IN THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-10459

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.

Appeal from the Superior Court of the State of Alaska,
Third Judicial District at Anchorage
The Honorable Stephanie Joannides
Case No. 3AN-99-11179 CI

BRIEF OF APPELLANTS

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Alaska Const. art. 1, § 1: "This constitution is dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law."

Alaska Const. art. 1, § 25: Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman.

AS 18.80.220. Unlawful employment practices; exception.

(a) Except as provided in (c) of this section, it is unlawful for

(1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood;

(c) Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section,

(1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees;

(2) a labor organization may, without violating this chapter, negotiate greater health and retirement benefits for employees of an employer who have a spouse or dependent children than are provided to other employees of the employer.

AS 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 25.05.171; or

(3) a member of the armed forces of the United States while on active duty.

AS 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.

JURISDICTIONAL STATEMENT

Pursuant to AS 22.05.010, Appellants appeal from a final judgment entered by the Superior Court of the State of Alaska, Third Judicial District at Anchorage, on February 20, 2002.

PARTIES TO THE CASE

Appellants: 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 ("Plaintiffs").

Appellees: State of Alaska ("State") and Municipality of Anchorage ("Municipality") ("Defendants").

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the state constitutional entitlement to equal rights, opportunities, and protection under the law precludes Defendants from denying health, pension, and other employment benefits to lesbian and gay employees and retirees for their same-sex partners.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Plaintiffs are nine lesbian or gay couples and an organization whose mission is to safeguard the civil liberties and civil rights of all Alaskans. It is undisputed that each of the plaintiff couples has committed to themselves, their families, and their

communities that they will remain united in an intimate association for life.[1] It is undisputed that they are interdependent in every aspect of their shared life, emotionally, financially, and otherwise.[2] Indeed, it is undisputed that each of the plaintiff couples is a loving couple whose life patterns are identical in all practical respects to those of a married couple.[3]

It is also undisputed that the plaintiff couples are denied important benefits that are available to heterosexual couples. At least one member of each of the plaintiff couples is an employee or retiree of the State or the Municipality.[4] Defendants offer health, pension, and other employment benefits to heterosexual employees and retirees for their opposite-sex spouses, e.g., pre-retirement and post-retirement health insurance, joint and survivor annuities, death benefits, life insurance, and long-term care insurance ("partner benefits").[5] The stated purpose of offering such benefits is "to encourage qualified personnel to enter and remain in the service of the state or a political subdivision or political organization of the state."[6] Although it is undisputed

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[1] See Exc. 108-35 (Affidavits of Plaintiffs).
[2] Id.
[3] Id.
[4] Exc. 382-87, 392 (State's Answer to First Am. Compl. at ¶¶ 29, 41, 52, 61, 70, 80, 89, 97; Municipality's Answer to First Am. Compl. at ¶ 20).
[5] Exc. 34-35, 380, 391 (State's Answer to First Am. Compl. at ¶ 10; Municipality's Answer to Compl. at ¶ 9; Municipality's Answer to First Am. Compl. at ¶ 10); see AS 39.20.360 (death benefits), AS 39.30.090 (pre-retirement health insurance, life insurance, and long-term care insurance), AS 39.35.450 (joint and survivor annuities), AS 39.35.535 (post-retirement health insurance); see also AS 14.25.010 - 220 (retirees of the school system), AS 22.25.10 - .900 (retirees of the judicial system).
[6] AS 39.35.010(a); see Exc. 140-41, 154-55 (Tourtellot Dep. at 25-26; Lindemuth Dep. at 28-29).

that lesbian and gay individuals are just as likely as heterosexual individuals to be qualified employees, Defendants do not offer such benefits to lesbian and gay employees and retirees for their same-sex partners.[7] They do not do so because they restrict such benefits to married couples[8] and, as a matter of state law, lesbian and gay couples cannot marry.[9] In other words, Defendants condition such benefits on a status that lesbian and gay couples cannot attain.

It is also undisputed that the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners significantly burdens important interests of each of the plaintiff couples. As discussed below, it penalizes the right to intimate association, and burdens the rights to or interests in family decisionmaking, reproductive freedom, health care, economic endeavor within a particular industry, and enjoyment of the rewards of one's own industry.[10]

The fact that lesbian and gay couples are ineligible for the benefits at issue is the product of governmental action directed against lesbian and gay couples, a fact that Defendants admit.[11] First, in 1995, in a statutory challenge to the state university's restriction of health benefits to heterosexual employees for their opposite-sex spouses,

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[7] Exc. 381, 392 (State's Answer to First Am. Compl. at ¶¶ 14-15; Municipality's Answer to First Am. Compl. at ¶¶ 14-15); see AS 25.05.013(b).
[8] Exc. 381, 391 (State's Answer to First Am. Compl. at ¶ 12; Municipality's Answer to First Am. Compl. at ¶ 12).
[9] Alaska Const. art. I, § 25; AS 25.05.011(a), AS 25.05.013(a).
[10] See infra II.C.2; see also Exc. 108-35 (Affidavits of Plaintiffs).
[11] See Exc. 380, 391 (State's Answer to First Am. Compl. at ¶ 6 (admitting the purpose of Alaska Const. art. I, § 25); Municipality's Answer to First Am. Compl. at ¶ 6 (same)); see also AS 25.05.013(b).

a trial court held that the denial of such benefits to lesbian and gay employees for their same-sex partners violated a statute prohibiting employment discrimination based on marital status.[12] In 1996, the state legislature responded by amending the statute to exempt discrimination in employment benefits from such statutory protection.[13] In 1996, the state legislature also acted to preclude any legal recognition of a marriage between a lesbian or gay couple. It did so by amending legislation to provide that "[m]arriage is a civil contract entered into by one man and one woman"[14] and enacting legislation to provide that "[a] marriage entered into by persons of the same-sex . . . that is recognized by another state or foreign jurisdiction is void in this state."[15] It further enacted legislation to provide that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."[16]

Second, in 1998, a trial court held that the State's restriction of marriage to heterosexual couples could be justified under the state constitution only if it was narrowly tailored to further a compelling interest.[17] The state legislature responded by proposing a state constitutional amendment to preclude any legal recognition of a marriage between a lesbian or gay couple: "To be valid or recognized in this State, a

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[12] Tumeo v. Univ. of Alaska, No. 4FA-94-43 Civ., 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995).
[13] AS 18.80.220(c).
[14] AS 25.05.011(a).
[15] AS 25.05.013(a).
[16] AS 25.05.013(b).
[17] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

marriage may exist only between one man and one woman."[18] The amendment was subsequently ratified.

II. STATEMENT OF THE COURSE OF PROCEEDINGS BELOW

Plaintiffs challenge the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners under the state equal protection clause.[19] They seek declaratory relief and limited injunctive relief.[20]

Plaintiffs and Defendants filed cross-motions for summary judgment. The trial court denied Plaintiffs' motion and granted Defendants' cross-motions.[21] In doing so, the trial court found that the restriction of partner benefits to heterosexual employees and retirees for their opposite-sex spouses does not discriminate based on sexual orientation or sex.[22] It further found that the denial of such benefits does not burden a fundamental right.[23] Accordingly, the trial court concluded that the classification is subject to the lowest level of scrutiny.[24] The trial court then found that the proffered interests in cost savings, administrative convenience, and promoting married relationships justify the classification.[25] The trial court subsequently entered a final judgment from which Plaintiffs appeal.

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[18] Alaska Const. art. I, § 25.
[19] Exc. 66 (First Am. Compl. at ¶¶ 106-10).
[20] Exc. 67 (Id. at 25).
[21] Exc. 580 (Alaska Civil Liberties Union v. State, No. 3AN-99-11179 CI, slip op. at 11 (Alaska Super. Ct. Nov. 16, 2001)).
[22] Exc. 573, 577-78 (Id. at 4, 8-9).
[23] Exc. 574, 576-77 (Id. at 5, 7-8).
[24] Exc. 575 (Id. at 6).
[25] Exc. 575-76 (Id. at 6-7).

