representative Norman Rokeberg introduced House Bill 227, which was designed to amend the Alaska marriage statute to specify that (1) only one man and one woman can legally marry in Alaska, and (2) no out-of-state marriage between individuals

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[23] *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

[24] Id. at 1149-1150.

[25] Id. at 1151.

[26] Id. at 1156.

[27] *See University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

of the same-sex would be recognized as valid in Alaska. At about the same time, Representative Pete Kelly introduced HB 226 proposing very similar changes to the Alaska marriage statute.

When asked for its comments regarding HB 227, the Alaska Department of Law offered the opinion that the legislation was unnecessary. Assistant Attorney General John Gaguine offered the Department of Law's opinion to Representative Rokeberg to the effect that the Alaska Supreme Court would most likely find that the 1974 revisions to the marriage statute were not intended to allow legalized same-sex marriage. Mr. Gaguine explained that oddly enough, this event was not unique to Alaska. Prior to 1970, the State of Washington's marriage statute (RCW 26.04.010) provided that only "males" and "females" could marry each other. In 1970, however, Washington's marriage statute was amended to make the age of consent for marriage the same for both genders, and in these same changes (just as had occurred in Alaska) the words "male" and "female" were eliminated and replaced with the word "persons."

Mr. Gaguine explained that the Washington Court of Appeals had been required to review the changes to Washington's marriage statute in 1974 in a case called Singer v. Hara,[28] and in that case concluded that the changes were not intended to allow same-sex marriage. In reaching this conclusion the Washington Court of Appeals noted that 1972 changes to Washington's community property laws had retained references to "husband" and "wife," therefore, indicating a lack of intention by the Washington Legislature to allow same-sex marriage.

Mr. Gaguine also explained that Courts from other states and jurisdictions in addition to Washington had also concluded that same-sex marriages were not authorized by "gender neutral" language changes to marriage statutes.[29] The courts in these cases decided the question presented to them regarding same-sex marriage upon the simple basis of reviewing the dictionary definition of "marriage" which refers to a relationship between a "man" and a "woman" or between members of "opposite sexes." To these courts, the simple use of the word "marriage" and nothing more signaled legislative intent to limit the marriage relationship to a contract between one man and one woman.

In light of the superior court's ruling in Tumeo, however, the Alaska Legislature was not willing to simply entrust the marriage statutes to the Alaska Judiciary. Accordingly, the Legislature went forward with its proposed changes to the marriage statutes. The changes had two ultimate goals: (1) to clearly provide that for purposes of legal recognition and status, marriage in Alaska could only exist between one man and one woman; and (2) to clearly prevent any same-sex marriage, which might at some time be recognized as valid in another state (at that time, potentially Hawaii), from receiving the legal status and recognition of marriage in Alaska simply because the

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[28] 522 P.2d 1187, 1189 (Wash. App. 1974).

[29] *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

participants in that possible same-sex marriage moved their residence to Alaska.

As finally amended, the Alaska marriage statutes provide as follows:"Marriage is a civil contract entered into between one man and one woman that requires both a license and solemnization."[30]

D. The Brause v. Bureau of Vital Statistics Case

The Plaintiffs in the Brause case sought marriage as a doorway to the benefits and privileges that the law bestows upon married couples. The Plaintiffs in Brause argued repeatedly that there are some 115 benefits and privileges available to married couples under Alaska law which they coud not access. The Plaintiffs in Brause sought to use the status of marriage as a doorway by which they could access the various benefits and privileges of marriage, and attach them to their same sex relationship. The Brause litigation treated marital status and marital benefits as being inseparable. In Brause the Plaintiffs specifically sought benefits *based on* marital status. In fact, the superior court's ruling in Brause treated marital status and benefits as being inseparable. "Once married," the superior court noted, "the state provides benefits and imposes duties that are significant and valuable to society as well as to the individual members of the marriage." Brause, 1998 WL 88743 at * 2. Put another way, the superior court's ruling treated the benefits, privileges and duties of marriage as being entirely consequent upon marital status.

The Marriage Amendment presupposed this context. The Marriage Amendment was specifically designed to close marital status as a doorway by which same-sex couples, or any combination of opposite sex individuals other than "one man and one woman," might access the benefits and privileges of marriage. The Marriage Amendment as it was originally introduced in the Legislature as SJR 42 contained three sentences:

> To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this Constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex. Additional requirements related to marriage may be established to the extent permitted by the Constitution of the United States and the Constitution of the State of Alaska.

The third sentence of the Marriage Amendment was dropped by the Legislature during the legislative process.

Before the popular vote, a group of citizens including the Alaska Civil Liberties Union challenged the constitutionality of the proposed amendment in two actions. Bess v. Ulmer, Case No. 3AN-98-7776 Civil (Alaska Super. Ct. 1998); and Dodd v. Ulmer, Case No. 3AN-98-8114 Civil (Alaska Super. Ct. 1998). The Alaska Supreme Court consolidated the cases and then in its decision

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[30]ALASKA REV. STAT. 25.05.011(a) (1998), *amended by* 1996 Alaska S.B. 308.

allowed the Amendment to proceed to a vote, with one change. The Alaska Supreme Court, rightly or wrongly, deleted the second sentence of the Marriage Amendment because the Court viewed the sentence as being "superfluous." See Bess v. Ulmer, 985 P.2d 979, 995 (Alaska 1999).

The first sentence of the Marriage Amendment was presented to the People of Alaska for ratification and it was ratified by a vote of 68%-32%. See Liz Ruskin, Limit on Marriage Passes in Landslide, Anchorage Daily News, November 4, 1998, § A, p. 1.

Following ratification of the Marriage Amendment, the Brause case did not end. Confirming that their primary focus in that case was the benefits and privileges that are attached to marriage and not marriage itself as a status, the Plaintiffs in Brause continued their quest in that case to receive the 115 benefits and privileges that are attached to marriage. Because marriage status had been foreclosed to them by way of the Marriage Amendment, the Brause Plaintiffs sought to require the State to give them all of the various attributes, benefits and privileges of marriage *outside of marriage*. The Brause Plaintiffs' claims were dismissed, however, because their claims for marriage benefits and privileges were not ripe. See Brause v. Bureau of Vital Statistics, 21 P.3d 357, 358 (Alaska 2001).

III. The ACLU v. State Case

Another case, the ACLU v. State litigation, began shortly after the Marriage Amendment was ratified. In this new case, the ACLU and eighteen individuals who alleged that they comprised nine lesbian or gay couples (hereafter referred to collectively as "the ACLU") filed suit against the State of Alaska and the Municipality of Anchorage. The ACLU complained that the state and the municipality maintained employee benefits programs that offer valuable benefits to their employee's spouses that are not offered to the same sex partners of lesbian and gay employees. In other words, the ACLU argued to the effect that when nearly seventy percent of Alaskans voted to ratify the Alaska Marriage Amendment they voted to command government to give marriage benefits to same sex couples, just as if they were married.

The ACLU also argued that those same Alaskans' vote was part of an invidious discriminatory scheme against lesbian and gay people. According to the ACLU, because the Marriage Amendment was created as part of an invidious discriminatory scheme, and because it foreclosed the option of marriage to same sex couples, the Alaska Constitution had to be interpreted to command government to treat same sex couples just as if they were married. The ACLU argued that public employees with same sex partners were being singled out and treated differently due to "sexual orientation" or "gender," because unlike an unmarried male/female couple who can choose to get married if they want to, the same sex couple "can't get married." And thus, the Amendment that was designed to end the constitutional debate in Alaska over same sex marriage, became the force of the claim that same sex couples must be treated "just as if they are married," even though they are not. Most Alaskan's heads were spinning upon hearing this argument.

