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METHODOLOGY

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During the period March 12 through March 23, 1998, five hundred fifty-eight (n=558) Alaskans over the age of 18, located in 64 communities were personally contacted via telephone by professional interviewing employees of the Dittman Research Corporation of Alaska. The views and opinions of the Alaska residents were recorded on a strictly confidential basis.

Research Design

A random sample design was featured which provided that all households listed in the most current telephone directory for each community had essentially an equal chance of being interviewed.

Sample Selection

Individual respondents were randomly selected from current telephone subscribers listed in the most current directory for each community.

Processing the Data

Dittman Research employees completed coding, editing, data entry and verification, while data processing was completed through the in-house Dittman Research Corporation computer system featuring the Statistical Package for the Social Sciences (SPSS/PC+) program. The SPSS program is one of the most sophisticated research-oriented data processing and analytical systems available, and is designed specifically for the processing and analysis of survey research data.

Measurement History

Citizen opinion measurements by the Dittman Research Corporation, utilizing the previously described methodology, analytical procedures and data processing systems, have proven to be virtually perfect predictors of political election results in Alaska for the past twenty-five years.

FINDINGS

FINDINGS

Nearly two-out-of three respondents (65%) *"disapprove"* of legalizing homosexual marriages...

QUESTION:

"Here in Alaska and in some other states, there has been some discussion regarding whether or not marriages between homosexuals should be legalized. Do you approve or disapprove of legalizing homosexual marriages?"

RESPONSE:

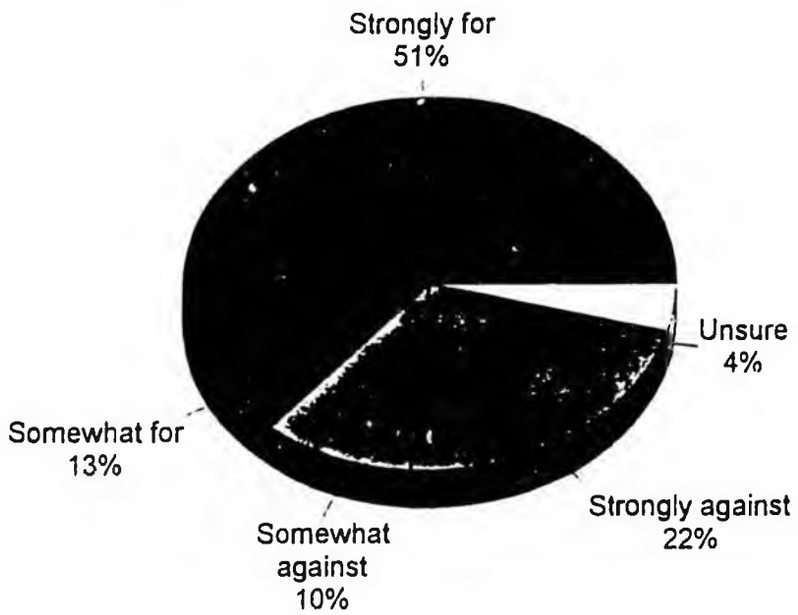
	15%	Strongly approve
	15%	Somewhat approve
65%	12%	Somewhat disapprove
65%	53%	Strongly disapprove
	5%	Unsure

...and if a constitutional amendment were proposed which stated *"to be valid or recognized in this state, a marriage may exist only between one man and one woman"*, again, nearly two thirds of respondents (64%) would vote *"fo* 'that amendment...

QUESTION:

"If there were a proposed amendment to Alaska's constitution on the ballot in November's General Election which stated 'to be valid or recognized in this state, a marriage may exist only between one man and one woman' -- do you think you would vote for or against that constitutional amendment?

RESPONSE:



CROSSTABULATIONS

HERE IN ALASKA AND IN SOME OTHER STATES, THERE HAS BEEN SOME DISCUSSION REGARDING WHETHER OR NOT MARRIAGES BETWEEN HOMOSEXUALS SHOULD BE LEGALIZED. DO YOU APPROVE OR DISAPPROVE OF LEGALIZING HOMOSEXUAL MARRIAGES?

DEMOGRAPHICS	UNSURE	STRONGLY APPROVE	SOMEWHAT APPROVE	SOMEWHAT DISAPPROVE	STRONGLY DISAPPROVE	BASE
TOTAL.....	5%	15%	15%	12%	53%	100.0%
LOCATION						
RURAL.....	7%	7%	20%	11%	56%	10.9%
CENTRAL.....	5%	16%	9%	14%	56%	13.8%
SOUTHCENTRAL.....	5%	8%	11%	13%	62%	17.6%
ANCHORAGE.....	5%	19%	16%	11%	49%	46.1%
SOUTHEAST.....	3%	18%	17%	14%	48%	11.6%
TIME IN COMMUNITY						
0 - 4 YRS.....	2%	19%	25%	15%	40%	9.5%
5 - 9 YRS.....	9%	20%	11%	11%	49%	12.5%
10 - 14 YRS.....	7%	20%	8%	8%	57%	10.8%
15+ YRS.....	4%	13%	15%	13%	55%	67.2%
EMPLOYER						
FEDERAL.....	2%	14%	11%	16%	57%	7.9%
STATE.....	0%	17%	19%	15%	50%	9.7%
LOCAL.....	6%	21%	17%	19%	38%	8.6%
PRIVATE COMPANY..	6%	17%	15%	11%	51%	52.9%
NOT IN WORKFORCE.	3%	9%	15%	9%	63%	21.0%
GENDER						
MALE.....	5%	13%	11%	13%	58%	51.6%
FEMALE.....	5%	18%	19%	11%	47%	48.4%
AGE						
18-29 YEARS.....	4%	22%	17%	13%	43%	13.6%
30-44 YEARS.....	5%	15%	18%	12%	50%	38.0%
45-59 YEARS.....	6%	17%	14%	12%	51%	34.8%
60+ YEARS.....	3%	4%	5%	11%	78%	13.6%
REGISTRATION						
DEMOCRAT.....	6%	22%	20%	6%	45%	17.6%
REPUBLICAN.....	5%	3%	9%	10%	74%	26.7%
NON-PARTISAN.....	4%	21%	15%	14%	46%	45.5%
OTHER.....	7%	14%	21%	17%	41%	5.2%
NOT REGISTERED...	4%	7%	21%	21%	46%	5.0%

IF THERE WERE A PROPOSED AMENDMENT TO ALASKA'S CONSTITUTION ON THE BALLOT IN NOVEMBER'S GENERAL ELECTION WHICH STATED 'TO BE VALID OR RECOGNIZED IN THIS STATE, A MARRIAGE MAY EXIST ONLY BETWEEN ONE MAN AND ONE WOMAN' -- DO YOU THINK YOU WOULD VOTE FOR OR AGAINST THAT CONSTITUTIONAL AMENDMENT?

DEMOGRAPHICS	UNSURE	STRONGLY FOR	SOMEWHAT FOR	SOMEWHAT AGAINST	STRONGLY AGAINST	BASE
TOTAL.....	4%	51%	13%	10%	22%	100.0%
LOCATION						
RURAL.....	5%	44%	25%	15%	11%	10.9%
CENTRAL.....	3%	60%	10%	10%	17%	13.8%
SOUTHCENTRAL.....	6%	63%	5%	11%	14%	17.6%
ANCHORAGE.....	4%	47%	14%	9%	27%	46.1%
SOUTHEAST.....	5%	43%	14%	11%	28%	11.6%
TIME IN COMMUNITY						
0 - 4 YRS.....	6%	38%	19%	11%	26%	9.5%
5 - 9 YRS.....	1%	51%	19%	9%	20%	12.5%
10 - 14 YRS.....	3%	48%	15%	12%	22%	10.8%
15+ YRS.....	5%	53%	11%	10%	21%	67.2%
EMPLOYER						
FEDERAL.....	0%	55%	20%	5%	20%	7.9%
STATE.....	2%	46%	13%	9%	30%	9.7%
LOCAL.....	0%	35%	19%	15%	31%	6.6%
PRIVATE COMPANY..	6%	51%	11%	11%	21%	52.9%
NOT IN WORKFORCE.	4%	56%	14%	9%	16%	21.0%
GENDER						
MALE.....	3%	56%	13%	9%	18%	51.6%
FEMALE.....	5%	45%	14%	11%	25%	48.4%
AGE						
18-29 YEARS.....	4%	43%	16%	13%	24%	13.6%
30-44 YEARS.....	4%	49%	13%	12%	22%	38.0%
45-59 YEARS.....	4%	47%	13%	10%	26%	34.8%
60+ YEARS.....	5%	72%	11%	4%	8%	13.6%
REGISTRATION						
DEMOCRAT.....	1%	41%	12%	15%	31%	17.6%
REPUBLICAN.....	5%	69%	10%	6%	9%	26.7%
NON-PARTISAN.....	4%	45%	14%	10%	27%	45.5%
OTHER.....	7%	38%	21%	14%	21%	5.2%
NOT REGISTERED...	7%	50%	21%	14%	7%	5.0%

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAY BRAUSE and GENE DUGAN,

Plaintiffs,

vs.

BUREAU OF VITAL STATISTICS, ALASKA DEPARTMENT OF HEALTH & SOCIAL SERVICES, and the ALASKA COURT SYSTEM,

Defendants.

Case No. 3AN-95-6562 CI

MEMORANDUM AND ORDER

Plaintiffs Jay Brause and Gene Dugan are men who sought and have been denied a license to marry each other by the State of Alaska. They subsequently filed a complaint against the Bureau of Vital Statistics, the Alaska Department of Health and Social Services, and the Alaska Court System. Plaintiffs' action seeks a declaration establishing that the relevant statutes prohibiting same-gender marriage violate Alaska's Constitution, and an injunction that prevents the state from applying or enforcing the statutes. The parties both move for summary judgment. The plaintiffs seek a ruling on the level of scrutiny to be applied in review of the Marriage Code; the defendants move for complete summary judgment. The parties agree that the decisions before the court are purely issues of law.

The plaintiffs' present motion for summary judgment seeks a decision that the Code's prohibition implicates the privacy and equal protection provisions of the Alaska Constitution, thus

UNITED STATES PUBLIC LAWS
104TH CONGRESS--SECOND SESSION

PUBLIC LAW 104-199 [H.R. 3396]
SEPTEMBER 21, 1996
DEFENSE OF MARRIAGE ACT

An Act

To define and protect the institution of marriage.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. <1 USC 1 note> SHORT TITLE.

This Act may be cited as the "Defense of Marriage Act".

[*2] SEC. 2. POWERS RESERVED TO THE STATES.

(a) In General.--Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

[*1738C] "Sec. 1738C. Certain acts, records, and proceedings and the effect thereof

"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.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738B the following new item:
"1738C. Certain acts, records, and proceedings and the effect thereof.".

[*3] Sec. 3. DEFINITION OF MARRIAGE.

(a) In General.--Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

7 "Sec. 7. Definition of 'marriage' and 'spouse'

"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.".

[**2420] (b) Clerical Amendment.--The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

"7. Definition of 'marriage' and 'spouse'.".

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

aktestt

WRITTEN STATEMENT OF PROFESSOR LYNN D. WARDLE
IN SUPPORT OF S.J.R. No. 42 and S.C.R. No. 25
Submitted for Alaska Senate Judiciary Committee Hearing on Monday, March 9, 1998

Mr. Chairman and distinguished members of the Senate Judiciary Committee:

I am honored to present this written statement in support of S.J.R. No. 42 and S.C.R. No. 25. By way of introduction, I am a professor of law.[1] Family Law is my primary area of scholarship; I have taught courses in Family Law, Children and the Law, Origins of the Constitution, Conflicts of Law and Comparative Family Law for twenty years.[2] These proposed Resolutions happen to touch on all of those fields. I also have authored or co-authored a multivolume treatise on family law, two other law books, and more than thirty articles or chapters dealing with family law subjects. Additionally, I am active in both national and international scholarly and law reform organizations dealing with family law and related areas.[3]

I am familiar with the *Brause v. Bureau of Vital Statistics* case, I have read the memoranda filed in the court, read the decision, and have been consulted about it. Thus, I have been invited to give my professional comment and analysis regarding S.J.R. No. 42 and S.C.R. No. 25. Of course, the opinions I express are my own professional views; I do not speak for any of the institutions or organizations with which I am associated.

I will discuss legal three points. First, I will explain about the legal status of same-sex marriage today. Second, I will clarify why S.J.R. No. 42 and S.C.R. No. 25. are reasonable, responsible, and necessary. Third, I will explain why I believe that they are constitutional under federal constitutional standards.

I. Status of Same-Sex Marriage in the World Today

I begin with a little background. No nation of the world permits same-sex marriage today. None. A few jurisdictions allow some form of same-sex domestic partnership. To date, all are in Europe (and arguably Hawaii). According to the International Gay and Lesbian Association, only

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[1]Currently I teach at Brigham Young University Law School. I also have taught at Howard University School of Law in Washington, D.C., at Sophia University Faculty of Law in Japan, and at the University of Aberdeen in Scotland.

[2]I have written or co-authored several books and several dozen law review articles or chapters in books about family law. Two of my most recent publications (published this year) are law review articles examining constitutional arguments for same-sex marriage, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U.L.Rev. 1-101, and the rules and practices regarding international recognition of marriages, Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, Family Law Quarterly, vol. 29, pp. 497-517 (Fall 1995).

[3]Presently I am the Secretary-General of the International Society of Family Law, an international learned society of 550 scholars and judges from 56 different nations devoted to the study of family law, and I am an active member of the American Law Institute consultative group that is working on a "Family Law Project."

six (of forty-nine listed European jurisdictions) permit some sort of legal domestic partnership.[4] Since 1989, Denmark,[5] Norway,[6] Sweden,[7] Iceland,[8] and the Netherlands,[9] have each enacted legislation authorizing the formal registration of same-sex "domestic partnerships" and extending to such relationships most of the economic and many of the noneconomic legal incidents of marriage.[10] Also, after a decision by the national supreme court, the legislature in Hungary legalized common-law same-sex live-in companionship for purposes of recognizing their mutually-owned purchases and acquisitions.[11] But none of these jurisdictions allow same-sex marriage. Even the most liberal of these domestic partnership laws clearly distinguishes domestic partnership from marriage, denies same-sex domestic partnerships significant marital benefits (especially pertaining to assisted procreation, adoption, and the official celebration, status, and dignity of marriage) and imposes significant restrictions not applicable to marriage. No jurisdiction on the face of the earth today recognizes same-sex marriage, and it appears safe to say

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[4]ILGA publishes this and other information on the internet at: http://inet.uni2.dk/~steff/survey.htm (search March 7, 1998).

[5]Danish Registered Partnership Act, No. 372 (June 7, 1989). *See generally* Linda Nielsen, *Family Rights and the 'Registered Partnership' In Denmark*, 4 INT'L J. L & FAM. 297 (1990); Marianne H. Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. FAM. L. 289 (1991-92).

[6]The Norwegian Act on Registered Partnership for Homosexual Couples, Act No. 40 of 30 April 1993.

[7]Law Regarding Registered Partnership of 23 June 1994 (Bert Andersen, trans. 1995). *See also* Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform*, 7 Int'l J. L. & Fam. 283, 287-288 (1993).

[8]Law on approved cohabitation, articles 1-9 (June 12, 1996)(Kristjan Matiesen trans. 1996); *see generally Iceland gives gay marriages legal stamp*, Reuters World Service, June 27, 1996 (Icelandic legislature has legalized "gay marriage" following Denmark, Norway & Swedish precedents).

[9]Joanne von Alroth, *Gay Couples' Registry Backed in Oak Park*, Chi. Trib. July 26, 1997 at 3. *See further* Rex Wockner, *supra* note 30; Steffen Jensen, *Partnership Law in the Netherlands*, ILGA, Euroletter 51 (July 1997).

[10]Certain restrictions commonly are imposed on same-sex domestic partnerships do not apply to heterosexual marriages, such as the requirement that at least one of the partners be a citizen or resident national of the country, and limitations re: joint custody, adoption, artificial insemination, state-church weddings, and exemption from marital status under international treaties, are common. *See generally* Nielsen, *supra* note 5, at 300.

[11]Year of 1996, XLII Law §§ 1-3 (May 21, 1996) (Stuart Schulte transla. 1996). *See also Hungary's gays welcome law on rights as first step*, Reuters World Service, May 22, 1996.

that no nation in history ever has allowed same-sex legal marriage (though some have tolerated widespread homosexual practices or conferred some social or legal status on some kinds of homosexual partners).

The overall global picture shows overwhelming support for exclusively heterosexual marriage. No legislature of any jurisdiction in the world has ever approved of same-sex marriage. Many jurisdictions (including most of the American states and Congress) have recently enacted laws denying legal recognition to same-sex marriage from other jurisdictions.[12] Likewise, in the past twenty-five years, dozens of lawsuits have been filed in the USA seeking judicial legalization of same-sex marriage, and all of these, unanimously, rejected the claim that there is a fundamental right to same-sex marriage.[13] Even the highly criticized *Baehr* case in Hawaii rejected, like all American trial and appellate courts before it, the claim that there is a fundamental right to marry someone of the same sex. Moreover, virtually all international conventions that describe marriage have defined it as the union of a man and a woman.[14] Polls have repeated found that the people in America strongly oppose legalizing same-sex marriage.[15]

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[12]In the past three years, Congress and the legislatures of more than half of the American states have enacted legislation forbidding recognition of same-sex marriage. *See generally* Marriage Law Project, *Bills Concerning Same-Sex Marriage, 1997 Legislative Update*, June 16, 1997 (available at http://www.pono.net).

[13]*See Constitutional Claims, supra* note 2 at 9-10, nn. 22-26, and *id.* at 56-57 nn. 252, 253 (identifying more than a dozen different lawsuits seeking marital status for same-sex unions). *See also* Storrs v. Holcomb, 1996 WL 379613 (N.Y. Sup.Ct. 1996).

[14]*See* Universal Declaration of Human Rights, Article 16 ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively Article 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 25 (1992) Article 17("the right of men and women of marriageable age to marry and to raise a family shall be recognized"); HabitatII Conference, Istanbul, Turkey, 3-14 June 1996, The Habitat Agenda (http://www.undp.org/un/habitat/agenda/ch-2.html) ("Marriage must be entered into with the free consent of the intending spouses, and husband and wife should be equal partners. The rights, capabilities and responsibilities of family members must be respected."). *See also* Hong Kong Bill of Rights Ordinance, 30 I.L.M. 1310, *1318 (Effective June 8, 1991) ("The right of men and women of marriageable age to marry and to found a family shall be recognized.").

