JANICE GREGG LEVY
534 5th Street
Juneau, Alaska 99801

March 24, 1998

Dear Legislator:

I write to inform you of yet another Alaskan voter who urges you to abandon your efforts to amend our constitution to limit the right to marry. Further, I urge you to use your position to legislate for the good of our society, rather than to discriminate against those whose core family values do not coincide with your own. I speak, of course, of the effort to construct a constitutional barrier to marriage between two people of the same gender.

I enjoy the privileges of marriage. It enriches my life enormously to share the companionship and love of my dear husband, to raise our children together, and to know that he and I can and will take care of each other - physically, emotionally, financially, and legally - through the various challenges in our lives. Not all my friends are so fortunate. Who am I, and who are you, to pass judgment on the validity, beauty, and merit of a lifelong commitment between two caring individuals?

The privileges of marriage include, among other things, the right to be treated as next of kin when illness and death strike, the right to cover my spouse on my health insurance, and the right to an equitable distribution of property should my marriage end in divorce. The obligations are largely financial. I became financially obligated for many expenditures made by my spouse, and we each have an obligation to support the other upon separation, depending on the circumstances. I fail to see any rational basis for permitting these rights and obligations to attach only to the commitment of a heterosexual couple.

From a strictly administrative viewpoint, why would a government oppose giving legal recognition, with the attendant rights and obligations, to two individuals who freely choose to love and support each other? It makes good administrative and financial sense for the government to encourage relationships where the individuals are legally obligated to provide support to each other. It eases the government's burden.

From a moral, religious, or ethical viewpoint, the issues become more complicated. Some believe that they are providing moral leadership by attempting to ensure that two people of the same gender cannot marry. But true leadership requires opening one's mind to more than one's own narrow life experience. True leaders examine their own morals and beliefs, listen to the

experiences of others, and reevaluate what is right. This type of reexamination of societal beliefs eventually broke down core family values such as segregated schools, prohibition of marriage between blacks and whites, prohibition on women voting, and many other forms of discrimination.

As a legislator, you have a choice. You can use your power and energy to divide our state, hurt our people, and prohibit some of our citizens from enjoying the fundamental rights (and duties) that accompany a marriage. Alternatively, you can take the truly courageous stand that supports committed, monogamous relationships in which two individuals care for each other, by supporting the legal recognition of such relationships.

If you cannot actively support such a new concept of marriage, then at least follow the guideline "First, do no harm." Please abandon all efforts to amend our constitution to prohibit same-sex marriage.

Sincerely,

Janice Gregg Levy

Marcia Mulloy
8536 Steep Place
Juneau, Alaska 99801

April 1, 1998

Senator Loren Leman
State Capitol
Room 115
Juneau, Alaska 99801-1182

Dear Senator Leman,

First, let me state I am opposed to SJR-42. It is completely at odds with the democratic principles this country was founded on to amend a state constitution in order to abridge the rights of any group of citizens. Let me remind you, we are citizens. A constitutional amendment to deny rights to citizens sets a dangerous precedent. Remember the adage about stones and glass houses.

Apparently, the possibility that the state will not be able to demonstrate that it has a compelling interest to justify denial of marriage rights to homosexuals is what motivates your push for SJR-42. Consider this: The state has no compelling interest because it cannot be demonstrated that homosexual marriage will have a negative impact on any aspect of the government, the economy, or the daily life of U. S. and Alaska citizens. On the other hand, creating unnecessary legislation and fostering hatred have obvious negative impacts on the state economy and all our lives. Specifically, I would ask, how do you justify that?

Now, let me take your points individually. Firstly, you argue that, thus far, no state in the union allows same sex marriages and the federal government defines marrige as consisting of a union of only one man and one woman. I would respond: Alaska is known for its tendency to buck the system. Alaska is currently at odds with the feds over environmental issues (This is a perpetual source of discord between Alaska and the federal government, is it not?) and the management of subsistence rights. There is no sign that Alaska is willing to back down. The feds will have to force the state to the mat. You are not protesting Alaska's combative stance in these matters. In fact, I believe you encourage it. Therefore, it is dishonest to use this particular complaint as an argument in favor of a constitutional amendment to ban same sex marriage.

Secondly, you argue that by force of natural law, marriage must remain an institution that recognizes only the relationship between one man and one woman. Natural law is not at the foundation of the laws that govern this country. Laws are not created by instinct. Laws are not based on the same forces that govern the behavior of apes or chimpanzees. Humans developed powers of reason to transcend a few of the more limiting aspects of animal behavior. Civilization depends upon the capacity for intelligent thought and the willingness to accept differences. This only becomes a burden when government decides it doesn't want citizens to think for themselves. Remember the governments around the world that have historically

preferred that their citizens not think for themselves. Is this what you want for this country? If so, SJR-42, which is bound to have repercussions outside Alaska, is a good first step.

Finally, the argument which maintains that allowing homosexual marriage would open the floodgates of demand for marriages that involve legalizing incestuous relationships and bestiality is simply ridiculous. I suppose they serve well as a red flag to wave in front of the faces of the religious fundamentalists who are by and large the main support of the movement to suppress and/or destroy everything that appears foreign to them. Gays are the tip of the iceberg and as such are also the first line of defense. Wouldn't it be ironic if by limiting the rights of gays you were ultimately to limit your own?

In spite of your arguments, and without any ado at all, the Senate has seen fit to unanimously approve SCR 25, requesting the courts to resolve this matter and making SJR-42 a superfluous piece of legislation.

In light of these above considerations, how do you, who represent yourself as a responsible member of a responsible government, justify support for SJR-42?

Sincerely,
Marcia Mulloy

cc: All Alaska Legislators

Can You Hear the Call to Violence?

Delta Junction.
April 1, 1998.
Testimony for 42.

Baptist pastor passionately declares 'the Bible says homosexuals should be stoned to death.' Then continues, 'and we should add people who live together without being married.'

Can't you hear it? It's a call to violence. Clear and simple and with the authority of God implied in it.

This kind of violent rhetoric can be all it takes for already-violent people to lash out against gay and lesbian citizens.

This kind of violent rhetoric can be the last straw that leads someone to feel overwhelmed enough to commit suicide. Not because they're gay, but because they despair of life when they're so condemned by so many.

This is not imaginary fear of violence. In states where statewide anti-gay ballot campaigns have raged, violence against homosexuals — and against those perceived to be homosexual whether they in fact were or not — rose dramatically. For example:

> From January 1992 to early December 1994, a total of 151 known anti-gay murders were reported to gay victim assistance groups nationwide. This includes 59 murders in 1994; 62 in 1993; and 30 in 1992. "One way to look at this data," said the letter to Janet Reno, "is that in the years since anti-gay initiatives emerged on the scene in Oregon, Colorado, Idaho and Maine, and made national headlines, anti-gay murders have almost doubled."
>
> "In 1992, the Lesbian Community Project in Portland, OR, tallied 968 incidents of anti-gay violence, more than any other gay victim service agency in the U.S. in that year. Measure 9, defeated by voters, was introduced in Oregon in 992 by the Oregon Citizens Alliance and included sensationalistic rhetoric such as bestiality and other homosexual "perversities." Hattie Mae Cohen, a lesbian, and Brian Mock, a gay man, were killed when their home in Oregon was firebombed during the 1992 ballot battle."
>
> [Excerpts = letter from National Gay Lesbian Task Force to Attorney General Janet Reno in December1995.]