The state superior court dismissed the ACLU's claims. See ACLU v. State, 3AN-99-11179

Civil (Alaska Super. Ct. 1999). The superior court reasoned that public employees with same sex partners are denied marriage benefits, not because of their sexual orientation or their gender, but instead simply because they are not married. The court concluded that no sexual orientation discrimination existed because same sex couples are treated exactly the same as every unmarried heterosexual couple, who also do not qualify for marital benefits. Finally, the superior court concluded that no gender discrimination existed because men and women equally receive marital benefits for their spouses. The ACLU appealed to the Alaska Supreme Court and on October 28, 2005 the Supreme Court reversed the superior court's decision. ACLU v. State, 122 P.3d 781 (Alaska 2005).

The State of Alaska, Department of Law, argued that the Marriage Amendment foreclosed the ACLU's claim that the Alaska Constitution mandated the extension of marriage benefits and privileges to unmarried same-sex partners. The Alaska Supreme Court rejected the State's argument. ACLU, 122 P.3d at 786-87. The Court reasoned that:

> The Marriage Amendment could have the effect of foreclosing the present challenge only if it could be read to prohibit public employees from offering benefits to their employees' same-sex domestic partners. . . . That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways.

Id. Because the Marriage Amendment did not foreclose the legislative and executive branches of government from *voluntarily* choosing to extend benefits to same sex partners, the Court concluded that the Marriage Amendment stood as no barrier to the ACLU's claim that the Alaska Constitution *commanded* the legislative and executive branches of government to extend benefits to same sex partners. Interestingly, the Court did not address another possible interpretation of the Marriage Amendment, which would have simply construed the Amendment to foreclose any judicially commanded extension of marriage benefits and privileges to unmarried same-sex couples under the guise of constitutional interpretation. Id.

The Court, like the ACLU, used the Marriage Amendment as the driving force for its decision that the Alaska Constitution commands government to treat unmarried same sex couples just as if they are married, even though they are not. Id. at 787-88. The Court explained:

> We agree with the [ACLU] . . . that the proper comparison is between same-sex couples and opposite sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely

> denied any opportunity to obtain these benefits because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

Id. at 788. In other words, the governments' employee benefits programs that denied marriage benefits to unmarried same-sex couples were discriminatory, and thus in violation of the Equal Protection Clause of the Alaska Constitution, only because the Marriage Amendment forecloses marriage to same-sex couples.

Put another way, according to the Alaska Supreme Court, the Marriage Amendment required the Court to command government to extend marriage benefits to unmarried same-sex partners. Id. The Court put this very conclusion into words in footnote 38 of its Opinion:

> We recognize that the benefits programs became discriminatory only after the legislature acted in 1996 and 1998 and the electorate adopted the Marriage Amendment in 1998.

Id. at 789 n. 38. Thus, apparently, according to the Alaska Supreme Court, when 68% of Alaskans voted to ratify the Marriage Amendment in 1998 they voted to command government to treat unmarried same-sex couples just as if they are married, even though they are not.

IV. Future Impacts of ACLU v. State

A. All of the Benefits and Privileges of Marriage Will Be Required to Be Given to Same Sex Relationships

Although ACLU v. State technically addresses only employment benefits in the context of public employment, State, Borough, or Municipal, the impact of the decision stretches much further. Based upon the logic of ACLU v. State, virtually every distinction that exists in Alaska law and public policy between married couples and unmarried same-sex partners will eventually fall to an equal protection challenge under the Alaska Constitution. There is no logical basis upon which to limit the reach of the ACLU v. State decision to simply public employment benefits. Effectively, the Alaska Supreme Court decision is a first step in the direction of constitutionally mandated domestic partnerships in Alaska just as was imposed upon the State of Vermont by the Vermont Supreme Court in Baker v. State, 744 A2d 864, 886-89 (Vt 1999).

If Alaska Supreme Court believes that unmarried same-sex partners are unconstitutionally discriminated against because the government denies them the employment benefits that are extended to married men and women, it appears a foregone conclusion that the Court will believe

that the state unconstitutionally discriminates against same-sex partners when it denies them other benefits and privileges of marriage, including, but not necessarily limited to, (1) the right of intestate succession; (2) the privilege of not being required to testify against a spouse; (3) the right to receive workers' compensation benefits on the death of a partner; (4) the right to maintain a legal action for loss of consortium, or a wrongful death action for the death of a partner; and/or (5) the right to receive spousal support on the dissolution of a relationship.

B. Private Employers must Extend Marriage Benefits to the Same Sex Partners of Their Employees

It is not a correct statement that the impact of ACLU v. State will be felt only in the context of public employment. The logic of the ACLU v. State decision reaches into private employment as well as public employment. Under Alaska law, every private employment contract between employer and employee contains an implied covenant of good faith and fair dealing. Charles v. Interior Regional Housing Auth., 55 P.3d 57, 62 n. 29 (Alaska 2002); Holland v. Union Oil Co. of Ca., Inc., 993 P.2d 1026, 1032 (Alaska 2000); Belluomini v. Fred Meyer of Alaska, Inc., 993 P.2d 1009, 1012-13 (Alaska 1999). One of the things that the implied covenant of good faith and fair dealing requires is that employers treat "like employees alike." Charles, 55 P.3d at 62 n. 29; Holland, 993 P.2d at 1032; Fred Meyer, 993 P.2d at 1012-13. The legal concept of treating "like employees alike" is much akin to the equal protection concept of not discriminating between "similarly situated individuals." Thus, it requires no stretch of logic to predict that the Alaska Supreme Court will conclude that a private employer violates the implied covenant of good faith and fair dealing when that private employer extends employment benefits to the spouses of its married employees but not to the same-sex partners of its "like" gay or lesbian employees.

V. SJR 20

SJR 20 is designed to allow the People of Alaska the opportunity to address the ACLU v. State decision. SJR 20 is also designed to allow the People of Alaska to decide whether they agree or disagree with the Alaska Supreme Court's interpretation of the meaning and effect of the Marriage Amendment. SJR 20 would add a second sentence to Art. I, Section 25 that would state:

> No other union is similarly situated to a marriage between a man and a woman and, therefore, a marriage between a man and a woman is the only union that shall be valid or recognized in this state and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned.

The first phrase of SJR 20 is designed to eliminate the fundamental basis for any equal protection claim, in any context, that involves an effort to compare married couples to unmarried same-sex partners, or for that matter to any unmarried combination of opposite sex individuals. The following language of SJR 20 is designed to confirm that marriage benefits and privileges, qualities, effects and obligations, are limited to marriage relationships as previously defined by the Alaska

Constitution. The word benefits is designed to address such things as employment benefits. The word privileges is designed to address such things as the spousal privilege regarding court testimony. The words qualities and effects are designed to address the various legal qualities and effects of marriage under Alaska law. The word obligations is intended to address such obligations as spousal support in a divorce context.

Nothing in SJR 20 would prohibit private employers from voluntarily deciding to extend marriage like benefits to employees with same-sex partners. A few private employers have decided to voluntarily extend employment benefits to the same-sex partners of their employees. SJR 20 would have the effect of precluding a public employer from extending employment benefits to unmarried same-sex partners. However, in this regard, it is important to note that AS 25.05.013(b), passed by the Alaska Legislature in 1996, already prohibits any public employer from extending marriage benefits to same-sex partners. Any public employer who currently extends marriage benefits to the same-sex partners of employees does so in violation of Alaska law.