[15]Portland Oregonian, April 19, 1997, at A01 (1997 WL 4165366) (March 1996 Gallup poll shows Americans oppose same-sex marriage 68-to-27); Associated Press, Aug. 19, 1996 (Lou Harris Poll reports 63-64% of Americans oppose legalizing same-sex marriage; 10-11% favor); *supra* note 28 (70 percent of Hawaiians oppose legalizing same-sex marriage); Fresno Bee

December, 1996, a trial court in Hawaii ruled that the state had no compelling reason to deny marriage licenses to same-sex couples, and ordered the state to issue marriage licenses to same-sex couples who apply for them.[16] That ruling has been appealed to the state supreme court, and the order has been stayed pending appeal. Just months after that ruling, the Hawaii legislature passed an amendment to the state constitution which, if ratified by the people of Hawaii in November 1998, will effectively overturn the basis for the court's ruling that the denial of same-sex marriage constitutes constitutionally impermissible sex discrimination.[17] The people of Hawaii overwhelming and consistently oppose legalizing same-sex marriage,[18] but they could be forced by their state courts to issue marriage licenses for same-sex marriages, at least temporarily.[19] There are movements to legalize same-sex marriage in a few European countries, but historically and to this day, same-sex marriage is legal in no jurisdiction.

II. Why S.J.R. No. 42 and S.C.R. No. 25 are Necessary and Prudent

The constitutional crisis that has led to these proposed resolutions today is about a radical judicial redefinition of marriage. That is what this whole controversy is all about.

May 25, 1997 at E6 (1997 WL 3904007) (1996 Los Angeles Times poll found Californians oppose legalizing same-sex marriage 60-to-31); *but see* Irish Times, Aug. 10, 1996, at 10 (1996 WL 11037747) (Germans favor legalizing same-sex marriage 48-to-42).

[16]Baehr v. Miike, No. 91 Civ. 1394 (Haw. Cir. Ct. Dec. 3, 1996), 23 FAM. L. REP. (BNA) 2001 (Dec. 3, 1996).

[17]Hawaii H.B. 117 (1997).

[18]Voters strongly oppose gay unions, Honolulu Star-Bulletin, Feb. 24, 1997, at 1 (currently 70% of those polled oppose legalizing same-sex marriage; 20% favor it; opposition has grown about 12% and support fallen 12% during four years).

[19]In *Baehr v. Lewin*, 852 P.2d 44 (1993), the Hawaii Supreme Court rejected the claim that the "right to marry" protected by the Hawaii Constitution extends to same-sex couples and held that there is no "fundamental constitutional right to same-sex marriage" because such relationship is not "rooted in tradition" or "at the base of all our civil and political institutions." *Id.* at 55, 57. However, a plurality concluded that Hawaii's marriage license law facially "discriminates based on sex against the applicant [same-sex] couples" or account of gender, in apparent violation of the state constitutional provisions protecting equality. *Id.* at 57-62. The December, 1996 ruling in *Baehr v. Miike* was on remand from this decision. If the Hawaii Supreme Court affirms the trial court decision in *Miike* before November 1988, same-sex marriage could be legalized before the people get to vote on the constitutional amendment. While the amendment, if passed, could effectively undo the supreme court decision, the same-sex couples who married in the interim could pose a significant political and legal dilemma. For a discussion of the *Baehr* case, *see* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. Rev. 1.

Last month, in *Brause v. Bureau of Vital Statistics*,[20] Alaska Superior Court Judge Michalski held that the privacy provision of the Alaska Constitution protects as a fundamental right the right of two persons of the same sex to marry, and that the denial of marriage licenses to same-sex couples constitutes sex discrimination, and that denial of same-sex marriage may only be upheld if it is justified under the very strict "compelling state interest" test. While that ruling is not a final ruling, it establishes a legal standard and principle as a matter of Alaskan constitutional law tnat seriously jeopardize Alaskan marriages, constitutional integrity, state legislative authority, interstate marriage recognition, and national harmony. It creates an enormous quagmire that needs to be promptly corrected.

A. The Importance of Exclusively Heterosexual Marriage

Marriage between a man and a woman is the foundation of our society. You can have marriage without society, but you cannot long have society without protecting and preserving the institution of marriage. The Supreme Court of the United States has repeatedly recognized this reality. Nearly 120 years ago, the Supreme Court said of marriage: "Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."[21] More than a century ago the Court both glorified the legal status of marriage and the affirmed importance of legislative control of it when he noted that "[m]arriage, as creating the most important relation in life, [has] 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."[22] In 1923, in Meyer v. Nebraska,[23] the Court acknowledged that "without doubt" among the liberties protected by the fourteenth amendment was the right "to marry, to establish a home ...." In 1942, in Skinner v. Oklahoma,[24] the Court declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race." Twenty-three years later, the Court repeated this viewpoint with even greater emphasis in Griswold v. Connecticut. [25]

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is the coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

In 1967, the Court struck down a Virginia anti-miscegenation statute in Loving v. Virginia, noting: "Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. ... To deny this fundamental freedom on so unsupportable a basis as the

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[20]Civil No. 3AN-95-6562-CI (Anchorage Super. Ct., Feb. 27, 1998).

[21]Reynolds v. United States, 98 U.S. 145, 165 (1878).

[22]Maynard v. Hill, 125 U.S. 190, 205-6 (1888).

[23]262 U.S. 390, 393 (1923).

[24]316 U.S. 535, 541 (1942).

[25]381 U.S. 479, 486 (1965).

racial classification embodied in these statutes ... is surely to deprive all the State's citizens of liberty without due process of law."[26] Four years later, in Boddie v. Connecticut,[27] the Court emphasized that "marriage involves interests of basic importance in our society." In 1977, in Zablocki v. Redhail,[28] the Court invalidated a state law restricting marriage of indigent support-obligated father of child receiving public assistance "reaffirming the fundamental character of the right to marry." In numerous other cases in recent years, the Court has reiterated and enhanced the fundamental importance and preferred status of marriage.[29]

Three things are undeniable from this long line of decisions of the U.S. Supreme Court. First, it is clear that for a long time the Court has been absolutely convinced, and it remains convinced, that marriage is of fundamental, critical importance to our society. Second, it is clear that the Court agrees that protecting marriage is essential to our constitutional form of government. Third, it is absolutely certain that the relationship that the Court was talking about as marriage in all of these cases was the exclusively heterosexual marriage relationship of a man and a woman.

B. Heterosexual Marriage Is Uniquely Beneficial to Society

Marriage is unique and uniquely beneficially to society and its members. Marriage is unique because the relationship between a man and a woman is different than the relationship between two persons of the same gender. Men and women are different, and thereby the relationship of two persons of opposite gender (in marriage) is different from other kinds of relations including same-sex relations that seek to imitate marital status.

Advocates of same-sex marriage are "trapped in a Kelsean dream,"[30] where they erroneously believe that they can create social order out of moral chaos by merely enacting positive laws. They embrace "the myth about the 'law-maker' and the 'legal system'" that is based upon an erroneous "impression of the origin, content and structure of law. . . . It hides the fact that the central elements of a legal order cannot be 'invented' by a law-maker, but must be rooted in a normative practice."[31] Shared normative values are "the basic element in what we call

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[26]388 U.S. 1, 12 (1967).

[27]401 U.S. 371, 376 (1971) (invalidating requirement that indigent parties pay divorce filing fees).

[28]434 U.S. 374, 383-386 (1978). *See also* Turner v. Saffley, 482 U.S. 578 (1987) (invalidating a state prison regulation permitting marriage by inmate only in case of pregnancy or child born out of wedlock).

[29]*See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Paul v. Davis, 424 U.S. 693, 713 (1976); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); United States v. Kras, 409 U.S. 434, 444, 446 (1973);

[30]Anna Christensen, *Polycentricity and Normative Patterns*, in LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 235, 239 (Hanne Petersen & Henrik Zahle eds. 1995).

[31]*Id.* at 236.

society,"[32] and what we call law.

Advocates of same-sex marriage fallaciously believe that if they can get the label of "marriage" for their gay and lesbian relationships, they will magically acquire the socially and individually beneficial characteristics associated with marriage for millennia. That is very strange thinking.[33] Abraham Lincoln once lampooned the flaw of this thinking with a homespun story: He asked how many legs a dog would have if you counted a tail as a leg. To the response "five legs," Lincoln said, "No; calling a tail a leg doesn't make it a leg."[34]

The relationship between two persons of the same sex is fundamentally different from heterosexual "marriage" because men and women are fundamentally different. Marriage is unique. No other companionate relationship provides the same great potential for benefitting individuals and society as the life-time covenant union of a man and a woman. That is why only certain committed heterosexual unions are given the legal status of marriage. It is not the marriage certificate, label, or legal status that makes the heterosexual marital relationship uniquely beneficial to individuals and society, but it the nature of the relationships itself that is so valuable, and that is why such unions are given the preferred legal status (and label) of *marriage*. Pluralistic arguments for same-sex marriage are simply self-alienating.[35] Their thesis of relational equivalence is a simplistic notion that fails to recognize that "something more complex is going on than can be explained" by saying "my sexual preference is as good as your sexual preference."[36]

Same-sex unions do not match the contributions to society that are made by heterosexual marriages. The public purposes for which marriage has been created are best achieved by cross-gender unions; same-sex unions fail to promote those social interests in any comparable degree. Let me mention just a few examples. Heterosexual marriage provides, *inter alia*, (1) the best setting for the safest and most beneficial expression of sexual intimacy; (2) the best environment into which children can be born and reared (the profound benefits of dual-gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender are lost in same-sex unions); (3) the best security for the status of women (who take the greatest risks and invest the greatest personal effort in maintaining families); (4) the strongest and most stable companionate unit of society (and thus the most secure setting for intergenerational transmission of social knowledge and skills); (5) a functional and historic social

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[32]*Id.*

[33]It is ironic that gay and lesbian critics who often chide their opponents for trying to "legislate morality" seek to radically transform the essential normative characteristics of their relationships by have the legislature (or judiciary) label them "marriages."

[34]*See generally* J. Bartlett, The Shorter Bartlett's Familiar Quotations 218d (1961) *cited in* Stephen A. Newman, *Baby Doe, Congress and the States: Challenging the Federal Treatment Standard for Impaired Infants*, 15 Am. J. L. and Med. 1, *15 (1989).

[35]Jeremy Waldron, Review Essay, *On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality*, 80 CALIF. L. REV. 1361, 1376 (1992) (Moral relativism is self-alienating; a moral relativist is "a person who could not take his own side in an argument.").

[36]*See generally id.* at 1381.

stability that same-sex marriage would undermine; and (6) the best seedground for democracy and the most important schoolroom for self-government. From the perspective of these social interests underlying marriage, same-sex unions are not equivalent to heterosexual marriages.

C. *The Opinion in* Brause *is Seriously Flawed and Dangerously Radical*

Judge Michalski's opinion in *Brause* is very interesting and even thought-provoking. I think he writes well. But there are at least three serious flaws in Judge Michalski's opinion. First, the opinion is very radical, extremely out of the mainstream of law and experience. Never before has any court held that same-sex marriage is protected by a fundamental constitutional right. Even the Hawaiin courts in their controversial *Baehr* opinions unanimously rejected that claim, as has every other court (now dozens total) to consider similar claims. Nor has any court so abruptly and summarily concluded that equal protection in implicated by the historic limitation of marriage to opposite-sex couples.

Second, the opinion seems to overlook some very fundamental points. One point overlooked is precedent. Judge Michalski's offers none of the kinds of support or evidence for his dramatic conclusions that are considered elementary and essential in the legal profession. For instance, the opinion cites no textual or historical support for the conclusion that there is a fundamental right to same-sex marriage. It does not cite anything in the record of the drafting or the debates of the privacy provision to support that radical conclusion. There is no evidence cited in the opinion to show that the people of Alaska intended to create or protect a fundamental right to same-sex marriage when they adopted Article 1, Section 22 (the right to privacy). The reason no evidence is cited is because none exists. I can find absolutely nothing in the Alaska Constitution or history or cases interpreting it that supports the notion that the people of Alaska intended to create a fundamental right to marry persons of the same gender, or anything to suggest that they believed that limiting marriage to opposite-sex couples implicates gender discrimination.

Another flaw is the superficiality of the analysis. For example, the opinion overlooks a subtle but significant distinction between public toleration of private choices and private claims to public preferences. The right to privacy of the Alaska Constitution protects certain private conduct from public penalty, but never before has any court anywhere held that a right to privacy compels the public to confer benefits, privilege and public preferences on private choices. Judge Michalski's opinion erases the critical distinction between public and private.

In *Breese v. Smith*,[37] and *Ravin v. State*,[38] the two cases cited heavily by Judge Michalski, the Alaska Supreme Court recognized that the public could not reach out and penalize certain private choices (how long a student grows his hair and private possession of marijuana for personal use by an adult in a private home). Applying that principle to same-sex relations might support an argument that the state should not penalize some private sexual choices among consenting adults. However, that is very different than saying that the state must affirmatively confer a public status and valuable legal benefit like marriage upon mere private preferences. Judge Michalski's conclusion that the privacy provision requires Alaska to confer public legal status of marriage on same-sex couples is like saying that Alaska constitutionally must provide

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[37]501 P.2d 159 (Alaska 1972).

[38]537 P.2d 494 (Alaska 1974).

free Rogaine or tax deductions for Rogaine expenses because individuals have a private right to grow their hair as long as they want, or that Alaska must provide crop subsidies and tax breaks for persons who want to exercise their private right to grow and possess marijuana.

Moreover, the opinion announces a radical right of "choice of life partner" but does not announce any principled boundaries of that right. If the Alaska Constitution's right to privacy really confers a broad right to marry on two adults of the same sex, logically it would also protect the right to marry of two adults who are closely related (incest), or three adults (polygamy). Those private relations may be as meaningful and loving as homosexual relations. Thus, under the *Brause* decision laws forbidding incest and polygamy also would infringe upon this broad fundamental right to marry.

The analysis of the right to privacy also seems to confuse tolerance and preference. Relations and conduct may be legally categorized in at least three different ways -- as "prohibited," "tolerated" or "preferred."[39] Marriage is the classic example of a *preferred* relationship. It is one of the most highly-preferred, historically-favored relations in the law. Thus, the claim for same-sex marriage is not a claim for mere tolerance, but for special preference. The principle of tolerance or privacy does not justify legalization of same-sex marriage because marriage is much more than a *tolerated private* relation, it is a legally a *preferred public* status.

Similarly, the gender equality analysis in the opinion ignores the fact that there is a critical distinction between sexual differences and sexual discrimination. It does not violate gender equality for the government to provide pregnancy services only to women, or prostate cancer treatment only to men because only women can become pregnant, and only men can get prostate cancer. Likewise, it does not violate gender equality for the government to give marital status only to male-female couples, because only male-female couples can constitute a cross-gender union that is the essence of marriage. "[T]he Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded.... The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist."[40] Judge Michalski's opinion, moreover, overlooks the fact that heterosexual marriage is the oldest gender-equality institution in the law. The requirement that marriage consist of both a man and a woman emphasizes the absolute equality and equal necessity of both sexes for the most fundamental unit of society. It recognizes the indispensable and equal contribution of both genders to the basic institution of our society.[41]

D. Legalizing Same-Sex Marriage Would Create A National Crisis

The matter at issue in *Brause* is not only about how Alaska treats same-sex unions, but it is also about how Alaska treats other states and the federal government. Any resolution of the same-sex marriage debate in Alaska must take into account the effect that Alaska's action will

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[39]Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Social Privacy - Balancing the Individual and Society Interests*, 81 MICH. L. REV. 463, 546-547 (1983); Bruce C. Hafen & Jonathan D. Hafen, *Individual Autonomy, Student Rights, and the U.N. Convention on Rights of the Child" DeJure vs. De Facto Autonomy for Children* 69 ST. JOHN'S L. REV. 601, 653-656 (1995).

[40]450 U.S. at 481 (Stewart, J., concurring).

[41]*See Constitutional Claims, supra* note 2, at 83-88.

have on the 49 other states and the federal union. In many ways, possibly including operation of the Full Faith and Credit clause, Alaska's legalization of same-sex marriage will be manipulated in an effort to override other states' and Congress' strong marriage policies. Legalizing same-sex marriage would prompt a constitutional crisis as other states and the federal government seek to avoid having same-sex marriage imposed in those other jurisdictions. Alaska has a compelling state interest in not drastically redefining marriage in a way that imperils the interjurisdictional recognition of some Alaskan marriages, that produce divisive, coercive pressures on the other states that may severely strain its relations with sister states, and which could precipitate a constitutional crisis.

If Alaska were to legalize same-sex marriage, it would create a major deviation from the concept and definition of marriage accepted in all forty-nine of the other states. The disruption, conflicts and disharmonies that would arise between Alaska and the other states in the union are potentially devastating. Marriage and marital status play a role in literally *hundreds* of government laws and programs in each separate jurisdiction -- both state and federal.[42] "When the State defines a spouse it has the effect of pushing the first domino in a parade of dominos."[43]

The threat of being forced to recognize same-sex marriage is not a speculative or trifling concern. The other states have reacted with unusual alacrity to the situation. The seriousness of this potential crisis is underscored by legislation and executive decrees enacted last years. In the past three years, *Congress and more than half of the states have enacted laws barring recognition of same-sex marriage.*[44] The Defense of Marriage Act passed both houses of Congress by overwhelming, bi-partisan majorities, and was signed by President Clinton. Alaska has joined the majority of the states by enacting a similar state law refusing to recognize same-sex marriages.[45] Yet *Brause* raises the very specter of a serious national marriage recognition crisis that that Alaska legislation and that DOMA are designed to avoid.

Marriages valid in the state where performed that have been denied recognition by another

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[42]Congress identified more than 800 federal statutory provisions incorporate the terms "marriage," and over 3000 use "husband, "wife," "spouse," and the like. H. Rep. 104-664, 104th Cong. 2d Sess, on Defense of Marriage Act, July 9, 1996, at 10.

[43]Report of the Commission on Sexual Orientation and the Law in Hawaii (Dec. 8, 1995) at 6.

[44]Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (Sep. 21, 1996) (defining marriage for purpose of federal law as exclusively heterosexual, thus barring federal court or agency recognition of same-sex marriage in federal law, and expressly providing that each state may choose whether or not it will recognize same-sex marriages from other states); *See generally* Marriage Law Project, *Bills Concerning Same-Sex Marriage, 1997 Legislative Update*, June 16, 1997 (available at http://www.pono.net).

[45]1996 Alaska Sess. Laws 21 ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.").

state when they are incompatible with a strong public policy of the second state are legion.[46] As another court recently noted, "no state is bound by comity to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy."[47] Thus, *Brause* jeopardizes the rights and interests of many Alaska citizens, and create years of costly, confusing litigation for both the people and for the state. Individuals rights to property interests, alimony, child support, custody, visitation, insurance benefits, inheritance, succession, public benefits would be insecure for years to come. Alaska's compelling interest in "minimizing the susceptibility of its own" marriages to nonrecognition in other states provides ample justification for immediate passage of S.J.R. No. 42. *Sosna v. Iowa*, 419 U.S. 393, 407 (1975).