STANDARD OF REVIEW

This Court reviews summary judgments de novo to determine whether any genuine issues of material fact exist and whether the moving party is entitled to a judgment as a matter of law.[26] In reviewing decisions in which summary judgment has been granted, the Court takes that view of the facts most favorable to the appellant in order to determine whether under the facts as so construed the appellee was entitled to judgment.[27] On questions of law, this Court applies its independent judgment and adopts the rule of law most persuasive in light of precedent, reason, and policy.[28]

ARGUMENT

I. The State Equal Protection Clause Is More Exacting Than Its Federal Counterpart.

This Court has recognized its duty to ensure that the level of protection afforded by the state constitution is higher than the floor of protection guaranteed by the federal constitution:

> While we must impose the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[29]

Accordingly, this Court has construed the state equal protection clause – which guarantees that "all persons are equal and entitled to equal rights, opportunities, and

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[26] Estate of Himsel v. State, 36 P.3d 35, 38 (Alaska 2001).
[27] Howarth v. State, 925 P.2d 1330, 1332 (Alaska 1996).
[28] Himsel, 36 P.3d at 38.
[29] Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (footnote omitted).

protection under the law"[30] – to be more flexible and more exacting than its federal counterpart.

Where governmental action is challenged under the state equal protection clause, this Court first determines the level of scrutiny to which the governmental action is subject. Its approach in doing so reflects the comparative flexibility that the state constitution affords:

> In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.[31]

This Court then scrutinizes the importance of the interests proffered to justify the governmental action, as well as the closeness of the fit between the governmental action and the proffered interests: "As the level of scrutiny selected is higher on the [sliding] scale, [this Court] require[s] that the asserted governmental interests be relatively more compelling and that the [governmental action's] means-to-ends fit be correspondingly closer."[32]

The highest level of scrutiny contemplated by the state constitution is the same as its federal counterpart.[33] Thus, where governmental action is subject to the highest level of scrutiny, the governmental action must be narrowly tailored to further a

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[30] Alaska Const. art. 1, § 1; see Schafer v. Vest, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, J., concurring) ("[The framers of the state constitution] [did] mean all three.") (quotation omitted).
[31] State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983).
[32] Id. at 1193.
[33] Id.

compelling interest.[34] The lowest level of scrutiny, however, is higher than its federal counterpart, "raising [it] from virtual abdication to genuine judicial inquiry:"[35]

> As a minimum, we require that the [governmental action] be based on a legitimate public purpose and that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[36]

Moreover, where governmental action is subject to the lowest level of scrutiny, this Court "will no longer hypothesize facts which would sustain otherwise questionable [governmental action] as was the case under the traditional rational basis standard."[37] It has noted that the necessary byproduct of its refusal to hypothesize such facts is a level of scrutiny that is higher than the lowest level of scrutiny contemplated by the federal constitution:

> Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusiveness and underinclusiveness classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.[38]

Consistent with such an approach, under any level of scrutiny contemplated by the state constitution, the government bears the burden of establishing a justification for its action.[39] Thus, the state equal protection clause is more exacting than its federal counterpart.

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[34] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).
[35] Isakson v. Rickey, 550 P.2d 359, 362 n.14 (Alaska 1976).
[36] Ostrosky, 667 P.2d at 1193 (quoting Isakson, 550 P.2d at 362).
[37] Isakson, 550 P.2d at 362.
[38] Id. (quotation omitted).
[39] Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984).

II. The Denial of Partner Benefits to Lesbian and Gay Employees and Retirees for Their Same-Sex Partners Is Subject to a Heightened Level of Scrutiny.

A. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners is subject to a heightened level of scrutiny because it discriminates based on sexual orientation.

1. Classifications based on sexual orientation merit a heightened level of scrutiny.

The level of scrutiny to which classifications based on sexual orientation are subject is an open question in this jurisdiction.[40] The answer to the depends on "the degree of suspicion with which [this Court] view[s] [such classifications]."[41] Because classifications based on sexual orientation should be viewed with a high degree of suspicion, such classifications should be subject to heightened scrutiny.

Where there is a historical pattern of prejudice directed against a class, governmental action that implicates the class is subject to heightened scrutiny.[42] This is so because governmental action that implicates the class has proven to be so often invidious that it should be viewed with a high degree of suspicion.[43] Lesbian and gay individuals are constituents of a discrete and insular minority who confront systemic,

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[40] See also Tobias B. Wolff, Case Note, Principled Silence, 106 Yale Law J. 247 (1996) (the level of scrutiny to which classifications based on sexual orientation are subject has not been addressed by the United States Supreme Court).
[41] Ostrosky, 667 P.2d at 1192.
[42] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); see also United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[43] Id.

egregious discrimination because of their sexual orientation.[44] As one appellate court recognized:

> Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.[45]

Certainly, the sliding scale was intended to empower this Court to invoke heightened scrutiny in this type of circumstance. Accordingly, classifications based on sexual orientation should be subject to heightened scrutiny.[46]

Such heightened scrutiny would reflect the fact that sexual orientation, like race or sex, is a consideration that is rarely relevant to governmental action. It is irrelevant in nearly every context, from police protection[47] to public education[48] to criminal prosecution.[49] It is especially irrelevant in the context of public employment. This is so because sexual orientation, like race or sex, does not inform whether an employee can perform his or her job. Thus, sexual orientation discrimination in the context of

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[44] See Exc. 579 (Alaska Civil Liberties Union, slip op. at 10); see also Admin. Order No. 195 (Mar. 5, 2002) (executive order); Faipeas v. Municipality of Anchorage, 860 P.2d 1214, 1218 (Alaska 1993); S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985); Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 960 n.21 (Alaska 1978).

[45] Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998).

[46] See Watkins v. United States Army, 875 U.S. 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); see also Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 Colum. Law Rev. 1753 (1996); Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. Law Rev. 1161 (1988); Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. Law Rev. 713 (1985).

[47] See Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

[48] See Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

[49] See Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

public employment – like sexual orientation discrimination in nearly every other context – is highly suspicious. Such governmental action should be closely scrutinized to ensure that it is justified.

In this case, sexual orientation, like race or sex, does not inform whether an employee or retiree and his or her partner are deserving of the benefits at issue. For example, the pension and death benefits at issue strengthen the relationship of a committed couple by affording them long-term security. Because committed lesbian and gay couples are just as likely as committed heterosexual couples to remain united in an intimate association for life,[50] they are just as likely to benefit from the long-term security afforded by such benefits. Thus, sexual orientation is irrelevant where pension and death benefits are at issue.

Each of the benefits at issue may be described in similar terms: lesbian and gay couples are just as likely as heterosexual couples to benefit from each, and their relationships are just as likely to be strengthened by each. At bottom, sexual orientation is a consideration that is irrelevant to each of the benefits at issue.

In Tanner v. Oregon Health Sciences Univ., a constitutional challenge to a state university's restriction of health benefits to heterosexual employees for their opposite-sex spouses, an appellate court held that, under the privileges and immunities clause of the Oregon constitution, classifications based on sexual orientation are subject to strict

[50] See Exc. 108-35 (Affidavits of Plaintiffs).

scrutiny.[51] Tanner is especially instructive because "Oregon's decision to construe its constitution [in a given way] is of particular relevance to Alaska because of the closely shared statutory history and legal traditions of the two states."[52] Moreover, the privileges and immunities clause of the Oregon constitution is the functional equivalent of the equal protection clause of the Alaska constitution,[53] and, in any event, "[a]lthough the Alaska constitution does not have a privileges and immunities clause, it is [this Court's] view that the equal rights, opportunities and protection clause of art. I, § 1 affords at least as much protection [as a privileges and immunities clause]."[54] Consistent with its duty to interpret the state constitution expansively,[55] this Court should hold that, under the Alaska constitution, as under the Oregon constitution, classifications based on sexual orientation are subject to heightened scrutiny.

2. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners discriminates based on sexual orientation.

Defendants condition benefits for couples on a status that heterosexual couples can, but lesbian and gay couples cannot, attain. Thus, they discriminate based on sexual orientation.

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[51] Tanner, 971 P.2d at 447.
[52] State v. Gonzalez, 825 P.2d 920, 933 (Alaska Ct. App. 1992) (citation omitted).
[53] See Tanner, 971 P.2d at 445 (quoting State v. Clark, 630 P.2d 810, 814 (Or. 1981)).
[54] State v. Enserch Alaska Constr., Inc., 787 P.2d 624, 634 n.19 (Alaska 1989).
[55] Baker, 471 P.2d at 401-02.

a. The classification discriminates based on sexual orientation on its face.