VI. MARRIAGE AMENDMENTS ACROSS THE COUNTRY

States With Marriage Amendments:

1. Alaska (1998 by 68%)
2. Arkansas (2004 by 75%)
3. Georgia (2004 by 77%)
4. Hawaii (1998 by 69%)
5. Kansas (2005 by 70%)
6. Kentucky (2004 by 75%)
7. Louisiana (2004 by 78%)
8. Michigan (2004 by 59%)
9. Mississippi (2004 by 86%)
10. Missouri (2004 by 71%)
11. Montana (2004 by 66%)
12. Nebraska (2000 by 70%)
13. Nevada (2002 by 67%)
14. North Dakota (2004 by 73%)
15. Ohio (2004 by 62%)
16. Oklahoma (2004 by 76%)
17. Oregon (2004 by 57%)
18. Texas (2005 by 76%)
19. Utah (2004 by 66%)

States where Amendments Are Expected to Be Voted On In 2006:

1. Alabama

2. Arizona
3. Colorado
4. Idaho
5. Indiana
6. New Hampshire
7. South Carolina
8. South Dakota
9. Tennessee
10. Virginia
11. West Virginia
12. Wisconsin

When marriage related Amendments are presented to the People for a vote they routinely pass by overwhelming margins. Marriage amendments voted on by the people across the country have passed by an average pass rate of 71%, ranging from 57% in Oregon to 86% in Mississippi. SJR 20 would have the effect of bringing Alaska's Marriage Amendment into line with marriage amendments that have passed in other states. Eleven of the nineteen existing marriage related amendments that have been passed in other states contain provisions similar to those of SJR 20 and specifically prohibit the extension of marriage benefits and privileges to unmarried same-sex partners. Seven amendments prohibit same-sex domestic partnerships and also prohibit the extension of marriage benefits to same-sex partners. Four other amendments have the effect of prohibiting the extension of marriage benefits to same-sex partners by prohibiting same-sex domestic partnerships.

A. Amendments That, Like SJR 20, Specifically Foreclose the Extension of Marriage Benefits and Privileges to Same Sex Partners

The Georgia Amendment provides in part that :

. . . . No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. . . .

GA CONST Art. I, Sec. IV.

The Kansas Amendment provides in part:

No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage. . . .

The Louisiana Amendment provides in part:

. . . . No official or court of the state of Louisiana shall construe this constitution or

any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. . . .

The North Dakota Amendment provides in part:

. . . . No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

The Ohio Amendment provides in part:

. . . . This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OH CONST. Art. XV, Sec. 11.

The Oklahoma Amendment provides in part:

. . . . Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

OK CONST. Art. 2, Sec 35.

The Utah Amendment provides in part:

. . . . No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect. . . .

UTAH CONST Art. 1, Sec. 29.

B. State Amendments That Foreclose the Extension of Marriage Benefits to Same-Sex Partners by Foreclosing the Creation or Recognition of Same-Sex Domestic Partnerships or Civil Unions

Some state amendments foreclose the extension of marriage benefits and privileges to same-sex partners by foreclosing the recognition of same-sex domestic partnerships or civil unions.

The Kentucky Amendment provides:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

The Arkansas Amendment provides:

> Section 1. Marriage.
> Marriage consists only of the union of one man and one woman.
>
> Section 2. Marital status.
> Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.

ARK CONST Amend. 83.

The Nebraska Amendment provides in part:

> . . . . The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

The Texas Amendment provides in part:

> . . . . This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage. . . .

TX CONST Art. 1, Sec. 32.

VII. Potential Federal Constitutional Challenges to SJR 20

Generally speaking, if a law bears a rational relation to a legitimate end, it will be upheld against a federal constitutional challenge.[31] Yet in 1996, using only rational basis review, the United States Supreme Court struck down a Colorado constitutional amendment which classified on the basis of "homosexual, lesbian or bisexual orientation."[32] This case, Romer v. Evans, is the most

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[31] *Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996).

[32] *Id.* at 1623.

likely basis for a challenge to SJR 20. It was specifically mentioned by the Alaska Supreme Court in ACLU v. State.

Romer invalidated the following Colorado Constitutional Amendment, thta was put on the ballot by initiative:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[33]

The United States Supreme Court interpreted this text not merely as repealing ordinances passed by municipalities prohibiting discrimination on the basis of "sexual orientation," but also as prohibiting "all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians."[34] The Amendment "imposes a special disability upon those persons alone." Therefore, the Court explained:

> We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[35]

Amendment 2 was "at once too narrow and too broad."[36] It was too narrow because it characterized a class of people by "a single trait." It was too broad because, on the basis of that single trait, it

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[33] *Id.* at 1623.

[34] *Id.*

[35] *Id.* at 1627.

[36] *Id.* at 1628.

"then denie[d] them protection across the board."[37] Based on this combination of targeting and potentially limitless breadth, the Court concluded that Amendment 2 could not possibly be justified by the State's purported reasons (i.e., conserving resources, respecting associational privacy). It was not only irrational, it was evil. The rationale of Amendment 2 was "inexplicable by anything but animus toward the class it affects."[38]

> Romer has a narrow and a shallow bite:
>
> It is narrow in the sense that the Court decided only the case before it and avoided creating broad rules that courts might apply in other cases. The decision is shallow in the sense that the Court's reasoning was almost subrational--there is more reflex than reason in Justice Kennedy's opinion in Romer.[39]

Romer is far more notable for what it did not do than for what it did do.[40] Romer would have come out the same way had the Amendment been targeted at *any* "narrowly defined" group. The Court, seemed more concerned about suspect *laws* than suspect *classifications*.[41] It was "the extreme overbreadth of Amendment 2--not the identity of the class of persons covered by the Amendment--that concerned Justice Kennedy and his colleagues in the Romer majority."[42] This can be seen by the fact that Romer left Bowers v. Hardwick standing, and did not hold that sexual orientation is a suspect classification.[43] In sum:

> It was the 'sheer breadth' of Amendment 2, not any perceived 'widespread animus against

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[37] *Id.*

[38] *Id.* at 1627.

[39] Richard F. Duncan, "The Narrow and Shallow Bite of *Romer* and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman," 6 *Wm. & Mary Bill of Rts. J.* 147, 148 (1997); *see also* Duncan. Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and *Romer v. Evans*, 72 *Notre Dame L. Rev.* 345, 346-355 (1997).

[40] Duncan, 6 *Wm. & Mary Bill of Rts. J.* at 149.

[41] *Id.*

[42] *Id.* at 150.

[43] *Id.* Duncan notes that the Respondents in *Romer* did not ask the Supreme Court to overrule *Hardwick*. *Id.* at 154, n. 42. From this he concludes that *Romer* "did not hold that moral disapproval of homosexual conduct is invidious or irrational." *Id.* at 150. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

> gays,' that undermined the state's attempt to provide an innocent explanation in support of the law. Romer is not a 'gay rights' case; it is a case about a purposeless and unlimited legal disability.[44]

The "rule of Romer," is something like the following: (1) does a law narrowly target a specific group, and impose upon it a broad and undifferentiated disability? (2) do the justifications offered by the State patently fail to offer a rational purpose for the law? (3) if the answers to (1) and (2) are yes, then one may *infer* the presence of irrational "animus." One does not *begin*, in other words, by searching the public record for "evidence" of "animus." In any heated debate, both sides are likely to hurl some dirt. Instead, one looks at the law itself and the justifications offered for it, and only infers "animus" if these first two conditions are not met.

"Those who wish to use Romer and the rational basis test to overturn conventional marriage laws are tilting at windmills."[45] This is so because:

> Laws defining marriage as a relationship between one man and one woman do not target a class of persons and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions. Marriage laws define and regulate the institution of marriage, but they do not forbid any individual or group that seek the law's protection against *any kind* of public or private discrimination.[46]

Rather than being based upon "animus," marriage laws and laws limiting the benefits and privileges of marriage to married couples have a variety of rational purposes, including, but not limited to (1) encouraging childbirth within marriage, (2) offering and encouraging the advantages of dual-gender parenting, (3) providing positive educative effects, and (4) avoiding a slippery slope whereby marriage becomes anarchic and incoherent.[47]

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[44] Duncan, 6 *W & M B of R J* at 155.

[45] Duncan, 6 *Wm. & Mary Bill Rts. J.* at 157.

[46] *Id. See also generally* Duncan, From *Loving* to *Romer*: Homosexual Marriage and Moral Discernment, 12 *B.Y.U. J. Pub. L.* 239 (1998).

[47] Duncan, 6 *Wm. & Mary Bill Rts. J.* at 158-165; see also Duncan, 12 *B.Y.U. J. Pub. Law* at 245-248.