Alaskan legislators — only you can stop this kind of violence from starting in Alaska. If SJR-42 goes to the ballot, no one can stop it. **The call to violence is sounding already.** Please -- leave the marriage debate in the courts. Leave the religious debate in the churches. There's no need to prematurely pass a bill that you know endangers innocent people. **Vote no on SJR-42.**

Sara Boesser Board member Committee for Equality Box 34202 Juneau 99803

Lisa Penalver
1166 Skyline Drive
Fairbanks, AK 99712,
(907) 457-1458
e-mail, pen-art@mosquitonet.com
3/31/98

Senator
State Capitol, Room 115, Juneau, Alaska 99801-1182.
fax 907-465-3810

Dear Senators,

I urge you to oppose SJR 42, which would amend the state constitution to narrowly define the marriage contract as only valid if between a man and a woman and which would invalidate commitments between people of the same gender.

I understand that some of you have trouble with the very concept of homosexuality - and to those of you who do - please realize that you are overlooking the fact that a marriage is far MORE than mere sex!! A marriage is about commitment, about LOVE - about openly accepting responsibility for another person - in front of family, friends, the community, God and everyone. Surely, many of you are more comfortable among people of your same gender; and you can probably think of people of the same gender (including relatives) of whom you could say you feel fondness (perhaps love?). It may be cliche, but love knows no bounds... I fail to see how it is in the interests of the State to interfere with the acceptance of such personal responsibility. This resolution is a blatant attempt to discriminate against the committed gay couples in our communities.

In response to the argument that acceptance of same-gender couples is "undermining the integrity of the family" - you should really be looking at the refusal of heterosexual men to accept that very responsibility you are trying to impede with this bill. The breakdown of the family has far more to do with older men having sex with much younger girls , then abandoning their offspring - WITH NO NEGATIVE REPERCUSSIONS from society (heck, THAT's not illegal, is it!). Stop trying to shift the blame away from the truly culpable, and please stop trying to scapegoat those who are different from yourselves.

As Alaskans, we believe strongly that the government should not be meddling in the very private and intimate realm of a person's choice of life partner. Surely the Legislature has better things to do than to try to tell us who we can love and live with?! If you infringe the privacy rights of this group, you will undermine everyone's rights!

I worry that if such a resolution were to pass, we would soon be seeing bans on cross-religious marriages, and on interracial marriages - it will never end! If we allow discrimination against one group, we grant permission to restrict the freedoms of any other group who may fall out of political favor! I find this resolution highly offensive.

Please oppose this SJR #42! Alaska does NOT need a Gay Discrimination Amendment!

Sincerely,

Lisa Penalver

CC: All Alaska Legislators

March 31, 1998

Dear Senator Taylor,

I'm writing you because I'm haunted by the news story where you said your long-time aid, Joe, had died - and that he was a gay man.

I feel for your loss.

What haunts me is that I can't get it out of my head that Joe's last days and weeks were full of anti-gay disparagement (due to the marriage bill). It pains me.

It pains me because it rubs the lifelong wound we as gay people suffer over and over whenever otherwise good people stab our hearts with their misinformation and misunderstandings about us.

If this goes to the ballot, people will demonize us. You know they will. And because you knew Joe, you know we don't deserve that.

I have to believe, somewhere in your heart, you can see the wisdom of not sending this to the ballot before the courts get through with it. You could save so many of us so much emotional - and likely physical - damage if you would.

I have to believe you can find the courage to vote no on 42 even if you completely oppose our marriage. You don't have to let just one judge decide - you can do as the testifier at Senate Finance said: send it to the Supreme Court and let <u>five</u> judges deliberate it. After they decide, you can re-evaluate your options if need be.

But please, for now, save us from this ballot issue. If you can lead on this, others will follow. Please - lead Alaska away from this divisive & ever so painful debate.

Thank you,

Juneau citizen of Alaska

copies: all legislators

Alaska Public Campaigns and Media Center

1026 W. 4th Avenue, Suite 210 · 907.276.9653 voice · 907.276.9654 · akmedia@alaska.net

1 April 1998

Senator Loren Leman
State Capitol, Room. 115
Juneau, Alaska 99801-1182
907.465.3810 fax

Senator Leman:

Consider these comments in *opposition* to Senate Joint Resolution 42, a pathetic and mean-spirited bill which I understand you have shepherded toward tomorrow's Finance Committee vote. Certainly there are more important issues facing Alaska residents today than this useless bill. The legislative majority does not need a role in the sexual lives of your constituents. I can only guess you have lost sight of legislative priorities people in your district really care about, namely.

1) Children and women are experiencing a rate of violence in Alaska at several times the national average. Here is a family issue SJR 42 fails to address

2) Workers who helped build the test facility at Amchitka in the late 1960s and early 1970s are dying cancer. What does SJR 42 do to help them?

3) The legislature is currently considering several bills which will seriously compromise the viability of our state's second largest industry, fishing. Water quality degradation (HB 51), forced spruce beetle logging (HB284) and gutting the Alaska Coastal Management regulations (HB 28) are of much greater concern to your constituents than who is married to whom.

4) Subsistence. Alaska Native preference for fish and game in times of shortage should be a basic human right. Non-Native fishing and hunting should be an allocation issue and provided for only when resources are plentiful.

5) Diversification of the state's lagging economy. We must find sustainable economic solutions for employment of Alaska residents when the oil runs out - or when the oil companies go elsewhere. I hope that day comes soon.

I'd like to know what purpose SJR 42 serves now that the Senate has unanimously approved SCR 25, which urges a

Dr. Marjorie V. Fields
2960 Glacierwood Drive
Juneau, AK 99801

March 24, 1998

TO: Senator Loran Leman FAX 465-3810

FROM: Marjorie Fields

RE: SJR 42

I am opposed to the bill defining marriage for citizens of Alaska.

This bill clearly violates privacy rights, with government intruding into private lives. This is not an issue for legislation: the origins of homosexuality are currently being studied, revealing more and more evidence that it is biological in nature. Is the legislature now trying to mandate how biology is supposed to work?

In addition, legislative action on this matter is clearly redundant. The Senate has already requested the courts to resolve the issue of legal marriage.

cc: Liz Dodd

Dr. Marc Dumas, M.D.
1166 Skyline Drive
Fairbanks, AK 99712,
(907) 457-1458
4/1/98

To all Legislature

State Capitol, Room 115, Juneau, Alaska 99801-1182.
fax 907-465-3810

Dear Senators,

and its HB equivalent

I recommend you please withdraw SJR 42, which would amend the state constitution to narrowly define the marriage contract as only valid if between a man and a woman, and which would invalidate commitments between people of the same gender. I cannot believe you have nothing better to do than to try to interfere in private matters that have nothing to do with you or matters of the State!