A classification defined by marriage discriminates based on sexual orientation on its face.[56] Because the classification is "overtly discriminatory," a showing of discriminatory intent is not necessary.[57]

The essential distinction between lesbian and gay couples and heterosexual couples is that the former are same-sex couples and the latter are opposite-sex couples. As a matter of state law, whether a couple can marry depends on whether the couple is same-sex or opposite-sex.[58] Thus, a classification defined by marriage discriminates based on the essential distinction between lesbian and gay couples and heterosexual couples. In other words, a classification defined by marriage discriminates based on sexual orientation on its face.

An analogous classification was at issue in Korematsu v. United States.[59] In Korematsu, the United States Supreme Court did not hesitate to characterize a classification defined by Japanese ancestry as a classification based on race on its face.[60] This Court recognized that the essential distinction between Asian individuals and non-Asian individuals is whether an individual is of Asian or non-Asian ancestry. In the same way, the essential distinction between lesbian and gay couples and heterosexual couples is whether a couple is same-sex or opposite-sex. Therefore, just

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[56] Cf. Exc. 573 (Alaska Civil Liberties Union, slip op. at 4).
[57] Wayte v. United States, 470 U.S. 598, 608 n.10 (1985) (citation omitted).
[58] Alaska Const. art. I, § 25; AS 25.05.011(a), AS 25.05.013(a).
[59] Korematsu v. United States, 323 U.S. 214 (1944).
[60] Id. at 216.

as a classification defined by whether an individual is of Asian or non-Asian ancestry is intrinsically a classification based on race, a classification defined by whether a couple is same-sex or opposite-sex is intrinsically a classification based on sexual orientation. Because a classification defined by marriage is a classification defined by whether a couple is same-sex or opposite-sex, such a classification discriminates based on sexual orientation on its face.[61]

If this Court were to conclude otherwise, it would ratify the repudiated reasoning underlying General Elec. Co. v. Gilbert.[62] In Gilbert, the United States Supreme Court addressed the denial of disability benefits to pregnant employees. Although a classification defined by pregnancy absolutely excludes all men but not all women, the Court held that such a classification does not discriminate based on sex on its face.[63] The reasoning underlying Gilbert has since been repudiated by Congress,[64] and this Court should not resurrect it. Instead, this Court should reject the fiction that a classification based on a consideration that necessarily excludes an entire class – e.g., pregnancy, which absolutely excludes all men, and marriage, which, in Alaska, absolutely excludes all lesbian and gay couples – does not discriminate against the class on its face.

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[61] See Hartmann v. Stone, 68 F.3d 973, 985 (6th Cir. 1995) (suggesting that, under the free exercise clause of the federal constitution, an explicit prohibition on yarmulkes discriminates based on religion on its face).
[62] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).
[63] Id. at 134-36.
[64] See Newport News Shipping and Dry Dock Co. v. EEOC, 462 U.S. 669, 678-79 (1983).

In doing so, this Court would reaffirm the analytical approach that it adopted in Williams v. Zobel.[65] Holding unconstitutional a durational residency requirement for an exemption from state income taxation, this Court exercised common sense to reach the conclusion that the durational residency requirement discriminated against new state residents:

> [T]he effect of the statute will be that few long-term residents of Alaska will ever have to pay income taxes, while anyone moving to Alaska will have to pay taxes for three years . . . . It is true that some nonresidents, such as fishermen who come to the state each year, will also be exempt under the statute. But we believe the pattern of the impact of the statutory scheme is so striking that it would be naïve to assume that the statute does not place the principal burden of taxation on new residents. Contrary to what the state and the dissenters argue, discrimination against new residents created by the series of exemptions is apparent from the statute.[66]

In the same way, because a classification defined by marriage excludes absolutely all lesbian and gay couples but not heterosexual couples, this Court should hold that such a classification discriminates based on sexual orientation on its face.

b. The classification discriminates based on sexual orientation as applied.

Where a classification is challenged as applied, the federal constitution requires a showing of disparate impact and discriminatory intent.[67] It is an open question in this jurisdiction whether the state constitution requires a showing of both. Regardless, because the classification at issue has a disparate impact on, and reflects a

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[65] 619 P.2d 422 (Alaska 1980).
[66] Id. at 423-24 (footnote omitted).
[67] Washington v. Davis, 426 U.S. 229, 239 (1976).

discriminatory intent directed against, lesbian and gay couples, it discriminates based on sexual orientation as applied.

i. The classification has a disparate impact on lesbian and gay couples.

Where benefits are conditioned on marriage, the disparate impact on lesbian and gay couples is manifest. One hundred percent of lesbian and gay couples are absolutely denied the opportunity to enjoy such benefits. In contrast, zero percent of heterosexual couples are absolutely denied the opportunity to enjoy such benefits. This is so because, unlike lesbian and gay couples, heterosexual couples can marry, a fact that disproves the trial court's thesis that "[a]n unmarried, [heterosexual] couple would have no more access to the State's [and the Municipality's] health, retirement and other benefits than a [lesbian or gay] couple would."[68] A more disproportionate impact is not possible.

The trial court failed to recognize the disproportionate impact on lesbian and gay couples where benefits are conditioned on marriage, reasoning that "gay and lesbian employees are not being treated differently from any other unmarried state or municipal employee."[69] Its reasoning, however, is factually incorrect and analytically flawed.

First, where benefits are conditioned on marriage, lesbian and gay couples are disadvantaged vis-à-vis unmarried heterosexual couples as a matter of fact. Unmarried

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[68] Exc. 573 (Alaska Civil Liberties Union, slip op. at 4).
[69] Id.

heterosexual couples can avail themselves of such benefits because they can attain the status on which the benefits are conditioned. In contrast, lesbian and gay couples can never avail themselves of such benefits because they can never attain the status on which the benefits are conditioned. Thus, the trial court's reasoning is factually incorrect, as confirmed by Tanner:

> [The state] insists that in this case privileges and immunities are available to all on equal terms: All *married* employees – heterosexual and homosexual alike – are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.[70]

Accordingly, lesbian and gay couples enjoy parity with neither married heterosexual couples nor unmarried heterosexual couples.

Second, where benefits are conditioned on marriage, lesbian and gay couples are not similarly situated to unmarried heterosexual couples; rather, they are similarly situated to heterosexual couples, whether married or unmarried. This is so because lesbian and gay and heterosexual couples who have committed to themselves, their families, and their communities that they will remain united in an intimate association for life are equally deserving of the benefits at issue. Thus, they are "similarly situated with respect to the purpose of the law."[71]

The facts of Griggs v. Duke Power Co.,[72] the seminal case setting forth the disparate impact analysis, illustrate the misapplication of the doctrine by the trial court.

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[70] Tanner, 971 P.2d at 447-48 (emphasis in original).
[71] Leege v. Martin, 379 P.2d 447, 452 (Alaska 1963).
[72] 401 U.S. 430 (1971).

In Griggs, an employer required a high school education of its employees, both black and white. The United States Supreme Court found that the requirement, which disqualified both black applicants and white applicants from employment, had a disparate impact on black applicants because it disqualified disproportionately more black applicants than white applicants. If the Court had applied the reasoning of the trial court, however, it would have found that the requirement had no disparate impact on black applicants because black applicants lacking a high school education were treated no differently than white applicants lacking a high school education. Such fallacious reasoning defeats the entire purpose of the disparate impact analysis.

The New York Court of Appeals recognized the fallacy of such reasoning in Levin v. Yeshiva Univ., a statutory challenge to a private university's restriction of housing benefits to heterosexual students for their opposite-sex spouses.[73] Just as it was proper for the Griggs court to compare black applicants with white applicants, whether lacking a high school education or not, it was proper for the Levin court to compare lesbian and gay students and their partners with heterosexual students and their partners, whether married or unmarried.[74] For the same reason, it is proper for this Court to compare lesbian and gay employees and retirees and their partners with heterosexual employees and retirees and their partners, whether married or unmarried.

[73] 754 N.E.2d 1099, 1104 (N.Y. 2001).
[74] Id.

Accordingly, relying on cases that reflect the same factually incorrect and analytically flawed reasoning,[75] the trial court erred by failing to recognize that the classification at issue has a disparate impact on lesbian and gay couples.

ii. The classification reflects a discriminatory intent directed against lesbian and gay couples.

