SEN GREEN SEN. DYSON 4/13/05
BUNDE STEDMAN
HOFFMAN
OLSEN

Compliments of...
Gary Wilken
Senator, Fairbanks

Fairbanks Daily News-Miner

Retirement reform

Wednesday, April 13, 2005 - Linking millions of dollars in retirement aid for schools, the University of Alaska and muncipalities across the state to approval of reforms in the two main state-run employee retirement programs has been characterized a number of ways by opponents. It's been called blackmail. It's been described as holding schools and communities hostage as they prepare their own budgets.

Proponents of the idea sharply disagree, saying that the linkage is the only way to bring about needed changes to a system that has accrued a significant debt and that has seen major increases in the cost to employers–the schools, the university, municipalities and the state government itself.

It's an ugly way to go about it, yes. But it appears necessary to bring equity to the retirement systems.

Government entities at all levels are having difficulty with the large mandatory payments to the Public Employees' Retirement System and the Teachers' Retirement System.

The persistent and large increases have come about for a variety of reasons: less-than-expected investment performance (the systems lost a combined $1.4 billion from July 2000 to June 2002), rising health-care costs and decisions made a few years ago to lower the employer contribution rate–decisions that people now believe were made on faulty assumptions provided to the retirement system boards and subsequently to the Legislature, which authorized the lower rates.

The key inequity is that employees pay a set percentage into the system and receive a defined benefit upon retirement, meaning that the increased costs of providing that defined benefit are borne solely by the employer.

In Fairbanks, the local school district is a good example of the magnitude of that burden.

The district must make $11.2 million in combined contributions to the PERS and TRS retirement systems in the current fiscal year. That's 8.9 percent of the district's total budget of $125.3 million.

For the following fiscal year, however, the district's chief financial officer expects the combined contribution will rise to $15.1 million, 11.1 percent of a budget that is projected to be about $135.8 million.

That's an increase of $3.9 million from one year to the next and the main reason that district officials and other educators in similar situations have been urging the Legislature to provide not only additional money for the classroom but also to pay those higher retirement costs.

The Senate on Monday took an important step to improving the systems, though governments will continue to need outside financial help for a number of years until the fiscal improvements begin to have a measurable effect.

Senate Bill 141, if it becomes law in its present form, would affect employees in two central ways:

New hires would be enrolled in a defined contribution plan, much like a 401(k), and would therefore assume the risk and responsibility for their retirement planning, and existing employees would be required to pay a little more into the system, with the goal of sharing cost increases equally with their employers for their own retirement. The additional money raised from those employees would not be used to pay the retirement cost of past employees.

Those sound like fair changes, though some employees presently enrolled won't see it that way.

Current employees who complain about the prospect of having to pay a little more--so that the rest of the public doesn't have to through higher local taxes or cuts in services so that the retirement bill can be paid–would do well to consider that they have a pretty good retirement plan that exceeds many plans offered in the private sector, where companies must be mindful of their bottom line.

How good is the state plan? An employee in the PERS system and who was hired from Jan. 1, 1961, to June 30, 1986, for

example, can retire at age 55 with early retirement at age 50, and have the comfort of a defined payment every month for the duration of his retirement, and paid medical coverage for himself, his spouse and his eligible dependents.

Benefits are less lucrative for employees hired from 1986 to 1996 and for those hired later, but there can be no disputing that the program for all of them is an enviable one.

Some opponents have argued that the state constitution prohibits any change to that generous program for existing employees, and a legal challenge is entirely possible. But it is a fight that should be waged.

Meanwhile, the ugliness of this necessary approach to bring real change will be felt by real people worrying about their future. That's because the Senate's retirement bill is on its way to the House, which has its own ideas and concerns. And with leading Republican senators suggesting they will not provide that needed assistance unless reforms are approved, the prospect of job losses and service cuts exists.

As sometimes happens in Juneau, this issue may end up as a test of wills between the chambers. In the end, though, it would be best for Alaskans if the Senate's threat can be avoided and the issue resolved now, provided that legislators are comfortable they can make thoughtful, informed decisions on the matter in the few weeks remaining before their scheduled May 10 adjournment.

NFIB
The Voice of Small Business®

ALASKA

National Federation of Independent Business

Statement of Support

of SJR 14

Permanent Repeal of Death Tax

April 12, 2005

The Alaska Chapter of the National Federation of Independent Business has 2,500 members, making it the largest small-business advocacy group in the state.

NFIB was very actively involved at the federal level in getting a law passed in 2001 to repeal the Death Tax. The repeal is phased in to finally accomplish total repeal by 2010. However, that legislation will sunset on December 31, 2010. SJR 14 calls for the death tax to be permanently repealed.

Some people think the Death Tax only hits the super-rich. Often the victims hardest hit by the Death Tax are middle-class hard-working Americans ... small business owners and their employees. Originally intended to prevent the concentration of wealth that worried our founding fathers and later intended to raise revenue during wartime, the Death Tax in its current form is destructive to America's entrepreneurs. In addition to the tax itself, thousands of small businesses are impacted each year by expensive fees paid to attorneys, accountants and life insurers necessary to prepare for an eventual Death Tax debt.

The legislative agenda of NFIB for state and federal issues is determined by ballot. The ballot is a poll of the membership on a series issues. Ballot results have shown that **89 percent of NFIB members favor full and total repeal of the Death Tax.**

NFIB/Alaska urges support for SJR 14.

Submitted by Thyes Shaub on behalf of NFIB/Alaska.

National Federation of Independent Business – ALASKA
217 Second St., Suite 205 • Juneau, AK 99801 • 907-463-5118 • Fax 907-463-5128 • www.NFIB.com

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/8/05

FURTHER: (Finance)

Date of 5-Day Notice: 3/17/2005
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3/23/05

State Affairs Committee considered SENATE JOINT RESOLUTION NO. 14

SJR 14 REPEAL FEDERAL ESTATE TAX

Urging the United States Congress to amend the tax code to permanently repeal the federal estate and generation-skipping transfer tax.

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

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

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
REV	3/20/05			✓	1

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
Elton			✓	
Wiggins			✓	
Huggins	X			
Davis	X			
L. Jouault CHAIR:	X			

SJR

19

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT
APR 2 0 2006
SENATE FINANCE COMMITTEE

DATE: 3/1/06

FURTHER:

DATE TURNED IN TO OFFICE: 21 April 2006

Finance Committee considered SENATE JOINT RESOLUTION NO. 19

SJR 19 TASK FORCE ON HOSPITAL INFECTIONS

Relating to creating the Task Force to Assess Public Reporting of Health Care Associated Infections.

and recommends:

[✓] be **replaced** with _____ **CS** SJR 19 (FIN)

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

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[✓] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#
fiscal note forthcoming					

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			✓	
	✓			
			✓	
COCHAIR:	✓			
COCHAIR:	✓			

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

REPORTED OUT
APR 2 0 2006
SENATE FINANCE COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CS SJR 19 (FIN)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Legislature
Title "Relating to creating the Task Force to Assess Public Reporting of Health Care Associated...."
RDU Budget and Audit Committee
Component: Legislative Finance
Sponsor Senator Gary Stevens
Requestor Senate Finance
Component No. 774

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

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

CS SJR19 (FIN) establishes a 10 member Task Force to Assess Public Reporting of Health Care Associated Infections. The 10 members are appointed jointly by the President of the Senate and the Speaker of the House. Public members of the Task Force may not receive compensation, per diem, or reimbursement for travel or other expenses incurred while serving on the Task Force, except that persons appointed as consumers of health care are entitled to reimbursement for lodging and travel expenses incurred while serving on the Task Force. The Senate Finance Committee will absorb the lodging and travel expenses for the public members appointed as consumers of health care. The Task Force will study the issue and issue a white paper of its findings to the Legislature by January 31, 2007. The Task Force may meet during and between Legislative sessions. The Legislative Affairs Agency will absorb costs to teleconference meetings and the costs to print the white paper.

Prepared by: Karla Schofield, Deputy Director
Phone 465-6626
Division Legislative Affairs Agency
Date/Time 4/24/06 4:49 PM

Approved by: Pamela Varni, Executive Director
Date 4/24/2006
Agency Legislative Affairs Agency

SENATE JOINT RESOLUTION NO. 19

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY SENATOR GARY STEVENS

Introduced: 2/14/06
Referred: Health, Education and Social Services, Finance

A RESOLUTION

Relating to creating the Task Force to Assess Public Reporting of Health Care Associated Infections.

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

WHEREAS infections associated with health care are a major public health problem in the United States, with an estimated 2,000,000 infections occurring each year; and

WHEREAS infections associated with health care cost 90,000 lives and $4,500,000,000 in excess health care costs each year; and

WHEREAS, since 2002, six states have enacted legislation that requires hospitals to report hospital-acquired infections to the public; and

WHEREAS advocates of mandatory reporting, including the Consumers Union, believe that making information about infections associated with health care available to the public will enable patients to make more informed choices about their health care and will improve overall health care quality; and

WHEREAS the state does not currently expressly require reporting of infections associated with health care and hospital-acquired infections, except as part of a risk management program;

Amendment #1 adopted

BE IT RESOLVED by the Alaska State Legislature that the Task Force to Assess Public Reporting of Health Care Associated Infections is established in the Legislative branch; the task force is composed of 10 members appointed jointly by the president of the senate and the speaker of the house of representatives a follows:

(1) two state senators;

(2) two state representatives;

(3) the state chief of epidemiology;

(4) a consumer of health care who resides in rural Alaska;

(5) a consumer of health care who resides in urban Alaska;

conceptual: the state would pay travel & lodging (not per diem) expenses for these members

(6) a representative of the Alaska Native Tribal Health Consortium;

(7) a representative of the Alaska Chapter of the Association of Professionals in Infection Control and Epidemiology; and

(8) a representative of the Alaska State Hospital and Nursing Home Association; and be it

FURTHER RESOLVED that the public members of the task force may not receive compensation, per diem, or reimbursement for travel or other expenses incurred while serving on the task force; and be it

FURTHER RESOLVED that the task force shall

(1) conduct a review of the experience of the public with reporting of infections associated with health care and hospitals; and

(2) develop a white paper to be used for drafting legislation for reporting of infections associated with health care and hospitals that addresses the unique health care challenges in the state, including

(A) reporting mechanisms;

(B) data sources and possible outcome and process measures to be reported;

(C) a timeline for implementation of recommendations; and

(D) the infrastructure needed for supporting a robust ongoing reporting system for disseminating accurate data; and be it

FURTHER RESOLVED that the task force may meet during and between legislative sessions; and be it

CS FOR SENATE JOINT RESOLUTION NO. 19(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR GARY STEVENS

A RESOLUTION

Relating to creating the Task Force to Assess Public Reporting of Health Care Associated Infections.

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

WHEREAS infections associated with health care are a major public health problem in the United States, with an estimated 2,000,000 infections occurring each year; and

WHEREAS infections associated with health care cost 90,000 lives and $4,500,000,000 in excess health care costs each year; and

WHEREAS, since 2002, six states have enacted legislation that requires hospitals to report hospital-acquired infections to the public; and

WHEREAS advocates of mandatory reporting, including the Consumers Union, believe that making information about infections associated with health care available to the public will enable patients to make more informed choices about their health care and will improve overall health care quality; and

WHEREAS the state does not currently expressly require reporting of infections associated with health care and hospital-acquired infections, except as part of a risk management program;

BE IT RESOLVED by the Alaska State Legislature that the Task Force to Assess Public Reporting of Health Care Associated Infections is established in the Legislative branch; the task force is composed of 10 members appointed jointly by the president of the senate and the speaker of the house of representatives a follows:

(1) two state senators;

(2) two state representatives;

(3) the state chief of epidemiology;

(4) a consumer of health care who resides in rural Alaska;

(5) a consumer of health care who resides in urban Alaska;

(6) a representative of the Alaska Native Tribal Health Consortium;

(7) a representative of the Alaska Chapter of the Association of Professionals in Infection Control and Epidemiology; and

(8) a representative of the Alaska State Hospital and Nursing Home Association; and be it

FURTHER RESOLVED that the public members of the task force may not receive compensation, per diem, or reimbursement for travel or other expenses incurred while serving on the task force, except that the persons appointed as consumers of health care are entitled to reimbursement for lodging and travel expenses incurred while serving on the task force; and be it

Amendment #1

FURTHER RESOLVED that the task force shall

(1) conduct a review of the experience of the public with reporting of infections associated with health care and hospitals; and

(2) develop a white paper to be used for drafting legislation for reporting of infections associated with health care and hospitals that addresses the unique health care challenges in the state, including

(A) reporting mechanisms;

(B) data sources and possible outcome and process measures to be reported;

(C) a timeline for implementation of recommendations; and

(D) the infrastructure needed for supporting a robust ongoing reporting system for disseminating accurate data; and be it

FURTHER RESOLVED that the task force may meet during and between legislative sessions; and be it

FURTHER RESOLVED that the task force shall deliver the white paper of its findings to the legislature by January 31, 2007; and be it

FURTHER RESOLVED that the task force is terminated on February 1, 2007.