Internationally, the position of nearly all nations appears to be that it would violate their strong public policy to recognize same-sex marriage, and in some nations that opposition to same-sex marriage could be so strong that same-sex marriages from Alaska could impair relations between the jurisdictions.[48] No nation in the world recognizes same-sex marriage. Even the nations that have allowed same-sex domestic partnership do not expect those domestic partnerships to be recognized abroad.[49] Same-sex marriage would be found incompatible with public policy in most of the nations of the world.[50] Marriages that "are incompatible with the public policy" of a country . . . not be recognized in that country, even if the marriage is deemed valid under the law of the state where celebrated or by the law of the parties' nationality or

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[46]*See, e.g.*, Metropolitan Life Insurance Co. v. Chase, 294 F.2d 500 (3d Cir. 1961); In re Estate of Levie, 123 Cal. Rptr. 445, 447 (Cal. App. 1975); Catalano v. Catalano, 170 A.2d 726, 728-729 (Conn. 1961); Laikola v. Engineered Concrete, 277 N.W.2d 653, 656 (Minn. 1979); Nelson v. Marshall, 869 S.W.2d 132 (Mo. App. 1993); Stein v. Stein, 641 S.W. 2d 856, 858 (Mo. App. 1982); Randall v. Randall, 345 N.W. 2d 319, 322 (Neb. 1984); Bucca v. New Jersey, 128 A.2d 506, 511 (N.J. Superior Court 1957); Rhodes v. McAfee, 457 S.W.2d 522, 524 (Tenn. 1970); Seth v. Seth, 694 S.W. 2d 459 (Tex. Ct. App. 1985); Farah v. Farah, 429 S.E.2d 626, 334-335 (Va. App. 1993); *see generally* Restatement (Second) Conflict of Laws § 283, Reporter's Note, comments j-k.

[47]Hager v. Hager, 3 Va. App. 415, 349 S.E.2d 908, 909 (1986), *citing* Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 430, 4 S.E.2d 364, 366 (1939)); State v. Austin, 234 S.E.2d 657, 663 (W. Va. 1977). *See generally* Rhodes v. McAfee, 224 Tenn. 495, 457 S.W.2d 522 (1970); Seth v. Seth, 694 S.W.2d 459 Ct. App. Texas, 1985); Godt v. Godt, 1990 WL 123047 (Del. Super., Aug. 7, 1990); *see further* In re Estate of Jenkins, 133 Misc.2d 420, 506 N.Y.S.2d 1009 (1986); Anderson v. Anderson, 27 Conn.Supp. 342, 238 A.2d 45 (1967); Farah v. Farah, 429 S.E.2d 626 (Va. App. 1993).

[48]*See generally* Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Family L. Q. 497-517 (Fall 1995).

[49]Marrianne Hojgarrd Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. Fam. L. 289, 290 (1991-92).

[50]Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, Family Law Quarterly, vol. 29, pp. 497-517 (Fall 1995).

domicile.[51] Thus, parties to Alaskan same-sex marriages would expect, but be denied rights based upon marital status in foreign nations, including property, succession, inheritance, insurance, employment benefits, pensions, etc., in other nations. Other Alaskan marriages might also would be viewed with suspicion as well, resulting in disadvantages for many Alaskans seeking benefits in other countries.

Alaska has a valid interest in not becoming the "Reno" of same-sex marriages. The potential detriment to the local economy (the public costs could easily overwhelm any minor increase in revenues), as well as the potential impact on Alaskan culture and on the environment in which to raise families are legitimate and substantial concerns.

Moreover, *Brause* compounds an already serious national constitutional crisis. Advocates of same-sex marriage argue that under the Full Faith and Credit Clause of the Constitution, art. IV, sec. 1, all states are obligated to give "full faith and credit" to public acts and records of sister states, and that includes marriages.[52] On the other side, opponents of same-sex marriage and supporters of the DOMA argue that the Supreme Court of the United States has never held that marriages must be given full faith and credit, but traditionally states have been permitted to decline to recognize marriages from other states that violate strong local public policy,[53] and that DOMA is constitutional under the last sentence of the Full Faith and Credit clause which specifically provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[54]

The point is not *which* position will ultimately be proven correct. Rather, the point is that a *serious* constitutional confrontation involving states, Congress, which overwhelmingly passed the Defense of Marriage Act, and the American judiciary is inevitable if Alaska legalizes same-sex marriage. In the confrontation, the judiciary will be asked to force states to recognize same-sex marriage over their own objections, and over the emphatic opposition of Congress. The only way to win that kind of confrontation is to avoid it.

Finally, Judge Michalski's February 27th opinion in *Brause* is not the end of the case.

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[51] *See* Lennart Palsson, Marriage in Comparative Conflict of Laws: Substantive Conditions 3 (Martinus Nijhoff Publishers 1981); *see also* Lennart Palsson, *Chapter 16, Marriage and Divorce*, in Vol. III, Private International Law, International Encyclopedia of Comparative Law 59 (1978).^

[52] *See* Hearing Before the Subcomm. on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, 104 Cong., 2d Sess., on H.R. 3396, May 15, 1996 (Serial No. 69) at 202 (Rabbi David Sapperstein); Hearing Before the Committee on the Judiciary, United States Senate, 104 Cong., 2d Sess., on S. 1740, July 11, 1996 (S. Hrg. 104-553) at 42-47 (Prof. Cass R. Sunstein).

[53] *See generally*, Restatement (Second) Conflict of Laws § 283(2) (1981); Robert A. Leflar, American Conflicts Law § 221 (4th ed. 1986); 1 Lynn D. Wardle, Christopher L. Blakesley, & Jacqueline Y. Parker, Contemporary Family Laws § 2:03 (1988).

[54] Hearings Before the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives, May 15, 1996, at 158-180 (Prof. Lynn D. Wardle); Rep. Tom Campbell, *Perspective on Same-Sex Marriages*, L.A.Times, July 12, 1996, at B9.

Certainly I believe that the state has several very compelling justifications for not permitting same-sex marriage, and a court might (and I believe should) so rule. Thus, some might argue that the legislature should take no action until both the trial court and Alaska Supreme Court have rendered their final judgments. There are three deficiencies of that argument. First, as a practical matter, the *Brause* ruling casts an immediate and serious cloud on the issue of same-sex marriages and on other laws passed by the Alaska legislature. It will have precedential influence on other cases in Alaska (and, indirectly, elsewhere). It seriously implicates what the Alaska legislature is doing, what it should do, in passing new legislation, amending old laws, etc. The legislature need not wait another year or two to determine if laws it is now passing are unconstitutional. Second, *Brause* immediately sends a dramatic and terribly mistaken message about how marriage is understood in the Alaska Constitution. The legislature has responsibility for the state constitution as well as the court. As the people's representatives, the legislators have a duty to guard the values and policies that the people have embodied in the Constitution of Alaska. You need not wait to correct such a seriously flawed misreading of the will of the people of Alaska. The people deserve to be heard on this issue now. Third, if the legislature delays, it could be like waiting to close the barn door until after the animals have gotten out. If the legislature waits to begin the process of letting the people clarify their understanding of marriage, and the *Brause* decision is affirmed and same-sex marriage is legalized in Alaska by judicial interpretation of the state constitution, several months, possibly years, could pass before the process of constitutional amendment is completed and the same-sex marriage interpretation is overturned. During that time, same-sex couples will be marrying, and filing suits, demanding benefits, moving to other states and other countries, etc. After a few weeks, months or years of that, even a constitutional amendment rejecting same-sex marriage will not practically remedy all the confusion generated in the interim.

III. Proposed Resolutions Nos. 25 and 42 Are Constitutional

Undoubtedly opponents of these Resolutions will claim that they are unconstitutional under the U.S. Constitution. However, that is simply political jawboning. I will focus on S.J.R. No. 42, because it is the operative Resolution, but the analysis is equally applicable to S.C.R. 25.

One argument that might be asserted against these Resolutions is the claim that it violates federal equal protection for Alaska to deny same-sex marriage. But every court that has addressed this claim has rejected it.[55] Again, the reason is simple. Heterosexual marriage is a unique relationship, that makes unique contributions to society, and equal protection law does not require treating things are equal that are different. Is denial of same-sex marriage like denial of interracial marriage that was declared unconstitutional in *Loving v. Virginia*? No, it is not. Prohibiting marriage because of race is different that prohibiting homosexual marriage. Race is different than sexual preference. Race is immutable and passive; sexual relationship is active and a matter of decision and choice. As General Colin Powell put it: "Skin color is a benign non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral

[55] *See* Wardle, *Constitutional Claims, supra note* 2, at 74-95.

characteristics. Comparison of the two is a convenient but invalid argument."[56] I agree totally with the judgment of the Supreme Court in *Loving* that racial classifications are totally irrelevant to any legitimate policy the state may have relating to marriage regulation, whereas sexual-behavior choices are of legitimate social concern, especially regarding marriage.

Another argument that might be raised is that S.J.R. No. 42 is unconstitutional under *Romer v. Evans*. Two years ago, the Supreme Court of the United States struck down Amendment 2 to the Colorado Constitution in *Romer*. That amendment was intended to generally prohibit the enactment of laws giving special preferences to persons on the basis of homosexual behavior. But it was drafted very broadly and the Supreme Court struck down the amendment. But it did so on grounds and logic that clearly distinguish S.J.R. No. 42. First, the Colorado amendment classified and discriminated in law on the basis of "homosexual, lesbian or bisexual orientation," and not solely on the basis of conduct, behavior or relationship. How someone feels or thinks or believes, including one's feelings or beliefs regarding sexual attraction, interest, or orientation, is not a permissible basis for legal discrimination; to legally classify persons on the basis of their "orientation" status is constitutionally forbidden.[57] By contrast, S.J.R. No. 42 does not discriminate on the basis of any "orientation" but it is conduct (marriage) and action (actual same-sex relationships) that are the permissible basis for distinguishing heterosexual marriage from same-sex unions.

Second, Colorado Amendment Two did not merely deny legal preference to persons with homosexual orientation, but it denied them basic protections of the law. The Supreme Court held that the Colorado amendment did not merely "put[] gays and lesbians in the same position as all other persons,"[58] as the supporters said they intended, but it arguably stripped them from even basic civil rights protections. The Colorado amendment arguably forbade specific protection of any kind for gays and lesbians,[59] and the Court noted that it could be construed to "deprive[] gays and lesbians even of protection of general laws."[60] Thus, police protection, fire protection, access to public libraries, and other basic protections arguably might have been denied gays and lesbians.

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[56]*See* Gen. Colin L. Powell, Letter to Representative Patricia Schroeder, May 8, 1992, in David F. Burrelli, HOMOSEXUALS AND U.S. MILITARY PERSONNEL POLICY, Jan. 14, 1993, at 25-26; *see also Gays in the Military, Hearing of the Military Forces and Personnel Subcomm. of the House Armed Serv. Comm.* (Statement by Joint Chiefs of Staff Chairman Colin Powell), FED. NEWS SERV. July 21, 1993, at 26. *See also* Baker v. Nelson, 191 N.W.2d 185, 197 (Minn. 1971) ("[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."). A *Wall Street Journal* article recently observed that "many African-Americans and Hispanics rejected the argument that gays are another minority group just like themselves, struggling for equal rights." Dennis Farney, *Shaky Ground,* WALL ST. J., Oct. 7, 1994, at A1, A6.

[57]116 S.Ct. at 1623.

[58]*Id.* at 1624.

[59]*Id.* at 1626.

[60]*Id.*

There is a tremendous and constitutionally significant difference between depriving persons of potentially all protection of the laws, as Colorado Amendment Two apparently did, and merely refusing to extend one specific, unique legal status (marriage) to same-sex relations, as S.J.R. No. 42 does.

Third, similarly, the form of the Colorado amendment was open-ended. It did not focus solely on the specific areas of abuse that the voters had been concerned about. It was an "across the board" prohibition of legal protection.[61] The "sweeping and comprehensive" Colorado rule singled out gays and lesbians, and no others, for comprehensive non-protection status.[62] While the amendment's alleged purpose to prevent certain special advantages for gays and lesbians was not improper, "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."[63] S.J.R. No. 42, by contrast, focuses specifically upon one particular legal relationship and on that relationship only. It is precise, specific, and exact as to the subject and kind of legal protection that is set aside for exclusive protection.

Fourth, the Supreme Court said that Colorado Amendment did not survive mere rational basis scrutiny. Despite the intention of its backers, the Court stated that: "We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective."[64] By contrast, protecting the institution of heterosexual marriage has repeatedly been recognized not merely as a legitimate purpose of legislation, but an essential and important duty of the legislature. In light of the history of the unique legal and social importance of heterosexual marriage, it would require extraordinary intolerance to argue that S.J.R. No. 42's purpose to preserve the unique legal status of heterosexual marriage is irrational.

Fifth, the Supreme Court emphasized that the Colorado amendment was really motivated by "animus" against gays, lesbians and bisexuals. In other words, it was invidious in its motive as well as its potential effect.[65] S.J.R. No. 42, by contrast, avoids any negative language or intent. It does not degrade or denigrate any class. It is positive and emphasizes the contributions and importance of conventional marriage to society, without condemning or punishing any class of alternative relationships.

Finally, the same day the Supreme Court announced the *Romer* decision, it also rendered another decision that underscored how important it is to protect each state's ability to decide important legal policy issues for itself without having other states impose their policies extraterritorially upon co-equal sovereign states. In *BMW of North America, Inc. v. Gore*,[66] the Court discussed whether Alabama courts could impose punitive damages upon a defendant for

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[61] *Id.* at 1628.

[62] *Id.* at 1625.

[63] 116 S.Ct. at 1628.

[64] 116 S.Ct. at 1628.

[65] *Id.* at 1627-1628.

[66] BMW, Inc. v. Gore, 116 S.Ct. 1589 (1996). This case is discussed *supra*.

doing something in other states that was legal in those states but illegal in Alabama.[67] It is impermissible, wrote Justice Stevens for the Court, for one state to"impose its own policy choice on neighboring States. See Bonaparte v. Tax Court, 104 U.S. 592, 594, 26 L.Ed. 845 (1881) ('No State can legislate except with reference to its own jurisdiction.... Each State is independent of all the others in this particular')."[68] The court emphasize the need for each state "to respect the interests of other States . . . ."[69] The Court emphasized that"*these principles of state sovereignty and comity*" forbid one state giving its laws and legal policy extraterritorial effect that "*infring[es] on the policy choices of other States,*" because the Constitution requires each state "[t]o avoid such encroachment."[70]

One of the reasons for enacting S.J.R. No. 42 is to avoid interstate conflict over recognition of same-sex marriages from Alaska. If protection of state sovereignty is required for mere state economic regulations, it is even more important that one state not legislate a radical redefinition of marriage and then impose it on the other states. Since the very day the Court decided *Romer* it also validated one of the core principle upon which S.J.R. No. 42 is based - the importance of protecting state sovereignty in setting its own legal policies from extraterritorialism of other state's contradictory laws - I do believe that S.J.R. No. 42 is valid under *Romer*.

Conclusion

I believe that S.J.R. No. 42 and S.C.R. No. 25 are generally well-considered and well-crafted. I believe that they are necessary and prudent. While some fine-tuning may be appropriate, some careful amendment may be considered, the thrust and focus of these Resolutions are important and timely. I recommend that this committee, this chamber, and this legislature enact S.J.R. No. 42 and S.C.R. No. 25 and submit the proposed Amendment of S.J.R. No. 42 to the people forthwith.

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[67]BMW had repainted parts of a new car that had suffered some paint damage while being transported from Germany to the United States, and then sold the car as a new car in Alabama without disclosing that it had been partially repainted at a cost of $601.37. That was lawful in other states, but a recent Alabama case made it improper there. The plaintiff introduced evidence that that lowered the resale price of the car about 10% and the jury awarded the buyer $4,000 in compensatory damages (10% of the car's price). BMW had sold about 1,000 such repainted cars in the United States, including 14 cars in Alabama. The jury mathematically awarded $4,000,000 in punitive damages, reduced on appeal to $2,000,000. The Supreme Court reversed and remanded, 5-4, noting that the award was so grossly excessive as to violate due process, in part because the award appeared to be based on out-of-state conduct that was lawful where it occurred and had no impact in Alabama.

[68]116 S.Ct. at 1596-97.

[69]*Id.* at 1597 (citing Healy v. Beer Institute, 491 U.S. 324, 335-336 (1989); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982).

[70]*Id.* at 1597-98 (emphasis added).

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–664

DEFENSE OF MARRIAGE ACT

JULY 9, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. CANADY, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3396]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3396) to define and protect the institution of marriage, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

★29–006

PURPOSE AND SUMMARY

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

To achieve these purposes, H.R. 3396 has two operative provisions. Section 2, entitled "Powers Reserved to the States," provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex. And Section 3 defines the terms "marriage" and "spouse," for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3396 is a response to a very particular development in the State of Hawaii. As will be explained in greater detail below, the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to "marry" in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.

More specifically, if Hawaii (or some other State) recognizes same-sex "marriages," other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions. With regard to federal law, a decision by one State to authorize same-sex "marriage" would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. H.R. 3396 anticipates these complicated questions by laying down clear rules to guide their resolution, and it does so in a manner that preserves each State's ability to decide the underlying policy issue however it chooses.

I. THE LEGAL CAMPAIGN FOR SAME-SEX "MARRIAGE"

Before discussing the Hawaiian lawsuit, the Committee believes it is important to place that development in its larger context. In particular, it is critical to understand the nature of the orchestrated legal assault being waged against traditional heterosexual

marriage by gay rights groups and their lawyers. Only then can the Committee's concerns that motivated H.R. 3396 be fully explained and understood.

The determination of who may marry in the United States is uniquely a function of state law. That has always been the rule, and H.R. 3396 in no way changes that fact. And while state laws may differ in some particulars—for example, with regard to minimum age requirements, the degree of consanguinity, and the like—the uniform and unbroken rule has been that only opposite-sex couples can marry. No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.[1]

Some in our society, however, are not satisfied that marriage should be an exclusively heterosexual institution. In particular, same-sex "marriage" has been an explicit goal of many in the gay rights movement for at least twenty-five years. In 1972, for example, the National Coalition of Gay Organizations called for the "[r]epeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or numbers."[2] This campaign, which has also included mass "weddins," has been waged on religious, cultural, and legal fronts.[3]

Beginning in the early 1970s, gay rights advocates periodically filed lawsuits seeking to win the right to same-sex "marriage." According to one commentator, "[o]ver the past twenty-five years, same-sex marriage advocates have mounted over a dozen substantial litigation campaigns seeking judicial legalization of same-sex marriages or judicial recognition of same-sex unions for purposes of qualifying for certain marital benefits."[4] Prior to the Hawaii case, none of these legal challenges succeeded.