This Court has held that a showing of discriminatory intent is not required to prosecute a claim of discrimination in a statutory context.[76] It has suggested the same in a constitutional context.[77] Consistent with its duty to interpret the state constitution expansively,[78] this Court should make express that no such showing is required. The Oregon constitution, which shares a legal tradition with the Alaska constitution,[79] does not require a showing of discriminatory intent:

> [The state's] defense is that it determined eligibility for insurance benefits on the basis of marital status, not sexual orientation. According to [the state], the fact that such a facially neutral classification has the unintended side effect of discriminating against homosexual couples who cannot marry is not actionable under [the state constitution]. We are not persuaded by the asserted defense. [The state constitution] does not prohibit only intentional discrimination . . . . [The state] has taken action with no apparent intention to treat disparately [lesbian and gay couples]. Nevertheless, its actions have the undeniable effect of doing just that . . . . [The state's] intentions in this case are not relevant.

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[75] See, e.g., Hinman v. Dep't of Personnel Admin., 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

[76] Thomas v. Anchorage Tel. Util., 741 P.2d 618, 628 (Alaska 1987); see also Griggs, 401 U.S. at 430.

[77] See Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 400-02 (Alaska 1997); Pharr v. Fairbanks N. Star Borough, 638 P.2d 666, 669 (Alaska 1981); Williams, 619 P.2d at 424-25; see also Williams, 619 P.2d at 432 (Rabinowitz, J., concurring); but see Gottschalk v. State, 36 P.3d 49, 55 (Alaska Ct. App. 2001).

[78] Baker, 471 P.2d at 401-02.

[79] Gonzalez, 825 P.2d at 933.

> What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms.[80]

This Court should interpret the Alaska constitution to do the same.

Even if a showing of discriminatory intent is required, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[81] Indeed, a discriminatory intent may be inferred from the presence of a disparate impact and the absence of a justification, a circumstance contemplated by the United States Supreme Court:

> It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.[82]

Thus, a discriminatory intent directed against lesbian and gay couples may be inferred from the fact that the classification at issue absolutely excludes all lesbian and gay couples and does so without justification.[83]

In this case, a discriminatory intent directed against lesbian and gay couples is manifest: Defendants condition the benefits at issue on a status that they admit is the

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[80] Tanner, 971 P.2d at 447; cf. Exc. 578 (Alaska Civil Liberties Union, slip op. at 9).
[81] Washington, 426 U.S. at 242.
[82] Id.
[83] See infra III.

product of governmental animus directed against lesbian and gay couples.[84] Indeed, such animus has been singularly aggressive and notorious.

First, in 1995, in a statutory challenge to the state university's restriction of health benefits to heterosexual employees for their opposite-sex spouses, a trial court held that the denial of such benefits to lesbian and gay employees for their same-sex partners violated a statute prohibiting employment discrimination based on marital status.[85] In 1996, the state legislature responded by amending the statute to exempt discrimination in employment benefits from such statutory protection.[86] Contemporaneously, it acted to preclude any legal recognition of a marriage between a lesbian or gay couple.[87] In other words, in the very context of employment benefits, the state legislature expressly sanctioned discrimination based on a status that it, at the same time, affirmatively denied to lesbian and gay couples. Its intent to exclude lesbian and gay couples from the opportunity to enjoy benefits conditioned on marriage is plainly revealed by the legislation itself: "[A] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."[88]

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[84] See Exc. 380, 391 (State's Answer to First Am. Compl. at ¶ 6 (admitting the purpose of Alaska Const. art. I, § 25); Municipality's Answer to First Am. Compl. at ¶ 6 (same)).

[85] Tumeo v. Univ. of Alaska, No. 4FA-94-43 Civ., 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995).

[86] AS 18.80.220(c).

[87] AS 25.05.011(a), AS 25.05.013(a).

[88] AS 25.05.013(b); see also House Committee Minutes concerning HB 226 and HB 227 (http://www.legis.state.ak.us/basis19.HTM); Senate Committee Minutes concerning HB 226 and SB 308 (same).

Second, in 1998, a trial court held that the State's restriction of marriage to heterosexual couples could be justified under the state constitution only if it was narrowly tailored to further a compelling interest.[89] In response, the state legislature went so far as to propose a state constitutional amendment, which was subsequently ratified, to preclude any legal recognition of a marriage between a lesbian or gay couple: "To be valid or recognized in this State, a marriage may exist only between one man and one woman."[90] In doing so, it once again demonstrated its intent to exclude lesbian and gay couples from the opportunity to enjoy benefits conditioned on marriage.[91]

The trial court ignored all such evidence of governmental animus directed against lesbian and gay couples, erroneously concluding that it is irrelevant because it post-dates the enactment of the employment benefits legislation.[92] The trial court, however, failed to recognize that, by modifying the definition of marriage, the state legislature effectively amended all legislation dependent on the definition of marriage, including the employment benefits legislation. If the state legislature had directly amended the employment benefits legislation to provide that employment benefits are conditioned on a relationship that excludes a lesbian or gay relationship, a showing of

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[89] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).
[90] Alaska Const. art. I, § 25.
[91] See House Committee Minutes concerning SJR 42 (http://www.legis.state.ak.us/basis20.HTM); Senate Committee Minutes concerning SJR 42 (same); see also infra IV (the marriage amendment does not preclude Defendants from offering partner benefits to lesbian and gay employees and retirees for their same-sex partners).
[92] Exc. 578 (Alaska Civil Liberties Union, slip op. at 9).

discriminatory intent directed against lesbian and gay couples would be indisputable. The fact that the state legislature indirectly amended the employment benefits legislation to do the same is of no moment: "[A legislature] can modify a statute directly or indirectly, the form is not decisive."[93] Thus, the trial court erred by ignoring evidence of governmental animus directed against lesbian and gay couples.

B. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners is subject to a heightened level of scrutiny because it discriminates based on sex.

1. Classifications based on sex merit a heightened level of scrutiny.

Because the federal constitution guarantees a floor of protection,[94] classifications based on sex are subject to at least an intermediate level of scrutiny. In other words, "[t]o withstand constitutional challenge, . . . classifications by gender must serve [at least] important governmental objectives and must be [at least] substantially related to achievement of those objectives."[95] Thus, "[p]arties who seek to defend gender-based government action must demonstrate [at least] an 'exceedingly persuasive justification' for that action."[96]

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[93] Apache Survival Coalition v. United States, 21 F.3d 895, 902 (9th Cir. 1994) (citing Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440-41 (1992)); see also Polymer Fabricating, Inc. v. Employers Workers' Compensation Ass'n, 980 P.2d 109, 114 (Okla. 1998); Raubar v. Raubar, 718 A.2d 705, 709 (N.J. Super. Ct. Law Div. 1998).
[94] Baker, 471 P.2d at 401-02.
[95] Craig v. Boren, 429 U.S. 190, 197 (1976).
[96] United States v. Virginia, 518 U.S. 515, 531 (1996).

Under the state constitution, classifications based on sex should be subject to the highest level of scrutiny. As amended,[97] the state constitution recognizes that sex discrimination, like race discrimination, is an especially pernicious form of discrimination.[98] Significantly, its interest in redressing sex discrimination is equal to its interest in redressing race discrimination: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin."[99] In other jurisdictions with comparable constitutional provisions, courts have held that classifications based on sex are subject to the highest level of scrutiny.[100] Consistent with its duty to interpret the state constitution expansively,[101] this Court should do the same.

2. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners discriminates based on sex.

Defendants condition benefits for couples on a status that opposite-sex couples can, but same-sex couples cannot, attain. Thus, Defendants discriminate based on sex.

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[97] See Plas v. State, 598 P.2d 966, 968 (Alaska 1979).
[98] Alaska Const. art. I, § 3.
[99] Id.
[100] See, e.g., New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 855 (N.M. 1998); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Tyler v. State, 623 A.2d 648, 651 (Md. 1993); In re McLean, 725 S.W.2d 696, 698 (Tex. 1987); Opinion of the Justices, 371 N.E.2d 426, 428 (Mass. 1977); Darrin v. Gould, 540 P.2d 882, 893 (Wash. 1975); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974); Commonwealth v. Butler, 328 A.2d 851, 855 (Pa. 1974); People v. Green, 514 P.2d 769, 770 (Colo. 1973); Doe v. Maher, 515 A.2d 134, 161 (Conn. Super. Ct. 1986); see also, e.g., Flack v. Sizer, 322 S.E.2d 850, 853 (W. Va. 1984); In re Williams, 653 P.2d 970, 977-78 (Or. 1982); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971).
[101] Baker, 471 P.2d at 401-02.