COPIES of this resolution shall be sent to the Honorable Karleen Jackson, Commissioner, Department of Health and Social Services; and the Honorable Ted Stevens and the Honorable Lisa Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

Alaska State Senate

Senate Finance Committee

Official Business

Mail Stop 3100
State Capitol
Juneau, Alaska 99301-1182

FAX COVER SHEET

DATE: 20 April 2006 TIME: 1:30 pm

TO: Legal Services

NUMBER OF PAGES, INCLUDING COVER SHEET: 2

FROM: MINDY ROWLAND
SENATE FINANCE COMMITTEE SECRETARY
PHONE: 465-4935
FAX: 465-2187

NOTES: Final Please
SJR 19 24-LS1657\A
plus 1 amendment - attached

Thanks.
Mindy

SESSION ADDRESS:
Alaska State Capitol
Juneau, Alaska 99801-1182
(907) 465-4925
Fax: (907) 465-3517
Toll Free: 1-800-821-4925

Senator Gary Stevens
Alaska State Legislature

INTERIM ADDRESS:
112 Mill Bay Road
Kodiak, Alaska 99615
(907) 486-4925
Fax: (907) 486-5264

Sponsor Statement for Senate Joint Resolution 19
(February 27, 2006)

Some 2 million infections a year are acquired in hospitals and an estimated 90,000 people die as a result of these infections, making it the sixth-leading cause of death in the country. The cost to the consumers is between $4.5 and $11 billion a year. Given these alarming statistics, it is vital for consumers to have full knowledge of how medical facilities fare with infection rates. Passage of SJR 19 can help accomplish this goal by providing lawmakers, state health officials and medical professions the opportunity to craft workable legislative recommendations for the collection of data on hospital-acquired infection rates.

SJR 19 creates the Task Force to Assess Public Reporting of Health Care Associated Infections. This ten member panel will consist of two senators, two representatives, the Chief of Epidemiology for the State of Alaska, one healthcare consumer from rural Alaska, one healthcare consumer from urban Alaska, a representative of the Alaska Native Tribal Health Consortium, a representative from the Alaska Chapter of the Association of Professionals in Infection Control and Epidemiology, and a representative of the Alaska State Hospital and Nursing Home Association.

During the 2006 Legislative Interim, the Task Force will be asked to:

(1) Review experience to date with public reporting of hospital-associated infections.
(2) Develop a white paper to be used for drafting legislation for reporting of healthcare associated infections. The white paper will address the unique healthcare challenges of Alaska and would encompass:
    (a) Mechanism(s) for reporting;
    (b) Identifying data sources and possible outcome and process measures to be reported;
    (c) Timeline for implementation;
    (d) Infrastructure needs for supporting a robust ongoing reporting system for dissemination of accurate data.

I ask for your support of this important legislation.

Senate District R
Senator_Gary_Stevens@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 16, 2006

SUBJECT: Summary of SJR 19 (Work Order No. 24-LS1657\A)

TO: Senator Gary Stevens
Attn: Doug Letch

FROM: Jean M. Mischel
Legislative Counsel

You have requested a summary of the above-described resolution.

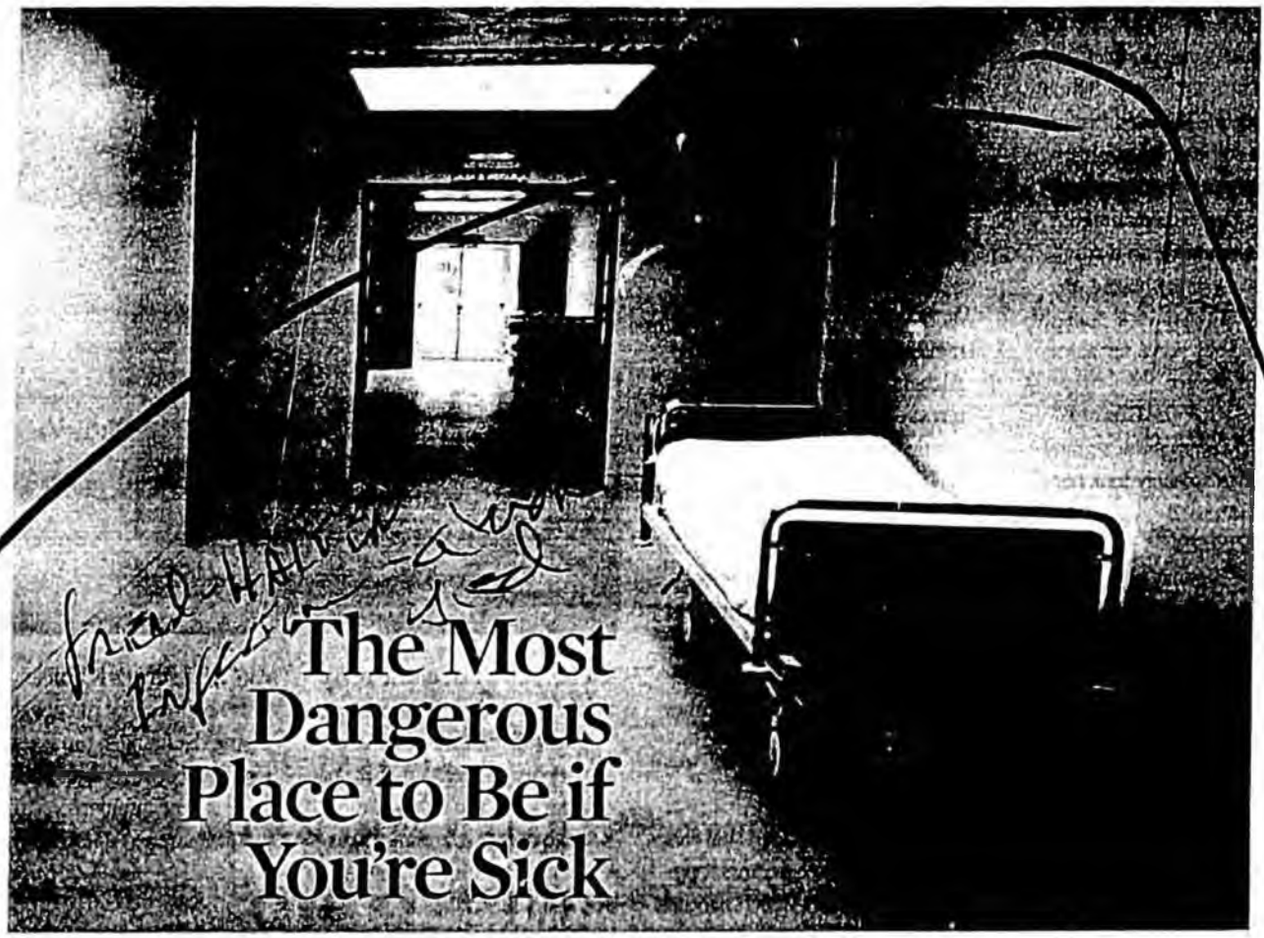
As a preliminary matter, note that a summary of a resolution should not be considered an authoritative interpretation of the resolution and the resolution itself is the best statement of its contents.

The Whereas clauses state the findings of the legislature regarding the rate and costs of hospital acquired infections and other infections associated with health care.

The Resolve clauses establish a 10 member task force to conduct a review of and report on infections associated with health care and hospitals and reporting mechanisms.

JMM:med
06-135.med

[BULLETINBOARD]



The Most Dangerous Place to Be if You're Sick

When Leroy Rickabaugh had surgery to remove a bladder tumor at Mercy Medical Center in Des Moines, Iowa, last October, he expected to be in the hospital for just a few days.

Instead, he ended up staying for nearly three weeks after he contracted a bacterial infection that also hit several other patients on his ward. "I didn't get more seriously sick," Rickabaugh, 74, says, "but they wouldn't let me out until it cleared up."

In a way, Rickabaugh was lucky. Of the 2 million or so Americans each year who contract infections while in the hospital, about 90,000 die because of them. Hospital infections, in fact, are the nation's sixth-leading cause of death.

Health care and consumer activists have been pushing for laws that would require hospitals to publicly disclose their infection statistics, in the hope of pressuring them into adopting more effective anti-infection measures. So far they've scored victories in five states: Florida, Illinois, Missouri, Pennsylvania and Virginia. About 30 other states are considering similar legislation.

"It's a problem begging for attention, one that costs a lot of lives and money," says Lisa McGiffert, director of the Stop Hospital Infection Project for Consumers Union. "Clearly, hospitals aren't doing all that they can."

Now, with efforts in the states accelerating, comes a push for a nationwide standard.

"We have an information shortage about hospital infections," says Kenneth W. Kizer, M.D., president of the National Quality Forum, a Washington-based nonprofit organization. "But if we have 50 different standards for measuring the problem, we'll have information chaos."

First the bad news: About 90,000 Americans die each year from infections they contract while in the hospital.

Most infection-fighting measures aren't new, but experts say they're not consistently followed. Hungarian physician Ignaz Semmelweis proved in 1847 that the transmission of infections in hospitals could be reduced by hand washing. But many doctors, nurses and other staff members still do not wash their hands between patients. Another simple but often overlooked precaution: ensuring that surgery patients receive the correct antibiotic up to one hour before incisions are made.

"Doctors and nurses get so caught up in their work that they don't even realize how far their own practices fall short, until they see the data out there," says David Sundike of the Washington-based American Health Quality Association. "We need to get that data to them."

—Patrick J. Kiger

Myth: Hospitals Keep You Safe from Germs

Hospital Infections Kill Tens of Thousands Every Year

(ABC NEWS)

ABC NEWS

Oct. 14, 2005 — There's a deadly threat hiding inside America's hospitals. What's even scarier, your hospital is probably keeping it a secret.

Maureen Daly's mother was a healthy 63-year-old woman when she had surgery to fix a broken shoulder. However, after being admitted to the hospital, Daly's mother got an infection that left her immobilized on a respirator. Daly was told that life-threatening germs are an inevitable fact of hospital life.

Daly was shocked. "I cannot accept that it would be a fact of life that you can walk into a hospital with a broken shoulder and leave practically dead," she said. Her mother died four months later. It turns out hospital infections are the fourth-leading cause of death in the United States.

Betsy McCaughey, former lieutenant governor of New York and founder of the Committee to Reduce Infection Deaths, said, "These infections kill as many people each year in our country as AIDS, breast cancer and auto accidents combined."

McCaughey said it's secrecy that's allowed the problem to grow. "Most states have not required hospitals to report their infections, or provide that information to the public," she said.

Pennsylvania is one of only six states that has passed a law requiring the reporting of infections. Experts say public disclosure forces hospitals to reduce infection rates. Dr. Rick Shannon, chief of medicine at Allegheny General Hospital in Pittsburgh, looked at the data on patients in the hospital's intensive care units. He was stunned.

"Fifty-one percent of everyone who got these infections died. Half the people who got one died," he said. Dr. Shannon wasted no time. He gave an order to the ICU staff. Reduce hospital infections to zero — in just 90 days.

Staff nurses said they didn't think it could be done.