You can search the entire site, or go to the recent opinions, or the chronological or subject indices. ACLU v. State & Municipality of Anchorage (10/28/2005) sp-5950

ACLU v. State & Municipality of Anchorage (10/28/2005) sp-5950

THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA CIVIL LIBERTIES UNION,	)
DAN CARTER and AL INCONTRO,	) Supreme Court No. S- 10459
LIN DAVIS and MAUREEN	)
LONGWORTH, SHIRLEY DEAN and	) Superior Court No.
CARLA TIMPONE, DARLA MADDEN and	) 3AN-99-11179 CI
KAREN WOOD, AIMEE OLEJASZ and	)
FABIENNE PETER-CONTESSE, KAREN	) O P I N I O N
STURNICK and ELIZABETH ANDREWS,	)
THERESA TAVEL and KAREN WALTER,	) [No. 5950 - October 28, 2005]
CORIN WHITTEMORE and GANI	)
RUTHELLEN, and ESTRA BENSUSSEN	)
and CAROL ROSE GACKOWSKI,	)
	)
Appellants,	)
	)
v.	)
	)
STATE OF ALASKA and MUNICIPALITY	)

OF ANCHORAGE.)
)
Appellees.)
)

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Stephanie Joannides, Judge.

Appearances: Allison E. Mendel, Mendel & Associates, Anchorage, Kenneth Y. Choe, American Civil Liberties Union Foundation, New York City, New York, and Tobias B. Wolff, Davis, California, for Appellants. John B. Gaguine, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska. Neil T. ODonnell, Atkinson, Conway & Gagnon, Anchorage, for Appellee Municipality of Anchorage. James M. Gorski, Hughes, Thorsness, Gantz, Powell, Huddleston & Bauman LLC, Anchorage, for Amicus Curiae The Alaska Catholic Conference. Rebecca L. Maxey, Law Offices of Rebecca L. Maxey, L.L.C., Anchorage, and Jennifer Middleton, Lambda Legal Defense and Education Fund, Inc., New York City, New York, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc. Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Amici Curiae North Star Civil Rights Defense Fund, Inc. and Marriage Law Project.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

The State of Alaska and the Municipality of Anchorage offer valuable benefits to their employees spouses that they do not offer to their unmarried employees domestic partners. Essentially all opposite-sex adult couples may marry and thus become eligible for these benefits. But no same-sex couple can ever become eligible for these benefits because same-sex couples may not marry in Alaska.1 The spousal limitations in the benefits programs therefore affect public employees with same-sex domestic partners differently than public employees who are married. This case requires us to determine if it is reasonable to pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their co-workers who are married. In making this determination, we must decide whether the spousal limitations in the benefits programs violate the rights of public employees with same-sex domestic partners to equal rights, opportunities, and protection under the law.2

The Alaska Constitution dictates the answer to that

constitutional question. Irrelevant to our analysis must be personal, moral, or religious beliefs held deeply by many about whether persons should enter into intimate same-sex relationships or whether same-sex domestic partners should be permitted to marry. It is the duty of courts to define the liberty of all, not to mandate [their] own moral code.3 Our duty here is to decide whether the eligibility restrictions satisfy established standards for resolving equal protection challenges to governmental action.

We do not need to decide whether heightened scrutiny should be applied here because the benefits programs cannot withstand minimum scrutiny. Although the governmental objectives are presumably legitimate, the difference in treatment is not substantially related to those objectives. We accordingly hold that the spousal limitations are unconstitutional as applied to public employees with same-sex domestic partners, and we vacate the judgment below. We ask the parties to file supplemental memoranda addressing the issue of remedy.

II. FACTS AND PROCEEDINGS

The State of Alaska and the Municipality of Anchorage offer health insurance and other employment benefits to the spouses of their employees.4 These benefits are financially valuable to employees and their spouses. Only couples who are married are eligible to receive these benefits; unmarried couples are not eligible. The state and the municipality have offered some form of these employment benefits since 1955 and at least 1985, respectively.

The Alaska Civil Liberties Union and eighteen individuals who alleged that they comprised nine lesbian or gay couples (collectively, the plaintiffs) filed suit against the state and the municipality in 1999, complaining that these benefits programs violated their right to equal protection under the Alaska Constitution. They alleged that at least one member of each same-sex couple was an employee or retiree of the state or the municipality, that the eighteen individual plaintiffs were involved in intimate, committed, loving long-term relationships with same-sex domestic partners, and that, as gay and lesbian couples, they are excluded by state law from the institution of marriage. Members of eight of the couples asserted in affidavits that they are in committed relationships.5 Their amended complaint alleged that because they are prohibited from marrying each other by Alaska Constitution article I, section 25, they are ineligible for the employment benefits the defendants provide to married couples, resulting in a denial of the individual plaintiffs right to equal protection.

Article I, section 25 was adopted by Alaska voters in 1998. Commonly known as the Marriage Amendment, it provides: To be valid or recognized in this State, a marriage may exist only between one man and one woman. It effectively prohibits marriage in Alaska between persons of the same sex.6 The plaintiff employees consequently cannot enter into the formal relationship marriage that the benefits programs require if the employees are to confer these benefits on their domestic partners.

Put another way, the plaintiff employees and their same-sex partners are absolutely precluded from becoming eligible for these benefits. Although all opposite-sex couples who are unmarried are also ineligible for these employment benefits, by marrying they can change the status that makes them ineligible.

The plaintiffs did not challenge the Marriage Amendment in the superior court (nor do they on appeal). Instead, their

amended complaint asked the superior court to declare that denying employment benefits to same-sex domestic partners violates, among other things, article I, section 1 of the Alaska Constitution, which states in part: This constitution is

> dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law.

All parties moved for summary judgment. The superior court denied the plaintiffs motion and granted the defendants motion. The court first rejected plaintiffs assertion that it was necessary to apply heightened scrutiny in considering their equal protection challenge; the court reasoned that heightened scrutiny was unwarranted because the state and the municipality were discriminating between married and unmarried employees, not between opposite-sex and same-sex couples. The court also determined that the only right at issue was a right to employee benefits, which it ruled was not a fundamental right. Because the court found that no suspect class or fundamental right was involved, it applied the lowest level of scrutiny to the governmental action. The court ruled that the defendants had a legitimate interest in reducing costs, increasing administrative efficiency, and promoting marriage. It then ruled that granting benefits only to spouses of married employees bore a fair and substantial relationship to those interests.

The plaintiffs appealed. Briefing on their appeal was completed and oral argument took place before the United States Supreme Court decided Lawrence v. Texas.7 With our permission, the parties filed supplemental briefs discussing Lawrence.

III. DISCUSSION

A. Standard of Review

We review a grant or denial of summary judgment de novo.8 Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.9 Deciding the applicable standard of scrutiny in an equal protection challenge to an allegedly discriminatory statute presents a question of law.10 Likewise, identifying the nature of the challengers interest and assessing the importance of the governmental interest and the fit between that interest and the means chosen to advance it, present questions of law.11 We will apply our independent judgment to questions of law and adopt the rule of law most persuasive in light of precedent, reason, and policy.12 We apply our independent judgment when interpreting constitutional provisions or statutes.13 A constitutional challenge to a statute must overcome a presumption of constitutionality.14

B. Effect of the Marriage Amendment on Plaintiffs Equal Protection Arguments

The plaintiffs, in challenging the spousal limitations in the benefits programs, rely on article I, section 1 of the Alaska Constitution, which guarantees the right to equal treatment. It states that all persons are equal and entitled to equal rights, opportunities, and protection under the law.15 Often referred to as the equal protection clause, this clause actually guarantees not only equal protection, but also equal rights and opportunities under the law.16

But Alaska Constitution article I, section 25, the Marriage Amendment, states that [t]o be valid or recognized in this State, a marriage may exist only between one man and one woman. It effectively prohibits same-sex domestic partners from

marrying in Alaska and denies recognition in Alaska to foreign marriages between same-sex couples.17 We must decide as a threshold matter whether, as contended by the municipality and amici curiae North Star Civil Rights Defense Fund, Inc. and the Marriage Law Project, the Marriage Amendment precludes challenges by same-sex couples to government policies that discriminate between married and unmarried couples.