In addition to lack of success in the courts, these efforts faced other difficulties. The most important of these has been a persistent reluctance by some within the gay and lesbian movement to embrace the objective of same-sex "marriage."[5] Initially, the major

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[1] In this, the United States is hardly unique; indeed, one authority on family law recently conducted an international survey of marriage laws and concluded that "[a]ll nations permit only heterosexual marriage. At present, same-sex marriage is allowed in no country or state in the world. . . ." *See* Lynn D. Wardle, "International Marriage and Divorce Regulation and Recognition: A Survey," 29 Family L.Q. 497, 500 (Fall 1995).

[2] *Quoted in* William N. Eskridge, Jr., "The Case for Same-Sex Marriage" 54 (Free Press 1996). More recently, the Platform of the 1993 "March on Washington" called for the "legalization of same-sex marriage." *Quoted in* Mark Blasius, "Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic" 175–78 (Temple Univ. Press 1994).

[3] *See generally,* Suzanne Sherman (ed.), "Lesbian and Gay Marriage: Private Commitments, Public Ceremonies" (Temple Univ. Press 1992. *see also* Eskridge, "The Case for Same-Sex Marriage" at 44–62.

[4] See Lynn D. Wardle, "A Critical Analysis of Constitutional Claims for Same-Sex Marriage," 1996 B.Y.U. L. Rev. 1, 9. Among the leading cases are: *Baker* v. *Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (state law limiting marriage to heterosexual unions does not violate Ninth or Fourteenth Amendment to the U.S. Constitution), *Jones* v. *Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (refusal to grant marriage license to lesbian couple does not violate constitutional right to marry, to associate freely, or to the free exercise of religion); *Singer* v. *Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (traditional marriage law does not violate either state or federal constitution); *De Santo* v. *Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (declining to recognize right to common law same-sex marriage); and *Dean* v. *District of Columbia*, 653 A.2d 307 (D.C. 1995) (D.C. Court of Appeals rejected statutory and federal due process and equal protection challenges to traditional marriage law).

[5] Notwithstanding the advances gay rights legal groups have made, the debate within the homosexual community continues, as prominent advocates of same-sex "marriage" still find it necessary to seek to persuade other homosexual activists to support their efforts. *See, e.g.,* Eskridge,

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national gay rights organizations—including the Lambda Legal Defense and Education Fund, a gay and lesbian legal group founded in 1973, and the American Civil Liberties Union, which launched a Lesbian and Gay Rights Project in 1984—were unwilling to make same-sex "marriage" a priority.[6]

But when a lawsuit filed by local gay activists in Hawaii began to show signs of promise, Lambda, the ACLU, and eventually the nation as a whole began to pay attention.[7]

II. THE HAWAII LAWSUIT: *BAEHR* V. *LEWIN*

The legal assault against traditional heterosexual marriage laws achieved its greatest breakthrough in the State of Hawaii in 1993. Because H.R. 3396 was motivated by the Hawaiian lawsuit, the Committee thinks it is important to discuss that situation in some detail.

In December 1990, three homosexual couples—two lesbian and one gay men—filed applications for marriage with the Hawaiian Department of Health ("DOH"), the agency responsible for administering the State's marriage laws.[8] The State denied the applications on the ground that its marriage laws did not permit same-sex couples to marry. In 1991, the three couples filed suit in state court challenging the denial of the marriage licenses as a violation of the Hawaii Constitution.

After the state trial court granted the State's motion for judgment on the pleadings, the plaintiffs appealed to the Hawaii Supreme Court. In May 1993, a highly-fractured five justice Court issued an opinion that has already had profound implications—in Hawaii, to be sure, but also in the other States and, with the introduction of H.R. 3396, in the United States Congress.

Three of the five justices who heard oral arguments in the case before the Hawaii Supreme Court held that the trial court's dismissal on the pleadings had to be reversed.[9] In an opinion for himself and Acting Chief Justice Moon, Justice Levinson held that the denial of marriage licenses to same-sex couples constitutes discrimination on the basis of sex.[10] The two-judge plurality also held that sex is a "suspect category" under the Equal Protection Clause of the Hawaii Constitution, and so ruled that the marriage statute (Haw. Rev. Stat. §572–1) could be upheld only if the State could satisfy the strict scrutiny test. As Judge Levinson summarized:

"The Case for Same-Sex Marriage," Chapter 3 (entitled "The Debate Within the Lesbian and Gay Community"), and Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique," 21 N.Y.U. Rev. L. & Soc. Change 567 (1994–95).

[6] *See generally* Patricia A. Cain, "Litigating for Lesbian and Gay Rights," 79 Va. L. Rev. 1551, 1586 (1993) (noting that "[t]ogether with the ACLU, Lambda has helped to shape gay rights litigation across the country.").

[7] *See* Paul M. Barrett, "I Do/No You Don't: How Hawaii Became Ground Zero in Battle Over Gay Marriages," *Wall Street Journal*, June 17, 1996, at A1 (describing reluctance of major gay rights legal organizations to support lawsuit seeking to win right of same-sex "marriage"). Despite this initial caution, Lambda has now signed on as co-counsel for the homosexual plaintiffs in the Hawaiian case, *id.*, and, as explained below, has emerged as the leading strategist in seeking to maximize the impact that case might have.

[8] Because Hawaii does not authorize common law marriages, *see* Haw. Rev. Stat. §572–1 (1985), the only way to get legally married in that state is to obtain a marriage license from the DOH.

[9] *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993).

[10] *Id.* at 60.

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the State] to overcome the presumption that HRS §572–1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.[11]

A third justice joined the plurality in voting to reverse the trial court's dismissal,[12] and one justice filed a dissenting opinion.[13]

Following the Supreme Court's ruling in *Baeher,* then, the State confronts a situation whereby their existing heterosexual-only marriage law is "presumed to be unconstitutional," [14] and the case has been sent back to the trial court to see whether the State can satisfy the very demanding strict scrutiny test. The trial date has been set for September 1996, and there is a strong possibility that the Hawaii courts will ultimately require the State to issue marriage licenses to same-sex couples.

It is, of course, no business of Congress how the Hawaiian Supreme Court interprets the Hawaiian Constitution, and the Committee expresses no opinion on the propriety of the ruling in *Baehr.* But the Committee does think it significant that the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers. As Hawaiian State Representative Terrance Tom, Chairman of the House Judiciary Committee, testified at a hearing on H.R. 3396:

> Same-sex marriage was not an issue that arose by submission of proposed legislation to the people's representatives. Instead, it arose because in May of 1993, two members of our state Supreme Court issued an opinion unprecedented in the history of jurisprudence.[15]

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[11] *Id. at* 68, 74.

[12] The third justice to vote for reversal, Justice Burns, concurred only in the result reached in Justice Levinson's opinion. Justice Burns ruled that the "case involves genuine issues of material fact"—namely, whether or not homosexuality is "biologically fated"—that warranted further proceedings by the trial court. *Id.* at 70.

[13] Justice Heen—who, like Justice Burns, was sitting by designation to fill temporary vacancies on the Supreme Court—rejected the plurality's conclusion that heterosexual-only marriage laws constitute sex discrimination because, he wrote, "all males and females are treated alike. . . . Neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has." *Id.* at 71 (emphasis in original). Accordingly, Justice Heen believed that the marriage law had only to pass the rational basis test; he would have held that it "is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage and bears a reasonable relationship to that purpose." *Id.* at 74. Finally, he noted that, to the extent the plaintiffs were complaining about the inability to receive certain statutory benefits associated with marriage, "redress of those deprivations is a matter for the legislature. . . . Those benefits can be conferred without rooting out the very essence of a legal marriage." *Id.* at 74.

Justice Heen's dissent indicates that the fifth Justice, Retired Justice Hayashi, whose temporary appointment to the Court expired prior to the filing of the opinion, would have joined the dissent. *Id.* at 48. However, after the initial opinion was issued, the State filed a motion for reconsideration or clarification; by the time the Court ruled on that motion, a new Justice—Justice Nakayama—had joined the Court, and Justice Nakayama joined in Justice Levinson's clarification of the mandate. *Id.* at 74–75. Accordingly, it appears that the final disposition was three justices forming a majority, with Justice Burns concurring in the result only, and Justice Heen dissenting.

[14] *Id.* at 67.

[15] Prepared Statement of Terrance Tom, Member and Chairman of Judiciary Committee, Hawaii House of Representatives ("Tom Prepared Statement"), at Hearing on H.R. 3396, the Defense of Marriage Act, before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (May 15, 1996) ("Subcommittee Hearing").

Rep. Tom also testified that the Supreme Court's ruling has been met with strong resistance on the part of the Hawaiian public and their elected representatives:

> In response to this judicial activism, the 1994 Hawaii Legislature, Democrat and Republican alike, overwhelmingly voted to reject this clearly erroneous interpretation of our State Constitution, and amended our marriage statutes to make clear that a legal marriage in our State can be entered into only by a man and a woman.[16]
>
> This decision by the Legislature followed extensive public hearings throughout the Islands. Thousands of Hawaii citizens have submitted testimony to the state legislature over the last three years. *It was clear then, and it is clear now, that the people of Hawaii do not want the State to issue marriage licenses to couples of the same-sex.*
>
> This Committee should understand that the people of Hawaii are not speaking out of ignorance or uncertainty. Both of our daily newspapers are strong supporters of same-sex marriage and have editorialized repeatedly in favor of issuing marriage licenses to couples of the same sex.
>
> Yet polls commissioned by the newspapers themselves show that *opposition to same-sex marriages has grown as the trial on this issue nears.*
>
> The most recent poll taken in February shows that 71% of the Hawaii public believe that marriage licenses should be issued only to male-female couples. Only 18% believe the state should license same-sex marriages.[17]

Just as it appears that judges in Hawaii are prepared to foist the newly-coined institution of homosexual "marriage" upon an unwilling Hawaiian public, the Hawaii lawsuit also presents the possibility that other States could, through the protracted and complex process of litigation, be forced to follow suit. The Defense of Marriage Act is an effort by Congress to clarify the extremely complicated situation that may result from one State's recognition of same-sex "marriage." The Committee turns now to a brief description of the implications of *Baehr* v. *Lewin* for other States and the federal government.[18]

III. INTERSTATE IMPLICATIONS OF *BAEHR* V. *LEWIN*: THE FULL FAITH AND CREDIT CLAUSE

H.R. 3936 is inspired, again, not by the effect of *Baehr* v. *Lewin* inside Hawaii, but rather by the implications that lawsuit threat-

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[16] Here, Rep. Tom is referring to the Legislature's enactment of a 1994 law which amended the marriage law to make it unmistakably clear that the Legislature intended to permit marriage only between one man and one woman. The Legislature also asserted that the marriage statute was "intended to foster and protect the propagation of the human race through male-female marriages." 1994 Haw. Sess. Laws 217.

[17] Tom Prepared Statement at 2.

[18] It has been suggested by some opponents of this Act that the legislation is premature on the ground that no State currently recognizes same-sex "marriage." Of course, to argue that this bill is premature concedes that such a measure at the right time might be appropriate. The Committee believes the right time is now. *Baehr* v. *Lewin* is poised for a final resolution, and the Committee believes it would be profoundly unwise—and even irresponsible—to permit the attendant uncertainty to stand.

ens to have on the other States and on federal law. The Committee will briefly explain here the interstate implications that the Hawaiian homosexual marriage case might have.

Simply stated, the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex "marriage." And the primary mechanism for nationalizing their break-through in Hawaii will be the Full Faith and Credit Clause of the U.S. Constitution.

In a memorandum entitled "Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr* v. *Lewin*?," Evan Wolfson, Director of the Marriage Project for the Lambda Legal Defense and Education Fund, Inc. ("Lambda"), sets forth the organization's strategy for seeking to extend their impending victory in Hawaii nationwide.[19] The memorandum is noteworthy both for what it reveals about the strategy the gay rights groups intend to pursue, and because it shows how plausible that strategy is.

First, as indicated by the title of the memorandum, Lambda is clearly optimistic that they will ultimately prevail in Hawaii. Second, the gay rights groups and gay men and lesbians across the country are preparing to take advantage of the Hawaii victory. As the Lambda memorandum states:

> Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions.[20]

Third, Lambda and other gay rights legal organizations are standing ready to assist same-sex couples who travel to Hawaii to obtain a marriage license to win full legal recognition of their newly-acquired status in their home State.[21]

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[19] This March 20, 1996, memorandum ("Lambda Memorandum"), is included in the report of the May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution.

[20] Lambda Memorandum at 2. In addition to Lambda's expectations, there have been numerous media reports that gays and lesbians throughout the United States are eagerly awaiting the opportunity to "marry" in Hawaii. *See, e.g.*, Dunlap, "Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door," *New York Times*, March 6, 1996, at A13 (quoting one lesbian activist as stating that "California is going to have literally thousands of couples who are going to come back from Hawaii expecting their marriage to be treated with the respect and dignity given every other marriage.")

[21] In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got "married," returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian "marriage" license. As we discuss below, a state or federal court confronting such a claim would probably be justified in declining to give effect to the Hawaiian license. But assuming (as it seems reasonable to do) that gay rights groups will find a judge somewhere in Ohio to accept their arguments, what would the result be? In general, the Committee believes that at least two things would occur.

First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to male-female unions. Upholding traditional morality, encouraging procreation in the context of families, encouraging heterosexuality—these and other important legitimate governmental purposes would be undermined by forcing another State to recognize same-sex unions. Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of government marital benefits. For example, in *Baehr* v. *Lewin*, the court listed fourteen specific "rights and benefits" that are available only to married couples. 852 P.2d at 59 (listing benefits relating to income tax; public assistance; community property; dower, courtesy, and inheritance; probate; child custody and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce rights; evidentiary privileges; and others). The Committee would add that recognizing same-sex "marriages" would almost certainly have implications on the ability of homosexuals to adopt children as well.

Of course, in the likely event Hawaii ultimately is forced by its courts to issue marriage licenses to same-sex couples, it will be the only State in the country to do so. Accordingly, when homosexual couples from other States travel to Hawaii, obtain a marriage license, and return home demanding recognition of their license, an important and complex legal situation will be presented. At bottom, the issue reduces to a choice-of-law question: Which law governs—Hawaii's, as represented by the "marriage" license, or the law of the forum state, which does not recognize same-sex "marriage"? That is, must a sister State adopt Hawaii's policy, or may it follow its own?

Lambda phrases the issue slightly differently: "Will these [same-sex couples'] validly-contracted [Hawaiian] marriages be recognized by their home states and the federal government, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?" Their response—"We at Lambda believe that the correct answer to these questions is 'Yes.'"[22]—is not without support.

The general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated.[23] States observing that rule would, of course, presumptively recognize as valid a same-sex "marriage" license from Hawaii. There is, however, an important exception to the general rule, well captured by the relevant section of the Restatement of Conflicts:

> A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.[24]

It is thus possible that a State, confronted with a resident same-sex couple possessing a "marriage" license from Hawaii, could decline to recognize that "marriage" on the grounds that to do so would offend that State's "strong public policy."

Because no State in the United States has ever recognized same-sex "marriages," it would seem that courts in other States would be justified in invoking this exception. The matter is somewhat more complicated, however, as the U.S. Constitution speaks to this issue. The first sentence of the Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[25] Lambda believes, quite sensibly, that this clause provides

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[22] Lambda Memorandum at 2. The memorandum then proceeds to survey "the legal grounds for gaining nationwide recognition of the marriages same-sex couples contract in Hawaii. These grounds include the U.S. Constitution, the common law, and statutory law." *Id.* at 2–3.

[23] For example, the Uniform Marriage and Divorce Act, which has been adopted by twenty-three States, provides that "[a]ll marriages contracted . . . outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted . . . are valid in this State." Unif. Marriage and Divorce Act §210, 9A U.L.A. 147.

[24] *Restatement (Second) of Conflicts of Law* §283(2) (1971).

[25] U.S. Const. art. IV, §1. The second sentence of the Full Faith and Credit Clause states: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Committee will discuss this provision in detail below.

both their strongest and most advantageous argument for forcing other States to recognize same-sex "marriage" licenses issued by Hawaii.[26]

Notwithstanding the seemingly mandatory terms of the Full Faith and Credit Clause, the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State's laws.[27] Indeed, despite the presumption created by *lex celebrationis* and reinforced by the Full Faith and Credit Clause, the Committee believes that a court conscientiously applying the relevant legal principles would be amply justified in refusing to give effect to a same-sex "marriage" license from another State.[28]

But even as the Committee believes that States currently possess the ability to avoid recognizing a same-sex "marriage" license from another State, it recognizes that that conclusion is far from certain. For example, there is a burgeoning body of legal scholarship—some of it inspired directly by the Hawaiian lawsuit—to the effect that the Full Faith and Credit Clause does mandate extraterritorial recognition of "marriage" licenses given to homosexual couples.[29] More significantly, Lambda agrees with that analysis, and clearly intends to press that argument in the course of its post-Hawaii, state-by-state litigation to nationalize same-sex "marriage."[30]

Most important of all, however, is the evident disquiet in the various States created by the Hawaii situation. The Committee is struck by the fact that so many States have been moved by the uncertain interstate implications of the Hawaii litigation to attempt to bolster their own public policy regarding traditional, heterosexual-only marriage laws. As of July 1, 1996, the Committee is informed that 14 States have enacted new laws designed to protect

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[26] Lambda Memorandum at 3–4 ("Successfully establishing that the Full Faith and Credit Clause requires all states to recognize a marriage legally contracted in another State would yield the most sweeping possible outcome, and, as a constitutional holding, the one most immune from legislative tampering. *We believe that full faith and credit recognition is mandated by the plain meaning of the Full Faith and Credit Clause,* and by basic federalist imperatives that unite this into one country and permit us to travel, work, and live in America as we have come to today. Simply put, all Americans, gay and non-gay alike, would be best served by assuring full faith and credit for marriages validly contracted in any U.S. state.") (emphasis added); *see also, e.g.,* Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 Col. L. Rev. 249, 296 (1992) ("[T]he Clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives its own law—to treat the law of sister states as equal in authority to its own").

[27] *See, e.g., Nevada* v. *Hall,* 440 U.S. 410, 424 (1979) ("the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."); *Alaska Packers Ass'n* v. *Industrial Accident Comm'n,* 294 U.S. 532, 547 (1935) ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum [State], would lead to the absurd result that, whenever conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.").

[28] The Committee endorses, therefore, the conclusion of Professor Lynn Wardle, who testified before the Subcommittee on the Constitution that, in his professional opinion, "it would not violate the full faith and credit clause . . . for a second state to refuse to recognize a same-sex marriage legalized in Hawaii when the second state has a strong public policy against same-sex marriage and when the same-sex couple lives in or has some other significant contact with the second state." *See* Prepared Statement of Lynn Wardle, Professor of Law, Brigham Young University ("Wardle Prepared Statement"), Subcommittee hearing.