But after just one week, the ICU staff identified the culprit. It wasn't a superbug — it was the staff. And the fact they each had their own way of washing hands, changing dressings, and putting in catheters. "No one actually knew what the right way to do it was. And not knowing what the right way to do it was that all these little errors could creep in that would lead to infection," Dr. Shannon said.

Dr. Shannon and his team quickly found solutions, like putting in more hand-sanitizers and raising the head of the bed 30 degrees to prevent pneumonia. The results were unbelievable.

"Ninety days later, we went from 49 infections to zero," he said.

And the results a year later are equally impressive. Only one patient in the ICU has died from an infection.

McCaughey says it's important for the public to know about infection rates at hospitals. "The public has a right to this information. If you are going into the hospital, you should be able to find out which hospital in your area has a serious infection problem, so you can stay away from that hospital," she said. Her advocacy group is working to pass more state laws — like Pennsylvania's — requiring hospitals to release this data.

And McCaughey says there's a simple thing you can do to keep yourself safe from dangerous germs in any hospital.

"Ask doctors and nurses to clean their hands before touching you. If you are worried about being too aggressive, just remember, your life is at stake," she said.

ASHNHA Testimony on SJR 19
Presented by: Rod Betit, President/CEO
April 20, 2006

The membership of the *Alaska State Hospital and Nursing Home Association* (ASHNHA) supports SJR 19 and believes it to be important legislation.

Although some complications from surgery and other health care are unavoidable, we agree with the sponsor that care can be improved through better adherence to evidence-based practice recommendations and by giving more attention to designing systems of care with redundant safeguards.

Alaska hospitals have been actively implementing measures to reduce hospital acquired infections for some time now. Research shows, for example, that delivering antibiotics to a patient within one hour prior to beginning surgery can dramatically cut post-surgery infection rates.

While Alaska's hospitals have been addressing these and other reasons for hospital acquired infections, we believe creation of this Task Force will allow us to do several things:

- First it will allow us to educate employers, community leaders and the public about our initiatives to strengthen health care quality for all Alaskans
- Second, it will provide us with valuable input into the deliberations of 'next steps' for addressing other factors leading to hospital acquired infections, and
- Third, it will provide a deliberative environment to design a reporting system that will track infection rates in Alaska that will be meaningful for Alaskans.

ASHNHA urges this Committee to move SJR 19 forward.

ASHNHA Represents the Following Alaska Health Care Providers

The *Alaska State Hospital and Nursing Home Association* represents 23 acute care hospitals, 2 behavioral health facilities, 6 assisted living facilities (Alaska Pioneer Homes), and 5 nursing facilities. ASHNHA's rich composition of private, federal, state, and tribal health care facilities provides a balanced viewpoint on important health care policy matters. ASHNHA's Legislative Committee evaluates health care legislation weekly and authorizes the position expressed in this testimony. Our member facilities include:

Alaska Regional Hospital, Alaska Native Medical Center, Alaska Pioneer Home System, Alaska Psychiatric Institute, Bartlett Regional Hospital, Bassett Army Community Hospital, Central Peninsula General Hospital, Cordova Community Medical Center, Denali Center Nursing Home, Fairbanks Memorial Hospital, Heritage Place Nursing Home, Kanakanak General Hospital, Ketchikan General Hospital, Manillaq Health Center, Mary Conrad Center, Mat-Su Regional Hospital, Mt. Edgecumbe Hospital SEARHC, North Star Behavioral Health, Norton Sound Regional Hospital, Petersburg Medical Center, Providence Alaska Medical Center, Providence Extended Care Center, Providence Kodiak Island Medical Center, Providence Seward Medical & Care Center, Providence Valdez Medical Center, Sitka Community Hospital, South Peninsula Hospital, USAF 3rd Medical Group- Elmendorf, Wrangell Medical Center, Wildflower Court Nursing Home, Yukon Kuskokwim Delta Regional Hospital.

Alaska State Hospital & Nursing Home Association, 426 Main St., Juneau, AK 99801 (907) 586-1790

SJR

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REPORTED OUT
APR 2 8 2006
SENATE FINANCE COMMITTEE

SENATE FINANCE COMMITTEE REPORT

DATE: 3/1/06

FURTHER:

DATE TURNED IN TO OFFICE: 4/28/06

Finance Committee considered SENATE JOINT RESOLUTION NO. 20

SJR 20 CONST. AM: BENEFITS & MARRIAGE

Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage.

and recommends:

[✓] be replaced with _____ CS SJR 20 (FIN)

[ ] adopt previous _____ CS FORTHCOMING ___ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[✓] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#
Elections	2/14/06	1.5			1

[ ] APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
		✓		
		✓		
			✓	
	✓		✓	
	✓			
COCHAIR:	✓			
COCHAIR:	✓			

CS FOR SENATE JOINT RESOLUTION NO. 20(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A RESOLUTION

Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage.

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

*** Section 1.** Article I, sec. 25, Constitution of the State of Alaska, is amended to read:

Section 25. Marriage and related limitations. To be valid or recognized in this State, a marriage may exist only between one man and one woman. **No other union is similarly situated to a marriage. No provision of this constitution shall be construed to require that marriage or the legal incidents of marriage be conferred on a union other than the union of a man and woman.**

*** Sec. 2.** The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

REPORTED OUT
APR 2 8 2006
SENATE FINANCE COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SJR 20
(S) Publish Date: 3/1/06

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

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

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

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

Prepared by: Whitney Brewster, Director — Phone 465-2644
Division: Division of Elections — Date/Time 2/14/2006, 2:45pm
Approved by: Whitney Brewster, Director — Date 2/14/2006
Agency: Office of the Lt. Governor, Division of Elections

(Revised 8/7/2003, OMB)

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DOCUMENT(S)
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24-LS1676\G AMENDED
Mischel
4/27/06

CS FOR SENATE JOINT RESOLUTION NO. 20( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A RESOLUTION

Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage.

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

* Section 1. Article I, sec. 25, Constitution of the State of Alaska, is amended to read:

Section 25. Marriage and related limitations. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No other union is similarly situated to a marriage. NO PROVISION OF THIS ~~This~~ constitution shall ~~not~~ be construed to require that marriage or the legal incidents of marriage be conferred on a union other than the union of a [redacted] man and woman.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

SENATE FINANCE COMMITTEE

4/28/ 2006 COMMITTEE ACTION

Bill Number	SJR 26		
Amendment	CS "G" Amended		
Motion	Report from Committee		
Motion by			
Objection by			
Removed			
Second Objection by			
Committee Member	**Y**	***Vote***	**N**
Senator Dyson	✓		
Senator Hoffman			✓
Senator Olson	✓		
Senator Stedman			✓
Senator Bunde			✓
Co-Chair Wilken	✓		
Co-Chair Green	✓		
Tally			
Yea	4		
Nay	3		
Absent			
MOTION	PASS		

Alaska State Senate

Senate Finance Committee

Official Business

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

FAX COVER SHEET

DATE: 4/28/2006 TIME: 11:00 am

TO: LEGAL

NUMBER OF PAGES, INCLUDING COVER SHEET: 2

FROM: ROBIN PAUL
SENATE FINANCE CMTE. ASST. SECRETARY
PHONE: 465-2618
FAX: 465-2187

NOTES: FINAL Please CS SJR 20(FIN)
of Version "G" as amended
(attached)

Thank You!
Robin

ADOPTED

24-LS1676\G
Mischel
4/27/06

CS FOR SENATE JOINT RESOLUTION NO. 20( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A RESOLUTION

Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage.

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

* Section 1. Article I, sec. 25, Constitution of the State of Alaska, is amended to read:

Section 25. Marriage and related limitations. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No other union is similarly situated to a marriage. ~~This~~ NO PROVISION OF THIS constitution shall ~~not~~ be construed to require that marriage or the legal incidents of marriage be conferred on a union other than the union of a [redacted] man and woman.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

SENATE FINANCE COMMITTEE

4 /28 / 2006 COMMITTEE ACTION

Bill Number	SJR 20			
Amendment				
Motion	Adopt CS			
	G Amended			
Motion by	Green			
Objection by	Green			
Removed	✓			
Second Objection by				
Committee Member	Y	***Vote***		N
Senator Olson				
Senator Stedman				
Senator Bunde				
Senator Dyson				
Senator Hoffman				
Co-Chair Wilken				
Co-Chair Green				
Tally				
Yea				
Nay				
Absent				
MOTION	ADOPTED			

ALASKA STATE SENATE

Session:
State Capitol
Juneau, Alaska 99801-1182
(907) 465-2327
(907) 465-5241 Fax

Interim:
119 N. Cushman, Suite 201
Fairbanks, Alaska 99701
(907) 456-8161
Senator_Ralph_Seekins@legis.state.ak.us

Senator Ralph Seekins
District D

Senate Joint Resolution 20 Sponsor Statement

"Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage."

Senate Joint Resolution 20 is presented to allow the people to address a fundamental question that has been the subject of a number of court cases dating back to the early 1990s. These cases challenged Alaska's right to reserve marriage to the union of one man and one woman and thereby to restrict the rights, benefits, obligations, qualities and effects of marriage to legally married Alaskans.

The legislature believed the matter was settled in 1996 when it passed what is commonly called the Alaska Defense of Marriage Act.[1] This Act provided that in Alaska a marriage is between one man and one woman. Furthermore, the Act specified that Alaska would not recognize foreign marriages that are not otherwise legal under Alaska law and that benefits of marriage extend only to legally married Alaskans.[2]

Then, in February 1998, an Anchorage Superior Court judge ruled that, as written, Alaska's Constitution provides a fundamental right for same-sex couples to marriage.[3] The Court ordered further hearings to determine whether a compelling state interest could be found to deny same-sex marriage in the Alaska Marriage Code.

As a result, a significant number of Alaskans believed the Court had trespassed into the people's prerogative. Consequently they sought a stronger defense of marriage through a constitutional amendment. They reasoned that only through a constitutional amendment could the matter be resolved with any finality. A super majority of the legislature[4] agreed and a proposition was placed on the 1998 general election ballot.

In November of 1998 Alaska's people voted – by a substantial margin[5] - to amend their Constitution. What is commonly called the Marriage Amendment reads:

> **Section 1.25 – Marriage.** To be valid or recognized in this State, a marriage may exist only between one man and one woman.

It was generally believed adoption of the Marriage Amendment constitutionally reserved marriage to the union of one man and one woman *and therefore* the pathway to the rights, benefits, obligations, qualities and effects of marriage was closed to anyone who was not legally married.

Seven years later, in October of 2005, the Alaska State Supreme Court correctly noted that the text of the Marriage Amendment effectively prohibits same-sex domestic partners from marrying in Alaska and that it effectively denies recognition in Alaska to foreign marriages between same-sex couples.[6]

However, the Court also held that the Marriage Amendment does not explicitly address the topic of spousal benefits. In fact, the Court went so far as to say, "spousal limitations in benefit programs are unconstitutional, and they are invalid only to the extent they deny benefits to persons who are absolutely precluded from becoming eligible for those benefits (same-sex unions), even though their domestic relationship is not legal."

To many Alaskans, the Court's reasoning conflicts with their own understanding of what the Marriage Amendment would accomplish when they went to the polls in 1998. Their conception was that if marriage was restricted to one man and one woman, only legally married Alaskans would be eligible for spousal benefits.

None believed the Amendment would ever be used to rule, as the Court did, that spousal limitations vis-à-vis benefit programs are "unconstitutional". None believed that the people themselves – by voting for the Marriage Amendment – forced the Court to treat same-sex couples as if they are legally married, as the Court now asserts.[7] None believed it would ever be necessary to revisit this issue.

The Constitution was conceived, written and approved by the people. It belongs to the people – not to the courts. Clearly, the right to clarify its meaning when challenged by the courts belongs to the people. Senate Joint Resolution 20 allows the people themselves to determine whether or not they intended in 1998 – and still intend today – to confine the rights, benefits, obligations, qualities and effects of marriage to legally married Alaskans.

---

[1] Senate Bill 308 – 19th Alaska State Legislature.