We must give effect to every word, phrase, and clause of the Alaska Constitution.18 [S]eemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution.19

The Alaska Constitutions equal protection clause and Marriage Amendment can be harmonized in this case because it concerns a dispute about employment benefits. The Marriage Amendment effectively precludes same-sex couples from marrying in Alaska, but it does not explicitly or implicitly prohibit public employers from offering to their employees same-sex domestic partners all benefits that they offer to their employees spouses. It does not address the topic of employment benefits at all.20

Nor have we been referred to any legislative history implying that, despite its clear words, the Marriage Amendment should be interpreted to deny employment benefits to public employees with same-sex domestic partners.21 The Marriage Amendment could have the effect of foreclosing the present challenge only if it could be read to prohibit public employers from offering benefits to their employees same-sex domestic partners. But nothing in its text would permit that reading, and indeed the state and the municipality implicitly assume on appeal that governments are free to offer employment benefits to their employees unmarried, domestic partners, including same-sex domestic partners.

Because the public employers benefits programs could be amended to include unmarried same-sex domestic partners without offending the Marriage Amendment, that amendment does not foreclose plaintiffs equal protection claims here. That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them.

The state equal protection clause cannot override more specific provisions in the Alaska Constitution.22 But the plaintiffs do not contend that the Marriage Amendment violates Alaskas equal protection clause. They argue not that they have a right to marry each other, but that the benefits programs discriminate against them by denying them benefits that the programs provide to others who, plaintiffs claim, are similarly situated.

Because the Marriage Amendment does not resolve this appeal, we turn to the merits of plaintiffs equal protection arguments.

C. Challenge to the Spousal Limitations Under the Equal Protection Clause of the Alaska Constitution

Article I, section 1 of the Alaska Constitution mandates equal treatment of those similarly situated; it protects Alaskans right to non-discriminatory treatment more robustly than does the federal equal protection clause.23 We have long recognized that [this clause] affords greater protection to

individual rights than the United States Constitutions Fourteenth Amendment.24

To implement Alaskas more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake 25

1. The benefits programs distinctions between same-sex and opposite-sex domestic partners

A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently.26 Absent disparate treatment of similarly situated persons, the law as applied to the aggrieved group does not violate the groups right to equal protection.27 We first consider whether, as the municipality contends, there is no evidence of differential treatment, making it unnecessary to engage in a sliding-scale analysis.28

The plaintiffs assert that the defendant governments treat same-sex and opposite-sex couples differently. The defendants argue that their programs differentiate on the basis of marital status, not sexual orientation or gender. The municipality asserts that all married employees can confer benefits on their spouses, and no unmarried employees can confer benefits on their partners. It therefore argues that it treats same sex couples no differently than any other unmarried couples, and that there is consequently no basis for an equal protection claim. Several courts examining similar programs have reached this conclusion.29

We must therefore decide whether there is a classification that results in different treatment for similarly situated people.

We agree with the plaintiffs that the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners.30 In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying The programs consequently treat same-sex couples differently from opposite-sex couples.31

2. Intent to discriminate

The state argues that an intent to discriminate is, or should be, an essential element of a state equal protection claim in Alaska. Both defendants contend that there was no discriminatory intent, or evidence of animus against gays and lesbians. Plaintiffs respond that Alaskas equal protection clause does not require a showing of discriminatory intent.

We need not resolve this dispute here because we

conclude that the benefits programs are facially discriminatory. When a law by its own terms classifies persons for different treatment, this is known as a facial classification.32 And when a law is discriminatory on its face, the question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory.33

To determine whether the benefits programs make a facial classification, we must therefore examine the meaning of the term spouse. The United States Supreme Court, in Personnel Administrator v. Feeney, considered whether a state statute granting a hiring preference to veterans violated equal protection on the basis of gender.34 The Court concluded in part that the statute was gender-neutral because the definition of veterans in the statute ha[d] always been neutral as to gender and that Massachusetts ha[d] consistently defined veteran status in a way that ha[d] been inclusive of women who ha[d] served in the military 35

But unlike the neutral definition of veteran in Feeney, Alaskas definition of the legal status of marriage (and, hence, who can be a spouse) excludes same-sex couples.36 By restricting the availability of benefits to spouses, the benefits programs by [their] own terms classif[y] same-sex couples for different treatment.37 Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of marriage, the partner of a homosexual employee can never be legally considered as that employees spouse and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.38

The next question is whether the disparate treatment is permitted under the sliding-scale analysis for equal protection challenges in Alaska.39

3. Sliding-scale analysis under the Alaska Constitution

Having resolved these preliminary issues by determining (1) that it cannot be said as a matter of law that the benefits programs do not treat public employees with same-sex domestic partners differently, and (2) that the benefits programs are facially discriminatory, we turn to the three-step, sliding-scale analysis applicable to equal protection challenges under the Alaska Constitution. This approach involves the following process:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives

> were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the states interest in the particular means employed to further its goals must be undertaken. Once again, the states burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[40]

The plaintiffs advance four alternative arguments to support their equal protection challenge to the spousal limitation in the benefits programs. The first three ask us to apply a heightened level of scrutiny because the programs allegedly (1) discriminate on the basis of sexual orientation; (2) discriminate on the basis of gender; or (3) significantly burden at least one of several important personal interests. The plaintiffs alternatively contend that the programs cannot withstand even the minimum level of scrutiny, either because the governmental interests advanced are not legitimate, or because the eligibility restrictions do not bear a fair and substantial relationship to advancing those interests.

Because we conclude that the benefits programs cannot survive minimum scrutiny, we need not address plaintiffs alternative arguments.

a. Nature of plaintiffs interests: level of scrutiny

The first step of our analysis requires us to determine what weight to give the individual interests affected by the benefits programs.41 Plaintiffs contend that the spousal limitations significantly burden important personal interests, such as the right to intimate association, and are therefore subject to heightened scrutiny. But because minimum scrutiny is sufficient to resolve this case, we do not need to decide whether the plaintiffs interests are important or whether a fundamental right is affected.42 Government action affecting an economic interest receives minimum scrutiny,43 and the employment benefits at issue here are undeniably economic.

b. The governmental interests and the relationship between those interests and the means chosen to advance them

The second step of the sliding-scale analysis requires us to consider the governmental interests advanced by a challenged law.44 Under minimum scrutiny, these interests need only be legitimate.45 The third step requires us to evaluate the means chosen to advance the interests identified from the second step. Minimum scrutiny requires a fair and substantial relation between the means (i.e., the classification) and the object of

the legislation.46

The state and the municipality contend that they have three legitimate interests cost control, administrative efficiency, and promotion of marriage in limiting employment benefits to spouses and dependent children. We must therefore consider whether these interests are legitimate and, if so, whether the classification bears a fair and substantial relationship to those interests.

Cost control. The state and the municipality argue that cost control is a primary purpose of limiting the availability of benefits to spouses of married employees. The state explains that it must offer health insurance to attract and retain a qualified work force and that the legislature should be entitled to take reasonable measures to control the cost of that offering. As the number of program participants increases, so does the cost.

The state also asserts that the legislature wanted to limit participation to that small group in a truly close relationship with the employee. The municipality asserts that it decided to limit employee benefits to a small, readily ascertainable group of individuals closely connected to the employee. These assertions indicate to us that the governmental interest here is more specific than just cost control. Indeed, if the governments were interested in simply saving money, the companion goal of promoting marriage would seem to do the opposite. As the benefits programs succeed in convincing couples to marry or to stay married, the governments have to provide benefits to more people. This apparent tension between cost control and promotion of marriage can be harmonized by more appropriately describing the governments interest in cost control as an interest in controlling costs by limiting benefits to those people in truly close relationship[s] with or closely connected to the employee.