1) What purpose do you believe SJR 42 serves? (Especially now that the Senate has unanimously approved SCR 25, urging a speedy appeal of the Brause-Doogan case)? Since the Senate already has requested the courts to resolve this matter, what do you think will be gained from legislative action on this issue at this time?

2) This is a Civil Rights issue! Why would you promote SJR-42, which only serves to violate both the privacy rights and the inherent equal rights of all citizens of the state of Alaska?!

3) Finally, I respectfully request that SJR 42's sponsors and supporters respond to this letter, answering the questions I have raised here.

I live in Alaska because Alaskans believe strongly that the government should not be meddling in people's personal lives. Surely the Legislature has better things to do than to try to tell us who we can marry?! If you infringe the privacy rights of this group, you will undermine everyone's rights. Next, you'll be picking on immigrants and Jews!

Enough is enough! Get back to the real work you were sent to Juneau to do - Stop trying to make yourselves look good by "solving " imaginary problems You are right about one thing - there exist corrupting influences in society. This hate-mongering bill is a perfect example.

Please oppose this SJR #42! Alaska does NOT need a Gay Discrimination Amendment!

Sincerely,

Marc Dumas, M.D.

CC: All Alaska Legislators

Lisa Penalver
1166 Skyline Drive
Fairbanks, AK 99712,
(907) 457-1458
e-mail, pen-art@mosquitonet.com
4/1/98

To All Legislators

Senator Loren Leman,
State Capitol, Room 115, Juneau, Alaska 99801-1182.
fax 907-465-3810

Dear Senators,

I urge you to oppose SJR 42, The Gay Marriage Ban. I have heard outrageous claims - some to the effect that if we allow gays to marry, what is to stop incestuous marriages?! Give me a break! - I have never heard of any group promoting incest , and Gays certainly do NOT!! This bill is clearly an attack on a group of law-abiding, hard-working tax-paying citizens - simply because they are different. I am convinced that Alaskans and Americans are better than this!

Would you please explain to me:
1) What purpose do you believe SJR 42 serves? (Especially now that the Senate has unanimously approved SCR 25, urging a speedy appeal of the Brause-Doogan case)? Since the Senate already has requested the courts to resolve this matter, what do you think will be gained from legislative action on this issue at this time?

2) This is clearly a Civil Rights issue! Why would you promote SJR-42, which only serves to violate both the privacy rights and the inherent equal rights of all citizens of the state of Alaska?!

As an Alaskan I believe strongly that the government should not be meddling in the very private and intimate realm of a person's choice of life partner. Surely the Legislature has better things to do than to try to tell us who we can love and live with?! If you infringe the privacy rights of this group, you will undermine everyone's rights!

I fail to see how it is in the interests of the State to interfere with the acceptance of personal responsibility for a partner. This resolution is a blatant attempt to discriminate against the committed gay couples in our communities.

I worry that if such a resolution were to pass, we would soon be seeing bans on cross-religious marriages, and on interracial marriages; - it will never end! If we allow discrimination against one group, we grant permission to restrict the freedoms of any other group who may fall out of political favor! I find this resolution highly offensive.

Please oppose this SJR #42! This Gay Discrimination Amendment should never have come up!

Sincerely,

Lisa Penalver

CC: All Alaska Legislators

Patrick Cahill
P.O. Box 60813
Fairbanks, AK 99706

April 1, 1998

Dear Senator Leman,

I wish to register my belief that SJR-42 is not in the best interest of the people of Alaska. The senate is trying to alter the State Constitution against a minority people who have done no harm to the public good. The Constitution was made to help protect a minority whose beliefs are contrary to the majority. Let the courts settle the question of same sex marriage.

Thank You,

Pat Cahill

Pat Cahill

P O Box 90122
Anchorage, AK 99509
March 31, 1998

Senator Loren Leman
State Capitol, Room 115
Juneau, AK 99801-1182

FAX: 1-907-465-3810

Dear Senator Leman:

For the following reasons, I am opposed to SJR-42.

Marriage is a matter of individual personal decision; it is the most important personal commitment that two people can make. If a gay couple wants to get married and take responsibility for each other for better or worse, in sickness and in health, why should the state interfere?

Marriage is best understood as a relationship of emotional and financial interdependence between two people who make a public commitment. Making a commitment to a life-long relationship is a fundamental human need that should not be denied to anyone. Adults should be free to make a commitment to the person with whom they wish to spend their life; government should not interfere in these personal matters.

In America, religious and civil marriage are separate institutions. The state should not dictate which marriage any religion performs or recognizes, just as religions should not dictate who gets a civil marriage license from the state. Same-sex marriage is about the freedom to have a civil marriage license issued by the state, not a religious ceremony in a church. Civil marriage is a basic human right and an individual personal decision.

Now that you know where I stand on SJR-42, I have two questic which I would like answered by you. For the record, please provide a written response.

1) What purpose do you believe SJR-42 serves since the Senate has unanimously approved SCR-25 which urges a speedy appeal of the Brause-Dugan case?

2) As SJR-42 only serves to violate both the privacy rights and the inherent equal rights of all citizens of the state of Alaska, why are you pushing and supporting it?

Most sincerely,

Thomas U. Rachal, Jr.

Thomas U. Rachal, Jr.

Copy to: All Alaska Legislators

P O Box 90122
Anchorage, AK 99509
March 31, 1998

Senator Loren Leman
State Capitol, Room 115
Juneau, AK 99801-1182

FAX: 1-907-465-3810

Dear Senator Leman:

I am opposed to SJR-42 for the following reasons.

A couple deeply in love wants to marry. A simple, unremarkable desire. But an impossible one, no matter how committed that couple is to a future together, if the individuals are two women or two men.

Gay people are moved by the same mix of personal, economic, and practical reasons for marriage as other people: marriage has social and emotional significance, with the opportunity for support of public declarations of love and commitment, and it is the sole source of important legal and economic protections that can be essential in times of crisis.

Only marriage ensures Social Security, Medicare, and veterans benefits for a spouse. Only marriage automatically grants the right to make emergency medical decisions for a spouse and access to hospital emergency and intensive care units. Only marriage assures the right to choose a final resting place for a deceased spouse, take bereavement leave, and inherit automatically in the absence of a will. Child custody frequently is denied for gay parents simply because they are not married. There are hundreds of legal rights and responsibilities that civil marriage affords.

Now that you know where I stand on SJR-42, I have two questions which I would like answered by you. For the record, please provide a written response.

1) What purpose do you believe SJR-42 serves since the Senate has unanimously approved SCR-25 which urges a speedy appeal of the Brause-Dugan case?

2) As SJR-42 only serves to violate both the privacy rights and the inherent equal rights of all citizens of the state of Alaska, why are you pushing and supporting it?

Most sincerely,

Elmer R. Kaneta

Copy to: All Alaska Legislators

March 31, 1998

Senator Loren Leman
State Capital, Room 115
Juneau, Alaska 99801-1182

Dear Senator Leman,

I am writing to urge you to reconsider your position on SJR-42. It is a divisive bill that is based on fear and ignorance.