As a matter of state law, whether a couple can marry depends on whether the couple is same-sex or opposite-sex;[102] thus, by definition, a classification defined by marriage is a classification defined in terms of sex. The trial court, however, concluded that "[t]he restriction of benefits to married couples is applied equally to men and women and does not act to elevate either gender to a position of superiority or inferiority."[103] In other words, the trial court concluded that a classification defined by marriage does not discriminate based on sex because it creates no disparity between men and women. This is error.

In fact, a classification defined by marriage creates disparities between women and men. A female employee with a female partner is treated differently than a male employee with a female partner. Similarly, a male employee with a male partner is treated differently than a female employee with a male partner.

But, regardless of whether a classification defined by marriage creates a disparity between men and women, the fact that the classification is defined in terms of sex means that it discriminates based on sex. The United States Supreme Court recognized this principle in Loving v. Virginia.[104] In Loving, the Court held unconstitutional a law that penalized equally the white and non-white parties to an interracial marriage. In doing so, it "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the

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[102] Alaska Const. art. I, § 25; AS 25.05.011(a), AS 25.05.013(a).
[103] Exc. 573 (Alaska Civil Liberties Union, slip op. at 4).
[104] Loving v. Virginia, 388 U.S. 1 (1967).

classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."[105] Thus, the Court did not require a showing that the classification created a disparity between whites and non-whites. Rather, it required only a showing that the classification was defined in terms of race. In this way, the Court accommodated the idiosyncratic nature of race-based classifications involving couples. Although no less invidious than race-based classifications involving individuals, such classifications are susceptible to the fallacy that they create no racial disparity. Accordingly, where race-based classifications involving couples are at issue, it is irrelevant whether they create a racial disparity; it is enough that they are defined in terms of race.

The reasoning underlying Loving extends to sex-based classifications involving couples. In Frontiero v. Richardson, the United States Supreme Court held unconstitutional a policy conditioning spousal benefits on spousal dependency for servicewomen but not servicemen.[106] In Frontiero, as in all cases involving couples, the classification arguably created no disparity between men and women: although servicewomen were disadvantaged vis-a-vis servicemen, the husbands of servicewomen were similarly disadvantaged vis-a-vis the wives of servicemen. The classification was nevertheless held to discriminate based on sex. Similarly, in Califano v. Goldfarb, the United States Supreme Court held unconstitutional a policy

[105] Id. at 8.
[106] Frontiero v. Richardson, 311 U.S. 677 (1973).

conditioning survivor benefits on spousal dependency for widowers but not widows.[107] Again, the classification arguably created no disparity between men and women: although the practice discriminated against female wage earners who had worked to ensure their husbands' security vis-à-vis male wage earners who had worked to ensure their wives' security, it similarly discriminated against surviving husbands vis-à-vis surviving wives. Again, the classification was nevertheless held to discriminate based on sex. All such case law demonstrates the fallacy of the trial court's reasoning.

Significantly, in Baehr v. Lewin, a constitutional challenge to a state's restriction of marriage to opposite-sex couples, the Hawaii Supreme Court adopted the reasoning underlying Loving.[108] Notwithstanding the fact that the restriction of marriage to opposite-sex couples arguably applied equally to men and women, the court held that "on its face and . . . as applied . . . the state's regulation of access to the status of married persons [discriminated] on the basis of the applicants' sex."[109] The Alaska Court of Appeals has observed that "the Hawaii Supreme Court's decision [in a given case] has particular relevance to Alaska because the adoption of the Hawaii Constitution was contemporaneous with the adoption of the Alaska Constitution."[110] Accordingly, this Court should adopt the reasoning underlying Loving. By doing so, this Court would recognize that, where sex-based classifications involving couples are

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[107] Califano v. Goldfarb, 430 U.S. 199 (1977).
[108] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
[109] Id. at 60.
[110] Gonzalez, 825 P.2d at 933.

at issue, it is irrelevant whether they create a disparity between men and women; it is enough that they are defined in terms of sex.

C. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners is subject to a heightened level of scrutiny because it significantly burdens important personal interests.

1. Classifications that burden important personal interests are subject to a heightened level of scrutiny.

Unlike its federal counterpart, the state equal protection clause dictates that the level of scrutiny to which a classification is subject may be determined by the importance of the personal interest burdened by the classification:

> Depending upon the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest . . . . [and] that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means.[111]

Thus, the trial court erred by restricting its inquiry to the federal inquiry: whether the classification at issue burdens a "fundamental right."[112] Under the state constitution, even if a classification is not subject to the highest level of scrutiny because it does not burden a fundamental right, it may nevertheless be subject to a heightened level of scrutiny because it burdens an important personal interest.

Moreover, the trial court erred by failing to recognize that a classification that burdens an economic interest may also burden a personal interest. For example, the

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[111] State v. Enserch Alaska Constr., Inc., 787 P.2d 624, 631-32 (Alaska 1989) (footnote and citation omitted).

[112] Exc. 574 (Alaska Civil Liberties Union, slip op. at 5).

classification at issue in Alaska Pacific Assurance Co. v. Brown burdened an interest in workers' compensation benefits, an economic interest.[113] Nonetheless, this Court subjected the classification to heightened scrutiny because it also burdened the fundamental right to travel. For analogous reasons, in this case, this Court should subject the classification at issue to heightened scrutiny.

2. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners significantly burdens important personal interests

The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners significantly burdens the fundamental right to intimate association, "a basic underpinning of . . . free society."[114] Ostrosky itself, the seminal case setting forth the state equal protection analytical framework, recognized "the exercise of intimate personal choices"[115] as a fundamental right. By doing so, it made express that the fundamental right to the exercise of intimate personal choices is an integral component of the right to personal autonomy guaranteed by the privacy clause of the state constitution,[116] a right which this Court has broadly construed. For example, this Court in Breese v. Smith held unconstitutional a student hair length regulation, stating that "[a]t the core of [the concept of liberty] is the notion of total

[113] 687 P.2d 264 (Alaska 1984).
[114] Exc. 574 (Alaska Civil Liberties Union, slip op. at 5 (citing Baker, 471 P.2d at 401-02)).
[115] Ostrosky, 667 P.2d at 1192 (footnote omitted).
[116] Alaska Const. art. I, § 22.

personal immunity from governmental control: the right 'to be let alone.'"[117] By including personal appearance within the ambit of privacy, this Court recognized what the California Supreme Court has recognized: the right to privacy "is not so much one of total secrecy"[118] as it is the right to personal autonomy, including "the right to define one's circle of intimacy."[119] Given the Court's broad construction of the right to privacy, the trial court's observation that "a limitation of health and retirement benefits has little to do with the traditional notion of the sanctity of the home"[120] is extraneous. The right to privacy encompasses more than the right to privacy within the home; it encompasses the right to intimate association.[121]

The classification at issue penalizes each of the plaintiff couples for exercising the fundamental right to intimate association. But "[t]here is no requirement to

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[117] 501 P.2d 159, 168 (Alaska 1972) (footnote omitted).
[118] Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 37 (Cal. 1971).
[119] Id.
[120] Exc. 576-77 (Alaska Civil Liberties Union, slip op. at 7-8).
[121] See also Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984) ("[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. . . . [Such] relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.").

demonstrate actual deterrence"[122] of the exercise of a right; "[t]he relevant criteria are the fact and severity of the restriction."[123] Accordingly, Plaintiffs need not show that the restriction of the benefits at issue to married couples has actually deterred each of the plaintiff couples from uniting in an intimate association for life. Rather, they need show only that, by so uniting, a penalty has been exacted, i.e., the benefits at issue have been absolutely denied to them.[124]

The fundamental right to intimate association is only the most significant of the important interests of each of the plaintiff couples that are significantly burdened by the classification at issue. The fundamental rights to or important interests in family decisionmaking,[125] reproductive freedom,[126] health care,[127] "economic endeavor within a particular industry,"[128] and "enjoyment of the rewards of [one's] own industry"[129] are all significantly burdened by the denial of health, pension, and other employment benefits. For example, because neither Estra Bensussen, a State employee, nor her partner Carol Rose Gackowski, a Municipality employee, has access to health benefits through the other, neither can afford to serve as a stay-at-home parent to the three

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[122] Brown, 687 P.2d at 271 n.11; see also Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
[123] Brown, 687 P.2d at 271 n.11.
[124] See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989).
[125] In re C.L.T., 597 P.2d 518, 524 (Alaska 1979); Stanley v. Illinois, 405 U.S. 645, 651 (1972).
[126] Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 968 (Alaska 1997).
[127] Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).
[128] Enserch, 787 P.2d at 632.
[129] Alaska Const. art. I, § 1.