[29] For a partial list of such articles, *see* Wardle, 1996 B.Y.U. L. Rev. at 17, n.65.

[30] *See* Lambda Memorandum at 9 ("[W]hen state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of *specific parties,* the other states *must* give those acts, records, or proceedings the same effect they would have at home. . . . Since a marriage . . . falls into the category of such adjudications or creations, there can be no policy balancing regarding their recognition.") (Emphasis in original) That is to say, Lambda will argue that there can be no "public policy" exception to the claim that other States must give effect to the Hawaiian "marriage" licenses.

against an impending assault on their marriage laws.[31] In addition, legislation has been defeated, withdrawn, or vetoed in 16 States, and is pending in 7 States.[32]

The fact that these States are sufficiently concerned about their ability to defend their marriage laws against the threat posed by the Hawaii situation is enough to persuade the Committee that federal legislation is warranted. The States, after all, are best-positioned to assess the legal situation within their own State; that so many of them are not content to rely on the amorphous "public policy" exception reveals that congressional clarification and assistance is both necessary and appropriate.[33] Section 2 of H.R. 3396 responds to this need.

IV. IMPLICATIONS OF *BAEHR* v. *LEWIN* ON FEDERAL LAW

Recognition of same-sex "marriages" in Hawaii could also have profound implications for federal law as well. The word "marriage" appears in more than 800 sections of federal statutes and regulations, and the word "spouse" appears more than 3,100 times. With very limited exceptions,[34] these terms are not defined in federal law.

With regard to the issue of same-sex "marriages," federal reliance on state law definitions has not, of course, been at all problematic. Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married. And the Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words "marriage" or "spouse" were thought by even a single Member of Congress to refer to same-sex couples.[35]

But if Hawaii does ultimately permit homosexuals to "marry," that development could have profound practical implications for federal law.[36] For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits. While there are literally hundreds of examples that would illus-

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[31] The States are: Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah.

[32] The Committee heard testimony from two state legislators regarding their efforts to enact legislation that would strengthen their State's public policy against same-sex "marriage." See Prepared Statement of Marilyn Musgrave, Member, Colorado State House of Representatives ("Musgrave Prepared Statement"), Subcommittee Hearing; Prepared Statement of Deborah Whyman, Member, Michigan State House of Representatives, Subcommittee Hearing.

[33] Such assistance seems particularly appropriate in situations like Colorado. The Colorado Legislature passed legislation clarifying that their marriage laws restricted marriage to unions between one man and one woman, and would have declared that same-sex "marriage" offends the public policy of the States. Governor Romer, however, vetoed the bill. Accordingly, Colorado now stands particularly exposed to an argument—sure to be made by gay rights groups—that its laws currently do not evince a public policy sufficiently strong to ward off a Hawaiian same-sex "marriage" license. *See* Musgrave Prepared Statement at 2.

[34] *See, e.g.*, 29 U.S.C. 2611(13) (1965) (provision of the Family and Medical Leave Act defining "spouse" as "a husband or wife, as the case may be.").

[35] Wardle Prepared Statement at 9 ("[I]t is beyond question that Congress has never actually intended to include same-sex unions when it used the terms 'marriage' and 'spouse.'").

[36] *See id.* ("Since the differences in state marriage laws (though numerous) were relatively minor, and since no state allowed such radical reconstruction of marriage as same-sex marriage, the passive presumption of adoption of state law has worked quite well. If some state legalized same-tax marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely, the essential fungibility of the concepts of marriage from one state to another.").

trate this point, the Committee will recount two that relate to events that have actually occurred.

In the 1970s, Richard Baker, a male, demanded increased veterans' educational benefits because he claimed James McConnell, another male, as his dependent spouse. When the Veterans Administration turned down his request, Baker filed suit. The outcome turned on the federal statue (38 U.S.C. § 103(c)) that made eligibility for the benefits contingent on his State's (Minnesota's) definition of "spouse" and "marriage." The federal courts rejected the claim for additional benefits on the ground that the Minnesota Supreme Court has already determined that marriage (which it defined as "the state of union between persons of the opposite sex") was not available to persons of the same sex.[37]

In a similar fashion, the Family and Medical Leave Act of 1993, Pub. L. 103–3, 107 Stat. 6, requires that employees be given unpaid leave to care for a "spouse" who is ill. Shortly before passage of the Act in the Senate, Senator Nickles attached an amendment defining "spouse" as "a husband or wife, as the case may be."[38] The amendment proved essential when the regulations were written.

When the Secretary of Labor published the proposed implementing regulations, he noted that a "considerable number of comments" were received urging that the definition of "spouse" "be broadened to include domestic partners in committed relationships, including same-sex relationships." The Nickles amendment, however, precluded such an expansive redefinition of "spouse." The Secretary quoted Sen. Nickles' floor statement on the amendment:

> This is the same definition [of "spouse"] that appears in Title 10 of the United States Code [10 U.S.C. § 101]. Under this amendment, an employer would be required to give an eligible female employee unpaid leave to care for her husband and an eligible male employee unpaid leave to care for his wife. No employer would be required to grant an eligible employee unpaid leave to care for an unmarried domestic partner. This simple definition will spare us a great deal of costly and unnecessary litigation. Without this amendment, the bill would invite lawsuits by workers who unsuccessfully seek leave on the basis of illness of their unmarried adult companions.

"Accordingly," the Secretary continued, "given this legislative history, the recommendations that the definition of spouse be broadened cannot be adopted."[39]

These two episodes highlight the potential impact that a change in Hawaiian marriage law could have on federal law.[40] Section 3 of H.R. 3396 responds to these considerations.

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[37] *See McConnell* v. *Nooner*, 547 F.2d 54 (8th Cir. 1976) (relying on *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971)).

[38] 29 U.S.C. § 2611(13)(1995).

[39] 60 Fed. Reg. 2180, 2191–92 (Jan. 6, 1995).

[40] For some other examples, *see* Wardle Prepared Statement at 10–14.

V. THE GOVERNMENTAL INTERESTS ADVANCED BY H.R. 3396

Of course, the foregoing discussion would hardly support—much less necessitate—congressional action if the Committee were supportive of (or even indifferent to) the notion of same-sex "marriage." But the Committee does not believe that passivity is an appropriate or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process. H.R. 3396 is a modest effort to combat that strategy.

In this section of the Report, the Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

A. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN DEFENDING AND NURTURING THE INSTITUTION OF TRADITIONAL, HETEROSEXUAL MARRIAGE

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony;* the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[41]

When Justice Scalia recently quoted this passage in his dissenting opinion in *Romer* v. *Evans,* he wrote: "I would not myself indulge in such official praise for heterosexual monogamy, because I think it is no business of the courts (*as opposed to the political branches*) to take sides in this culture war."[42] Congress, of course, is one of the "political branches," and the Committee believes that it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.

H.R. 3396, is appropriately entitled the "Defense of Marriage Act." The effort to redefine "marriage" to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.[43] To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status.[44] Is it, as many advocates of same-sex

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[41] *Murphy* v. *Ramsey,* 114 U.S. 15, 45 (1885) (emphasis added)(rejecting constitutional challenge to a federal statute that denied the right to vote in federal territories to persons involved in polygamous relationships).

[42] *Romer* v. *Evans,* 116 S. Ct. 1620, slip op. at 18 (1996) (Scalia, dissenting) (emphasis added).

[43] *See, e.g.,* William J. Bennett, "But Not a Very Good Idea, Either," *The Washington Post,* May 21, 1996, at A19 ("Recognizing the legal union of gay and lesbian couples would represent a profound change in the meaning and definition of marriage. Indeed, it would be the most radical step ever taken in the deconstruction of society's most important institution.").

[44] *See, e.g., Baehr,* 852 P.2d at 59 (providing partial list of marital benefits provided under Hawaiian law).

"marriage" claim, to grant public recognition to the love between persons?[45] We know it is not the mere presence of love that explains marriage, for as Professor Hadley Arkes testified:

> There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves because they are not . . . expressed in marriage.[46]

No, as Professor Arkes continued:

> The question of what is suitable for marriage is quite separate from the matter of love, though of course it cannot be detached from love. The love of marriage is directed to a different end, or it is woven into a different meaning, rooted in the character and ends of marriage.[47]

And to discover the "ends of marriage," we need only reflect on this central, unimpeachable lesson of human nature:

> We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, *it is hard to detach marriage from what may be called the "natural teleology of the body": namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.*[48]

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.

Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the connection between marriage and children:

> The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throughout history. Why is marriage our most universal social institution, found prominently in

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[45] *See, e.g.*, Prepared Statement of Andrew Sullivan ("Sullivan Prepared Statement") at 2, Subcommittee hearing (gay advocate of same-sex "marriage" stating: "People ask us why we want marriage, but the answer is obvious. It is the same reason that anyone would want marriage. After the crushes and passions of adolescence, some of us are lucky enough *to meet the person we truly love.* And we want to commit to that person in front of our family and country for the rest of our lives. It's the most natural, the most simple, the most human instinct in the world.") (emphasis added).

[46] Prepared Statement of Hadley Arkes, Ney Professor of Jurisprudence and America Institutions, Amherst College ("Arkes Prepared Statement") at 11, Subcommittee Hearing.

[47] *Id.*

[48] *Id.* at 11–12 (emphasis added); *see also* Bennett, *The Washington Post*, May 21, 1996, at A19 ("'Marriage' is not an arbitrary construct; it is an 'honorable estate' based on the different, complementary nature of men and women—and how they refine, support, encourage, and complete one another.").

> virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity.[49]

And from this nexus between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:

> Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.[50]

That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

There are two standard attacks on this rationale for opposing a redefinition of marriage to include homosexual unions. First, it is noted that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children.[51] But this is not a serious argument. Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so. Such steps would be both offensive and unworkable. Rather, society has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children.

Second, it will be objected that there are greater threats to marriage and families than the one posed by same-sex "marriage," the most prominent of which is divorce. There is great force in this argument—as the Council on Families has noted:

> The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed par-

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[49] *"Marriage in America: A Report to the Nation"* 10 (Council on Families in America 1995), *reprinted in* David Popenoe, et al., eds., "Promises To Keep: Decline and Renewal of Marriage in America" 303 (Rowman & Littlefield 1996).

[50] *Id.; see also* Arkes Prepared Statement at 12 ("We do not need a marriage to mark the presence of love, but a marriage marks something matchless in a framework for the begetting and nurturance of children. It means that a child enters the world in a framework of lawfulness, with parents who are committed to her care and nurturance for the same reason that they are committed to each other."); Barbara Dafoe Whitehead, "The War Between the Sexes," *The American Enterprise* 26 (May/June 1996) ("Marriage is the central cultural resource for reconciling men and women's separate natures and different reproductive strategies. Indeed, the most important purpose of marriage is to unite men and women in a formal partnership that will last through the prolonged period of dependency of a human child."); Hillary Rodham Clinton, "It Takes a Village" 50 (Simon & Schuster 1995) ("Although the nuclear family, consisting of an adult mother and father and the children to whom they are biologically related, has proven the most durable and effective means of meeting children's needs over time, it is not the only form that has worked in the past or the present.").

[51] *See, e.g.* Sullivan Prepared Statement at 4 ("You will be told that marriage is only about the rearing of children. But we know that isn't true. We know that our society grants marriage licenses to people who choose not to have children, or who, for some reason, are unable to have children.").

> enthood—has failed. It has created terrible hardships for children, incurred insupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

But the fact that marriage is embattled is surely no argument for opening a new front in the war. Indeed, it is precisely now, when marriage and the family are most in need of nurturing and care, that we should be most wary of conducting new experiments with the institution. As William Bennett, commenting on same-sex "marriage," has observed:

> The institution of marriage is already reeling because of the effects of the sexual revolution, no-fault divorce and out-of-wedlock births. We have reaped the consequences of its devaluation. It is exceedingly imprudent to conduct a radical, untested and inherently flawed social experiment on an institution that is the keystone in the arch of civilization.[52]

In short, government has an interest in defending and nurturing the institution of traditional marriage, and H.R. 3396 advances that interest.[53]

B. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN DEFENDING TRADITIONAL NOTIONS OF MORALITY

There are, then, significant practical reasons why government affords preferential status to the institution of heterosexual marriage. These reasons—procreation and child-rearing—are in accord with nature and hence have a moral component. But they are not—or at least are not necessarily—moral or religious in nature.

For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This

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[52] Bennett, *The Washington Post*, May 21, 1996, at A19.

[53] Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality. While there is controversy concerning how sexual "orientation" is determined, "there is good reason to think that a very substantial number of people are born with the potential to live either gay or straight lives." E.L. Pattullo, "Straight Talk About Gays," *Commentary* 21 (December 1992). "[R]eason suggest[s] that we guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop." *Id.* at 22; *see also* Bennett, *The Washington Post* A19 (May 21, 1996) ("Societal indifference about heterosexuality and homosexuality would cause a lot of confusion."); Deneen L. Brown, "Teens Ponder: Gay, Bi, Straight? Social Climate Fosters Openness, Experimentation," *The Washington Post* A1 (July 15, 1993) (recounting interviews with dozens of teenagers, school counselors, and parents regarding increased "sexual identity confusion" apparently reflecting increasing social acceptance of homosexuality). Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality, for as Dr. Pattullo notes, "to the extent that society has an interest both in reproducing itself and in strengthening the institution of the family . . . there is warrant for resisting the movement to abolish all societal distinctions between homosexual and heterosexual." Pattullo, *Commentary* at 23.

judgment entails both moral disapproval of homosexuality,[54] and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. As Representative Henry Hyde, the Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396: "[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate. . . . And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral."[55]

It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

C. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PROTECTING STATE SOVEREIGNTY AND DEMOCRATIC SELF-GOVERNANCE

The Committee is struck by the fact that this entire issue of same-sex "marriage," like so much of the debate related to matters of sexual morality, is being driven by the courts. Of course, by declaring the right to an abortion to be constitutionally protected, the federal courts have largely assumed control over the course of abortion law in this country. And whether one agrees or disagrees with the Court's jurisprudence in that area, all must concede that as the degree of court involvement increases, to that extent democratic self-governance over such matters is diminished.

In some contexts, of course, it is legitimate for courts to take precedence over decision-making by the representative branches of government. But what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-assigned or authorized role. As Professor Arkes testified before the Subcommittee on the Constitution, in the area of sexual morality, "we have a campaign [being] waged to transform the culture through the law, or through the control of the courts." He suggests, further, that this "program of cultural change cannot be accompanied through legislatures and elections."

> No voting public in this country has ever voted to install abortion on demand at every stage of pregnancy, and it is hard to imagine a scheme of same-sex marriage voted in

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[54] *See, e.g., Bowers* v. *Hardwick* 478 U.S. 186, 196 (1986) (rejecting constitutional challenge to Georgia law criminalizing homosexual sodomy and holding that the law served the rational purpose of embodying "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."); "The Homosexual Movement; A Response by the Ramsey Colloquium," *First Things* 15 (March 1994) (noting that "the Jewish and Christian traditions have, in a clear and sustained manner, judged homosexual behavior to be morally wrong.").

[55] "*Markup Session: H.R. 3396, the Defense of Marriage Act,*" Committee on the Judiciary, Subcommittee on the Constitution, 104th Cong., 2d Sess. 87 (May 30, 1996) (Statement of Chairman Hyde); *see also* Remarks by President Bill Clinton at the National Prayer Breakfast, 32 Weekly Comp. Pres. Doc. 135 (Feb. 5, 1996) (emphasis added):

[W]e know that ultimately this is an affair of the heart—an affair of the heart that has enormous economic and political and social implications for America, but, most importantly, *has moral implications, because families are ordained by God as a way of giving children and their parents the chance to live up to the fullest of their God-given capacities.* And when we save them and strengthen them, we overcome the notion that self-gratification is more important than our obligations to others; we overcome the notion that is so prevalent in our culture that life is just a series of response to impulses, and instead is a whole pattern, with a fabric that should be pleasing to God.

> by the public in a referendum. These things must be imposed by the courts, if they are to be imposed at all, and that concert to impose them has been evident, on gay rights, over the past few years.[56]

The Defense of Marriage Act is motivated in part by a desire to protect the ability of elected officials to decide matters related to homosexuality, Again, Professor Arkes captures the point:

> Against the concert of judges, remodeling on their own laws on marriage and the family, the Congress weighs in to supply another understanding, and a rival doctrine. But it happens, at the same time, to be an ancient understanding and a traditional doctrine. The Congress would proclaim it again now, and suggest that the courts take their bearing anew from this doctrine, state anew, brought back and affirmed by officers elected by the people.[57]

By taking the Full Faith and Credit Clause out of the legal equation surrounding the Hawaiian situation, Congress will to that extent protect the ability of the elected officials in each State to deliberate on this important policy issue free from the threat of federal constitutional compulsion.

The Committee was favorably impressed by Rep. Tom's testimony on this point of democratic self-governance:

> . . . I do know this: No single individual, no matter how wise or learned in the law, should be invested with the power to overturn fundamental social policies against the will of the people.
>
> If this Congress can act to preserve the will of the people as expressed through their elected representatives, it has the duty to do so. If inaction by the Congress runs the risk that a single judge in Hawaii may re-define the scope of federal legislation, as well as legislation throughout the other forty-nine states, *failure to act is a dereliction of the responsibility you were invested with by the voters.*[58]

And again:

> Changes to public policies are matters reserved to legislative bodies, and not to the judiciary. It would indeed be a fundamental shift away from democracy and representative government should a single justice in Hawaii be given the power and authority to rewrite the legislative will of this Congress and of the several states, based upon a fun-

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[56] Arkes Prepared Statement at 18. Professor Arkes' statement was prepared before the Supreme Court issued its decision in *Romer* v. *Evans,* 116 S. Ct. 1620 (1996), a decision that must serve as Exhibit A is supported of the phenomenon he describes. *See infra* "A Short Note on *Romer* v. *Evans*"; *see also Romer,* slip op. at 1 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite."); *id.* at 2 ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are elected, pronouncing that 'animosity' toward homosexuality is evil.").

[57] Arkes Prepared Statement at 25; *see also id.* at 26 ("The Congress, with this move, brings this issue back into a public arena of deliberation; it makes this a subject of discussion on the part of citizens, and not merely of judges and lawyers.").

[58] Tom Prepared Statement at 3 (emphasis added).

damentally flawed interpretation of the Hawaii State Constitution.

Federal legislation to prevent this result is both necessary and appropriate.[59]

The Committee fully endorses the views expressed by Rep. Tom. It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. H.R. 3396 advances this most important government interest.

D. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PRESERVING SCARCE GOVERNMENT RESOURCES

Government currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the institution of marriage. While the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal obligations on the federal government.[60] For example, survivorship benefits paid to the surviving spouse of a veteran of the Armed Services plainly cost the federal government money.