There is room for all of us in this state to live our own lives according to who we are as individuals. What qualifies you to restrict the expression of love, respect and personal responsibility in my partnership? What benefit would it serve? It seems to me that we need MORE love and respect in this world, rather than less.

Mahatma Gandhi said that truth and justice *will always prevail*. Do you disagree that we all are equally worthy of respect? Your actions indicate that you are an advocate of discrimination.

If you are so convinced of the morality of your position, why are you afraid to have it scrutinized by the courts? The courts are the appropriate arena for a determination of truth and justice.

Please serve the Alaskans who elected you and revoke SJR-42. It is in the best interest of all Alaskans to insist upon a Constitution that upholds equality for all.

I would appreciate a response to the questions that I have raised.

Respectfully,

Susan Galcreave

Susan Galcreave
P.O. Box 212
Ester, Alaska 99725
ftsmg@uaf.edu

cc: All Alaska Legislators

RR1 Box 519-A
Walpole, NH 03608
(603) 756-3867
March 13, 1998

Dear Editor:

I'm temporarily out of state and thus was horrified to learn that Alaskans were considering an anti-gay marriage amendment. While we're at it, why don't we ban all those who walk to the tune of a different drummer ... Libertarians, yoga practitioners, "greenies," poets.... Get real! Who on Earth does banning gay marriages benefit? This proposal is a loser from all angles. In my 22 years of residency I've been proud of the fact that we Alaskans could tolerate our neighbors, no matter who they were or what they did, so long as they didn't infringe on our own rights to our own pursuits. Isn't that what the founding fathers of our nation were declaring in the Constitution? How could we pass such an amendment and remain true to the intent of this hallowed document? We Alaskans have always upheld those self-evident truths to a greater degree than the citizens of any other state of which I'm aware. Why tarnish our reputation with such an idiotic, intolerant amendment? Let's not restrict the pursuit of happiness to a privileged group! Let's live and let live. And get off the backs of a class of citizens that deserves our respect as much as any other!

Sincerely,

Ed Ashmead

cc: all Alaska legislators

P.O. Box 84680
Fairbanks, AK 99708
March 31,1998

Senator Loren Leman
State Capitol, Room 115
Juneau, AK 99801-1182

Dear Senator Leman,

I am **AGAINST SJR 42.**

This is an important issue for me and my family. Our wonderful daughter came out to us when she was 21. It was then that my husband and I began our education on society's fear, hatred, and discrimination against gays. Our daughter has to expend an enormous amount of energy hiding a part of who she is so that she can be safe, healthy and prosperous in this society. She is now 31 and we have been active in PFLAG since 1991. We have received death threats and nas_ phone calls just because we support our daughter and other gays who should have the same rights, privileges and protection as any other citizen. Just because our daughter loves another woman and plans to remain with her for the rest of her life. She should be able to publicly acknowledge this love and this relationship through marriage just as straight people.

Putting this constitutional amendment before the public will generate more hate and hurt feelings. I have seen the rhetoric put out by the Christian Coalition to support SJR 42 and it is very hurtful and insulting. I too am a Christian and resent this type of talk. Could we serve the same loving Heavenly Father? I know many who support this amendment are good people. If these supporters had a loved gay family member who they know to be a good, capable, giving person, I'm sure they would see this bill and the implications differently.

Sincerely, Nancy Kailing
Nancy Kailing
(mother of a lesbian daughter, retired elementary school teacher with 17 years of service in the Fairbanks North Star Borough School District, UAF graduate student in Community Psychology, president of PFLAG Fairbanks, deacon in the Presbyterian Church, etc.)

cc: All Alaska Legislators

Parents, Families and Friends of Lesbians and Gays - Fairbanks
P.O. Box 84680
Fairbanks, AK 99708
e-mail: pflag@mosquitonet.com
phone: (907)45P-FLAG

March 31,1998

Senator Loren Leman
State Capitol, Room 115
Juneau, AK 99801-1182

Dear Senator Leman,

PFLAG National, many other national, state, and local organizations and many individual U.S. citizens have signed the marriage resolution as follows:

THE MARRIAGE RESOLUTION

Because marriage is a basic human right and an individual personal choice,
RESOLVED, the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage.

PFLAG Fairbanks has over 50 households as members and has many other fair-minded individuals as friends. We support this marriage resolution and are **AGAINST SJR 42!!**

Sincerely, Nancy Kailing
Nancy Kailing
PFLAG Fairbanks President

cc: All Alaska Legislators

P.S. Attatched is a selelect list of signatories of the Marriage Resolution.

From: PFLAG Fairbanks

THE MARRIAGE RESOLUTION

Because marriage is a basic human right and an individual personal choice,

RESOLVED, the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage.

The following is a select list of signatories of the Marriage Resolution.

Coretta Scott King
Gillian Anderson
Bea Arthur
David Crosby
Ted Danson & Mary Steenburgen
Ellen DeGeneres & Anne Heche
Lea Delaria
Laura Dern
David Duchovny
Melissa Etheridge & Julie Cypher
Mike Farrell
Harvey Fierstein

The Rev. James Forbes
Whoopi Goldberg
Helen Hunt
Billie Jean King
Werner Klemperer
Ricki Lake
Lucy Lawless
Norman Lear
John Leguizamo
Judith Light
Terrence McNally

Eleanor Mondale
Kathy Najimy
Martina Navratilova
Bonnie Raitt
Anthony Rapp and the Broadway Cast of Rent
Paul Reiser
Bishop Walter Righter
Chita Rivera
The Rt. Rev. John Shelby Spong
Gloria Steinem
Marlo Thomas & Phil Donahue
Lily Tomlin

American Friends Service Committee (Quakers)
American Humanist Association

Gay Asian Pacific Alliance
Gay & Lesbian Latinos United

California Council of Churches
Central Conference of American Rabbis
Ecumenical Catholic Church
Federation of Reconstructionist Congregations & Havurot
Lazarus Project, Mission of the Presbyterian Church
National Council of Jewish Women
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church of Christ Board for Homeland Ministries
United Church of Christ Office for Church in Society
Women's Rabbinic Network, Reform Women Rabbis

American Civil Liberties Union
American Family Therapy Academy
American Latin Alliance
American Psychoanalytic Association
Atlantic Records
Bar Association of the City of NY
Bar Association of San Francisco
Broadway Cares/Equity Fights AIDS

Gay & Lesbian Parents Coalition International
Gay, Lesbian & Straight Education Network
Hetrick-Martin Institute
Ithaca, NY
Japanese-American Bar Association
Japanese-American Citizens League
Lesbian & Gay Immigration Rights Task Force
National Adoption Information Clearinghouse
National Association for Women in Education
National Association of Social Workers
National Black Lesbian & Gay Leadership Forum
National Center for Lesbian Rights
National Latino/a Lesbian & Gay Organization
National Lawyers Guild
National Organization for Women
Parents, Families & Friends of Lesbians & Gays
People for the American Way
Southern Center for Law & Justice
United States Student Association
West Hollywood, CA

... and many others, state, local, and national

Lisa Penalver 1166 Skyline Drive, Fairbanks, AK 99712

(907) 457-1458 e-mail, pen-art@mosquitonet.com

Senator Loren Leman,
State Capitol, Room 115, Juneau, Alaska 99801-1182.

fax 907-465-3810

Dear Senators,

I urge you to oppose SJR 42, which would amend the state constitution to narrowly define the marriage contract as only valid if between a man and a woman and which would invalidate commitments between people of the same gender.