siblings whom they adopted, all of whom have significant psychological and emotional needs.[130] Given the needs of their children, Ms. Bensussen and Ms. Gackowski, in consultation with medical experts, made the difficult decision to place two of the three siblings in a residential care facility in Montana, a decision that they would not have had to make if one had had access to health benefits through the other.[131] Similarly, because Karen Wood had no access to health benefits through her partner Darla Madden, a State employee, her attempts at pregnancy through artificial insemination were constrained by whether she had access to employer-sponsored health benefits of her own, given the need for such benefits during pregnancy.[132] Over a five-year period, Ms. Wood had only intermittent access to employer-sponsored health benefits of her own and, therefore, made only intermittent attempts at pregnancy, all of which were unsuccessful, a circumstance that might have been avoided if she had had access to health benefits through Ms. Madden.[133] These are but a few of the examples of the ways in which the record demonstrates that the denial of partner benefits to lesbian and gay employees and retirees significantly burdens important interests.[134]

The trial court failed to apply the principles set forth above, erroneously concluding that "[t]he right to health insurance and other employment benefits is not a

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[130] Exc. 108-12 (Affidavit of Carol Rose Gackowski).
[131] Id.
[132] Exc. 133-35 (Affidavit of Karen Wood).
[133] Id.
[134] See Exc. 108-35 (Affidavits of Plaintiffs); see also Brief of Amicus Curiae Lambda Legal Defense and Education Fund.

'fundamental right.'"[135] The proper inquiry is not whether the right to employments benefits is a fundamental right but rather whether the denial of employment benefits burdens an important interest. In this case, the denial of employment benefits significantly burdens important interests, not merely "economic interests,"[136] as discussed above.

III. The Denial of Partner Benefits to Lesbian and Gay Employees and Retirees for Their Same-Sex Partners Is Not Justified Under Any Level of Scrutiny.

A. The denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners cannot be justified under any level of scrutiny because it is motivated by governmental animus directed against lesbian and gay couples.

The fact that lesbian and gay couples are ineligible for the benefits at issue is the product of governmental action directed against lesbian and gay couples, a fact that Defendants admit.[137] Governmental action motivated by animus is discrimination for its own sake and therefore inherently illegitimate. This principle is consistent with the admonition that "[t]he state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals."[138] It is also consistent with the view that "[t]he United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such

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[135] Exc. 574 (Alaska Civil Liberties Union, slip op. at 5).
[136] Exc. 575 (Id. at 6).
[137] See Exc. 380, 391 (State's Answer to First Am. Compl. at ¶ 6 (admitting the purpose of Alaska Const. art. I, § 25); Municipality's Answer to First Am. Compl. at ¶ 6 (same)); see also AS 25.05.013(b).
[138] Ravin v. State, 537 P.2d 494, 509 (Alaska 1975).

basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles."[139] Because the classification at issue is motivated by governmental animus directed against lesbian and gay couples, it cannot be justified under any level of scrutiny.

The United States Supreme Court has long held that discrimination for its own sake is inherently illegitimate: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[140] Thus, "mere negative attitudes"[141] are an improper motivation for governmental action. This is so even if a public entity acts, not on its own animus, but rather on the animus of another entity, whether public or private.[142] Although Plaintiffs use the term "animus" to describe Defendants' improper motivation, discrimination for its own sake is inherently illegitimate regardless of how the motivation is characterized.[143]

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[139] Breese, 501 P.2d at 169.
[140] United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
[141] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).
[142] See Palmore v. Sidoti, 466 U.S. 429, 433 (1984).
[143] See, e.g., Cleburne, 473 U.S. at 448 ("negative attitudes" or "fear"); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985) (promoting one class by discriminating against another); Palmore, 466 U.S. at 433 ("prejudice" or "biases"); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("public unease" or "public intolerance"); Marks v. City of Chesapeake, 883 F.2d 308, 312 (4th Cir. 1989) ("the public's expressions of concern" or "the 'irrational neighborhood pressure' manifestly found in . . . prejudice"); Guitterez v. Municipal Court of S.E. Judicial Dist., 838 F.2d 1031, 1042-43 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989) ("fears," "suspicions," or "prejudices").

In Romer v. Evans, the United States Supreme Court made express that these principles apply equally to governmental action motivated by animus directed against lesbian and gay individuals.[144] In the wake of Romer, courts have held that governmental action motivated by sexual orientation bias is unlawful under any level of scrutiny. For example, in Quinn v. Nassau County Police Dep't, the court held that harassment of a police officer based on sexual orientation violated the federal equal protection clause: "[H]arassment by [police department] personnel cannot survive rational basis review when it is motivated by irrational fear and prejudice towards homosexuals. The inevitable inference from [the police officer's] mistreatment is that it was born of animosity toward the class of persons affected, namely homosexuals."[145] Similarly, in Weaver v. Nebo Sch. Dist., the court held that the termination of a volleyball coach based on sexual orientation violated the federal equal protection clause: "[A]n 'irrational prejudice' cannot provide the rational basis to support a state action against an equal protection challenge. . . . [W]hen state action reflects an animus directed at a defined minority, it cannot be supported under the Equal Protection Clause."[146] Addressing the non-renewal of a teaching contract based on sexual orientation, the court in Glover v. Williamsburg Local Sch. Dist. Bd. of Educ. reached the same conclusion: "[A] state action which discriminates against homosexuals and is motivated solely by animus towards that group necessarily violates the Equal

[144] 517 U.S. 620, 634-35 (1996).
[145] 53 F. Supp. 2d 347, 358 (E.D.N.Y. 1999) (quotation and citation omitted).
[146] 29 F. Supp. 2d 1279, 1987 (D. Utah 1998).

Protection Clause, because a desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose."[147] In contexts other than public employment, courts have similarly held that governmental action motivated by sexual orientation bias is unlawful under any level of scrutiny.[148]

In Alaska, the principle that discrimination for its own sake is inherently illegitimate is reflected in Principal Mut. Life Ins. Co. v. State.[149] In Principal, this Court concluded that a tax scheme that disadvantaged out-of-state insurers simply "to penalize foreign, or reward domestic, insurers"[150] violated the state equal protection clause; disadvantaging out-of-state corporations simply to advantage in-state corporations was "a discrimination which lack[ed] any legitimate state purpose."[151] For analogous reasons, this Court should conclude that Defendants may not condition the benefits at issue on a status that they admit is the product of governmental animus directed against lesbian and gay couples. As discussed above, such animus is manifest.[152] The State's agenda is to ensure that classifications defined by marriage, especially those in the context of employment benefits, absolutely exclude all lesbian

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[147] 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998) (quotation omitted).
[148] See, e.g., Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997) (selective law enforcement based on sexual orientation violated federal equal protection clause); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (student harassment based on sexual orientation violated federal equal protection clause); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (criminalization of same-sex sodomy violated state equal protection clause).
[149] 780 P.2d 1023 (Alaska 1989).
[150] Id. at 1026.
[151] Id. at 1025.
[152] See supra II.A.2.b.ii.

and gay couples simply because they are lesbian or gay.[153] The Municipality has furthered the State's agenda by conditioning benefits on a status that it admits is the product of governmental animus directed against lesbian and gay couples.[154] Thus, at a minimum, the Municipality has acted on the animus of another entity, an improper motivation in its own right.[155] Because the classification at issue is motivated by governmental animus directed against lesbian and gay couples, it cannot be justified under any level of scrutiny.

B. The proffered governmental interests do not justify the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners.

1. The proffered governmental interest in cost savings does not justify the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners.

This Court has held that an interest in cost savings "can have no independent force in the state's attempt to meet its burden under the equal protection clause."[156] In other words, an interest in cost savings alone is never a valid justification. This Court has explained the rationale underlying the principle as follows:

> Although reducing costs to taxpayers or consumers is a legitimate governmental goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive. Such economizing is justifiable only when effected through independently legitimate distinctions.[157]

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[153] Id.
[154] See Exc. 391 (Municipality's Answer to First Am. Compl. at ¶ 6 (admitting the purpose of Alaska Const. art. I § 25)).
[155] See Palmore v. Sidoti, 466 U.S. 429, 433 (1984).
[156] Brown, 687 P.2d at 272.
[157] Id.