If Hawaii (or some other State) were to permit homosexuals to "marry," these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and surviving spouses of homosexual "marriages" on the same terms as they are now available to opposite-sex married couples and spouses. To deny federal recognition to same-sex "marriages" will thus preserve scarce government resources, surely a legitimate government purpose.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on H.R. 3396 on May 15, 1996. Testimony was received from thirteen witnesses: Honorable Terrance W.H. Tom, Hawaii State House of Representatives; Honorable Edward Fallon, Iowa State House of Representatives; Honorable Marilyn Musgrave, Colorado State House of Representatives. Honorable Ernest Chambers, Nebraska State Senate; Honorable Deborah Whyman, Michigan State House of Representatives; Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College; Andrew Sullivan, Editor, The New Republic; Dennis Prager, Author and Radio Talk Show Commentator, KABC/Los Angeles; Nancy McDonald, Tulsa, Oklahoma; Lynn Wardle, Professor of Law, Brigham Young University Law School; Elizabeth Birch, Executive Director, Human Rights Campaign; Rabbi David Saperstein, Director, Religious Action Center, Union of American Hebrew Congregations; Jay Alan Sekulow, Chief Counsel, American Center For Law and Justice; with additional material submitted by Maurice Holland, Professor of Law, University of Oregon School of Law.

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[59] Tom Prepared Statement at 4.

[60] For a partial list of federal government programs that might be affected by state recognition of same-sex "marriage," *see* "Compilation and Overview of Selected Federal Laws and Regulations Concerning Spouses," American Law Division, Congressional Research Service to the Honorable Tom DeLay, June 20, 1996.

COMMITTEE CONSIDERATION

On May 30, 1996, the Subcommittee on the Constitution met in open session and ordered reported the bill H.R. 3396, by a vote of 8 to 4, a quorum being present. On June 11 and 12, 1996, the Committee met in open session and ordered reported favorably the bill H.R. 3396 without amendment by a vote of 20 to 10, a quorum being present.

VOTE OF THE COMMITTEE

The committee then considered the following amendments, none of which was adopted.

1. An amendment by Mr. Frank to strike the definition of "marriage" and "spouse" (Section 3) from the bill. The amendment was defeated by a 13–19 rollcall vote.

ROLLCALL VOTE NO. 1

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mr. Conyers	Mr. Moorhead
Mrs. Schroeder	Mr. Sensenbrenner
Mr. Frank	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Mr. Becerra	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
Ms. Waters	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher

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March 8, 1995

MEMORANDUM

TO: Representative Norman R. Rokeberg

FROM: Carol R. Vandor
Legislative Analyst

RE: **Legislative History of AS 25.05.011 (Requirements for Marriage)**
Research Request 95.152

You asked for a legislative history of AS 25.05.011 which addresses marriage requirements. Alaska Statute 25.05.011 states that marriage is a civil contract requiring a license and solemnization which may be entered into by a person who is 18 years of age or older; those who qualify for a license under section 171[1]; or a member of the armed forces of the U.S. while on active duty.

This provision has been simplified over the years. Initially, it established a minimum age for a *male* as 21 years and for a *female* as 18 years. In 1970 the minimum age of a male was lowered to 19. In 1974 the legislature amended the law again to specify that a *person*, rather than a male or female, be at least 19 years of age. A year later the minimum age was lowered to 18, and members of the armed forces on active duty were included.

Alaska Statute 25.05.011 traces its origin to a territorial law (§ 21-1-1) which read

> 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 who are otherwise capable; provided, however, that no person shall be joined in marriage in this Territory until a license shall have been obtained for that purpose from a duly appointed and qualified United States Commissioner, or Marriage Commissioner as provided by Section 1211, Compiled Laws of Alaska, 1933 [§ 21-1-31 herein]. That nothing in Section 1189, Compiled Laws of Alaska, 1933, as amended [§ 21-1-11 herein], shall prevent a Marriage Commissioner from issuing a marriage license.

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[1]AS 25.05.171 addresses persons capable of consenting to marriage, minimum ages, and consent of parents or guardian.

After statehood, the legislature began to adopt territorial laws as Alaska statutes. The territorial law was revised somewhat and formally adopted as a state law by Chapter 1 SLA 1963. It was renumbered as AS 25.05.010 which read

> Marriage is a civil contract, which may be entered into by males of the age of 21 years, and females of the age of 18 years who are otherwise capable. However, no person shall be joined in marriage in the state until he obtains a license from a person authorized by law to issue marriage licenses.

Section 1, Chapter 58 SLA 1963, repealed AS 25.05.010 and enacted AS 25.05.011 as follows:

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> (1) a male who is 21 years of age or older with a female who is 18 years of age or older, who are otherwise capable, or
>
> (2) those who qualify for a license under sec. 171 of this chapter.
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Section 9, Chapter 245 SLA 1970 amended AS 25.05.011(a)(1) to read (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> **(1) a male who is 19 years of age or older with a female who is 18 years of age or older, who are otherwise capable, or**
>
> (2) those who qualify for a license under § 171 of this chapter.
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Section 92, Chapter 127 SLA 1974 amended AS 25.05.011(a)(1) to read (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> **(1) a person who is 19 years of age or older, who is otherwise capable, or**
>
> (2) those who qualify for a license under § 171 of this chapter.
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Section 1, Chapter 28 SLA 1975 amended AS 25.05.011(a) to read (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> **(1) a person who is 18 years of age or older, who is otherwise capable, or**
>
> (2) those who qualify for a license under § 171 of this chapter, or
>
> **(3) a member of the armed forces of the United States while on active duty.**
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Minor revisions were made in the law after 1977. Alaska Statute 25.05.011 currently reads (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization that may be entered into by
>
> (1) a person who is 18 years of age or older, who is otherwise capable,
>
> (2) those who qualify for a license under **AS 25.05.171**, or
>
> (3) a member of the armed forces of the United States while on active duty.
>
> **(b)** A person may not be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. A marriage performed in this state is not valid without solemnization as provided in this chapter.

Copies of the session laws and the replacement statutes are attached. We hope this information is useful to you. If we may be of further assistance, please contact this office.

Attachments

JUNEAU EMPIRE

Alaska should ban same-sex marriages

While Hawaii argues its case in court against issuing marriage licenses to same sex-couples and California flirts with the issue by setting up "domestic partner registries," legislators here have been considering a bill that would outlaw such marriages in Alaska.

On Thursday, the Senate approved the legislation, Senate Bill 308, by a 16-3 margin.

Juneau Democrat and Senate Minority Leader Jim Duncan, who opposes same-sex marriages, voted against the bill because, he said, such marriages already are prohibited by state law.

"We're really correcting a nonproblem," he said. "I really think this causes a controversy that doesn't need to be caused."

But proponents argue the bill is necessary because it extends the prohibition to include marriages in other states.

Anchorage Sen. Loren Leman, who supports the measure, said, "It's important that be clearly stated as Alaska public policy."

Similar legislation is being considered in 15 other states because of the Hawaii court case that could legalize same-sex marriages. Three already have passed such laws.

Opponents claim the bill is an anti-gay proposal, while supporters say it reaffirms the moral value of traditional marriages – those entered into by one man and one woman – and provides protection against lawsuits like the one in Hawaii.

Daniel Collison of the Southeast Alaska Gay and Lesbian Alliance said the measure was an attempt to legislate sexual preference.

"Does Senator Leman think that I and every other gay man and lesbian are going to go back into the closet and maintain the front of a heterosexual relationship?" Collison said. "The reality is more gay men and lesbians are coming out of the closet."

Every adult individual has a right to express his or her own sexual preference within certain limits. It is the matter of a state-sanctioned practice with which we have a concern.

The Juneau Empire supports this bill. For more than 200 years, this country's marriage laws have undergirded traditional one man-one woman marriages. In the 19th century, adherents to the Mormon faith practiced polygamy; that practice, however, was contrary to American tradition and laws were written to ban it. Even today, polygamy persists in other religions and cultures, but it remains banned in the United States. While religious freedom is an American tenet, courts and the Congress have limited certain practices when they are not deemed to be in the best interest of the family or society in general.

Likewise, the tradition of one man-one woman marriages is a strongly held one in this country. National polls have indicated nearly two-thirds of the American public opposes same-sex marriages. While others may differ from our views, we are not obligated to embrace their beliefs and practices, or make them a part of our legal system. Tradition is an integral part of our body of laws; those laws reflect the majority culture and the state has a right – no, an obligation – to write legislation that undergirds and protects it.

Alaska should continue to protect and reinforce the tradition of one man-one woman marriage; it is in the best interest of the larger culture. We urge the House to follow the Senate's example and pass this bill.

they were not entitled to two-step merit increases after they received outstanding evaluations. Although the employees' union contract provided only for one-step increases, the employees contend that they should have received two-step increases because the Personnel Rules allow two-step increases. Briefing in this appeal should be complete by June. AAG David Jones represents the state in this matter.

National Guard Employment Case Dismissed

We successfully moved to dismiss George Carpenter's case filed against the Department of Military and Veteran's Affairs. Mr. Carpenter claimed that DMVA failed to follow federal regulations on promotion of National Guard Members. Mr. Carpenter claimed that he was wrongfully denied promotion in the Guard and therefore retired at a lower grade than he should have attained, and received a smaller pension that he should have received. We filed a comprehensive motion to dismiss raising defenses relating to jurisdiction, justiciability, military immunity, and failure to exhaust administrative remedies. On January 16, 1998, Judge Sen Tan granted our motion to dismiss, in part. The court agreed that Mr. Carpenter had failed to exhaust his administrative remedies available from the Army Board for the Correction of Military Records. Judge Tan dismissed the case without prejudice so that Mr. Carpenter could pursue his administrative remedies in proceedings before the ABCMR. As the prevailing party we have filed a motion for costs and attorney's fees using the DOLaw "market rate" standard for attorney's fees. This case was handled by AAG Sarah Felix.

Court Rules Right to Chose Marriage Partner is Fundamental

In the case challenging the constitutionality of the statutory prohibition on same-sex marriage, the superior court in Anchorage rendered a major ruling in favor of the plaintiffs. The court held in essence that the same-sex plaintiffs had a basic right to be married, and that the prohibition would fall unless the state could show a compelling interest in it. Under constitutional analysis, the requirement to show a compelling interest is extremely difficult." In ruling as it did, the court ignored the state's arguments that the history of the Alaska Constitution and marriage in Alaska established that the constitution should not be interpreted as granting any right to same-sex marriage.

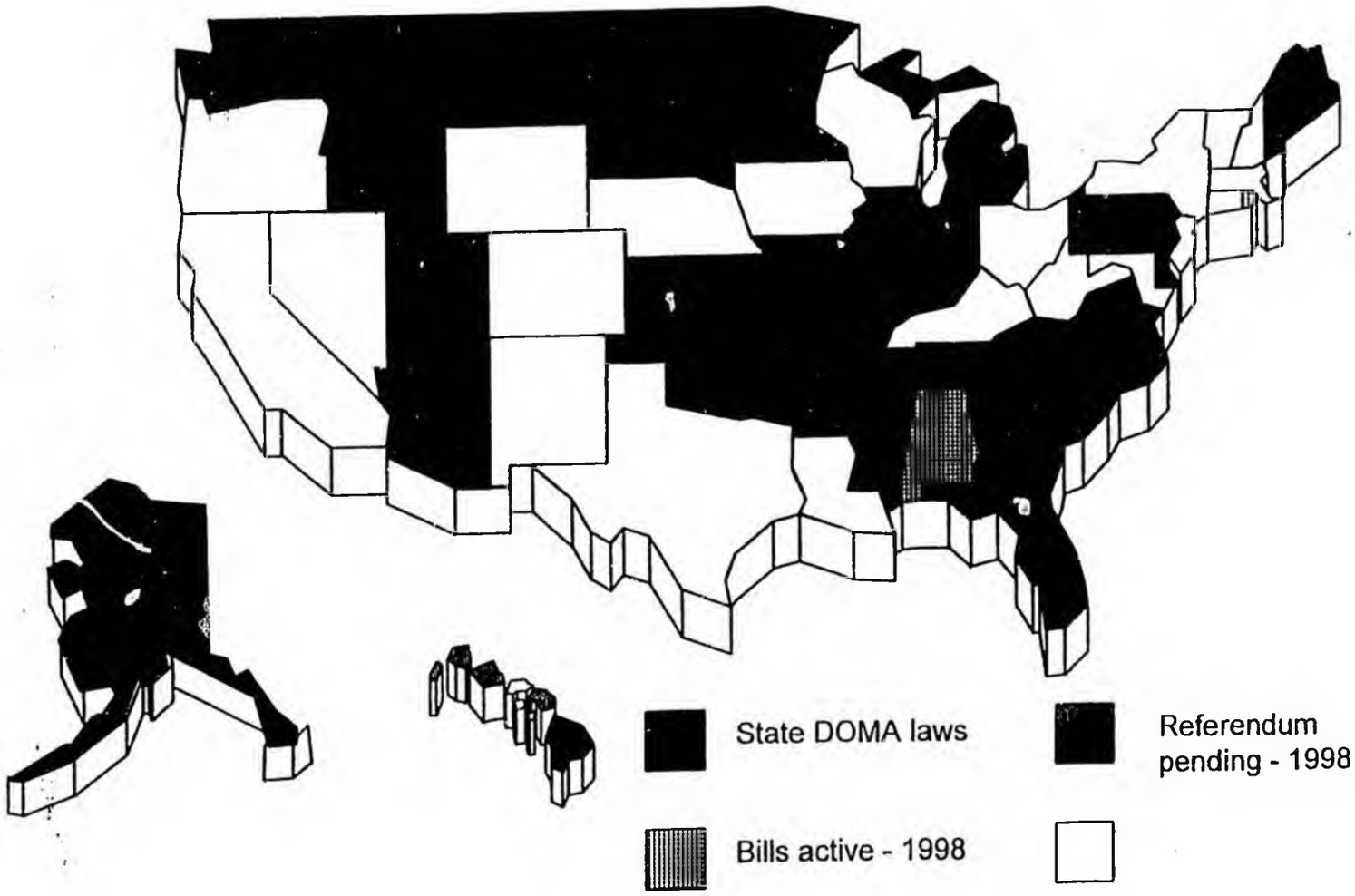
The state has filed a petition for review with the Alaska Supreme Court, asking the court to review the superior court's ruling on compelling state interest prior to the trial that the superior court ordered. In addition, the legislature, in response to the superior court's ruling, is moving on a constitutional amendment, to appear on the November general election ballot, that would place a prohibition on same-sex marriage in the Alaska Constitution. If that amendment passes the legislature and is approved by the electorate, it would bring this case to an end. This case is being handled by AAG John Gaguine

Human Services Section

Fairbanks Human Services Completes Termination Trials

The Fairbanks' office continues to be very busy with numerous court hearings and trials. AAG McKinney, after completing a relatively short termination trial in Barrow, returned to a six-day termination trial in Fairbanks. AAG Taylor-Welsh also just completed a ten-day termination trial. While all three trials involved long-term substance abuse by the parents and a history of incarceration of a least one of the parents, Ms. McKinney's second termination trial presented an interesting issue — whether the state was moving too quickly to termination. That case involved two infants, an eighteen month old who had been in custody since he was eight months old and his eight month old brother who had been in custody since birth. The parents argued, in essence, that the termination petition should be

State Defense of Marriage (DOMA)



Senate Floor Statement in Support of SJR 42

Senator Loren Leman (R-Anchorage)

Thursday, April 16, 1998 **Juneau, Alaska**

Mr. President, Senate Joint Resolution 42 will give Alaska voters the opportunity to decide the definition of the institution of marriage, and protect it in our constitution.

Why are we here today? I think all of us are aware that less than seven weeks ago, in the case of *Brause & Dugan vs. State of Alaska*, Superior Court Judge Peter Michalski discovered in the state constitution a right to "choose a life partner." In a decision rich with ironies, he concluded that the state's "failure... to provide *public* recognition" of a person's homosexual relationship is contrary to the state constitution's right to *privacy*

The Senator from downtown Anchorage [Johnny Ellis] talked about what he calls the "premature action" of this body in considering this resolution. Let me remind the members that the state of Hawaii has dealt with this for the past four years, in litigation going back and forth between its superior court and its supreme court. And it is just this year that its legislature is placing on the ballot, for a vote this fall, the very same issue. The same will hold true in Alaska – this could be tied up for years in litigation, along with all the costs associated with it.

Judge Michalski's decision set in motion a chain of events that could result in Alaska becoming the first and only political jurisdiction in the world to recognize marriage between homosexuals. No other state in the country recognizes homosexual marriage.

The federal government, in a bill signed by President Clinton, defines marriage as being a union that can exist only between one man and one woman. And I note this definition is controlling on more than 3,900 sections of federal statutes and regulations.

Marriage is a cultural institution with profound importance. Our existing definition, or one similar to it, is one that has served us through more than 6,000 years of recorded history. I recognize that there have been aberrations from this, even in our country. For a short time, in one territory, there was an experiment with polygamy. But over time, especially in the Western world, this has been the tradition.

Redefining the institution of marriage – even if that were possible – raises probably hundreds of cultural and legal questions. And I believe decisions of this magnitude should

be made either by the representatives of the people of Alaska, or the people of Alaska, not by unelected judges.

Some have suggested that the motivation behind this resolution, and also Senate Bill 308 that we had before us two years ago, is to discriminate against homosexuals, to deny them rights and protections they deserve under the law. That is just not true.

A plain reading of the amendment shows that it offers constitutional protection to the marriage statute that this Legislature approved by overwhelming margins. Senate Joint Resolution 42 protects the statute we enacted in 1996 – nothing more, and nothing less. And any other interpretation of the motives behind the amendment is simply not true.

The marriage relationship has enjoyed preferred status in the Western legal tradition because of the unique social benefits it offers. William Bennett, well-known author of the *Book of Virtues*, which perhaps many of you have read or are aware of, recently wrote that

> "Marriage is not an arbitrary construct; it is an 'honorable estate' based on the different, complementary nature of men and women – and how they refine, support, encourage, and complete one another."

He further stated that the recognition of homosexual marriages "would be the most radical step ever taken in the deconstruction of society's most important institution."

Mr. President, I submit that Judge Michalski is attempting to redefine something that really is impervious to redefinition. We can no more redefine marriage than we can redefine gender. I accept that reality. Judge Michalski does not. And that is why we are here today.

Some critics have said that if this amendment is sent to Alaska's voters for ratification, it will lead to a long, divisive debate with a lot of hateful rhetoric. I respectfully disagree – it doesn't need to be that way.

In the last month, I've had the opportunity to participate in statewide debates on this subject. One of them was on television, and one yesterday was on radio. I debated a [homosexual] activist, an attorney from Anchorage who is a very intelligent woman, and we were able to conduct a debate that was civil. And for the most part, the questions from people who called in were the same, even when people had strong beliefs on the issue.