As Alaskans, we believe strongly that the government should not be meddling in the very private and intimate realm of a person's choice of life partner. Surely the Legislature has better things to do than to try to tell us who we can love and live with?! If you infringe the privacy rights of this group, you will undermine everyone's rights!

I understand that some of you have trouble with the very concept of homosexuality - and to those of you who do - please realize that you are overlooking the fact that a marriage is far MORE than mere sex!! A marriage is about commitment, about LOVE - about openly accepting responsibility for another person - in front of family, friends, the community, God and everyone. Surely, many of you are more comfortable among people of your same gender, and you can probably think of people of the same gender (including relatives) of whom you could say you feel fondness (perhaps love?). It may be cliche, but love knows no bounds... I fail to see how it is in the interests of the State to interfere with the acceptance of such personal responsibility. This resolution is a blatant attempt to discriminate against the committed gay couples in our communities.

In response to the argument that acceptance of same-gender couples is "undermining the integrity of the family" - you should really be looking at the refusal of heterosexual men to accept that very responsibility you are trying to impede with this bill. The breakdown of the family has far more to do with older men having sex with much younger girls , then abandoning their offspring - WITH NO NEGATIVE REPERCUSSIONS from society (heck, THAT's not illegal, is it!). Stop trying to shift the blame away from the truly culpable, and please stop trying to scapegoat those who are different from yourselves.

I worry that if such a resolution were to pass, we would soon be seeing bans on cross-religious marriages, and on interracial marriages - it will never end! If we allow discrimination against one group, we grant permission to restrict the freedoms of any other group who may fall out of political favor! We find this resolution highly offensive.

Please oppose this SJR #42! Alaska does NOT need a Gay Discrimination Amendment!

Sincerely,

/s/
Lisa Penalver

cc: All Alaska Legislators

Ilena Lee Cramer
324 6th Ave. Fairbanks, Alaska 99701 (907) 479-2136

To:
Sen. Loren Leman
State Capitol, Room 115
Juneau, Alaska 99801-1182
Fax: (907) 465-3810

Re: SJR 42

Dear Senator Leman

In this debate over the SJR 42 I continually heard you, and others who support this amendment stating the importance of marriage to society, and the fear that opening that institution to same sex couples would undermine one of the foundations of society. I agree that the institution of marriage is a foundation of our society. Marriage is at the roots of family, families are the foundations of communities, communities are the foundations of our country.

Let me tell you about family and myself: My mother and father moved to Alaska in the early 70's. My sister and I were raised here in Alaska. My sister is raising her family here in Alaska, and I hope someday to have a family here in Alaska. As for myself, I am 25. I received my BA from UAF. I am a social worker and an artist. I abide by the laws, pay my taxes and vote. I think I would make a fine wife, and a good mother. The only differences between my sister and I are a few inches in height and the fact that she can marry the one she loves, and I cannot. It seems that I am not worthy, not even for the simplest societal privilege of getting married and having a family. I take very personal offense when I hear you attack my future family as something that will undermine society.

Not allowing me to marry will not make me 'straight', it will not 'change my mind'. It will also not stop me from entering into a lifelong commitment with someone or raising my family here in Alaska. It will just make things more difficult for my family. Don't families today have enough things to worry about? I think that it is the government that is undermining American families by regulating our lives all over the place instead of concentrating of the issues that really make a difference to families, like education, the subsistence issues, safe roads, and money for the university.

I am opposed to SJR 42, and am personally offended by the things that you have said on the subject. Your lack of respect for me and my family will be reciprocated come re-election time.

I would like for you to respond to my letter and explain what is the states REAL compelling reason for denying my rights.

Sincerely
Ilena Lee Cramer

cc: All Alaska Legislators

Senator Loren Leman
State Capitol, Room 115
Juneau, AK 99801-1182

P.O. Box 84680
Fairbanks, AK 99708
March 31,1998

Dear Senator Leman,

SJR 42 has brought gay bashing to a new level. The legislation you introduced is being railroaded through the Senate in order to mollify people who are intolerant of Alaska's gay citizens.

Gay people throughout Alaska are having to listen to ugly, stereotypical public rhetoric against same-sex marriage. The arguments are similar to those advanced in the past against ending slavery and allowing interracial marriage. They are coming from some of the people elected to lead Alaska--not just uninformed, conservative members of the public. Most of Alaska's gay citizens are doing their jobs, following the law and being responsible members of their communities--now they must take time and energy to fight legislative discrimination against them.

It is true that same-sex marriage has not been allowed in recent history. It may surprise you to learn that the Catholic Church performed same-sex marriages and blessed these unions between 500 A.D. and 1300 A.D. (John Boswell, "Homosexuality and Religious Life, A Historical Approach", 1989). Since then, discrimination against gays has become so pervasive in society that it is no wonder same-sex marriages were not even seriously considered until recently. To use historical attitudes and laws as an argument against denying same-sex marriage today is ludicrous.

Equally ludicrous is the argument that same-sex marriage will cheapen or make a mockery of opposite-sex marriage. Would you please explain to me how allowing a minority of Alaska's citizens the same rights, privileges and benefits as the majority will detract from my own 36-year marriage?

I have even heard members of the Judiciary Committee attack the Alaska judicial system because it is telling them and their supporters what they do not want to hear. This is reminiscent of past public attitudes against equal civil rights for people of color and Alaska Natives.

At the end of this debate (if the Legislature even allows a real one), I simply ask you to do what is right--not what is popular. Nip your discriminatory legislation in the bud before it turns into an ugly leaf in the annals of Alaska's history.

Sincerely,

S.H. Kailing

Stephen H. Kailing
cc: All Alaska Legislators

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California State Senate

SENATOR
WM. J. "PETE" KNIGHT
SEVENTEENTH SENATORIAL DISTRICT

April 3, 1998

Alaska State Senators
State Capitol
Juneau, AK 99801

RE: SJR 42 -- Support

Dear Senators:

As the California State Senator who has sponsored legislation to keep marriage between "a man and a woman," I strongly urge you to adopt SJR 42 to undo the violence that your courts are doing to your current marriage statutes.

Alaska has a right to determine whether the special rights and benefits incidental to marriage will or will not be used to reward certain types of relationships. No other state, nor the judiciary of Alaska, should be allowed to force such a radical change upon the people.

If you would like to discuss the need for Alaska, and every other state, to put an end to this judicial assault on traditional families, please feel free to contact me at (805) 274-0188.