Reaffirming this principle, this Court recently refused to countenance a proffered interest in "spending limits,"[158] noting that the United States Supreme Court has long held that an interest in cost savings alone is never a valid justification:

> We recognize that the State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.[159]

Thus, even if a classification achieves cost savings, it is not justified by an interest in cost savings alone under any level of scrutiny.[160]

2. The proffered governmental interest in administrative convenience does not justify the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners.

This Court has held that "[w]hile administrative convenience is a legitimate purpose, it will usually not outweigh the nature and the importance of the right which it impinges on."[161] Nevertheless, the trial court here concluded that the proffered interest in administrative convenience justifies the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners because of "the problems inherent in administrating a program where determinations as to what constitute a 'committed couple' or to whom benefits should extend would be fraught with

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[158] State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 910 (Alaska 2001).
[159] Id. (quoting Shapiro, 394 U.S. at 633).
[160] Cf. Exc. 575-76 (Alaska Civil Liberties Union, slip op. at 6-7).
[161] Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1266 n.45 (Alaska 1980) (citation omitted); see also Deubelbeiss v. Commercial Fisheries Entry Comm'n, 689 P.2d 487, 489 n.7 (Alaska 1984).

disputes."[162] The trial court's conclusion, however, is factually unfounded and analytically disingenuous.

First, if Plaintiffs were to prevail, Defendants would not experience the administrative inconvenience envisioned by the trial court. The State already administers a state employment benefits plan that requires it to make the case-by-case determinations of concern to the trial court. The state university now extends health benefits to employees for their domestic partners, including lesbian and gay employees for their same-sex partners.[163] Thus, the State has already devised a methodology by which to make the case-by-case determinations of concern to the trial court, a methodology that is equally applicable to the state employment benefits plan at issue.[164] Moreover, the fact that the State has devised a methodology that is equally applicable to the state employment benefits plan at issue, including the state pension benefits plan at issue, informs whether the Municipality would experience the administrative convenience envisioned by the trial court. This is so because Defendants share the same pension benefits plan,[165] and a methodology that is applied to the shared pension benefits plan is equally applicable to the other components of the municipal employment benefits plan at issue. Thus, if Plaintiffs were to prevail,

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[162] Exc. 576 (Alaska Civil Liberties Union, slip op. at 7).
[163] Univ. of Alaska v. Tumeo, 933 P.2d 1147, 1149-50 (Alaska 1997).
[164] See University of Alaska Explanation of Availability of Benefits Based on Financially Interdependent Relationship (http://info.alaska.edu/hr/forms/PDF/ B140-FIPExplanation.pdf); see also Brief of Amicus Curiae Lambda Legal Defense and Education Fund.
[165] Exc. 34-35 (Municipality's Answer to Compl. at ¶¶ 8-9).

neither Defendant would experience the administrative inconvenience envisioned by the trial court.

Furthermore, the employment benefits plans at issue already require Defendants to make case-by-case determinations similar to those of concern to the trial court. For example, "unmarried children chiefly dependent on [an] employee"[166] are eligible for health benefits, necessitating such case-by-case determinations. As explained by the State:

> Children incapable of employment because of a physical or mental incapacity are covered even if they are past age 23. However, the incapacity must have existed before age 19 and the children must continue to rely chiefly on [the employee] for support. [The employee] must furnish the claims administrator evidence of the incapacity, proof that the incapacity existed before age 19 and proof of financial dependence.[167]

Thus, given that methodologies have already been devised to make the case-by-case determinations of concern to the trial court, the trial court's conclusion that the proffered interest in administrative convenience justifies the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners is factually unfounded.

Second, the trial court's conclusion is analytically disingenuous because it allows a formerly neutral consideration to be used as a discriminatory tool in every case, permitting a governmental entity to accomplish in three steps what it cannot accomplish in one. A governmental entity may not deny a benefit to a class for its

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[166] AS 39.30.090.

[167] Select Benefits Health Dependent Enrollment Form (http://www.state.ak.us/local/akpages/ADMIN/drb/forms/ben032.pdf).

own sake.[168] The trial court's conclusion, however, encourages a governmental entity to effect the same result by (1) defining a bright-line status that excludes the class, (2) conditioning the benefit on the bright-line status, and (3) proffering a bootstrapped interest in administrative convenience to justify the denial of the benefit to the class because the benefit is conditioned on a bright-line status. In other words, the trial court's conclusion encourages a governmental entity to invent an interest in administrative convenience where no such interest would otherwise exist. Such subterfuge is offensive to the constitution.

In this case, the proffered interest in administrative convenience is similarly contrived. In 1998, a trial court held that the State's denial of marriage to lesbian and gay couples could be justified under the state constitution only if it was narrowly tailored to further a compelling interest.[169] In response, the state legislature redefined marriage to exclude lesbian and gay couples.[170] By doing so, the state legislature transformed what was once a neutral consideration – marriage as a bright-line status – into a discriminatory tool. Accordingly, notwithstanding the fact that benefits conditioned on marriage are conditioned on a bright-line status, this Court should preclude Defendants from proffering a bootstrapped interest in administrative convenience to justify the denial of such benefits to lesbian and gay couples.

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[168] Romer, 517 U.S. at 634-35; Moreno, 413 U.S. at 534.
[169] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).
[170] Alaska Const., art. I, § 25.

3. The proffered governmental interest in promoting married relationships does not justify the denial of partner benefits to lesbian and gay employees and retirees for their same-sex partners.

The trial court found that the restriction of benefits to married couples induces couples to marry and, therefore, that the proffered interest in promoting married relationships justifies the denial of partner benefits to lesbian and gay couples.[171] Its reasoning, however, is fundamentally flawed.

First, the proffered interest in promoting married relationships is belied by the State's own actions. In the recent past, legal recognition of a marriage between a lesbian or gay couple was at hand.[172] Instead of acting to promote married relationships between lesbian and gay couples, however, the state legislature responded by preempting such legal recognition.[173] The State thereby demonstrated that it has no interest in promoting married relationships.

As the United States Supreme Court recognized in City of Cleburne v. Cleburne Living Ctr., Inc.,[174] where a proffered interest is belied by the government's own actions, a court will refuse to recognize the interest. In Cleburne, a constitutional challenge to a city's exclusion of a mentally retarded group home from a zoning district, the city sought to justify the exclusion by asserting that "[it] was concerned that the facility was across the street from a junior high school, and it feared that the

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[171] Exc. 575-76 (Alaska Civil Liberties Union, slip op. at 6-7).
[172] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).
[173] Alaska Const., art. I, § 25.
[174] 473 U.S. 432 (1985).

students might harass the occupants of [the group home]."[175] The Court, however, refused to credit the assertion because "the school itself [was] attended by about 30 mentally retarded students,"[176] belying the proffered interest. In the same way, in this case, the proffered interest in promoting married relationships is belied by the State's own actions.

Second, Defendants may not assert an interest in promoting married relationships for its own sake. Just as the government may not disfavor a class simply because it disfavors the class,[177] it may not favor a class simply because it favors the class. Discrimination for its own sake is never a legitimate interest, a fundamental principle affirmed by this Court time and again. For example, in State v. Enserch Alaska Constr., Inc., this Court struck down a hiring preference for residents of economically distressed zones that was justified by nothing more than an "underlying objective of economically assisting one class over another:"

> We have held that this objective is illegitimate . . . . [W]e [have] ruled that discrimination between residents and nonresidents based solely on the object of assisting one class over the other economically cannot be upheld under . . . the . . . equal protection clause . . . . We conclude that the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region is not a legitimate legislative goal.[178]

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[175] Id. at 449.
[176] Id.
[177] Romer, 517 U.S. at 634-35; Moreno, 413 U.S. at 534-35.
[178] 787 P.2d at 634 (quotation and footnote omitted).

Thus, Defendants may not favor married relationships simply because they – or their citizens[179] – favor married relationships. This is so even if Defendants recharacterize the proffered interest as an interest in preserving the institution of marriage. As this Court noted in Enserch, preserving a social structure for its own sake is tantamount to favoring a class for its own sake: "That the legislature also hoped to preserve the social structure of economically depressed areas cannot be viewed as a purpose separate from that of aiding the residents of such areas."[180] Accordingly, Defendants must characterize the proffered interest as an interest in promoting married relationships because of the social good that such relationships represent, i.e., the social good that results when a couple makes a commitment of the highest order to each other, e.g., a stable household.