We've seen that people can get very emotional about issues before the Legislature. But that's not a reason for not taking on an issue. In fact, I believe that this issue has probably generated more messages, more calls, more interest than anything else that we have before the Legislature today.

The issue of marriage is clearly important to many Alaskans. The people of Alaska deserve a chance to discuss and debate this issue – and I believe that it can and must be done with civility, and with respect for the dignity of all people.

Mr. President, I thought about this, and thought about digressing into some personal observations. It's not always easy to do that, because sometimes that strikes really close to home. But in light of the messages that I've received, and suggestions by some that I don't understand their lifestyle, that somehow I'm motivated by hate or fear, I just want to share something from my own past, from my own family.

I recognize that this can be, for some, a difficult issue. Although it's a difficult issue to take on, I support it, as do many people in this body [the Senate]. But I do it because I believe in it. I believe this is one of the most important actions that we can take in this Legislature.

I've been troubled by accusations from some critics who question my motives. I have received hateful messages. I've received very, very perverse messages, some that I wouldn't even share with my own staff, they were so bad. I don't attribute that to the people who are in the gallery today who are watching this, or perhaps the people who are watching on TV. I believe that is the result of a very few people, and I also recognize that there are people who are supporters of this who are capable of doing the same thing. I don't condone that, I don't encourage it, and I hope that it doesn't happen.

I have a few relatives – members of my extended family – who are homosexuals. My distant cousin is not an enemy. We love him. He's a member of what we call "Agrafena's children." That's the name we've given to our extended family. It comes from our Alutiq ancestor – our "great-great-great-great grandmother" who was married in Kodiak 200 years ago. And now our extended family not only is all around Alaska, but it's in other parts of the world.

I have another cousin who was a homosexual, and he recently died. And as I reflect on my adult life, I can think back in recent years to three men who were friends of mine who were homosexuals. And unfortunately, all three of them are dead today. Two of them died of AIDS, tragically.

In the past decade, I've made the acquaintance of another man who formerly was a homosexual, but he abandoned that lifestyle. Sadly, he too is dying of AIDS.

I mention these things, because I believe it's important for the public – and for us – to understand that we don't operate in a vacuum or debate these issues in a vacuum. I doubt there is a single member of this Senate who doesn't have a friend or relative who is a

homosexual. But even when we disagree with the moral choices another person makes, our relationship can still be rooted in love.

However, it is a false compassion to suggest that tolerance requires us to publicly recognize and sanction and confer special benefits on homosexual relationships.

I know there is an article in this morning's Anchorage paper about poll results. Recent polls tell us that 70 percent of Alaskans believe marriage should be limited to a union of one man and one woman.

I believe it is not appropriate for one superior court judge, and perhaps as few as three Supreme Court judges, all unelected, to redefine the institution of marriage and force it upon the 70 percent of Alaskans who don't want it redefined.

I'll close by reflecting on the words of Judge Andrew Kleinfeld on the Ninth Circuit Court of Appeals. I believe I shared this quote with the Senate earlier this year. In a dissenting opinion last year, he said:

> "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."

Mr. President, the definition of marriage is indeed one of the great questions of our time. It deserves to be resolved by the people and their elected representatives. SJR 42 will allow that process to happen. I encourage all my colleagues to support it.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAY BRAUSE and GENE DUGAN,

Plaintiffs,

vs.

BUREAU OF VITAL STATISTICS, ALASKA DEPARTMENT OF HEALTH & SOCIAL SERVICES, and the ALASKA COURT SYSTEM,

Defendants.

Case No. 3AN-95-6562 CI

MEMORANDUM AND ORDER

Plaintiffs Jay Brause and Gene Dugan are men who sought and have been denied a license to marry each other by the State of Alaska. They subsequently filed a complaint against the Bureau of Vital Statistics, the Alaska Department of Health and Social Services, and the Alaska Court System. Plaintiffs' action seeks a declaration establishing that the relevant statutes prohibiting same-gender marriage violate Alaska's Constitution, and an injunction that prevents the state from applying or enforcing the statutes. The parties both move for summary judgment. The plaintiffs seek a ruling on the level of scrutiny to be applied in review of the Marriage Code; the defendants move for complete summary judgment. The parties agree that the decisions before the court are purely issues of law.

The plaintiffs' present motion for summary judgment seeks a decision that the Code's prohibition implicates the privacy and equal protection provisions of the Alaska Constitution, thus

requiring a showing of a compelling state interest to withstand plaintiffs' claim that the Code's ban on same-sex marriage is unconstitutional.

The court finds that marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right. The state must therefore have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.

STATEMENT OF FACTS

On August 4, 1994, Mr. Brause and Mr. Dugan completed and filed an application for a marriage license. The Office of Vital Statistics denied the application. Presiding Judge Karl Johnstone had previously issued a policy directive stating that "a marriage license shall not be issued for the purpose of marrying two persons of the same sex" since "marriage between two persons of the same sex is not contemplated by our statutory scheme." The parties agree that the directive correctly interpreted the Marriage Code as it existed at the time and that it is consistent with recent amendment of the Code.

Except for being of the same sex, plaintiffs have met all statutory requirements for obtaining a marriage license.

DISCUSSION

The current provision of the Alaska Marriage Code, A.S. 25.05.011(a), states: "Marriage is a civil contract entered into

by one man and one woman that requires both a license and a solemnization." A.S. 25.05.013 adds:

> (a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.
>
> (b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Brause and Dugan argue that the statutory ban on same-sex marriage violates the Alaska Constitution's guarantee of the right to privacy and equal protection.

The plaintiffs' motion challenges the very definition of marriage found in the Code. Though that definition contains notions with which many are familiar, for example, that marriage means the union of one man and one woman, that is not the end of the inquiry. Indeed, it is the definition of marriage itself which the court must test as a result of plaintiffs' challenge. It is not enough to say that "marriage is marriage" and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with. In some parts of our nation mere acceptance of the familiar would have left segregation in place. In light of Brause and Dugan's challenge to the constitutionality of the relevant statutes, this court cannot defer to the legislature or familiar notions when addressing this issue.

Before addressing the privacy and equal protection claims

presented, it is useful to first review the basic role of the state in marriage.

The state issues marriage licenses, solemnizes marriages and keeps a docket of applications for marriage licenses available for public review. The state also distributes basic information to applicants about the effects alcohol, drugs and battering can have upon a fetus. Other than that, the state does not become involved, except to require that the applicants be at least 18 years of age or, if minors, have the proper consents or be on active duty with the armed services. The Marriage Code now specifically prohibits same-sex marriage, bigamy and marrying anyone closer than one's first cousin. Applicants for marriage are under a duty to swear that the contemplated marriage meets the requirements of the law, give their names, relationship, occupations, ages (and, where appropriate, guardians), and give descriptions of any prior marriages and their dissolutions. The issuing officer has a duty to issue the license if "all requirements are met and there is no legal objection to the contemplated marriage, and neither party is under the influence of intoxicating liquor or otherwise incapable of understanding the seriousness or the proceeding . . ." A.S. 25.05.111. The license is to issue after a three day waiting period and is good for three months thereafter. A.S. 25.05.091; A.S. 25.05.121.

This description of the state's role in marriage focuses on the establishment of the marriage itself and is not inclusive, nor is it intended to be, of the many rights and consequences

established by the state on behalf of those who are married. Once married, the state provides benefits and imposes duties that are significant and valuable to society as well as to the individual members of the marriage. For a list of statutory benefits of marriage, see the appendix to plaintiffs' reply brief identified as "Revised Exhibit 4." Further evidence of the importance of marriage and the issuance of marriage licenses is found in A.S. 25.05.331 which makes it a misdemeanor to willfully and wrongfully refuse to issue a license.

Once the role of the state in creating and acknowledging marriages is recognized, the next step is to determine whether the state is infringing constitutionally protected rights in the way it exercises its power over marriage. The court must now test the legal definition of marriage to determine whether the definition itself, a definition that excludes persons of the same sex who want to marry, is constitutional. As further discussed below, the same principle that requires the state to have a compelling purpose before it can dictate choices related to personal appearance, requires the state to have a compelling purpose before it can define marriage to exclude partners of the same sex.

A. Right to Privacy

Alaska amended its Constitution in 1972 to explicitly guarantee the right to privacy. Article I, Section 22 reads in part: "The right of the people to privacy is recognized and shall not be infringed." Brause and Dugan contend that, insofar as the

above cited statutes prevent same-sex marriage, they violate Alaska's guarantee of the right to privacy.

Brause and Dugan cite two primary cases for their argument that a prohibition of same-sex marriage implicates an Alaskan's constitutional right to privacy. In Breese v. Smith, 501 P.2d 159 (Alaska 1972), the Alaska Supreme Court invalidated a high school hair length limitation and stated that the core of the concept of liberty is the right to control one's personal appearance or, more broadly, the right to be let alone. 501 P.2d at 166-67. Because the hair length requirement implicated such an important right, the Supreme Court required the school to show a compelling interest for its existence. When the school was unable to do so, the limitation was struck down.

Secondly, Brause and Dugan cite Ravin v. State, 537 P.2d 494 (Alaska 1974). The court in Ravin recognized a fundamental right to privacy in one's home and declared unconstitutional a state statute that prohibited marijuana possession by an adult for personal use in the home.

The plaintiffs' contention that their privacy is violated by a refusal of the State of Alaska to recognize and allow their marriage may not instinctively conform to common connotations of privacy, since, after all, they seek public recognition of a same-sex marriage. Privacy is commonly understood to mean seclusion, secrecy, or being left to one's personal affairs. These connotations of privacy may seem to make plaintiffs' claim of violation of privacy self-defeating, as the making public of a

relationship is not what one thinks of as the right to be let alone. Here Brause and Dugan claim a right to state recognition of their relationship. What they seek is clearly a public act and important for its public nature as much as for the other legal consequences which attend it.

Griswold v. Connecticut, 381 U.S. 479 (1965), demonstrates how government regulation can intrude improperly into the personal zone of intimacy protected by privacy. There the Supreme Court found that the state's prohibition of the distribution of information regarding contraceptives interfered with the right of marital partners to make intimate personal decisions about conceiving children and practicing birth control. The Court struck down the law for being an impermissible encroachment on the right to privacy. However, in Alaska, the history of the cases interpreting the right to privacy demonstrate that very public conduct may also be protected by the right to privacy, and that the right to privacy reaches beyond simple protection from government intrusion into one's intimate affairs.

Breese is an example of how government regulation improperly encroached on the exercise of the right to privacy and the public ramifications of that right. The Court held that hair length requirements of a public school interfered with the fundamental right of the student to determine his own personal appearance. According to the Court, the government could not interfere with the fundamental right to determine one's personal appearance - a right protected by privacy - without demonstrating a compelling state

interest. Though how one looks is a very public fact, the decision about one's personal appearance is personal, and therefore protected by the right to privacy.

At stake here is whether same-sex marriage can be denied by the state without violating fundamental rights, including the fundamental right to privacy. It is undisputed that marriage between persons of opposite gender is a fundamental right. See, e.g., Griswold; Loving v. Virginia, 388 U.S. 1 (1967). The question presented by this case is whether the personal decision by those who choose a mate of the same gender will be recognized as the same fundamental right. Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make. Indeed, the marriage license and the marriage ceremony themselves make clear that this must be a choice freely made by the individual. Certainly the choice of a life partner is as important and personal as the choices involved in determining one's personal appearance.

When the Supreme Court of Hawaii in Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993), addressed same-sex marriage, it noted that:

> [W]e do not believe that a right to same sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .

852 P.2d at 57.

The Hawaii court could reach such a conclusion because of the question it chose to ask. It is self-evident that same-sex marriage is not "accepted" or "rooted in the traditions and collective conscience" of the people. Were this not the case, Brause and Dugan and the plaintiffs in Baehr would not have had to file complaints seeking precisely this right. The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.

Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy. Failure of the state to provide public recognition of that private choice, whether it is the choice of a life partner of the opposite sex or of the same sex, is analogous to the unwillingness of the school in Breese to allow the presence of a student who made a personal choice to wear long hair.

Government intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual. This the Constitution does not allow unless the state can show a compelling interest "necessitating the abridgment of the . . . constitutionally protected right." Breese at 501 P.2d at 170.

B. Equal Protection

Brause and Dugan also assert that the relevant statutes deny them their rights as Alaskans to equal protection under the laws. Article I, Section 1 of the Alaska Constitution provides:

> Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal right, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article I, Section 3 goes on to prohibit the denial of civil rights on the basis of certain classifications:

> Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.

Whether a law violates the equal protection guarantees of the Alaska Constitution is determined by using the "sliding scale" test explained in State Dep't of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993):

> [W]e apply a sliding scale under which the applicable standard of review for a given case is to be determined by the importance of the individual right asserted and by the degree of suspicion with which we view the resultant classification scheme. As the right asserted becomes more fundamental or the classification scheme employed becomes more constitutionally suspect, the challenged law is subjected to more rigorous scrutiny at a more elevated position on our sliding scale.

[Citations omitted].

Brause and Dugan argue that the statutes prohibiting same-sex marriage should be at the highest end of the sliding scale, and therefore require the most rigorous scrutiny, because they implicate the fundamental right to marry and because the classification scheme is based on sex.

1. The Fundamental Right to Choose One's Life Partner

There is no dispute that the right to marry is recognized as fundamental. Today the court has recognized that the personal choice of a life partner is fundamental and that such a choice may include persons of the same sex. When the United States Supreme Court first characterized the right to marry as fundamental in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), it linked the right to marry to the right to procreate, being faced, as it was, with a case involving the sterilization of prisoners. Similarly, in Zablocki v. Redhail, 434 U.S. 374 (1977), the court was faced with a law that required a marriage applicant to prove he was up to date on his child support for children of his previous marriage before he could obtain a marriage license. The court focused on the decision to marry and have children as deserving of at least the protection allowed a woman in deciding whether to seek an abortion or to raise a child in illegitimacy:

> Surely, a decision to marry and raise a child in a traditional family setting must receive equivalent protection.

434 U.S. at 385.

The court thus recognizes that procreation has been an important part of the U.S. Supreme Court's decisions that have found the right to marry fundamental. However, just as the "decision to marry and raise a child in a traditional family setting" is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected.

It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice Brause and Dugan seek to have recognized. The same constitution protects both.

Thus, today's decision finds a person's choice of life partner to be a fundamental right. The consequence of this decision is that any limitations on this right are subject to the strict scrutiny standard established by the Alaska Supreme Court.

2. Classification Based on Sex

The court, having found the decision to choose one's life partner to be a fundamental right, has concluded that the strict scrutiny test applicable to fundamental rights applies to its review of the State's prohibition of same-sex marriages.

Were the right to choose one's life partner not fundamental, the court would need to determine whether the Code raised classification issues. Were this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications. That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.

CONCLUSION

Having found that the Marriage Code implicates constitutional provisions, the court grants the plaintiffs' motion for summary judgment. The state's motion for summary judgment is denied.

The parties are directed to set necessary further hearings to determine whether a compelling state interest can be shown for the ban on same-sex marriage found in the Alaska Marriage Code.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27th day of February, 1998.

Peter A. Michalski

PETER A. MICHALSKI
Superior Court Judge

I certify that on:

2-27-98

a copy of the above was mailed to each of the following at their addresses of record.

R. Wagstaff
E. Lakey
AG-Cangiuine

Secretary/Clerk

SJR 42 TESTIMONY
HOUSE FINANCE COMMITTEE
May, 1998

My name is Marsha Buck and I am here to ask you to OPPOSE SJR 42. I am the co-chair of PFLAG Juneau. PFLAG stands for Parents, Families, and Friends of Lesbians and Gays. There are four active and growing PFLAG chapters here in Alaska. I am involved in PFLAG because I have a very wonderful, very bright bisexual daughter.

My daughter, Lys, is a foods microbiologist. She graduated from Chugiak High School up in Eagle River as salutatorian of her class. She met her partner, Liz, when she was at Oklahoma State finishing her masters degree. We could not have wished for a better spouse for our daughter. Liz is also bright and talented. She is a plant geneticist, a musician, and she makes gorgeous quilts. Lys and Liz are responsible women, active church members -- your ideal citizens.

Lys and Liz have done nothing to deserve hateful name calling. They have done nothing to warrant the possibility that they could lose their jobs without recourse to the law. They have done nothing to deserve the fact that neither of them can get health benefits from their jobs that cover them both. They have done nothing to deserve all the legal hassle and IRS hassle they are going through right now simply because they are buying their first home together. They have done nothing to deserve removal of their basic rights under the constitution, such as SJR 42 proposes.

Alaskans don't need to support same sex marriage to be able to see discrimination when it stares us in the face. Alaskans don't need to support same sex marriage to be able to understand that Lys and Liz will be hurt by the divisiveness and hateful rhetoric that will occur in our great state if SJR 42 ends up as a ballot measure. My wonderful daughter doesn't deserve what you are doing to her if you pass this resolution along. And to be honest, I don't think you ~~don't~~ need or want all the heated debate this resolution is going to continue to cause you if it is not stopped. Please do not send SJR 42 out of this committee.

Marsha Buck
8445 Kimberly St.
Juneau, AK 99801

Pam Stallup

I encouraged that same support of SURGE as a "Christian stance - no faith was banned or banned God's love for all - for all - but for inclusion unless not unless that we be not judged + love your neighbor as yourself

I was fortunate to move to Alaska with my parents the year of statehood. We immediately became part of the community + the Chapel by the Lake. Over the years I married, served the church as a deacon and Stephen Minister, directed the choirs, taught 25 years in the public schools, and raised three wonderful children.

Three wonderful, individual children. Each arrived with their own abilities, personalities, gifts. They have been Boy Scouts, paper boys, equestrians, debaters, Merit Scholars, Alumni Scholar. They are lawyer, a banker, and a high school student. They are married + single. They attend church, volunteer at homeless shelters, raise children. One is gay.