Sincerely,

WM. J. "PETE" KNIGHT
17th Senate District

cc:
Senator Al Adams
Senator Dave Donley
Senator Jim Duncan
Senator Johnny Ellis
Senator Lyda Green
Senator Rick Halford
Senator Lyman Hoffman
Senator Tim Kelly
Senator Loren Leman
Senator Georgianna
Senator Jerry Mackie
Senator Mike Miller
Senator Sean Parnell
Senator Drue Pearce
Senator Randy Phillips
Senator Bert Sharp
Senator Robin Taylor
Senator John Torgerson
Senator Jerry Ward
Senator Gary Wilken

March 23, 1998
P.O. Box 779
Delta Jct, AK
99737

Dear Senator:

I would like to strongly recommend you to vote to pass SJR 37 and also SJR 42.

I have tried to voice my opinion and concern every time these issues are known to me to be discussed.

Thank you!

Sincerely,

Jo E. McBride

Christie
put on
SJR 42 board
please

REPUBLICAN PARTY OF ALASKA
DISTRICT 35
Mrs. Debbie Joslin, Chairperson
PO Box 377, Delta Junction, AK 99737
(907) 895-4565 phone/fax
dijoslin@juno.com

March 22, 1998

To: Members of the Senate Finance Committee

Dear Senator,

I urge you to pass SJR 42 immediately. Putting this amendment on the ballot and letting the people of Alaska decide is the ONLY reasonable course of action at this point. Passing SJR 42 is the more fiscally prudent thing to do. Lets not spend hundred of thousands of dollars to let a judge decide something that the people of Alaska have every right to decide. I am confident that this amendment would pass if put before the people. But if it does not I would be willing to live with that if it is the will of the people.

Please do not forget that the platform of the Republican Party of Alaska opposes same sex marriage.

Thank you for your time and consideration in this matter.

Sincerely,

Debbie Joslin

March 22, 1998

Dear Senator:

I urge you to pass SJR 42 proposed constitutional amendment to define marriage as a union that can be enter into only by "one man and one woman". I believe that to allow anything else would further destroy the family unit in the State of Alaska and I strongly oppose allowing the marriage of homosexuals in the State of Alaska.

Sincerely,

John W. Lunn Jr.

John W. Lunn Jr.
PO Box 406
Delta Junction, AK 99737

Michael Pelto
Regina Pelto
P. O. Box 624
Delta, AK 99737
(907) 895-4730
3-22-98

Dear Senate Members,

Both my husband and I would like Senate Joint Resolution 42 passed into law. Our country and its laws were formed and based on biblical laws and customs. Homosexual relationship & marriage go against what our founding fathers had in mind for our country. We, as partners in a traditional biblical marriage, strongly believe in the traditional one man + one women marriage. Please, vote to strengthen our state and our country; vote yes for SJR 42 and our families.

2 votes for SJR 42

Earnestly,
Mike Pelto and
Mike Pelto
Regina Pelto
Regina C. Pelto

Dept. of Law's petition to the AK Supreme Court re: Statute prohibiting same sex marriages (SB 308)

IN THE SUPREME COURT FOR THE STATE OF ALASKA

BUREAU OF VITAL STATISTICS, ALASKA DEPARTMENT OF HEALTH & SOCIAL SERVICES, the STATE OF ALASKA, and the ALASKA COURT SYSTEM, Petitioners, vs. JAY BRAUSE and GENE DUGAN, Respondents.	Supreme Court No. S- Super. Ct. No. 3AN-95-6562 CI

PETITION FOR REVIEW

This petition seeks review of an order of the superior court at Anchorage, Hon. Peter Michalski, in a case challenging the constitutionality of Alaska's statutory prohibition on same-sex marriage. The court, in the instant order (attached to this petition as Exhibit A), denied the defendants' motion for summary judgment on the constitutional question, and ordered a hearing at which the defendants will have to show a compelling state interest in the prohibition in order to sustain it.

FACTS

The facts of this case, as set cut in the superior court's opinion, are simple and undisputed. Plaintiffs Jay Brause

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P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

and Gene Dugan are two male residents of Anchorage who sought a license to be married. Based on a memorandum from former Presiding Judge Karl Johnstone which concluded that the Alaska statutes did not authorize same-sex marriage, the court clerk denied their application. Other than their sex, Brause and Dugan met the other qualifications for issuance of a marriage license.

Brause and Dugan brought suit in Anchorage superior court, contending that the statutory prohibition on same-sex marriage is unconstitutional. Their claims rested primarily on the privacy section of the Alaska constitution, art. I, sec. 22, and the civil rights section, art. I, sec. 3. They subsequently moved for partial summary judgment, seeking a ruling that the Alaska constitution implicates the right to same-sex marriage, and that that prohibition must fail unless the state can show a compelling state interest in it. The defendants cross-moved, arguing that the Alaska constitution does not implicate a right to same-sex marriage, and that, even if it does, the prohibition is constitutional because of the basic biological differences between same-sex couples and opposite-sex couples.

In his order, entered on February 27, 1998, Judge Michalski granted the plaintiffs' motion and denied the defendants' cross-motion, and ordered the parties "to set

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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." Exhibit A, at 13.

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether the superior court erred in ruling that there is a fundamental right under the Alaska constitution to "choose one's life partner and have a recognized nontraditional family" Exhibit A, at 11], which in effect constitutes a right to same-sex marriage.

Whether the superior court erred in denying the defendants' motion for summary judgment and in not dismissing the plaintiffs' action.

WHY REVIEW SHOULD NOT BE POSTPONED

Immediate review of the superior court's decision is warranted under Appellate Rule 402(b)(2). The court's decision clearly "involves an important question of law on which there is substantial ground for difference of opinion," and immediate review will both "materially advance the ultimate termination of the litigation" and "advance an important public interest which might be compromised if the petition is not granted."

Substantial ground for difference of opinion. The superior court's decision in this case, holding in effect that

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there is a fundamental right to same-sex marriage, departed from every American decision of which the defendants are aware. See, e.g., Storrs v. Holcomb, 645 N.Y.S.2d 286 (Sup. Ct. 1996); Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1992); Adams v. Howerton, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). In addition, the court's ruling that a trial on the plaintiffs' claims is required is inconsistent with every decision of which the defendants are aware, except for the Baehr decision. Thus the substantial ground for difference of opinion is clear.

Advancing an important public interest. In recent years - since the Hawaii Supreme Court's 1993 decision in Baehr v. Lewin - same-sex marriage has become one of the "hot button" social issues in the United States. Its "hot button" status in Alaska is reflected in the Alaska legislature's response to the Baehr litigation, the enactment of a so-called "defense of marriage" act, and in the proceedings surrounding the enactment of that act. AS 25.05.013, enacted by ch. 21, SLA 1996, provides that same-sex marriages will not be recognized in Alaska, even if they are legal under the law of the jurisdiction where there

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marriage takes place.[1] The legislative history of the bill that became chapter 21 illustrates the inflammatory passions that this subject unleashes.[2]

Thus the principal reason why this court should grant immediate review of the superior court's decision is that the trial which that court has ordered is certain to be extremely contentious, and has the potential of stirring up widespread animosity and prejudice. Clearly the avoidance of such a trial, if it is not necessary, is strongly in the public interest. And if the defendants' arguments before the superior court were correct, such a trial would not be necessary, and summary judgment for the defendants would be the proper course.