[2] **Sec. 25.05.011. Civil Contract.** (a) Marriage is a civil contract entered into by one man and one woman that requires both a license and solemnization. The man and the woman must each be at least one of the following:
(1) 18 years of age or older and otherwise capable;
(2) qualified for a license under AS 25.05.071; or
(3) a member of the armed forces of the United States while on active duty.
(b) A person may not be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. A marriage performed in this state is not valid without solemnization as provided in this chapter. (§ 1 ch 58 SLA 1963; am § 9 ch 245 SLA 1970; am § 92 ch 127 SLA 1974; am § 1 ch 28 SLA 1975; am § 1 ch 21 SLA 1996)
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. (§ 2 ch 21 SLA 1996).

[3] *Brause and Dugan v. State of Alaska.* This case was dismissed following passage of the Marriage Amendment.

[4] A 2/3 majority of the legislature is required to place a constitutional amendment on the ballot.

[5] A 69% majority voted in favor of amending the State's Constitution.

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

[7] Footnote 38 to the *ACLU* decision states in pertinent part: "We recognize that the benefits became discriminatory only after the legislature acted in 1996 and 1998 and the electorate adopted the Marriage Amendment in 1998."

ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE
February 21, 2006

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

INTRODUCTION

I would like to thank the Chairman of the Committee, Senator Seekins, and the members of the Committee, Senators Terio, Huggins, French and Guess, for the opportunity to speak today regarding SJR 20, a proposed amendment to the Alaska Constitution to preserve the benefits and privileges of marriage to married couples. By way of introduction, I was legal counsel for the Alaska Legislature in 1998 in the litigation related to whether the Marriage Amendment, Art. I, Section 25 of the Alaska Constitution, would remain on the general ballot so that the People of Alaska could vote to ratify it. I was also one of the primary drafters of the Marriage Amendment.

HISTORICAL BACKGROUND

In order to understand the present significance of SJR 20 it is essential to understand the history that has lead up to its introduction. The Marriage Amendment, Art. I. Section 25, was ratified by the People, on a vote of 68%-32%, in response to a decision of the superior court in Anchorage in a case called Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998). On February 28, 1998 a superior court judge ruled that there was a fundamental right to "choose your life mate" protected by the Alaska Constitution and that this right included the right to marry someone of the same sex.

The Plaintiffs in the Brause case sought marriage as a doorway to the benefits and privileges that the law bestows upon married couples. The same sex couple Plaintiffs in Brause argued repeatedly that there were some 115 benefits and privileges available to married couples under Alaska law and they sought to use access to marriage as a doorway by which they could access these same benefits and attach them to their same sex relationship. The Brause litigation treated marital status and marital benefits as being inseparable. In Brause the Plaintiffs specifically sought benefits *based on* marital status. In fact, the superior court's ruling in Brause treated marital status and benefits as being inseparable. "Once married," the superior court noted, "the state provides benefits and imposes duties that are significant and valuable to society as well as to the individual members of the marriage." Brause, 1998 WL 88743 at * 2. Put another way, the court's ruling treated the benefits and duties of marriage as being entirely consequent upon marital status.

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

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

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

Before the popular vote, a group of citizens including the Alaska Civil Liberties Union challenged the constitutionality of the proposed amendment in two actions. Bess v. Ulmer, Case No. 3AN-98-7776 Civil (Alaska Super. Ct. 1998); and Dodd v. Ulmer, Case No. 3AN-98-8114 Civil (Alaska Super. Ct. 1998). The Alaska Supreme Court consolidated the cases and allowed the Amendment to proceed to a vote, with one change. The second sentence of the Marriage Amendment was deleted, rightly or wrongly, by the Alaska Supreme Court at the conclusion of the litigation because the Court viewed the sentence as being "superfluous." See Bess v. Ulmer, 985 P.2d 979, 995 (Alaska 1999).

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

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

Another case, the ACLU v. State litigation, began shortly after the Marriage Amendment was ratified. In this new case, the ACLU and eighteen individuals who alleged that they comprised nine lesbian or gay couples (hereafter referred to collectively as "the ACLU") filed suit against the State of Alaska and the Municipality of Anchorage. The ACLU complained that the state and the municipality maintained employee benefits programs that offer valuable benefits to their employee's spouses that are not offered to the same sex partners of lesbian and gay employees. The ACLU effectively argued that when nearly seventy percent of Alaskans voted to ratify the Alaska Marriage Amendment they voted to command government to give marriage benefits to same sex couples, just as if they were married. The ACLU also argued that those same Alaskans' vote was part of an invidious discriminatory scheme against lesbian and gay people. According to the ACLU, because the Marriage Amendment was created as part of an invidious discriminatory scheme, and because it forecloses the option of marriage to same sex couples, the Alaska Constitution had to be interpreted to command government to treat same sex couples just as if they were married. The ACLU argued that public employees with same sex partners were being singled out and treated

differently due to "sexual orientation" or "gender," because unlike an unmarried male/female couple who can choose to get married if they want to, the same sex couple "can't get married." And so, the Amendment that was designed to end the constitutional debate in Alaska over same sex marriage, became the force of the claim that same sex couples must be treated "just as if they are married," even though they are not. Most Alaskan's heads were spinning upon hearing this argument.

The superior court dismissed the ACLU's claims. See ACLU v. State, 3AN-99-11179 Civil (Alaska Super. Ct. 1999). The superior court reasoned that public employees with same sex partners are denied marriage benefits simply because they are not married. The court concluded that no sexual orientation discrimination existed because same sex couples are treated exactly the same as every unmarried heterosexual couple, who also do not qualify for marital benefits. Finally, the superior court concluded that no gender discrimination existed because men and women equally receive marital benefits for their spouses. The ACLU appealed to the Alaska Supreme Court and on October 28, 2005 the Supreme Court reversed the superior court's decision. ACLU v. State, 122 P.3d 781 (Alaska 2005).

The Alaska Supreme Court rejected the argument that the marriage Amendment foreclosed any claim that the Alaska Constitution mandated the extension of marriage benefits to same sex partners. ACLU, 122 P.3d at 786-87. The Court reasoned that:

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

Id. Because the Marriage Amendment did not foreclose the legislative and executive branches of government from voluntarily choosing to extend benefits to same sex partners, the Court concluded that the Marriage Amendment stood as no barrier to the ACLU's claim that the Alaska Constitution commanded the legislative and executive branches of government to extend benefits to same sex partners. The Court did not address one other possible interpretation of the Marriage Amendment which would have been short of the extreme of "forbidding" any voluntary legislative or executive extension of benefits and that, instead, would have simply forbid any judicially commanded extension of the benefits under the guise of interpreting some other provision of the Alaska Constitution. Id.

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

> We agree with the [ACLU] . . . that the proper comparison is between same-sex couples and opposite sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex

> couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

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

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

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

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

FUTURE IMPACTS OF ACLU v. State

Although ACLU v. State technically addresses only employment benefits in the context of public employment, State, Borough, or Municipal, the impact of the decision stretches much further. Based upon the logic of ACLU v. State, virtually every distinction in Alaska law and public policy between married couples and unmarried same-sex partners is bound to eventually fall to an equal protection challenge under the Alaska Constitution. There is no logical basis upon which to limit the reach of the ACLU v. State decision to simply public employment benefits. Effectively, the Alaska Supreme Court decision is a first step in the direction of constitutionally mandated domestic partnerships in Alaska just as was imposed upon the State of Vermont by the Vermont Supreme Court in Baker v. State, 744 A2d 864, 886-89 (Vt 1999). If Alaska Supreme Court believes that unmarried same-sex partners are unconstitutionally discriminated against because the government denies them the employment benefits that are extended to married men and women, it appears a foregone conclusion that the Court will believe that the state unconstitutionally discriminates against same-sex partners when it denies them other benefits and privileges of marriage, including, but not necessarily limited to, (1) the right of intestate succession; (2) the privilege of not being required to testify against a spouse; (3) the right to receive workers' compensation benefits on the death of a

partner; (4) the right to maintain a legal action for loss of consortium, or a wrongful death action for the death of a partner; and/or (5) the right to receive spousal support on the dissolution of a relationship.

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

SJR 20

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

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

The first phrase of SJR 20 is designed to eliminate the fundamental basis for any equal protection claim in any context that involves comparing married couples to unmarried same-sex partners. The following language of SJR 20 simply confirms that marriage benefits and privileges, qualities, effects and obligations, are limited to marriage relationships as previously defined by the Alaska Constitution. The word benefits is designed to address such things as employment benefits. The word privileges is designed to address such things as the spousal privilege as to court testimony. The words qualities and effects are designed to address any of the various legal qualities and effects of marriage under Alaska law. The word obligations is intended to address such obligations as spousal support in a divorce context.

Nothing in SJR 20 would prohibit private employers from voluntarily deciding to extend marriage like benefits to employees with same-sex partners.

I will provide additional information regarding benefits and marriage amendments in other states by a separate memorandum.

THE SUPREME COURT OF THE STATE OF ALASKA

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

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

Appearances: Allison E. Mendel, Mendel & Associates, Anchorage, Kenneth Y. Choe, American Civil Liberties Union Foundation, New York City, New York, and Tobias B. Wolff, Davis, California, for Appellants. John B. Gaguine,

Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska. Neil T. O'Donnell, Atkinson, Conway & Gagnon, Anchorage, for Appellee Municipality of Anchorage. James M. Gorski, Hughes, Thorsness, Gantz, Powell, Huddleston & Bauman LLC, Anchorage, for Amicus Curiae The Alaska Catholic Conference. Rebecca L. Maxey, Law Offices of Rebecca L. Maxey, L.L.C., Anchorage, and Jennifer Middleton, Lambda Legal Defense and Education Fund, Inc., New York City, New York, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc. Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Amici Curiae North Star Civil Rights Defense Fund, Inc. and Marriage Law Project.

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

EASTAUGH, Justice.

I. INTRODUCTION

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

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[1] Alaska Const. art. I, § 25.

spousal limitations in the benefits programs violate the rights of public employees with same-sex domestic partners to "equal rights, opportunities, and protection under the law."[2]

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

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

II. FACTS AND PROCEEDINGS

The State of Alaska and the Municipality of Anchorage offer health

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

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

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

The Alaska Civil Liberties Union and eighteen individuals who alleged that they comprised nine lesbian or gay couples (collectively, the "plaintiffs") filed suit against the state and the municipality in 1999, complaining that these benefits programs violated their right to equal protection under the Alaska Constitution. They alleged that at least one member of each same-sex couple was an employee or retiree of the state or the municipality, that the eighteen individual plaintiffs were involved in "intimate, committed, loving" long-term relationships with same-sex domestic partners, and that, as gay and lesbian couples, they are excluded by state law from the institution of marriage. Members of eight of the couples asserted in affidavits that they are in

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

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

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

"committed relationships."[5] Their amended complaint alleged that because they are prohibited from marrying each other by Alaska Constitution article I, section 25, they are ineligible for the employment benefits the defendants provide to married couples, resulting in a denial of the individual plaintiffs' right to equal protection.

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

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

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

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

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

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

to declare that denying employment benefits to same-sex domestic partners violates, among other things, article I, section 1 of the Alaska Constitution, which states in part: "This constitution is dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law."

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

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

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

III. DISCUSSION

A. Standard of Review

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

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

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

[10] *See Reichmann v. State, Dep't of Natural Res.*, 917 P.2d 1197, 1200 & n.6 (Alaska 1996); *Sonneman v. Knight*, 790 P.2d 702, 704 (Alaska 1990).

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

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

[13] *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 956 (Alaska 2004); *State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 858 (Alaska 2003).

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

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

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

But Alaska Constitution article I, section 25, the Marriage Amendment, states that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman." It effectively prohibits same-sex domestic partners from marrying in Alaska and denies recognition in Alaska to foreign marriages between same-sex couples.[17] We must decide as a threshold matter whether, as contended by the municipality and amici curiae North Star Civil Rights Defense Fund, Inc. and the Marriage Law Project, the Marriage Amendment precludes challenges by same-sex

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[15] Alaska Const. art. I, § 1.