We assume that limiting benefit programs to those in truly close relationships with the employee is a legitimate governmental goal. But we do not see how an absolute exclusion of same-sex domestic partners from being eligible for benefits is substantially related to this interest. Many same-sex couples are no doubt just as truly close[ly] relat[ed] and closely connected as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so. Although limiting benefits to spouses, and thereby excluding all same-sex domestic partners, does technically reduce costs, such a restriction fails to advance the expressed governmental goal of limiting benefits to those in truly close relationships with and closely connected to the employee.

Administrative efficiency. The state and the municipality argue that the need to efficiently administer the benefits programs justifies the spousal limitations. They argue that marriage provides a bright-line distinction that is easily applied, and that allowing employees to designate beneficiaries other than spouses will make it more difficult to administer the programs. The director of the benefits section of the Alaska Division of Retirement and Benefits explained during deposition the potential administrative difficulties that could arise if employees were allowed to designate benefits recipients other than spouses. She discussed theoretical burdens of determining who other than a spouse might be eligible for coverage. The

municipality anticipates difficulty in deciding how long a same-sex relationship must last, whether the partners must reside in the same house, whether the relationship must be of a sexual nature, and when the relationship ends.

We have recognized that administrative efficiency is a legitimate governmental interest.47 There is no doubt that making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens. But Alaskas Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be substantial.48

It is significant that other agencies, political subdivisions, and states provide, or have provided, employment benefits to their employees same-sex domestic partners. The state does not dispute the plaintiffs contention that the University of Alaska does or did so and that it adopted qualifying criteria.49 Likewise, other states50 and municipalities,51 including the City and Borough of Juneau,52 offer the same health benefits to domestic partners, per their eligibility standards, that they offer to married couples.

We do not assume, as plaintiffs assert, that the state and the municipality can simply adopt the methodology the University of Alaska adopted to administer its programs. The state has many more employees than the university. Nonetheless, that many other agencies, municipalities, and states offer employment benefits to their employees same-sex domestic partners suggests that the governments legitimate administrative concerns can be satisfied. The availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided. We therefore conclude that the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency.

Promotion of marriage. The state and municipality assert that they have a legitimate interest in the promotion of marriage. To support this assertion, the municipality points to the ancient cultural and legal status of marriage and the place of a marriage between one man and one woman as the historic foundation of society. Amicus curiae Alaska Catholic Conference also contends that the promotion of marriage is a legitimate state interest. It cites in support several United States Supreme Court decisions that have recognized the right to marry as involv[ing] interests of basic importance in our society.53 The Supreme Court has also explained that marriage is a social relation subject to the states police power.54

We have never considered whether the promotion of marriage is a valid governmental interest.

Plaintiffs argue that whether or not the promotion of marriage is a legitimate governmental interest, the state is not truly interested in promoting marriage, because, if it were, it would not have prevented gays and lesbians from entering into married relationships. This argument has little merit. The state rightly argues that just because the legislature did not want to promote same-sex marriage does not mean it did not have a sincere interest in promoting traditional marriage.

Plaintiffs also challenge the legitimacy of any interest in promoting marriage. They argue that the state and municipality may not assert an interest in promoting married relationships for its own sake. They claim that the government

may not favor a class simply because it favors the class, and that discrimination is never a legitimate interest. That proposition is certainly correct, but the promotion of marriage in and of itself is not necessarily discriminatory. And it is not irrational. Among other things, it can encourage family stability (an undeniably valid public goal), as the Alaska Catholic Conference argues.

As to this issue, plaintiffs true challenge is to the decision to promote family stability among opposite-sex couples but not among same-sex couples. They argue that the social good from family stability in same-sex relationships is just as important and valuable as the social good from stable opposite-sex relationships. Assuming plaintiffs argument is correct, it would not establish that an interest in promoting marriage is not legitimate. Given the social benefits potentially inherent in marriage and the Supreme Courts statement that marriage is subject to state regulation,55 we conclude that the promotion of marriage is at least a legitimate governmental interest.

We accept the states contention that providing employment benefits to spouses of its employees may encourage persons to marry or stay married. Such benefits are financially valuable and their availability may be an important or even critical factor to persons deciding whether to marry. But the question here is whether the means chosen to advance the interest are substantially related to the governments interest.

The first part of the chosen means providing a benefit to spouses is directly related to advancing the marriage interest. But the second part of the chosen means restricting eligibility to persons in a status that same-sex domestic partners can never achieve cannot be said to be related to that interest. There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not seem to advance any valid reasons for promoting marriage. In short, there is no indication that the programs challenged aspect the denial of benefits to all public employees with same-sex domestic partners has any relationship at all to the interest in promoting marriage. To repeat: making benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage.

The municipality raises several other arguments that justify brief response. It asserts that it can properly limit eligibility because the Marriage Amendment sanctions the marriage relationship. We discussed above the effect of the Marriage Amendment and rejected a contention that it altogether forecloses plaintiffs equal protection claims. See Part III.B. Moreover, the marriage relationship sanctioned by the amendment cannot justify unequal treatment unless the means relate to the purpose. No one has suggested that the Marriage Amendment would permit the municipality to double the pay of only its married employees or permit it to hire only married persons.

The municipality seems to imply that accepting the plaintiffs arguments would require defendants to extend marriage benefits to members of other non-traditional marriages, such as persons in polygamous relationships. But polygamy is illegal in Alaska,56 as are incestuous relationships.57 Even though same-sex domestic relationships are not marriages in Alaska,58 they are not illegal. And, following Lawrence v. Texas, they could not be made illegal.59 Nothing we hold here would require public employers to extend to members of polygamous or incestuous relationships the employment benefits they provide to their employees spouses.

d. Equal protection conclusion

The governmental interests of cost control, administrative efficiency, and promotion of marriage are legitimate, but the absolute denial of benefits to public employees with same-sex domestic partners is not substantially related to these governmental interests.

In this case, because the programs at issue govern the governments actions in their specific capacities as public employers, rather than in their broader governmental capacities, the programs marital preferences would have difficulty meeting the means-to-end fit requirement unless they had a fair and substantial relationship to the governments roles as public employers. When the state or a political subdivision acts in this capacity, it is subject to the overarching principles set out in article I, section 1, and article XII, section 6, of the Alaska Constitution. Those sections guarantee all Alaskans the rewards of their own industry and require public employment to be based on merit.60 Programs allowing the governments to give married workers substantially greater compensation than they give, for identical work, to workers with same-sex partners cut against these constitutional principles yet further no legitimate goal of the governments as public employers. However legitimate these programs broader policy goals may be, then, the means they employ would not be fairly and substantially related to furthering those goals.

We therefore conclude, applying minimum scrutiny, that the challenged programs violate the individual plaintiffs right to equal protection of the law.

D. Trombley v. Starr-Wood Cardiac Group Does Not Control Here.

The state argues that comments we made in Trombley v. Starr-Wood Cardiac Group, P.C.61 should be dispositive of the constitutional issues now before us.

Trombley did not address constitutional issues. The Trombleys appealed the dismissal of their malpractice claims arising out of Barbara Trombleys medical care. One issue was whether Dale Trombley could bring a loss-of-consortium claim. While Barbara was being treated, she was cohabiting with Dale Trombley but was married to Keith Bradick. Some months later she divorced Bradick and married Dale Trombley. The superior court rejected Dales consortium claim on summary judgment. In considering Dales appellate contention that an unmarried cohabitant could claim loss of consortium, we said that [w]hether spousal consortium claims should be extended to unmarried cohabitants as a general matter is not an easy issue to resolve. There are reasonable arguments on both sides.62 We did not decide whether, as a general matter, unmarried cohabitants could ever claim loss of consortium. We instead affirmed the denial of the consortium claim because one of the cohabitants was actually

married to someone else when the alleged malpractice occurred.63

The state contends that it follows from our quoted characterization of the argument limiting consortium claims to legal spouses as reasonable that the legislatures choice in denying employment benefits to unmarried cohabitants must also be reasonable and hence constitutional. It asserts that both areas concern simply the right to receive money.