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[1] Chapter 21 also amended AS 25.05.011, so that it now states explicitly that marriage is limited to one man and one woman. This amendment was made even though no one, including the plaintiffs in this action, contended that the old sex-neutral language of AS 25.05.011 authorized same-sex marriage.

[2] For instance, the minutes of the House State Affairs Committee on the bill (found on the BASIS database) show one witness before the committee calling homosexuals "perverted" and homosexuality "an abomination"; another saying that the bill would prevent the "immorality of the few," an obvious reference to homosexuals, from being imposed on the majority; and a third referring to "the average homosexual [who] had over 500 partners in a lifetime which did nothing more than spread sexually transmitted diseases." Even a legislator said that "homosexual relationships were not the will of God according to the Bible."

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Material advancement of the ultimate termination of the litigation. If the superior court erred, and the defendants' contentions are correct, then the trial which the Superior court has ordered will be unnecessary. Review of that court's ruling now, rather than after a trial, will obviously advance the termination of this litigation.

WHY THE DECISION BELOW IS ERRONEOUS[3]

"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." Compassion in Dying v. State of Washington, 79 F.3d 790, 858 (9th Cir. 1996) (en banc) (Kleinfeld, J., dissenting), reversed, ___ U.S. ___, 138 L.Ed.2d 772 (1997).

Whether or not there should be same-sex marriage in Alaska is indeed a great question, as was the question of assisted suicide at issue in Compassion in Dying. The same-sex marriage question is also a question that the legislature, and not the

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[3] The 15-page limit on petitions for review precludes the petitioners from discussing in detail why the superior court's decision was erroneous. The petitioners have appended to this petition as Exhibit B a copy of their memorandum in opposition to the plaintiffs' motion for partial summary judgment and in support of their own cross-motion for summary judgment, which sets out their arguments in detail.

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judiciary, should decide (and, as noted above, one that the legislature has already decided). The superior court's intrusion here into the province of the legislature was its most fundamental error.

The superior court failed to recognize that the provisions of the Alaska constitution invoked by the plaintiffs do not even implicate the right to same-sex marriage. This court has repeatedly held that the Alaska constitution should be construed consistently with the intent of the framers. See Arco Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992); Kochutin v. State, 739 P.2d 170, 171 (Alaska 1987); Hammond v. Hoffbeck, 627 P.2d 1052, 1056 n.7 (Alaska 1981). Thus, unless there is evidence indicating intent by the framers that a constitutional provision be construed to provide for rights inconsistent with long-standing law at the time of its adoption, a provision should not be construed to provide for such inconsistent rights. Cf. Hootch v. Alaska State-Operated School System, 536 P.2d 793, 800 (Alaska 1975) ("an historical perspective is essential to an enlightened contemporary interpretation of our constitution").[4] Here, there

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[4] See also Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) (footnote omitted; emphasis in original):

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is no such evidence, and Judge Michalski totally ignored the absence of any such evidence.[5]

In 1955 and 1956, when the Alaska constitution was drafted and adopted by the constitutional convention and ratified by the people, the idea of same-sex marriage had been basically unheard of in the Western world for centuries.[6] The statutes of

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> There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.

The answer, according to the Court plurality: "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" Id. at 503 (internal quote and bracketed word in original).

[5] The plaintiffs also essentially ignored the defendants' arguments on history and framers' intent, responding to them in the plaintiffs' summary judgment reply memorandum with the comment that the relevant constitutional provisions are of a "forward looking nature."

[6] See W. Eskridge, Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419 (1993). Professor Eskridge shows that same-sex marriage has existed historically, especially in non-Western cultures. However, he states that in the West (i.e., in Europe) attitudes turned against same-sex marriage in the 13th century. Id. at 1469. (Continued)

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the Territory of Alaska had, since before their first codification in 1913, provided that a marriage must be between a man and a woman. CLA 1913, § 431; CLA 1933, § 1181; ACLA 1949, § 21-1-1. There is no reference in the minutes of the Constitutional Convention to same-sex marriage. Thus it cannot be said that the framers, in adopting the constitution, intended to confer a right to same-sex marriage, or intended that the proposed constitution in any way alter existing law on the subject of marriage.

By 1972, when art. I, sec. 22 was adopted and art. I, sec. 3 was amended to add its reference to sex, litigation seeking the right to same-sex marriage had begun in the Lower 48. However, none of this litigation had been successful, and none had taken place in Alaska. Thus again it cannot be said that the legislature and the electorate, in proposing and adopting these two constitutional changes, intended to confer a right to same-sex marriage or to alter the existing marriage law.

In fact, the limited amount of history behind these two changes that is now available suggests no such intentions. The

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In a recent newspaper article, a sociology professor noted that in the 1950s and 1960s articles in a major gay publication discussed the pros and cons of same-sex marriage. P. Nardi, Saying "I Do" to Broadening the Debate, L.A. Times, Feb. 5, 1996, at B5. This article does not indicate that any such articles appeared in the "mainstream" press during this period.

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privacy amendment was apparently enacted to address specific concerns about access to criminal justice information, a subject obviously having nothing whatsoever to do with any right to marry. G. Harrison, Alaska's Constitution - A Citizen's Guide, at 44-45 (3rd ed. 1992). The amendment to art. I, sec. 3 was apparently intended to give the state constitution a counterpart to the proposed federal Equal Rights Amendment then undergoing the ratification process before the legislatures of the states (and which the Alaska legislature had ratified quickly during its 1972 session). But the framers and proponents of the federal ERA specifically denied that that amendment would confer a right to same-sex marriage.[7] Thus there is no reason to give a different construction to the Alaska ERA.

The superior court erred in ruling that the plaintiffs have a fundamental right to be married. As noted above, the superior court's conclusion that the same-sex plaintiffs had a fundamental right to "choose [their] life partner and have a recognized nontraditional family" (i.e., to be married) departs

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[7] See 118 Cong. Rec. 4389 (1972) (statement of Sen. Bayh, an ERA sponsor, that the ERA would not require the states to recognize same-sex marriage); Note, The Legality of Homosexual Marriage, 82 Yale L.J. 573, 584 n.50 (1973) (quoting a similar view by one of the legal scholars who originally drafted and propounded the federal ERA, Yale Professor Thomas Emerson).

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from every other court decision to ever consider the matter. Judge Michalski ignored the correct analysis in Baehr (also reflected in other cases), where the court stated that "we 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 that lie at the base of all our civil and political institutions." 852 P.2d at 57. The judge ignored the fact that Alaska has a test virtually identical to that of Hawaii for determining when "constitutional rights and privileges" should be "develop[ed]" under the Alaska constitution: when the courts "find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) (footnote omitted). Instead Judge Michalski improperly recharacterized the question as whether there is a basic right "to choose one's life partner," Exhibit A, at 8, then found that there was such a right.