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

[17] *See* Alaska Const. art. I, § 25.

Alaska voters adopted this amendment in 1998. *See* OFFICE OF THE LIEUTENANT GOVERNOR, *Alaska Constitution: Alaska Constitutional Amendment Summary, at* http://www.gov.state.ak.us/ltgov/akcon/summary.html. The amendment took effect January 3, 1999. *See Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001).

couples to government policies that discriminate between married and unmarried couples.

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

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

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[18] *See Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 496 (Alaska 1988); *State v. Ostrosky*, 667 P.2d 1184, 1191 (Alaska 1983); *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974); CHESTER JAMES ANTIEAU, CONSTITUTIONAL CONSTRUCTION § 2.06, at 18-20 (1982).

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

[20] Explicitly denying benefits to public employees with same-sex domestic partners would arguably offend the Federal Constitution. In *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court struck down on federal equal protection grounds an amendment to the Colorado Constitution that repealed all local and statewide laws prohibiting discrimination based on sexual orientation. The Court explained that in addition to merely repealing state and local laws, the amendment "prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect the named class . . . ." *Id.* at 624. The Court invalidated the amendment under the rational basis standard of judicial review, reasoning that the amendment could not satisfy even the minimal level of scrutiny. *Id.* at 632. It explained that the amendment's

(continued...)

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

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

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[20](...continued)
"disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence . . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

[21] *See Brooks v. Wright*, 971 P.2d 1025, 1028 (Alaska 1999) (stating that court looks to plain language, purpose, and framers' intent in interpreting constitution); *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999) (same); *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992) (same).

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

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

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

Article I, section 1 of the Alaska Constitution "mandates 'equal treatment of those similarly situated;' it protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause."[23] "We have long recognized that [this clause] affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."[24]

"To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed

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

[23] *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (footnote omitted) (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984)).

[24] *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003); *see also Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 272 & n.13 (Alaska 2003).

classification and the nature of the governmental interest at stake . . . ."[25]

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

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

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

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

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

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

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

[29] *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 596-97 (Cal. App. 1992); *Hinman v. Dep't of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Cal. App. 1985); *Ross v.* (continued...)

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

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

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[29](...continued)
Denver Dep't of Health & Hosps., 883 P.2d 516, 519 (Colo. App. 1994); *Phillips v. Wisconsin Pers. Comm'n*, 482 N.W.2d 121, 129 (Wis. App. 1992).

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

consequently treat same-sex couples differently from opposite-sex couples.[31]

2. Intent to discriminate

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

We need not resolve this dispute here because we conclude that the benefits programs are facially discriminatory. When a "law by its own terms classifies persons for different treatment," this is known as a facial classification.[32] And when a law is discriminatory on its face, "the question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory."[33]

To determine whether the benefits programs make a facial classification, we must therefore examine the meaning of the term "spouse." The United States Supreme Court, in *Personnel Administrator v. Feeney*, considered whether a state statute

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

[32] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.4, at 711 (7th ed. 2004) (emphasis added).

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

granting a hiring preference to veterans violated equal protection on the basis of gender.[34] The Court concluded in part that the statute was gender-neutral because the "definition of 'veterans' in the statute ha[d] always been neutral as to gender" and that "Massachusetts ha[d] consistently defined veteran status in a way that ha[d] been inclusive of women who ha[d] served in the military . . . ."[35]

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

The next question is whether the disparate treatment is permitted under the

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[34] *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

[35] *Id.* at 275.

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

[37] *See* NOWAK & ROTUNDA, *supra* note 32, § 14.4, at 711.

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

sliding-scale analysis for equal protection challenges in Alaska.[39]

3. Sliding-scale analysis under the Alaska Constitution

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

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be

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[39] In the case of a facial classification, "there is no problem of proof and the court can proceed to test the validity of the classification by the appropriate standard." NOWAK & ROTUNDA, *supra* note 32, § 14.4, at 711.

> much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[40]

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

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

a. Nature of plaintiffs' interests: level of scrutiny

The first step of our analysis requires us to determine what weight to give the individual interests affected by the benefits programs.[41] Plaintiffs contend that the spousal limitations significantly burden important personal interests, such as the right to intimate association, and are therefore subject to heightened scrutiny. But because minimum scrutiny is sufficient to resolve this case, we do not need to decide whether the plaintiffs' interests are "important" or whether a "fundamental right" is affected.[42]

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

[41] *Id.* at 396.

[42] *Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003) (continued...)

Government action affecting an economic interest receives minimum scrutiny,[43] and the employment benefits at issue here are undeniably economic.

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

The second step of the sliding-scale analysis requires us to consider the governmental interests advanced by a challenged law.[44] Under minimum scrutiny, these interests need only be legitimate.[45] The third step requires us to evaluate the means chosen to advance the interests identified from the second step. Minimum scrutiny requires a "fair and substantial relation" between the means (i.e., the classification) and the "object of the legislation."[46]

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

Cost control. The state and the municipality argue that cost control is a

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[42](...continued)
(applying "close" scrutiny to enactment affecting "important" interest); *State , Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (observing that "strict" scrutiny is applied to enactments affecting "fundamental rights").

[43] *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999).

[44] *Planned Parenthood*, 28 P.3d at 909.

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

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

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

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

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

excluding all same-sex domestic partners, does technically reduce costs, such a restriction fails to advance the expressed governmental goal of limiting benefits to those in "truly close relationships" with and "closely connected" to the employee.

Administrative efficiency. The state and the municipality argue that the need to efficiently administer the benefits programs justifies the spousal limitations. They argue that marriage provides a bright-line distinction that is easily applied, and that allowing employees to designate beneficiaries other than spouses will make it more difficult to administer the programs. The director of the benefits section of the Alaska Division of Retirement and Benefits explained during deposition the potential administrative difficulties that could arise if employees were allowed to designate benefits recipients other than spouses. She discussed theoretical burdens of determining who other than a spouse might be eligible for coverage. The municipality anticipates difficulty in deciding how long a same-sex relationship must last, whether the partners must reside in the same house, whether the relationship must be of a sexual nature, and when the relationship ends.

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

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[47] *Wilkerson v. State, Dep't of Health & Soc. Servs.*, 993 P.2d 1018, 1024 (Alaska 1999); *State v. Albert*, 899 P.2d 103, 115 (Alaska 1995).

[48] *See Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (approving of "less speculative, less deferential, more intensified means-to-end inquiry" for traditional (continued...)

It is significant that other agencies, political subdivisions, and states provide, or have provided, employment benefits to their employees' same-sex domestic partners. The state does not dispute the plaintiffs' contention that the University of Alaska does or did so and that it adopted qualifying criteria.[49] Likewise, other states[50] and municipalities,[51] including the City and Borough of Juneau,[52] offer the same health

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[48](...continued)
rational basis test).

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

[50] *E.g.*, CAL. GOV'T CODE § 22818, *amended by* 2005 Cal. Legis. Serv. 418 (West); OR. ADMIN. R. 101-015-0005(c); WASH. ADMIN. CODE § 182-12-260. A more complete list of states that provide health benefits to domestic partners can be found in a database maintained by the Human Rights Campaign. The database can be accessed through the organization's website at http://www.hrc.org (last visited October 21, 2005).

[51] According to the Human Rights Campaign's database, 130 cities and counties offer domestic partner benefits. As of October 21, 2005, the cities and counties included, for example, Atlanta, Broward County, Chicago, Denver, and New York City. *See* ATLANTA, GA., CODE OF ORDINANCES § 2-858; BROWARD COUNTY, FL., CODE § 16 1/2-156; CHICAGO, ILL., MUNICIPAL CODE ch. 2-152-072; DENVER, CO., REV. MUNICIPAL
(continued...)

benefits to domestic partners, per their eligibility standards, that they offer to married couples.

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

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

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(...continued)
CODE § 18.321(4)-18.328; NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 3-244(f).

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

importance in our society."[53] The Supreme Court has also explained that "marriage is a social relation subject to the state's police power."[54]

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

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

Plaintiffs also challenge the legitimacy of any interest in promoting marriage. They argue that the state and municipality "may not assert an interest in promoting married relationships for its own sake." They claim that the government "may not favor a class simply because it favors the class," and that discrimination is never a legitimate interest. That proposition is certainly correct, but the promotion of marriage in and of itself is not necessarily discriminatory. And it is not irrational. Among other things, it can encourage family stability (an undeniably valid public goal), as the Alaska Catholic Conference argues.

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

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

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

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

The first part of the chosen means — providing a benefit to spouses — is directly related to advancing the marriage interest. But the second part of the chosen means — restricting eligibility to persons in a status that same-sex domestic partners can never achieve — cannot be said to be related to that interest. There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not

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[55] *See Loving*, 388 U.S. at 7.

seem to advance any valid reasons for promoting marriage. In short, there is no indication that the programs' challenged aspect — the denial of benefits to all public employees with same-sex domestic partners — has any relationship at all to the interest in promoting marriage To repeat: making benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage.

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

The municipality seems to imply that accepting the plaintiffs' arguments would require defendants to extend marriage benefits to members of "other non-traditional marriages," such as persons in polygamous relationships. But polygamy is illegal in Alaska,[56] as are incestuous relationships.[57] Even though same-sex domestic relationships are not marriages in Alaska,[58] they are not illegal. And, following

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[56] AS 11.51.140.

[57] AS 11.41.450.

[58] Alaska Const. art. I, § 25.

Lawrence v. Texas, they could not be made illegal.[59] Nothing we hold here would require public employers to extend to members of polygamous or incestuous relationships the employment benefits they provide to their employees' spouses.

d. Equal protection conclusion

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

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

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

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

to furthering those goals.

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

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

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

Trombley did not address constitutional issues. The Trombleys appealed the dismissal of their malpractice claims arising out of Barbara Trombley's medical care. One issue was whether Dale Trombley could bring a loss-of-consortium claim. While Barbara was being treated, she was cohabiting with Dale Trombley but was married to Keith Bradick. Some months later she divorced Bradick and married Dale Trombley. The superior court rejected Dale's consortium claim on summary judgment. In considering Dale's appellate contention that an unmarried cohabitant could claim loss of consortium, we said that "[w]hether spousal consortium claims should be extended to unmarried cohabitants as a general matter is not an easy issue to resolve. There are reasonable arguments on both sides."[62] We did not decide whether, "as a general matter," unmarried cohabitants could ever claim loss of consortium. We instead affirmed the denial of the consortium claim because one of the cohabitants was actually married to someone else when the alleged malpractice occurred.[63]

The state contends that it follows from our quoted characterization of the

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

[62] *Id.* at 923 (emphasis added).

[63] *Id.*

argument limiting consortium claims to legal spouses as "reasonable" that the legislature's choice in denying employment benefits to unmarried cohabitants must also be "reasonable and hence constitutional." It asserts that both areas "concern simply the right to receive money."

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

E. Remedy

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

Therefore, one possible remedy would be to give the state and the municipality a reasonable opportunity to adopt standards for making these benefits available to persons deemed eligible. Many other public employers now have programs

that may be useful models,[64] and private employers may also.[65] Having held unconstitutional the exclusion of same-sex couples from access to civil marriage, the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, vacated the department's summary judgment and remanded for entry of judgment consistent with its opinion. But it stayed entry of judgment on remand for 180 days to permit the legislature "to take such action as it may deem appropriate in light of this opinion."[66]

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

IV. CONCLUSION

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

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[64] *See supra* notes 49-52.

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

[66] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003); *see also Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). In *Baker*, the Vermont Supreme Court deferred to the prerogatives of the legislature "to craft an appropriate means of addressing this constitutional mandate." It therefore left the current statutory scheme in effect "for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion." *Id.* at 887.

LEXSEE 21 P3D 357

JAY BRAUSE and GENE DUGAN, Appellants, v. STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, BUREAU OF VITAL STATISTICS, and the ALASKA COURT SYSTEM, Appellees.

Supreme Court No. S-9376, No. 5392

SUPREME COURT OF ALASKA

21 P.3d 357; 2001 Alas. LEXIS 40

April 17, 2001, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge. Superior Court No. 3AN-95-6562 CI.