And of course, because they were not a same-sex couple, nothing prohibited Dale and Barbara from marrying as soon as Barbara divorced her prior spouse. Plaintiffs correctly observe that this court there analyzed distinctions between married heterosexual couples and unmarried heterosexual couples, who can marry. It did not analyze distinctions between heterosexual couples [and] lesbian and gay couples, who cannot marry. (Emphasis in original.) That we stated in dictum that it was reasonable not to allow consortium claims by unmarried cohabitants does not mean that the government can treat unmarried couples of the same sex differently than it treats unmarried couples of the opposite sex.

E. Remedy

Plaintiffs do not contend that finding an equal protection violation would require that the benefits programs themselves must end; they simply seek the same benefits and opportunities potentially available to opposite-sex couples. Only the spousal limitations in the programs are unconstitutional, and they are invalid only to the extent they deny benefits to persons who are absolutely precluded from becoming eligible for those benefits, even though their domestic relationship is not illegal.

Therefore, one possible remedy would be to give the state and the municipality a reasonable opportunity to adopt standards for making these benefits available to persons deemed eligible. Many other public employers now have programs that may be useful models,64 and private employers may also.65 Having held unconstitutional the exclusion of same-sex couples from access to civil marriage, the Supreme Judicial Court of Massachusetts in Goodridge v. Department of Public Health, vacated the departments summary judgment and remanded for entry of judgment consistent with its opinion. But it stayed entry of judgment on remand for 180 days to permit the legislature to take such action as it may deem appropriate in light of this opinion.66

Because the parties have not addressed the issue of remedy, or how the state and municipality may comply, we invite supplemental briefing on this issue.

IV. CONCLUSION

We conclude that the public employers spousal limitations violate the Alaska Constitutions equal protection clause. We therefore VACATE the judgment below. After hearing from the parties about the issue of remedy we will REMAND. Until we resolve the issue of remedies, the disputed benefits programs remain in effect.

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1 Alaska Const. art. I, 25.

2 Alaska Const. art. I, 1. As the issue is framed in this case, we need not reach any separate question of the independent right to benefits of a same-sex domestic partner of a public employee.

3 Lawrence v. Texas, 539 U.S. 558, 559 (2003) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

4 The plaintiffs opening brief states that the benefits available for spouses of state employees include those provided by AS 39.20.360 (death benefits); AS 39.30.090 (life and health insurance); AS 39.35.450 (joint and survivor annuities); AS 39.35.535 (post-retirement health insurance); AS 14.25.010-.220 (benefits for retired teachers); and AS 22.25.010-.900 (benefits for retirees of state judiciary). These statutes do not expressly deny benefits to unmarried domestic partners, but each contains a clause expressly conferring them on an eligible employees spouse. The state refers to such clauses as spousal limitations. We will sometimes use that terminology in this appeal.

No party has identified a Municipality of Anchorage ordinance containing an equivalent spousal limitation, but it is undisputed here that an unmarried domestic partner of a municipal employee is not eligible for employment benefits.

We variously refer to the challenged state statutes and municipal benefit plans as benefits laws or benefits programs.

5 We use the phrases domestic partnership and committed relationship interchangeably to refer to relationships between adult couples who reside together in long-term, interdependent, intimate associations. We use the phrase domestic partners to refer to persons in these relationships. The phrase includes both same-sex and opposite-sex couples. For our purposes, domestic partners also includes all married couples.

6 Section 25 does not contain express words of prohibition, but it confers validity or recognition in Alaska only on a marriage between one man and one woman. It therefore effectively prohibits marriage, or recognition of marriage, between persons of the same sex in Alaska.

AS 25.05.011(a), enacted in 1996, defines marriage. It provides in part: Marriage is a civil contract entered into by one man and one woman . . . .

7 Lawrence v. Texas, 539 U.S. 558 (2003).

8 City of Kodiak v. Samaniego, 83 P.3d 1077, 1082 (Alaska 2004); Powell v. Tanner, 59 P.3d 246, 248 (Alaska 2002).

9 Odsather v. Richardson, 96 P.3d 521, 523 n 2 (Alaska 2004).

10 See Reichmann v. State, Dept of Natural Res., 917 P.2d 1197, 1200 & n.6 (Alaska 1996); Sonneman v. Knight, 790 P.2d 702, 704 (Alaska 1990).

11 See Sonneman, 790 P.2d at 704-06.

12 Hickel v. Southeast Conference, 868 P.2d 919, 923 (Alaska 1994); Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

13 Alaska Trademark Shellfish, LLC v. State, 91 P.3d 953, 956 (Alaska 2004); State, Commercial Fisheries Entry Commn v. Carlson, 65 P.3d 851, 858 (Alaska 2003).

14 Brandon v. Corr. Corp. of Am., 28 P.3d 269, 275 (Alaska 2001).

15 Alaska Const. art. I, 1.

16 See Alaska Const. art. I, 1; Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003) (We have long recognized that the Alaska Constitutions equal protection clause affords greater protection to individual rights than the United States Constitutions Fourteenth Amendment.); Schafer v. Vest, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, C.J., concurring, noting that this textual difference from the Federal Constitution emphasizes that the framers meant all three guarantees).

17 See Alaska Const. art. I, 25.

Alaska voters adopted this amendment in 1998. See Office of the Lieutenant Governor, Alaska Constitution: Alaska Constitutional Amendment Summary, at http://www.gov.state.ak.us/ltgov/akcon/summary.html. The amendment took effect January 3, 1999. See Brause v. State, Dept of Health & Soc. Servs., 21 P.3d 357, 358 (Alaska 2001).

18 See Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 496 (Alaska 1988); State v. Ostrosky, 667 P.2d 1184, 1191 (Alaska 1983); Park v. State, 528 P.2d 785, 786-87 (Alaska 1974); Chester James Antieau, Constitutional Construction 2.06, at 18-20 (1982).

19 Antieau, supra note 18, 2.15, at 27; see also Ostrosky, 667 P.2d at 1190 (holding that constitutional amendment cannot, in turn, be challenged as unconstitutional under preexisting clauses in the same document).

20 Explicitly denying benefits to public employees with same-sex domestic partners would arguably offend the Federal Constitution. In Romer v. Evans, 517 U.S. 620 (1996), the United States Supreme Court struck down on federal equal protection grounds an amendment to the Colorado Constitution that repealed all local and statewide laws prohibiting discrimination based on sexual orientation. The Court explained that in addition to merely repealing state and local laws, the amendment prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect the named class . . . . Id. at 624. The Court invalidated the amendment under the rational basis standard of judicial review, reasoning that the amendment could not satisfy even the minimal level of scrutiny. Id. at 632. It explained that the amendments disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence . . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. Id. at 633.

21 See Brooks v. Wright, 971 P.2d 1025, 1028 (Alaska 1999)

(stating that court looks to plain language, purpose, and framers intent in interpreting constitution); Native Vill. of Elim v. State, 990 P.2d 1, 5 (Alaska 1999) (same); Arco Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992) (same).

22 Cf. Bess v. Ulmer, 985 P.2d 979, 988 n.57 (Alaska 1999) ([A] specific amendment controls other more general [constitutional] provisions with which it might conflict.); Antieau, supra note 18, 2.16, at 27-28.

23 State, Dept of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 909 (Alaska 2001) (footnote omitted) (quoting Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 271 (Alaska 1984)).

24 Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003); see also Stanek v. Kenai Peninsula Borough, 81 P.3d 268, 272 & n.15 (Alaska 2003).

25 Malabed, 70 P.3d at 420-21.

26 Alaska Inter-Tribal Council v. State, 110 P.3d 947, 966 (Alaska 2005); Lawson v. Helmer, 77 P.3d 724, 728 (Alaska 2003).