In reaching this conclusion, the judge relied primarily on Breese v. Smith, 501 P.2d 159 (Alaska 1972). Breese, in which this court invalidated hair length rules of the Fairbanks school

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system, is the first of the major Alaska privacy cases, even though it predated the adoption of art. I, sec. 22. But there is a huge and controlling difference between this case and Breese.

Breese involved an outright prohibition against conduct - the wearing of long hair in the schools. By contrast, the marriage laws at issue here do not outlaw conduct. They do not prohibit same-sex couples from taking wedding vows in a ceremony, from living together as a couple, from holding themselves out to the world as wed. They simply deny formal legal recognition of that relationship as a marriage. As one of the leading scholars on same-sex marriage has written, in comparing state marriage laws to sodomy laws (which Alaska no longer has), "[T]here is a legally recognized and profound difference between the state not punishing private homosexual behavior between consenting adults and the state endorsing or recognizing a public right to engage in such behavior." Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 Brigham Young U.L.R. 1, 40. Professor Wardle's analysis is equally applicable for comparing Breese with the case at bar.

The superior court here ignored the basic holding of Breese - that the right to privacy is essentially the right to be let alone. 501 P.2d at 168. As just discussed, the state

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marriage laws do let Brause and Dugan alone - they simply deny official recognition of a private decision.

The superior court also erred in giving a very expansive reading to the early privacy cases - Breese and Ravin v. State, 537 P.2d 494 (Alaska 1974) - when subsequent Alaska cases have indicated that those cases should not be read so expansively. See Hilbers v. Municipality of Anchorage, 611 P.2d 31, 41-42 (Alaska 1980); Friedman v. District Court, 611 P.2d 77 (Alaska 1980); McKenzie v. Municipality of Anchorage, 631 P.2d 514, 518 (Alaska App. 1981). It is especially difficult to square the superior court's reading of Breese with Friedman, a decision which upheld the right of the state district court to require that an attorney appearing before it wear a coat and a tie, and which rejected the attorney's Breese-based argument.

Professor Wardle, in the article cited above, observed that "[a]sking the judiciary to impose a radical redefinition of marriage upon the American people is a very troubling proposition." L. Wardle, supra, at 5. It is especially troubling when the people, speaking through their elected representatives, have so recently rejected the radical redefinition. By finding a fundamental right in the case at bar, the superior court went a

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long way toward this radical redefinition.[8] The court erred in so doing.

The superior court erred in ruling that the prohibition on same-sex marriage constitutes sex discrimination. In an alternate holding, the superior court ruled that the prohibition on same-sex marriage constitutes sex discrimination banned by art. I, sec. 3 of the Alaska constitution.[9] The court offered only a very brief discussion on this issue and did not even cite to Baehr. Despite the divergence of judicial and academic views on this question, Judge Michalski opined that "[s]ex-based classification can hardly be more obvious."

With due respect to the judge, the petitioners must strongly disagree. The same-sex prohibition is in fact sex-neutral: both men and women may marry members of the opposite sex,

---

[8] It is of course extremely difficult for the state ever to meet the compelling state interest test under Alaska constitutional analysis. The State of Hawaii, on remand from the Baehr decision, was unable to do so to the satisfaction of the Hawaii circuit court. Baehr v. Miike, Civ. No. 91-1394 (Findings of Fact and Conclusions of Law, entered Dec. 3, 1996). That court ruling is currently on appeal to the Hawaii Supreme Court.

[9] This was an alternate holding because the court had already found that, in light of its holding about a fundamental right to choose one's own life partner, the state must show a compelling interest to have the same-sex marriage prohibition upheld under the general equal protection clause, art. I, sec. 1.

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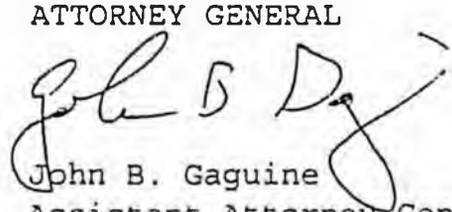
but may not marry members of their own sex. The better analysis on this issue is found not in the superior court's opinion or in Baehr, but in the opinion in Singer v. Hara, 522 P.2d at 1190-91.

PRECISE RELIEF SOUGHT

The petitioners ultimately seek from this court an order that reverses the superior court's grant of partial summary judgment to the plaintiffs and its denial of complete summary judgment to the defendants, and that orders the superior court to dismiss the action with prejudice. However, because of the complexity and importance of the issues that this petition presents, the petitioners are not seeking such an order based on this petition and any opposition to it that may be filed. Rather the petitioners seek only an order accepting the petition and ordering full briefing.

DATED this 9th day of March, 1998, at Juneau, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
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Judge Michalski's February 27, 1998 decision

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 of 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 386.

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-Cauguine

Newby

Secretary/Clerk

Prof. Wardle's testimony before Senate Judiciary Committee re: SJR 42

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

In 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" on 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 that 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 clementary 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 I, 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 will 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 i 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

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[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).

Background information on SB 308, same sex marriage statute currently being litigated

Alaska State Legislature

Sen. Lyda Green, Chairman
Sen. Loren Leman, Vice-Chairman
Sen. Mike Miller
Sen. Johnny Ellis
Sen. Judith Salo

State Capitol
Room 433
Juneau, Alaska 99801-1182
907-465-3762

Senate Committee on Health, Education and Social Services

Sponsor Statement -- SB 308

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

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

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

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

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

SUPPORTING
DOCUMENTS

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

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

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

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Bill Defining Marriage as a Man/Woman Partnership Becomes Law

For Immediate Release: May 6, 1996

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

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

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

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

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

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

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

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

-more-

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

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

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

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

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

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

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

SENATE BILL NO. 308

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

Introduced: 3/14/96
Referred: HES, JUD

A BILL

FOR AN ACT ENTITLED

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

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

*** Section 1.** AS 25.05.011(a) is amended to read:

(a) Marriage is a civil contract **entered into by one man and one woman that requires** [REQUIRING] both a license and solemnization**. The man and the woman must each be at least one of the following:** [THAT MAY BE ENTERED INTO BY]

(1) [A PERSON WHO IS] 18 years of age or older **and** [, WHO IS] otherwise capable;

(2) **qualified** [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.

* **Sec. 2.** AS 25.05 is amended by adding a new section to read:

Sec. 25.05.013. SAME-SEX MARRIAGES. (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.

* **Sec. 3.** APPLICABILITY. AS 25.05.013, enacted by sec. 2 of this Act, applies to all marriages entered into in other jurisdictions, whether entered into before, on, or after the effective date of this Act.

* **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

TONY KNOWLES
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 6, 1996

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

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

Dear Drue and Gail,

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

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

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

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

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

Sincerely,

Tony Knowles
Governor

SB308

THE NATIONAL LEGAL FOUNDATION

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

April 4, 1996

OPINION LETTER

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

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

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

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

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