DISPOSITION: The judgment of the superior court AFFIRMED.

COUNSEL: Robert H. Wagstaff, Anchorage, for Appellants.

John B. Gagune, Assistant Attorney General, Bruce M. Botelho, Attorney General, Juneau, for Appellees.

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

OPINIONBY: MATTHEWS

OPINION: [*357]

MATTHEWS, Justice.

The underlying issue in this case is whether Jay Brause and Gene Dugan, a same-sex couple who are precluded from marrying, can [*358] be denied benefits which are by law available only to married people. The superior court dismissed this case as to this issue, based on the State's contention that Brause and Dugan's complaint did not challenge the denial of any specific benefit to them and they did not show that they had standing to challenge the denial of any specific benefit. The court's dismissal was "without [**2] prejudice to subsequent filings" "where a particular right is at issue and being challenged — or a particular benefit." Without first seeking to amend their complaint to allege that they were denied specific benefits, Brause and Dugan appeal. We affirm because the superior court did not abuse its discretion in concluding that no actual controversy ripe for adjudication had been pleaded.

Brause and Dugan's complaint contains three counts. The first two counts challenge on state constitutional grounds the State's refusal under existing Alaska statutes to grant them a marriage license. The adoption of article I, section 25 of the Alaska Constitution, effective January 3, 1999, mooted these counts. Now, as a matter of state constitutional law, "to be valid or recognized in this State, a marriage may exist only between one man and one woman." n1

n1 Alaska Const. art I, § 25.

Count 3 challenges, among other things, on state and federal constitutional grounds AS 25.05.013(b), [**3] which provides: "A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage." Count 3 does not allege that appellants have been denied any specific benefits. It alleges generally that

.013 violates the Constitutions of the State of Alaska and the United States inasmuch as persons of the same sex are

denied the due process of law, equal protection of law, recognition of their privacy, full faith and credit, and the equal protection of the laws as guaranteed by the Constitutions of Alaska and the United States.

This allegation is followed by a request for a declaration that section .013 "violates the Constitutions of the State of Alaska and the United States."

STANDARD OF REVIEW

Alaska Statute 22.10.020(g) grants to superior courts the power to issue declaratory judgments in cases of actual controversy. The language of the statute makes it explicit that whether to issue a declaration is a discretionary decision committed to the superior court. **n2** This court has previously noted that "judicial discretion was intended to play a significant role in the administration [of the declaratory judgment [**4] act]." **n3** Therefore we will reverse a superior court's dismissal of a declaratory judgment action which is based on prudential grounds only when we find that the superior court abused its discretion.

n2 "In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought." AS 22.10.020(g) (emphasis added).

n3 Jefferson v. Asplund, 458 P.2d 995, 997 (Alaska 1969).

WAS THERE AN "ACTUAL CONTROVERSY"?

Under AS 22.10.020(g) the superior court, "in case of an actual controversy . . . upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration . . . ." This statute explicitly requires "an actual controversy."

The "actual controversy" language in AS 22.10.020(g) [**5] reflects a general limitation on the power of courts to entertain cases; similar language is used in federal law. **n4** It encompasses a number of more specific reasons for not deciding cases, including lack of standing, mootness, and lack of ripeness. **n5** Although these are interrelated doctrines, they also have distinct elements. **n6** We believe [*359] that it was not an abuse of discretion to dismiss the complaint in this case on lack-of-ripeness grounds.

n4 See Bowers Office Prods., Inc. v. University of Alaska, 755 P.2d 1095, 1096 (Alaska 1988).

n5 See id.

n6 "As compared to mootness, which asks whether there is anything left for the court to do, ripeness asks whether there yet is any need for the court to act. Both ripeness and mootness, moreover, could be addressed as nothing but the time dimensions of standing." 13A Charles Alan Wright, et al., Federal Practice and Procedure § 3532.1, at 101 (Supp. 2000).

The ripeness doctrine requires a plaintiff [**6] to claim that either a legal injury has been suffered or that one will be suffered in the future. **n7** The degree of immediacy of a prospective injury needed to satisfy the ripeness doctrine has not been systematically explored in our case law. Instead, our cases contain statements such as "'advisory opinions' are to be avoided," **n8** or "the ripeness doctrine forbids judicial review of 'abstract disagreements,'" **n9** or "courts should decide only 'a real, substantial controversy,' not a mere hypothetical question." **n10** This lack of particularity is not surprising, for there is no set formula that can identify whether a case is or is not ripe for decision. Instead, a number of factors must be considered.

n7 See Bowers, 755 P.2d at 1099.

n8 Earth Movers of Fairbanks, Inc. v. State, Dep't of Transp. and Pub. Facilities, 824 P.2d 715, 718 (Alaska 1992).

n9 Standard Alaska Production Co. v. State, Dep't of Revenue, 773 P.2d 201, 210 n.14 (Alaska 1989) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)).

[**7]

n10 State v. Patterson, 740 P.2d 944, 949 n.18 (Alaska 1987) (quoting 13A Charles Alan Wright, et al., Federal Practice and Procedure § 3532.2, at 137 (2d ed. 1984)).

According to Federal Practice and Procedure, a leading text on federal jurisdiction, the central concern of ripeness "is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." n11 This text goes on to set out both abstract and practical formulations of ripeness. The former is "whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." n12 The more practical formulation is said to be: "Ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" n13

n11 13A Charles Alan Wright, et al., Federal Practice and Procedure § 3532, at 112 (2d ed. 1984).

[**8]

n12 Id. (quoting Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506, 32 L. Ed. 2d 257, 92 S. Ct. 1749 (1972)).

n13 Id. (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Devel. Comm'n, 461 U.S. 190, 201, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983)).

Federal Practice and Procedure discusses the factors which underlie the ripeness doctrine:

The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance. As to the parties themselves, courts should not undertake the role of helpful counselors, since refusal to decide may itself be a healthy spur to inventive private or public planning that alters the course of possible conduct so as to achieve the desired ends in less troubling or more desirable fashion. Defendants, moreover, should not be forced to bear the burdens of litigation without substantial justification, and in any event may find [**9] themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts. Perhaps more important, decisions involve lawmaking. Courts worry that unnecessary lawmaking should be avoided, both as a matter of defining the proper role of the judiciary in society and as a matter of reducing the risk that premature litigation will lead to ill-advised adjudication. These concerns translate into an approach that balances the need for decision against the risks of decision. The need to decide is a function of the probability and importance of the anticipated injury. The risks of decision are measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision. n14

n14 Wright, et al., supra note 11, § 3532.1, at 114-15 (footnotes omitted).

[*360] In the present case Brause and Dugan claim on appeal that AS 25.05.013(b) denies them at least 115 separate [**10] rights which are afforded to people who are able to marry. These include, Brause and Dugan argue, "the denial of health coverage, forms of insurance, equal participation in pension and retirement plans, as well as testamentary and property rights." There is no doubt that at least in some circumstances married partners have rights that are denied unmarried domestic partners, and the subjects specifically identified by Brause and Dugan may be areas where inequality exists. But lacking in Brause and Dugan's brief is any assertion that they have been or in their current circumstances that they will be denied rights that are available to married partners.

The State argues that AS 25.05.013(b) is a "purely symbolic" statement lacking in "independent legal significance." The State contends that AS 25.05.013(b) does not deprive Brause and Dugan of rights, rather "what excludes [them] from the '115 separate rights' and the 'benefits of marriage' is the language of each of the statutes . . . creating rights and benefits based upon marital status . . . ." It is one or more of these statutes that may be challenged, the State continues, [**11] but the challenge must be mounted by parties who are substantially injured by the particular statute in question.

Further, in such a case, the particular statute must be examined independently under the "sliding scale" analysis used by Alaska courts to test the constitutionality of statutes under the equal rights clause of the Alaska Constitution, and "such analysis cannot be applied to AS 25.05.013(b), the symbolic enactment." The State describes by contrast a more recently filed case pending in the superior court in Anchorage in which a number of same-sex couples, one of whom is employed by the State, allege that they are denied specific health insurance and pension benefits in violation of their constitutional rights to equal protection.

Given the level of abstraction of this case as presented, we believe that many of the considerations on which the doctrine of ripeness is based counsel in favor of dismissal. Without more immediate facts it will be difficult to deal intelligently with the legal issues presented. The issues themselves are difficult, presenting a case of first impression in Alaska. In order to grant relief to Brause and Dugan, the superior [**12] court would have to declare a statute unconstitutional. This is, of course, a power that courts possess. But it is not a power that should be exercised unnecessarily, for doing so can undermine public trust and confidence in the courts and be interpreted as an indication of lack of respect for the legislative and executive branches of government. Further, ruling on the constitutionality of a statute when the issues are not concretely framed increases the risk of erroneous decisions.

As Federal Practice and Procedure puts it, the various concerns underlying the doctrine of ripeness indicate that any ripeness decision requires a balance of the plaintiffs' "need for decision against the risks of decision." **n15** To the extent that the need to decide is a function of the probability that they will suffer an anticipated injury, Brause and Dugan have failed to demonstrate such a need. The risks of decision, on the other hand, are considerable, measured as they are "by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision." **n16** It was not an abuse of discretion for the superior court to conclude that the balance [**13] weighs in favor of the conclusion that this case is not ripe for adjudication and presents no actual controversy under AS 22.10.020(g).

n15 Id. at 115.

n16 Id.

The judgment of the superior court is AFFIRMED.

DISSENTBY: BRYNER

DISSENT: BRYNER, Justice, dissenting.

I disagree with the court's conclusion that the issue in this case is not ripe for adjudication; therefore I dissent. This court's standing jurisprudence indicates a willingness to adjudicate claims where the injury claimed is but "an identifiable trifle." **n1** Here, Brause [*361] and Dugan's claimed injury far exceeds the identifiable trifle necessary to give them standing and is sufficiently imminent to make their constitutional challenge of AS 25.05.013(b) ripe for an immediate decision.

n1 Bowers Office Prods., Inc. v. University of Alaska, 755 P.2d 1095, 1097 (Alaska 1988) (quoting Trustees for Alaska v. State, Dep't of Natural Resources, 736 P.2d 324, 327 (Alaska 1987)).

[**14]

I first note my opposition to the court's reliance on federal law as the law defining the doctrine of ripeness in Alaska. **n2** In particular, the court turns to Federal Practice and Procedure for guidance on ripeness, **n3** but that treatise reviews exclusively federal law. Our standing jurisprudence varies significantly from that of federal courts, **n4** and our case law counsels against reliance on federal law: "instead of looking to federal courts, . . . this court should first look to its own precedent." **n5**

n2 21 P.3d 357, 360.

n3 See id. (quoting 13A Charles Alan Wright et al., Federal Practice and Procedure § 3532 (2d ed. 1984 & 2000 Supp.)).

n4 See Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 474-75 (Alaska 1977) (recognizing that standing

is not a constitutional limitation on jurisdiction of Alaska courts as in federal law); Bowers Office Prods., 755 P.2d at 1096-97.

n5 Bowers Office Prods., 755 P.2d at 1096 (emphasis added).

[**15]

This court's case law has developed the doctrine of ripeness among the interrelated issues of standing and mootness. n6 We have stated that the "basic requirement for standing in Alaska is adversity" of legal interests and that adversity can be satisfied by an "intangible" interest such as an "aesthetic or environmental interest." n7 And we have not required that prospective plaintiffs wait until an unavoidable injury occurs before Alaskan courts may render a declaratory judgment. n8

n6 See id.

n7 Id. at 1097 (quoting Trustees for Alaska, 736 P.2d at 327).

n8 See Johns v. Commercial Fisheries Entry Comm'n, 699 P.2d 334, 337-39 (Alaska 1985); Benesch v. Miller, 446 P.2d 400, 401-02 (Alaska 1968).