27 Lawson, 77 P.3d at 728; Brandon v. Corr. Corp. of Am., 28 P.3d 269, 275-76 (Alaska 2001).

28 Cf. Shearer v. Mundt, 36 P.3d 1196, 1199 (Alaska 2001).

29 Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593, 596-97 (Cal. App. 1992); Hinman v. Dept of Pers. Admin., 213 Cal. Rptr. 410, 416 (Cal. App. 1985); Ross v. Denver Dept of Health & Hosps., 883 P.2d 516, 519 (Colo. App. 1994); Phillips v. Wisconsin Pers. Comm'n, 482 N.W.2d 121, 129 (Wis. App. 1992).

30 Some heterosexual couples, such as consanguineous couples, are also prohibited from marrying and are consequently prevented from obtaining benefits. But in those instances, the relationship itself is illegal, not merely the marriage. AS 11.41.450 classifies incest as a class C felony. No Alaska statute criminalizes homosexual relationships or homosexual conduct between consenting adults, nor could it. See Lawrence v. Texas, 539 U.S. 558 (2003). Moreover, as discussed below, just because some other, smaller group of people is also excluded does not mean that the plaintiffs here cannot have a valid claim.

31 See Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 442-43, 447 (Or. App. 1998) (determining that denial of employment benefits to unmarried domestic partners of employees had disparate impact on homosexuals).

32 John E. Nowak & Ronald D. Rotunda, Constitutional Law 14.4, at 711 (7th ed. 2004) (emphasis added).

33 Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126, 1133 (C.D. Ill. 1997); see also Cook v. Babbitt, 819 F. Supp. 1, 14 (D.D.C. 1993) (In cases where a law or regulation makes an explicit reference to a suspect characteristic, purposeful discrimination is self-evident, and the measure is subject to challenge on its face without any

evidentiary inquiry into the motives of the relevant government actors.).

34 Personnel Admr v. Feeney, 442 U.S. 256 (1979).

35 Id. at 275.

36 Alaska Const. art. I, 25 (To be valid or recognized in this State, a marriage may exist only between one man and one woman.).

37 See Nowak & Rotunda, supra note 32, 14.4, at 711.

38 We recognize that the benefits programs became discriminatory only after the legislature acted in 1996 and 1998 and the electorate adopted the Marriage Amendment in 1998. But, in our view, allowing a discriminatory classification to remain in force is no different than giving it the force of law in the first place.

39 In the case of a facial classification, there is no problem of proof and the court can proceed to test the validity of the classification by the appropriate standard. Nowak & Rotunda, supra note 32, 14.4, at 711.

40 Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 396-97 (Alaska 1997) (quoting Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)).

41 Id. at 396.

42 Malabed v. North Slope Borough, 70 P.3d 416, 421 (Alaska 2003) (applying close scrutiny to enactment affecting important interest); State , Dept of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 909 (Alaska 2001) (observing that strict scrutiny is applied to enactments affecting fundamental rights).

43 Church v. State, Dept of Revenue, 973 P.2d 1125, 1130 (Alaska 1999).

44 Planned Parenthood, 28 P.3d at 909.

45 Matanuska-Susitna Borough, 931 P.2d at 396-97 (quoting Alaska Pac. Assurance, 687 P.2d at 269-70).

46 Planned Parenthood, 28 P.3d at 911 (quoting Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)).

47 Wilkerson v. State, Dept of Health & Soc. Servs., 993 P.2d 1018, 1024 (Alaska 1999); State v. Albert, 899 P.2d 103, 115 (Alaska 1995).

48 See Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (approving of less speculative, less deferential, more intensified means-to-end inquiry for traditional rational basis test).

49 Under the universitys plan, an employee and the employees partner submit an affidavit stating that they are

financially interdependent partners and meet certain criteria of commitment and dependency. They must meet eight criteria including: having an exclusive personal relationship with each other for at least the last twelve consecutive months and an intention to continue the relationship indefinitely; residing together at the same primary residence for at least the last twelve consecutive months and intending to reside together indefinitely; considering themselves members of each others immediate family; being responsible for each others common welfare; and sharing financial obligations. They must also attest that they meet at least five of a second set of eight criteria, including: jointly purchasing or leasing real property; jointly owning an automobile; sharing a joint bank or credit account; naming each other as life insurance beneficiaries; and naming each other as primary beneficiaries in each others wills. University of Alaska, Explanation of Availability of Benefits Based on Financially Interdependent Relationship, at http://info.alaska.edu/hr/ forms/PDF/B140-FIPExplanation.pdf (last visited June 13, 2003).

50 E.g., Cal. Govt Code 22818, amended by 2005 Cal. Legis. Serv. 418 (West); Or. Admin. R. 101-015-0005(c); Wash. Admin. Code 182-12-260. A more complete list of states that provide health benefits to domestic partners can be found in a database maintained by the Human Rights Campaign. The database can be accessed through the organizations website at http://www.hrc.org (last visited October 21, 2005).

51 According to the Human Rights Campaigns database, 130 cities and counties offer domestic partner benefits. As of October 21, 2005, the cities and counties included, for example, Atlanta, Broward County, Chicago, Denver, and New York City. See Atlanta, Ga., Code of Ordinances 2-858; Broward County, Fl., Code 16 1/2-156; Chicago, Ill., Municipal Code ch. 2-152-072; Denver, Co., Rev. Municipal Code 18.321(4)-18.328; New York City, N.Y., Administrative Code 3-244(f).

52 See http://www.juneau.lib.ak.us/cbj/risk_management/pdfs/2005/Enrollment Guide2005.pdf (last visited June 6, 2005).

53 Boddie v. Connecticut, 401 U.S. 371, 376 (1971); see also Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing marriage as one of the vital personal rights essential to the orderly pursuit of happiness by free people); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (one of the basic civil rights of man); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (essential to the orderly pursuit of happiness).

54 Loving, 388 U.S. at 7; Maynard v. Hill, 125 U.S. 190, 205 (1888) (Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.).

55 See Loving, 388 U.S. at 7.

56 AS 11.51.140.

57 AS 11.41.450.

58 Alaska Const. art. I, 25.

59 Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding that states may not criminalize private, consensual homosexual relations).

60 Alaska Const. art. I, 1 (This constitution is dedicated to the principle[] that all persons have a natural right to . . . the enjoyment of the rewards of their own industry. . . .); Alaska Const. art. XII, 6.

61 Trombley v. Starr-Wood Cardiac Group, P.C., 3 P.3d 916 (Alaska 2000).

62 Id. at 923 (emphasis added).

63 Id.

64 See supra notes 49-52.

65 According to the Human Rights Campaigns database, 247 Fortune 500 companies offer domestic partner benefits. The database can be accessed through the organizations website at http://www.hrc.org (last visited October 21, 2005).

66 Goodridge v. Dept of Pub. Health, 798 N.E.2d 941, 969-70 (Mass. 2003); see also Baker v. State, 744 A.2d 864, 886 (Vt. 1999). In Baker, the Vermont Supreme Court deferred to the prerogatives of the legislature to craft an appropriate means of addressing this constitutional mandate. It therefore left the current statutory scheme in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion. Id. at 887.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HJR 2
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: Constitutional Amendment relating to marriage
RDU: Elections
Component: Elections
Sponsor: Representative Coghill
Requester: House Judiciary Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**1.5**	**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	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

If this amendment appears on the 2006 ballot, the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58 is $1.5. Should the addition of this question require printing an 8 1/2 by 18 inch ballot the cost will increase to $22.0.

Prepared by: Whitney Brewster, Director — Phone 465-2644
Division: Division of Elections — Date/Time 3/13/2006, 11:12am
Approved by: Whitney Brewster, Director — Date 3/13/2006
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HJR 32
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: ALL
Title: Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage
RDU: All RDUs
Component: All Components
Sponsor: Coghill, Lynn, Kelly
Requester: House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation would not have a significant impact on any state agency.

Prepared by: John Boucher
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Division: Governor's Office of Management and Budget
Date/Time 3/28/2006 4:00pm
Approved by: Cheryl Frasca, Director
Date 3/28/2006
Agency: Governor's Office of Managment and Budget

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