I love them all. Which of them should have fewer rights under the law? I worry for them all. And I especially fear for one. Our society laughs at gay jokes. Gay bashing + subtle bigotry are completely endorsed. And the hate I have of that churches personal

4/12/98

Fairbanks, AK p(1)

The Alaska State Legislature is considering an amendment to the Alaska Constitution, titled Senate Joint Resolution 42 (SJR 42), which would prohibit state recognition of same-sex marriages. We believe the proposed amendment encroaches on an Alaskan's right to privacy. We also believe the proposed amendment would undermine the state constitution's guarantee of equal rights and opportunities for all Alaskans. **We, the undersigned, urge all Alaska state legislators to vote against SJR 42.**

Signature	Printed Name	Mailing Address	Phone	E-mail address
Lorette K Rees	Lorette K. Rees	1968 Hilton Ave FBKS, AK	457-4119	Rees@alaska.net.com
Rose Pagh	Rose Pagh	1640 Gradell Ida's	479-3335	
Anne-Nahisha Pinchey	ANNE-NAHISHA PINCHEY	510 VAK RD # 8621B FBKS	479-0033	Kalav Tic@hotmail.com
Brian A Lawrence	BRIAN A LAWRENCE, I	5618 S LAWRENCE ST TACOMA WA 98409	253 474 8646	BLawrence@gowebway.com
Ilena Lee Cramer	ILENA LEE CRAMER	Box 81289 FBNX 99708	479-2136	IHA@PEARNET.COM
Wendy A Buckholz	Wendy Buckholz	Ave Ft Wainwright 99703	356-1385	Starks-27@Yahoo.com
Mary Lee	MARY MACKEY	PO Box 11 Eagle AK 99738	547-8829	mdan@polarnet.com
David R Benson	David R Benson	5618 S. Lawrence. ST Tacoma, WA 98409	(253) 474-8546	dupcom@Mindspring.net DLawrence@Gowebway.com
Jeffery D Walters	Jeffery D. Walters	P.O. Box 82705 FBKS. AK 99708	457-3876	wahfjdw@northstarnet.us
Crystal L Miles	Crystal Miles	3476 Shanley FBKS AK 99709		
Patrick McGill	PAT CAHILL	P.O. Box 60089 FBX AK 99706	479-7180	Kodiak@ptialaska.net
Jose Cuzco	José Cuzco	P.O. Box 72021 FBX AK	———	
Roland A Palin III	Roland A. Palin III	4347 9th St. #1 Ft. Wainwright	——	rpalin@mosquitonet.com
Sarah Palin	Sarah Palin	4347 9th St. #1 Ft. Wainwright	——	———
Debby Drong-Bjork	DEBBY DRONG-BJORK	BOX 333 ESTER AK 99725	479-3474	debbyb@ [illegible]
Martha A Stevenson	Martha Stevenson	785 Wilcox Ave FBK 99709	455-4569	
Joseph A Daly	Joseph A Daly	"	479 4569	
John E Davis	John E Davis	302 Cowles + P.O. 99701	456-2045	

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Fairbanks should save a copy and return to one of the following people or place: Rich Collins, Jeff Walters, Pete Pinney, Mark Schubauer, Lisa Slayton, Nancy Kailing, Mari [illegible]

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

Pam Stattler

I was fortunate to move to Alaska with my parents the year of statehood. We immediately became part of the community & the Chapel by the Lake. Over the years I married, served the church as a deacon and Stephen Minister, directed the choirs, taught 25 years in the public schools, and raised three wonderful children.

Three wonderful, individual children. Each arrived with their own abilities, personalities, gifts. They have been Boy Scouts, paper boys, equestrians, debaters, Merit Scholars, Alumni Scholars. They are lawyer, a banker, and a high school student. They are married & single. They attend church, volunteer at homeless shelters, raise children. One is gay.

I love them all. Which of them should have fewer rights under the law? I worry for them all. And I especially fear for one. Our society laughs at gay jokes. Gay bashing & subtle bigotry are completely endorsed. And the state I love & that cherishes personal

I'm encouraged that some parish support of SYR42 as a "Christian stance - my faith was learned & based on God's love for all - for better or worse gender not that he not be judged & how your neighbor as yourself

freedom is on the verge of an action that will create extreme divisiveness. The rhetoric will be ugly + hurtful. My fears for all my children increase at the prospect of a state vote on SJR 42.

This committee is in a position to deter that danger. There are many issues before the state that need the vote of the people. This is not one of them. It is the duty of the electorate + the legislature to protect the rights of all our citizens, of all our children.

None is less equal, less deserving, or less loved by me or God.

4/12/98

Fairbanks, AK p(1)

The Alaska State Legislature is considering an amendment to the Alaska Constitution, titled Senate Joint Resolution 42 (SJR 42), which would prohibit state recognition of same-sex marriages. We believe the proposed amendment encroaches on an Alaskan's right to privacy. We also believe the proposed amendment would undermine the state constitution's guarantee of equal rights and opportunities for all Alaskans. **We, the undersigned, urge all Alaska state legislators to vote against SJR 42.**

Signature	Printed Name	Mailing Address	Phone	E-mail address
Loretta K Rees	Loretta K Rees	1968 Hilton Ave FBKS. AK	452-4119	Rees@alaska.net.com
Rose Pagh	Rose Pagh	640 Gradell Ibbs	479-3335	
[illegible]	ANNE-NATASHA Pinkney	510 VAK RD # 8621B FBKS	479-0033	Kalaw76@hotmail.com
Brian A Lawrence	Brian A Lawrence	5618 S Lawrence ST TACOMA WA 98409	253 474 8546	Blawrence@gateway.com
Ilena Ie Cramer	ILENA IE CRAMER	Box 81289 FBNX 99708	479-2136	ILIA@POLARNET.COM
[illegible]	Wendy Buchholz	Box FT Wainwright 99703	356-1383	Starks-27@Yahoo.com
[illegible]	MARVIN COX	PO Box 11 Eagle AK 99738	547-8829	mdcox@polarnet.com
David R Brasa	David R Brasa	5618 S. Lawrence. ST Tacoma, WA 98409	(253) 474-8546	dubcon@mindspring.net blawrence@gateway.com
Jeffery D Walters	Jeffery D Walters	P.O. Box 82708 FBKS. AK 99708	457-3876	wahfjdw@northstarnet.com
Crystal L Miles	Crystal Miles	3476 Shanly FBKS AK 99709		
Patrick C Gill	PAT CAHILL	P.O. Box 60005 FBX. AK 99706	479-7180	Kasitsa@ptialaska.net
Jose Cuzco	José Cuzco	P.O. Box 70221 FBX AK		
Roland A. Palin III	Roland A. Palin III	4347 9th ST. #1 FT. WAINWRIGHT		SPALIN@ARMYSOLDIER.COM
Sandra Palin	Sandra Palin	4347 9th ST #1 Ft Wainwright		
Debby Drong-Bjork	DEBBY DRONG-BJORK	BOX 333 ESTER AK 99725	479-3479	debbyb@northstarnet.com
Martin A Stevenson	Martin Stevenson	785 Wilcox Ave FBK 99709	455-4569	
[illegible]	Joseph A Vetz	"	479 4569	
[illegible]	JOHN E DAVIS	302 Cowles + P.B. 99701	456-2048	

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4/12/98

Fairbanks, AK p(2)

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Signature	Printed Name	Mailing Address	Phone	E-mail address
	COERT OLMSTED	PO 83716 99708		
	DIANE ZENNER	PO Box 84223 99708		
	Lisa Sawyer	PO Box 51236 FBX AK 99708		
	JENNIFER MARKS	PO Box 10746 Fbx AK 99707		
	Mark Schuhauer	PO Box 82 Ester AK 99725		
	Heidi K. Benson	PO Box 82774 Fbks AK 99708		
	Laurie Aaronson	PO Box 84564 Fbks AK 99708		
	TYCHAN REXFORD L.	510 YUKON 85E7 FBKS AK 99709		
	CARLY CUMMINGS	305 Wedgewood Dr #A27 99701		
	Anita M. Lohr	P.O. Box 84067 Fbks, AK 99708		
	BONNIE HIVATIN	1108 O'CONNOR 99701	479-2107	
	Michael Solomon	1721 University Ave C-14		
	Paul Swan!	196 Hilton Ave		
	Malika Harper	1121 11th Ave Fbks AK	451-7665	
	TRAVIS GEIST	PO Box 82774 Fbks AK 99708		TAG7645@yahoo.com
	TRESSA MCGINNIS	1994 Badger		
	Mary Eichman	1420 Lacey St #3 Fbks		eichmanm@plane.com
	Robert Messer	P.O. Box 70234 FBKS, AK 99707	4526908	

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4/12/98

Fairbanks, AK p(3)

The Alaska State Legislature is considering an amendment to the Alaska Constitution, titled Senate Joint Resolution 42 (SJR 42), which would prohibit state recognition of same-sex marriages. We believe the proposed amendment encroaches on an Alaskan's right to privacy. We also believe the proposed amendment would undermine the state constitution's guarantee of equal rights and opportunities for all Alaskans. **We, the undersigned, urge all Alaska state legislators to vote against SJR 42.**

Signature	Printed Name	Mailing Address	Phone	E-mail address
	Colleen S Morel	P.O. Box 81197 FBKS, AK 99708	458-7079	
	Phil Cateron	837 9th Ave FBKS, AK 9970	457-2457	
	Volodya Reid	P.O Box 75115 FBKS, AK 99775	456-4369	FFWRE@UAF.EDU
	Mardi Medin	PO Box 82282 FBKS 99708	479.3727	fsmlc3@uaf.edu
	Isaac Medin	" "	"	fsiwc@uaf.edu
	BARBARA PRESCOTT	835 7th AVE FBKS 99701	457-2983	bhp@mosquito.net.com
	Leola Montoya	PO BOX 74368 FBKS 99707		AKLEOLA@ptialaska.NET
	Lenora Epperson	PO Box 71534 FBKS AK 99701	458-0283	FNLEP@UAF.edu
	Carol L. Gustafson	1237 27th FBKS 99701	457-7246	
	A. Ruth Ewen	P.O. Box 82156 FBKS 99708	W: 474-5207	FNARE@uaf.edu
	Jeffrey Wagner	731 Craig Ave FBK 99701	907-474-8057	
	Richard J Kemnitz	P.O.BOX 84734, FBKS 99708	457-9009	rkemnitz@polarnet.com
	Stephanie Schneider	[illegible]	474-6008	[illegible]
	MARK TAYLOR	#83711 FBKS, 99708		
	Katherine S Kowalski	Box 551		
	Anna Mickberg	PO Box 81332 Fairbanks AK 99708	479-0770	FSAMF@UAF.EDU
	Stephen Buchman	FBKS AK 99708		FSSCB@uaf.edu
	Lissa Rieger Fesen	2256 [illegible]	452-3444	[illegible]

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The Alaska State Legislature is considering an amendment to the Alaska Constitution, titled Senate Joint Resolution 42 (SJR 42), which would prohibit state recognition of same-sex marriages. We believe the proposed amendment encroaches on an Alaskan's right to privacy. We also believe the proposed amendment would undermine the state constitution's guarantee of equal rights and opportunities for all Alaskans. **We, the undersigned, urge all Alaska state legislators to vote against SJR 42.**

4/12/98

Fairbanks, AK p. (4)

Signature	Printed Name	Mailing Address	Phone	E-mail address
[illegible]	Lisa Slayton	Box 82315 FBX AK 99708	457-2787	lslayton@ptialaska.net
[illegible]	Deborah Villers	PO Box 165 Delta AK 99708		
[illegible]	Lynn Standley Lee	P.O. Box 10513 Fairbanks, AK 99	710 474-3603	
[illegible]	[illegible]	[illegible]	479 7514	
[illegible]	James Forrester	PO Box 71200 Fairbanks AK 9971	457-1615	
[illegible]	Rebecca J. Ikuc	1892 Kiska Dr Fbks AK 99709	(907) 474-1788	
[illegible]	Vicki Kohler	413 Oak Star Court Fbx 99712	479-4827	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Melinda Lyons	P. Box 3434 Fbks, AK 99707	452-5346	fsmls@uaf.edu
[illegible]	Anne Kraxberger	P.O. Box 75C278 Fbks, AK 99775	474-6666	fsmls@uaf.edu
[illegible]	Patricia M Mack	412 Barnard Fbks, AK 99701	452-4934	
[illegible]	Angela D Binkley	[illegible]	456-7461	ADBinkley@[illegible]
[illegible]	The Bookseller	3112 [illegible] Fbx AK 99701	456-1871	[illegible]
[illegible]	Baldwin Hall H	[illegible] #3 Fbk 99701	457-4660	Baldwin@alaskan.com
[illegible]	Tina D Lyons	1011 Cowles #47 Fbx AK 99775	456-1220	[illegible]
[illegible]	Kenta Stevens	P.O. Box 58439 FBKS, AK 99711	488-9231	
Veronica L. Belton	Veronica Belton	P.O. Box 58437 Fairbanks AK 99711	488 9231	
[illegible]	Nicole L. Sulami	1144 Sunset Drive Fairbanks AK 99709	452-4183	Nicole@mosquitonet.com

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4/12/98

Fairbanks, AK p. (5)

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Signature	Printed Name	Mailing Address	Phone	E-mail address
[illegible]				
Margaret Willett	Margaret Willett	959 Reindeer Drive 99709	455-1028	
Peter Bowers	Peter Bowers	959 Reindeer Dr. Fbks. 99709	" "	pbowers@polarnet.alaska.net
Arthur L. Bruhn	Arthur L. Bruhn	1191 Bruhn Rd. Fbx AK 99709		
[illegible]	[illegible]	2231 Linsa Lane Fbks 99709	479-6898	
Richard C. Thomas Jr.	Richard Thomas Jr.	POB 72107 Fbks AK 99707	476-1419	RTHomas@yahoo.com
Sarah McClellan	Sarah McClellan	494 Oakpark Way Fairbanks AK 99709	452-2577	ffsm@uaf.edu
Dede M. Tracy	Dede M. Tracy	PO Box 83117 Fairbanks AK 99708	474-4349	fsdmt2@uaf.edu
[illegible]	Bradley D. Snow	Box 81911 Fbx AK	479-6790	fsbds2@uaf.edu
John D. Hoch	John D. Hoch	2536 Linsa Land Fairbanks 99709	479-8368	JHoch@NorthStar.K12.AK.us
[illegible]	Lori Robinson	2536 Linda Ln Fairbanks AK 99709	479-8368	fflar@uaf.edu
Susan Galecave	Susan Galecave	P.O. Box 212 Ester AK 99725	479-8811	ffsmg@uaf.edu
Patricia Lyn Seifert	Patricia Lyn Seifert	P.O. Box 10-135, Fairbanks AK 99710	457-6981	fnpls@aurora.ak.edu
[illegible]	William Bradley	1301 Moya Lane 99712	457-8552	
Marysia Ortez	Marysia Ortez	PO Box 85335 99708	452-5949	mboz@ptialaska.net
[illegible]	Dana L. Richter	501 Summer Ave Fai. AK 99712	457-3924	
Scarlett Hutchison	Scarlett Hutchison	P.O. Box 81909 Fairbanks AK 99708	456-4125	scarlett@MosquitoNet.com
[illegible]	Richard Hutchison	1911 Wembley Rd Fairbanks AK 99709	456-4125	hutch@mosquitonet.com

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4/12/98

Fairbanks, AK p. 6

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Signature	Printed Name	Mailing Address	Phone	E-mail address
Barbara Braley	Barbara Braley	1301 Maya Lane Fairbanks, AK 99712	457-8857	bbraley@northstar.k12.ak.u
Geraldine Smith	Geraldine Smith	PO Box 35223 FWA 99703	455-7611	N/A
Teresa Sammons	Teresa Sammons	POB 72464 Fbks AK 99707	456-1418	tsammons@[illegible]
Tyana A. Redmond	Tyana A. Redmond	[illegible]	474-6932	[illegible]
Jane M Williams	JANE M. WILLIAMS	1048 NORRIS CIR FAIRBANKS 99712	457-4979	—
Christine McGarvin	Christine McGarvin	PO Box 83962 Fbks AK 99708	474-3766	
[illegible]	RUSSELL GOULD	PO Box 82962 FAIRBANKS, AK 99708	474-3766	rgould@infoinsights.com
Laurel McLaughlin	Laurel McLaughlin	Box 70019 Elks AK 99707	452-5734	
Suzanne L. Johnson	Suzanne L. Johnson	852 Cir Ave Elks AK 99707	452-6056	
Kathleen Dove	Kathleen Dove	3254 Rosie Creek Rd Fbks	479-3808	[illegible]
Rod S. Marsh	Rod S. Marsh	3254 Rosie Creek Rd. Fbx 99709	479-3808	
Helen Anne Myers	Helen Anne Myers	1329 Summit Dr FBKS 99712	457-1676	
Leif Johansen	Leif Johansen	3191 AMPER AVE FBKS AK 99709	451-7670	
Leanne Hatch	Mary Leanne Hatch	PO Box 70292 Fbx AK 99707	451-7670	
Richard Seifert	RICHARD SEIFERT	PO BOX 10935 Fbx AK 99710	474-7201	FFRDS@UAF.EDU
[illegible]	[illegible]	[illegible]	[illegible]	
[illegible]	JANA [illegible]	820 Billi Dr, Fbx 99712	455-5692	[illegible]
Kimberly A. Rogers	Kimberly Rogers	930 Sheira Rae Rd 99712	474-8603	

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Fairbanks should [illegible] Dick Colling, Jeff Walters, Pete Pinney, Mark [illegible]

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4/12/98
Fairbanks, AK p. 7

Signature	Printed Name	Mailing Address	Phone	E-mail address
Nancy Kailing	Nancy Kailing	PO Box 84680, Fairbanks, AK 99708	(907) 479-4944	kailing@mosquitonet.com
S.H. Kailing	Stephen H Kailing	POB 84680, Fairbanks AK 99708	479-4944	kailing@mosquitonet.com
Julie Doorack	Julie Doorack	POB 750443 " " 99775	474-6666 x3299	ftjed@uaf.edu
Cassandra Mohatt	Cassandra V. Mohatt	1625 Hess Way, FBKS 99709	479-6441	[illegible] @ uaf.edu
Kelly Hazel	Kelly Hazel	PO Box 83534 Fbks 99708	474-6961	ftklh@uaf.edu
Mark Lomax	MARK LOMAX	PO Box 72401 FRKS 99707	456-6919	fsmll2@UAF.EDU
Jennifer Hilbert	Jennifer Hilbert	PO Box 83215 Fbks 99708	455-9032	[illegible]
[illegible]	[illegible]	[illegible]	457-7091	FT[illegible]@UAF.edu
Lara Hensley	Lara Hensley	P.O. Box 750105 Fairbanks AK 99775	458-0697	ftlsh@UAF.edu
Faye L. Stock	Faye L. Stock	4450 Dartmouth Dr. Fbks 99709	455-4597	ftfls@uaf.edu
Phillip P. Shelton	Phillip P. Shelton	1242 Munoz Court, Fort Wainwright, AK 99703	353-2268	ftpps@uaf.edu
Timothy E. Gladieux	Timothy E. Gladieux	1235 Bellaire Rd. FBKS. 99709	455-4069	
Mikie Windsor	Mikie Windsor	1440 Lacey Street FBKS 99701-0208	457-1207	—
Rich Collins	RICHARD COLLINS	Box 83683 Fairbanks AK 99708	458-0913	
Pete Pinney	PETE PINNEY	P.O. Box 5020 FAIRBANKS AK 99703	389-3582	picaro@mosquitonet.com

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