In Johns v. Commercial Fisheries Entry Commission we stated that "the threat of future injury confers standing to seek judicial aid to forestall possible harm." n9 There, three applicants [**16] for fishing limited entry permits filed suit seeking a declaratory judgment regarding the "threatened loss of their right to enter the fishery" although none had yet been excluded. n10 Rejecting a rule of inevitability of harm, we stated: "We think it bad law and bad policy to approve a rule which shuts the courthouse doors until . . . it may be too late to obtain meaningful judicial relief." n11

n9 699 P.2d at 337 (emphasis added).

n10 Id. at 336-37.

n11 Id. at 338.

Similarly, in Benesch v. Miller we did not force a candidate for the United States Senate to wait until after election day to challenge a statute he believed unconstitutionally restricted write-in candidates. n12 Reversing the trial court's finding that the claim was premature, we held that "an actual controversy existed" despite the fact that the injury had not yet occurred. n13

n12 446 P.2d at 400-02.

[**17]

n13 Id. at 402.

Moreover, our case law establishes that a challenger need not plead specific facts of injury in order to seek review of the constitutionality of a statute. In Jefferson v. Asplund we addressed declaratory relief with respect to Jefferson's challenge of the actions of the Greater Anchorage Area Borough. n14 Regarding the availability of declaratory relief to Jefferson, we stated: "declaratory relief will be withheld when declarations are sought concerning hypothetical or advisory questions or moot questions. On the other hand, declaratory relief may be sought to determine the validity and construction of statutes and public acts." n15 We then held that Jefferson's claim that an Alaska statute [*362] was illegal was ripe without facts showing the powers of the statute had been exercised. n16 Other states have reached the same conclusion.

n14 458 P.2d 995, 1001-02 (Alaska 1969).

n15 Id. at 999 (footnotes and citations omitted); accord Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n, 27 S.W.3d 276, 282 (Tex. App. 2000) ("ripeness does not require an actual injury . . . [only] that an injury is

likely to occur").
[**18]

n16 See Jefferson, 458 P.2d at 1002. The statute — former AS 07.25.080 — granted the borough chair the power to veto assembly actions.

This court cited Federal Practice & Procedure for the same proposition: "The complaint must allege conduct of the defendants which threatens or endangers some legal right of the plaintiff." Jefferson, 458 P.2d at 999 n.25 (quoting 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1269, at 319 (Wright rev. 1958)) (emphasis added).

The Washington Supreme Court in First Covenant Church, of Seattle, Washington v. City of Seattle reviewed a church's claims that Seattle's designation of a church as a landmark was unconstitutional. n17 The designation prevented the church from altering the exterior of the building or selling it without the approval of a landmarks commission. n18 Seattle argued that the church's claim was not ripe because it had not submitted a proposal for alteration or attempted to sell the building. The Washington Supreme Court rejected [**19] that argument: "The record before the court contains the factual background surrounding the designation of First Covenant Church and no additional facts need be developed to determine the constitutionality of that designation." n19

n17 114 Wn.2d 392, 787 P.2d 1352 (Wash. 1990), vacated, City of Seattle v. First Covenant Church of Seattle, Wash., 499 U.S. 901, 113 L. Ed. 2d 208, 111 S. Ct. 1097 (1991), judgment reinstated by First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (Wash. 1992).

n18 See id. at 1355.

n19 Id. at 1356.

In Advocates for Effective Regulation v. City of Eugene, the Oregon Court of Appeals addressed the question of whether a coalition of hazardous substance producers had a ripe claim to a declaratory judgment regarding a city charter amendment regulating and assessing fees against users of hazardous substances. n20 The court concluded the claim was ripe although no fee structure [**20] had been approved. It stated:

n20 160 Ore. App. 292, 981 P.2d 368 (Or. App. 1999).

The exercise of judicial power requires a concrete controversy that is based on present facts, not hypothetical possibilities. A facial challenge to the validity of an enactment generally presents such a concrete controversy; the question is whether the challenged enactment is valid as written, as opposed to validly applied to a given set of facts. [n21]

n21 981 P.2d at 373 (citations omitted); see also Hunt v. Superior Court, 21 Cal. 4th 984, 987 P.2d 705, 716 (Cal. 1999) ("The ripeness requirement does not prevent us from resolving a concrete dispute if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question.").

[**21]

Our precedent establishes that Brause and Dugan's constitutional attack on AS 25.05.013(b) is ripe for adjudication without a specific claim of past injury. But, even if we apply the federal standard for ripeness, I believe that the case presented by Brause and Dugan meets that standard. Although federal ripeness jurisprudence "prevents the courts . . . from entangling themselves in abstract disagreements" n22 where the relevant factual situation is not adequately developed, it also recognizes that disputes that are purely legal "will not be clarified by further factual development" and are ripe for adjudication. n23

n22 Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985)

(quoting Abbott Lab. v. Gardner, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)).

n23 473 U.S. at 581; see also Pavey v. University of Alaska, 490 F. Supp. 1011, 1015 (D. Alaska 1980) (university not required to risk sanctions affecting student athletes to challenge conflicting rules of NCAA and Association for Intercollegiate Athletics for Women to have ripe claim to declaratory judgment) (cited in 10B Wright, supra note 3, § 2757, at 492 n.30); Johnson v. Rockefeller, 58 F.R.D. 42, 46-47 (S.D.N.Y. 1972) (inmates did not have to bring failed suit challenging denial of access to courts to have ripe controversy over statute denying access) (cited in 10B Wright, supra note 3, § 2757, at 494-95).

[**22]

In Thomas v. Union Carbide Agricultural Products Co., thirteen pesticide manufacturing firms challenged amendments to the Federal [*363] Insecticide, Fungicide, and Rodenticide Act (FIFRA) that required the firms to consent to binding arbitration in order to qualify for compensation for involuntary sharing of information required by FIFRA. n24 Although only one of the firms had been subject to arbitration, the Supreme Court held that the other firms' claims were ripe stating: "One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." n25 And in a decision issued during its current term, the Supreme Court has reconfirmed its adherence to this view of standing. n26 There, in a pre-enforcement review of air quality standards set by the Environmental Protection Agency (EPA) under the Clean Air Act, the Court rejected the EPA's argument that the claim was not ripe for review because the EPA had not implemented the standards: "The question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'" [**23] n27

n24 See Thomas, 473 U.S. at 571-76.

n25 Id. at 581 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 143, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)).

n26 See Whitman, Admin. of EPA v. American Trucking Ass'n, 149 L. Ed. 2d 1, 531 U.S. 457, , 121 S. Ct. 903, 915-16 (2001).

n27 121 S. Ct. at 915 (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998)).

Here, Brause and Dugan's claim presents a purely legal question: whether AS 25.05.013(b) is constitutional on its face. Further factual development will not help this court address that question. Brause and Dugan do not allege that the statute is unconstitutional as it might be applied to them in the future; they assert that it is unconstitutional now, and so subjects them to immediate harm. The constitutional injury that Brause and Dugan allege flows [**24] directly and immediately from AS 25.05.013(b)'s categorical denial of all benefits of marriage to same-sex couples, not from an as-yet unrealized application to them of another statute's delineation of specific benefits. Hence, any uncertainty concerning whether they might eventually be denied health coverage based on their non-spousal relationship, for example, as opposed to being denied testamentary rights reserved to spouses, would have no effect on the legal analysis of AS 25.05.013(b)'s constitutionality. Just as the Union Carbide firms' claims were ripe without being subject to arbitration, Brause and Dugan's claim of facial unconstitutionality is ripe for immediate adjudication, without waiting until the provision is applied to deny them specific benefits.

Moreover, even assuming that the ripeness doctrine required a facial constitutional challenge to be accompanied by an immediate threat of unconstitutional application, Brause and Dugan's case would meet this requirement. To properly assess the risk of unconstitutional application, it is important to recognize the nature of the alleged constitutional problem. The [**25] court characterizes the problem as one involving the disparate treatment of married heterosexual couples, on the one hand, and unmarried same-sex couples, on the other: "The underlying issue in this case is whether . . . same-sex couples who are precluded from marrying [] can be denied benefits which are by law available only to married people." n28 But Brause and Dugan's constitutional claim does not confine itself to this form of discrimination. n29 What their claim more directly targets is Alaska's disparate treatment of two similarly situated groups of unmarried couples.

n28 21 P.3d 357, at 357.

n29 In fact, now that the Alaska Constitution allows marriages "only between one man and one woman," Alaska Const. art. I, § 25, this form of discrimination is to a large extent beyond state constitutional challenge.

By prohibiting the state from extending "the benefits of marriage" only to persons involved in "a same-sex relationship" — rather than prohibiting marital benefits to all unmarried [**26] couples — AS 25.05.013(b) necessarily suggests that the state may confer some or all of those benefits on unmarried couples involved in heterosexual relationships. As I [*364] see it, then, the bone of constitutional contention is AS 25.05.013(b)'s disparate treatment of unmarried homosexual and unmarried heterosexual couples: the statute categorically bars state agencies and officials from granting unmarried same-sex couples spousal benefits that those agencies and officials may routinely choose to extend to unmarried heterosexual couples.

If this form of discrimination is constitutionally impermissible, as Brause and Dugan allege it to be, then the danger that AS 25.05.013(b) might be unconstitutionally applied to them can hardly be dismissed as remote or hypothetical. For instance, among the statutory rights that Brause and Dugan argue they are denied by AS 25.05.013(b) is the right of a spouse to workers' compensation benefits. Brause and Dugan's point on this statute is strong given that this court has interpreted the workers' compensation statutes to require the payment [**27] of death benefits to a surviving opposite-sex domestic partner outside of a legal marriage. n30

n30 See Burgess Constr. Co. v. Lindley, 504 P.2d 1023, 1024-25 (Alaska 1972).

In Burgess Construction, a married couple had divorced, then reunited after the former husband had two other unsuccessful marriages. n31 The couple lived together, but never remarried. When the former husband died in a job-related accident, the former wife claimed benefits under the workers' compensation statutes. This court held that the workers' compensation statute's definition of "married" and "widow" included the unmarried former spouse. n32 This court stated: "While, for some purposes, [Lindley] would not have been recognized by the Alaska courts as married to the decedent, [she] qualifies for benefits as a 'surviving wife' under [the] terms of the Alaska Workmen's Compensation Act." n33

n31 See id. at 1023-24.

[**28]

n32 See id. at 1024. The court acknowledged that the statute did not define "surviving wife" before concluding that Lindley was "married" under the statutory definition of that term. Therefore, "it followed that under the Act [Lindley] would be regarded as his 'surviving wife.' She qualifies as a 'widow' for she was living with decedent at the time of his death and was dependent upon him for support." Id.

n33 Id. at 1025.

Notably, Justice Erwin in his concurrence in Burgess Construction disagreed with the majority's perceived reliance on the workers' compensation statutory definitions of "married" and "widow" to award benefits to the decedent's common law wife. n34 He stated that "after [Lindley's] divorce from the deceased and his remarriage," Lindley could only be characterized as a common law wife, not a legal wife. n35 He further reasoned that the "surviving wife" language in the statute obviously "referred to a legal wife" as defined by former AS 25.05.011. n37 But Justice Erwin [**29] also concluded that the benefit of the workers' compensation statute should be extended to Lindley outside the definition of a legal marriage based on equal protection grounds. n38

n34 See id.

n35 Id.

n37 Id.

n38 See id. at 1026.

If the statute awarded workers' compensation benefits to "legal" spouses but not to common law spouses, it would create two categories of similarly situated persons and impermissibly discriminate against those who did not participate in a formal marriage ceremony. **n39** Justice Erwin found "no rational relationship between the legal formality of marriage ceremony and the purpose of the Alaska Workmen's Compensation Act, which compensates a dependent 'spouse' for the death of a provider." **n40** Viewed through the lens of Justice Erwin's concurrence, then, the majority opinion in Burgess Construction appears to have consciously extended a spousal benefit to an unmarried person based on her involvement [**30] in a heterosexual de facto spousal relationship. **n41**

n39 See id.

n40 Id.

n41 The Burgess Construction majority's logical leap of faith from "married" to "surviving wife" to "widow" can only be explained by the court's reliance on Lindley's cohabitation and financial dependence on the decedent — a fact pattern identical to many long-term cohabiting heterosexual and homosexual couples.

[*365] Brause and Dugan cite the same statute at issue in Burgess Construction — now AS 23.30.215 — as a violation of equal protection to same-sex couples. The definition of "married" under the workers' compensation statute is essentially unchanged since Burgess Construction and "includes a person who is divorced but is required by the decree of divorce to contribute to the support of the former spouse." **n42**

n42 AS 23.30.395(19). Compare id. with former AS 23.30.265(15) (defining married to "include [] a person who is divorced but is required by the decree of divorce to contribute to the support of his former spouse").

[**31]

This uncertainty alone should prompt the court to reach the merits of Brause and Dugan's case: assuming, as alleged, that AS 25.05.013(b)'s disparate treatment of same-sex and heterosexual unmarried couples is unconstitutional, is it not a constitutionally cognizable injury that statutorily guaranteed benefits are extended to some unmarried opposite-sex couples, but are categorically denied to all similarly situated same-sex couples? Even under the most rigorous of ripeness standards, this question is ripe for decision.

Our case law interpreting Alaska's prohibitions against discrimination based on marital status further militates for reviewing Brause and Dugan's claim on its merits. **n43** We have extended the protection against marital discrimination to unmarried couples: "state . . . prohibitions against discrimination based on marital status protect the rights of unmarried couples." **n44** Alaska Statute 25.05.013(b)'s language throws these holdings into doubt. This additional uncertainty provides an independent reason to address the merits of Brause and Dugan's claim.

n43 Brause and Dugan cite AS 18.80.220(c)(1). That statute uses the same terms — "marital status" and "changes in marital status" — as other statutes in the chapter prohibiting discrimination, including AS 18.80.240, the statute applied in Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989). See AS 18.80.060, .200, .210, .220, .240, .250.

[**32]

n44 Foreman, 779 P.2d at 1203; see also University of Alaska v. Tumeo, 933 P.2d 1147, 1152-53 (Alaska 1997); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994); cf. Wood v. Collins, 812 P.2d 951, 957 (Alaska 1991) (adopting "conclusion of law that, for unmarried cohabitants, the intent of the parties will control property division for property acquired before separation").

The court expresses misgivings about "ruling on the constitutionality of a statute when the issues are not concretely framed." **n45** It also voices its concern that, "in order to grant relief to Brause and Dugan, the superior court would have to declare a statute unconstitutional." **n46**

n45 21 P.3d 357, 360.

n46 21 P.3d 357, 360.

But in my view the court overstates the difficulty of deciding the constitutional question presented. There [**33] is certainly ample case law from other jurisdictions to guide this court's decision on the merits. And as already noted, framing this controversy more concretely would not help us resolve the issue of facial constitutionality. Moreover, the court's prediction that relief could be granted only by declaring AS 25.05.013(b) unconstitutional overlooks the less drastic possibility of a narrowing construction to avoid constitutional problems — an alternative that would comport with this court's expressed preference for interpreting a statute in a manner that renders it constitutional. n47

n47 See Boucher v. Engstrom, 528 P.2d 456, 462-63 (Alaska 1974), overruled on other grounds by McAlpine v. University of Alaska, 762 P.2d 81, 85 (Alaska 1988); see also 2A Norman J. Singer, Sutherland Statutory Construction § 45:11, at 75-76 (6th ed. 2000). This alternative would also square with Jefferson v. Asplund, 458 P.2d 995, 998-99 (Alaska 1969), where we stated that "declaratory relief may be sought to determine the validity and construction of statutes and public acts."

[**34]

The court's exaggeration of the difficulty that the constitutional issue in this case presents is especially apparent in light of the court's enthusiastic endorsement of the state's position that the challenged statute is "purely symbolic" and has no "independent [*366] legal significance." n48 For if the statute indeed has no real significance, the state can have no particularly strong interest in enforcing it. Alaska's sliding-scale test of equal protection would then compel the conclusion that the statute should be declared invalid or given a limiting construction if it were shown to have even a mild tendency to chill the exercise of associational freedoms by those who might not be privy to the state's closely held view that the statute is all gums and no teeth. And in any event, the court's aversion for the prospect of having to declare AS 25.05.013(b) invalid — its preference for a case involving a claim of unconstitutionality as applied to a particular set of facts — seems unjustified as a jurisprudential matter: if the statute is indeed unconstitutional on its face, it would hardly suffice to declare it invalid only as it applies to a concretely [**35] framed factual setting.

n48 21 P.3d 357, 360.

In short, I believe that Brause and Dugan established a sufficiently concrete controversy when they asserted at oral argument that, as a same-sex couple, they have a legitimate interest in knowing whether AS 25.05.013(b) will remain on the books in Alaska. n49 By declaring their claim unripe until they suffer irreparable injury that they are capable of proving and are willing to redress through the lengthy process of post-injury litigation, the court unjustifiably deprives Brause and Dugan, all other similarly situated couples, and all otherwise interested Alaskans of a legal ruling that would enable them to make informed choices about how to organize their lives in Alaska and whether to continue to reside in this state if its law does in fact withhold from same-sex couples benefits that it would routinely extend to unmarried opposite-sex couples.

n49 This right to know whether AS 25.05.013(b) is facially constitutional cannot be resolved by assurances, such as those given by the attorney general's office at oral argument, that the state will not enforce the statute in a discriminatory manner. As a legal matter, these assurances will have no binding effect in future cases; and as a practical matter, they can provide no realistic protection against the possibility of discriminatory application by myriad state officials who are called upon daily to apply the ostensibly valid statute in specific factual settings.

[**36]

The court tries to diminish the legal impact of today's ruling by emphasizing that the question of whether to issue a declaratory judgment is a matter in which "judicial discretion was intended to play a significant role" n50 and by finding that, here, "it was not an abuse of discretion [for the trial court] to dismiss . . . on lack-of-ripeness grounds." n51 But while decisions on ripeness undoubtedly involve judicial discretion, the trial court, as always, was obliged to exercise its discretion within the appropriate legal framework established by relevant case law. Here, as indicated above, this court's prior cases dealing with ripeness — as well as a significant body of cases decided by federal courts and courts in other states — point uniformly to the conclusion that Brause and Dugan's constitutional challenge is ripe for decision. Since the

trial court's ruling is incompatible with Alaska's law of ripeness as it existed before today's opinion, the court's attempt to portray the trial court's ruling as a permissible exercise of discretion rings hollow. n52

n50 21 P.3d 357, 356 (quoting Jefferson, 458 P.2d at 997).

[**37]

n51 21 P.3d 357, 358.

n52 Indeed, the court overlooks the fact that the very case it cites for the proposition that trial courts have discretion in determining when to grant declaratory relief — Jefferson, 458 P.2d at 997, cited in Slip Op. at 3 n.3 — found an abuse of discretion and proceeded to decide the case on its merits. See id. at 1002.

Because I believe that Brause and Dugan's claims are ripe for adjudication, I would decide the claims on the merits. n53

n53 Although the superior court did not address the merits of Brause and Dugan's constitutional claim, the claim presents pure questions of law that this court could resolve without a remand. The state, however, has confined its briefing to the issues of ripeness and standing and has not addressed the merits of Brause and Dugan's constitutional challenge to AS 25.05.013(b). Accordingly, I would order supplemental briefing before ruling on the merits. Because resolution on the merits would be premature at this stage of the proceedings, my dissent is confined to the issue of ripeness and expresses no opinion on the underlying merits.

[**38]

Senator _____,

The following churches and associated pastors listed below have strongly indicated their support of SJR20. They have asked the Alaska Family Council to remind our elected Senators that the people of Alaska deserve an opportunity to vote on this critical issue. The list represents 30 communities across the state and more than 100 pastors. The attached article was e-mailed to each pastor prior to receiving their support. Please do not hesitate to contact me at your convenience if you should have any further questions.

Thank you for your consideration of this matter.

Jim Minnery
President
Alaska Family Council
Strengthening and Protecting Alaskan Families
Ph - 907-279-2825

Rick Benjamin Abbott Loop Community Church Anchorage
Jim Basinger All Saints' Episcopal Church Anchorage
Jeff Wiesinger Alliance Bible Church Anchorage
Mike Massey Anchorage Bible Church Anchorage
Richard Irwin Anchorage City Church Anchorage
James Strutz Anchorage City Church Anchorage
John Hunn Anchorage Grace Church Anchorage
Bob Mather Baxter Road Bible Church Anchorage
Karl Clausen Change Point Anchorage
Dan Jarrell Change Point Anchorage
Tim Davis Chapel by the Sea Anchorage

Provided by Sen. Seekins
4/28/06
10:20 AM

Ken Rosentrator Chapel by the Sea Anchorage
Steven Sanders Eastside UPC Anchorage
Tom Hoffman Fairview Loop Baptist Church Anchorage
Jack Bacher Faith Christian Community Anchorage
Dr. Don Darling Faith Presbyterian Church Anchorage
Ed Gregory First Baptist Church of Anchorage Anchorage
Nathan D. Toots First Covenant Church Anchorage
Mark Gillespie Foothills Fellowship Anchorage
Dr. Roger Holmberg Grace Baptist Temple Anchorage
Randy Graham Grandview Baptist Church Anchorage
Chuck Johnston Hope Christian Fellowship Anchorage
Frank Thompson Hosanna Fellowship Anchorage
Andy Heer Jewel Lake Church of the Nazarene Anchorage
James Blackshear Life Church Anchorage
Lewis Hayes Muldoon Road Baptist Church Anchorage
Rev. Dennis Richardson Mt. View Baptist Church Anchorage
Brian Gray New Direction Ministries Anchorage
Brian Chronister New Grace Christian Church Anchorage
Bill Donovan North Star Assembly Anchorage
Gregg Clark Northern Lights Baptist Church Anchorage
Terry Hill Rabbit Creek Community Church Anchorage
Jack Minnery Real Life Foundation Anchorage
Jim Heritage Sand Lake Baptist Church Anchorage
Jack Grimm Shepherd's Heart Church Anchorage
Alonzo Patterson Shiloh Baptist Church Anchorage
J. R. Blackshear United Pentecostal Church International Anchorage
Velton Johnston Barrow Bible Study in Christ Barrow
Darryl Serino Calvary Bible Baptist Barrow
Lorin L. Bradbury, Ph.D United Pentecostal Church Bethel
Mike Roub Chickaloon Community Bible Church Chickaloon
Dr. Tim Page Bible Baptist Church Chugiak
Brad Rud Birchwood Community Church Chugiak
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Dr. David S. George First Baptist Church of Eagle River Eagle River
Jim Sackett Bethel Church Fairbanks
Dr. Douglas Duffett Bible Baptist Church Fairbanks
Al & Donna Woods Door of Hope Church Fairbanks
Paul R. McDonald First Assembly of God Fairbanks
Rev. Grant Shimanek Love In the Name of Christ Fairbanks
William A. Hill Servants' Touch Ministries Fairbanks
Leonard John Leonard John Ministry Fairbanks
Joe Perez Valley of Blessing Church of God Fairbanks
David Taylor Christian Community Church Homer
Rick Wise Glacierview Baptist Church Homer
Grant Funk Hooper Bay Covenant Church Hooper Bay
Wendell Terwilliger Valley Bible Chalet Indian
Fr. Peter Gorges, Ret. Roman Catholic Diocese of Juneau Juneau
Bill Nelson United Pentecostal Church Juneau
Michael W. Hicks Newlife Christian Fellowship Kasilof
Phil Reemtsma Calvary Baptist Church Kenai
Ray Boutwell Immanuel Baptist of Kenai Kenai
Stephen Brown Kenai New Life Assembly of God Kenai
Austin Swan, Sr Episcopal Epiphany Church Kivalina
David Bradbury Kodiak United Pentecostal Church Kodiak
Marcus Hill Larsen Bay Baptist Church Kodiak
Don & Dawn Merila The Living Room Ministry Kodiak
John T. Forrester First Baptist Church Kotzebue
Marlin Beachy Glacierview Bible Church Mat-Su Borough
Denver Copeland Lighthouse Community Church Nikiski
Corey McGee Lighthouse Community Church Nikiski