Given the essence of the proffered interest, it is clear that Defendants assert the proffered interest in an arbitrary manner. Because lesbian and gay relationships are no less committed than heterosexual relationships,[181] the social good that results when a lesbian or gay couple makes a commitment of the highest order to each other is no less than the social good that results when a heterosexual couple does the same. This is so notwithstanding the fact that a commitment of the highest order between a heterosexual couple is called a marriage but a commitment of the highest order between a lesbian or gay couple is not. The level of commitment is the same

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[179] See Palmore, 466 U.S. at 433; cf. Exc. 575-76 (Alaska Civil Liberties Union, slip op. at 6-7).
[180] Enserch, 787 P.2d at 634.
[181] See Exc. 108-35 (Affidavits of Plaintiffs).

regardless of what it is called. Thus, it is arbitrary[182] – indeed, contrary to a recognized "interest in protecting the basic family unit"[183] – to induce heterosexual couples to make a commitment of the highest order to each other but not to induce lesbian and gay couples to do the same.[184]

Third, Defendants may not assert a proffered interest in promoting married relationships because the interest does not "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[185] Indeed, as the United States Supreme Court recognized in Romer, where a proffered interest is so discontinuous from the purpose of the governmental action at issue, a court will not recognize the interest. In Romer, a constitutional challenge to a state's ban on civil rights protections for lesbian and gay individuals, the state sought to justify the ban by asserting interests in respecting associational rights and conserving limited

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[182] Cf. Ostrosky, 667 P.2d at 1193.

[183] State v. Adams, 522 P.2d 1125, 1131 (Alaska 1974); see also Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53-54 (N.Y. 1989) ("[T]he term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order . . . . [A] more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units.").

[184] See Cleburne, 473 U.S. at 449 ("[An] objection to the home's location was that it was located on 'a five hundred year flood plain.' This concern with the possibility of a flood, however, can hardly be based on a distinction between [the group home] and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on [the group home] site without obtaining a special use permit").

[185] Planned Parenthood, 28 P.2d at 911 (quoting Isakson, 550 P.2d at 362).

resources.[186] The Court, however, refused to recognize the interests because they were "so far removed"[187] from the purpose of the ban. Applying such a standard, this Court in State v. Planned Parenthood of Alaska, Inc. struck down a denial of funding for medically necessary abortions that was "based on criteria entirely unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons of this state."[188] Similarly, this Court should strike down the denial of partner benefits to lesbian and gay couples because the proffered interest in promoting married relationships is entirely unrelated to the stated purpose of offering such benefits. According to Defendants, themselves, the purpose of offering the benefits is "to encourage qualified personnel to enter and remain in the service of the state or a political subdivision or political organization of the state."[189] Because recruitment and retention of qualified employees is entirely unrelated to the marital status of such employees,[190] the proffered interest in promoting married relationships does not have a fair and substantial relationship to the stated purpose of offering the benefits.

Moreover, there is no evidence to suggest that the restriction of benefits to married couples induces couples to marry. Unlike federal equal protection jurisprudence, state equal protection jurisprudence does not permit this Court "[to]

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[186] Romer, 517 U.S. at 635.
[187] Id.
[188] Planned Parenthood, 28 P.2d at 911.
[189] AS 39.35.010(a); see Exc. 140-41, 154-55 (Tourtellot Dep. at 25-26; Lindemuth Dep. at 28-29).
[190] See AS 18.80.220(a)(1) (proscribing, with limited exception, employment discrimination based on marital status).

hypothesize facts which would sustain otherwise questionable [governmental action]."[191] This principle is recognized in Justice Rabinowitz's concurring opinion in Thomas v. Bailey.[192] Concluding that a durational residency requirement was not justified by an interest in "excluding from the benefits of the land grants those persons who have not made a substantial contribution to the state's economy and general welfare,"[193] Justice Rabinowitz stated as follows:

> [T]he asserted correlation between the contribution of the land grantee to the state's economy and the varying periods of residency required to become eligible for each incremental . . . grant of land . . . is on its face too tenuous to satisfy the standard of review . . . . The parties to this action have made available no additional data supporting this rationale. Therefore, this court is left in the position of hypothesizing facts to sustain the classification on cost-equalization grounds, an exercise that we expressly declined to undertake in Isakson.[194]

Such reasoning is consistent with this Court's insistence that proffered interests be "concrete . . . having a substantial basis in reality"[195] and not be "regarded as after the fact hypotheses."[196] Thus, because this Court would be required to hypothesize that the restriction of benefits to married couples induces couples to marry as a matter of fact, Defendants cannot meet their burden of justifying the denial of partner benefits to lesbian and gay couples.[197]

Fourth, for the same reason that this Court should preclude Defendants from

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[191] Isakson, 550 P.2d at 362.
[192] 595 P.2d 1 (Alaska 1979) (Rabinowitz, J., concurring).
[193] Id. at 17.
[194] Id. at 18.
[195] Ostrosky, 667 P.2d 1184, 1195 n.39.
[196] Id. at 1195.
[197] See Brown, 687 P.2d at 269-70.

proffering a bootstrapped interest in administrative convenience to justify the denial of benefits conditioned on marriage to lesbian and gay couples,[198] it should preclude them from proffering a bootstrapped interest in promoting married relationships to do the same. Otherwise, this Court would sanction a circumstance in which a governmental entity defines a status that excludes a class, conditions a benefit on the status, and proffers an interest in promoting the status to justify the denial of the benefit to the class. This is precisely the circumstance presented by this case. The state legislature redefined marriage to exclude lesbian and gay couples.[199] By doing so, the state legislature transformed what was once a neutral consideration – marriage as a status – into a discriminatory tool. Thus, the proffered interest in promoting married relationships is now an intrinsically discriminatory interest where lesbian and gay couples are concerned. Accordingly, this Court should refuse to recognize the proffered interest in promoting married relationships in this case.

IV. The Marriage Amendment Does Not Preclude Defendants from Offering Partner Benefits to Lesbian and Gay Employees and Retirees for Their Same-Sex Partners.

Plaintiffs do not challenge the marriage amendment.[200] They need not do so because it does not preclude Defendants from offering partner benefits to lesbian and gay employees and retirees for their same-sex partners; it simply precludes lesbian and gay couples from marrying.

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[198] See supra III.B.2.
[199] Alaska Const., art. I, § 25.
[200] Id.

The benefits at issue are not intrinsically spousal benefits. Such benefits are available to dependent children.[201] Moreover, in other jurisdictions in which lesbian and gay couples cannot marry as a matter of state law,[202] such benefits are available to lesbian and gay employees and retirees for their same-sex partners.[203] Thus, the benefits at issue are not of a type that necessarily precludes Defendants from offering such benefits to lesbian and gay employees and retirees for their same-sex partners.

Moreover, where a constitutional amendment stands in derogation of a pre-existing right – in this case, the right to equal protection of the laws – a fundamental canon of constitutional construction is to afford the constitutional amendment a narrow interpretation.[204] In its entirety, the marriage amendment states as follows: "To be valid or recognized in this State, a marriage may exist only between one man and one

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[201] See, e.g., AS 39.30.090.

[202] See, e.g., Cal. Fam. Code § 308.5.

[203] See, e.g., Cal. Gov't Code § 22869.

[204] Vannatta v. Keisling, 931 P.2d 770, 779 (Or. 1997) ("Any particular forms of expression that have been removed from [the right of free expression] by a subsequent constitutional amendment must be construed carefully to give effect to the scope of the later exception, but no more, lest the salutary value of [the right of free expression] unintentionally be lost."); State v. Cianci, 591 A.2d 1193, 1202 (R.I. 1991) ("When more than one construction of a constitutional provision is possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted.") (quotation omitted); Brimmer v. Thomson, 521 P.2d 574, 580 (Wyo. 1974) (recognizing "the basic and universally accepted rule that statutory and constitutional provisions which tend to limit the candidacy of any person for public office or exclude any citizen from participation in the elective process must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby"); Howton v. Morrow, 106 S.W.2d 81, 82 (Ky. 1937) ("[P]rovisions in statutes and Constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of his eligibility.").

woman."[205] Thus, by its own terms, the marriage amendment restricts marriage – but not partner benefits – to opposite-sex couples. Thus, the marriage amendment does not stand in derogation to the state equal protection clause where partner benefits are at issue.

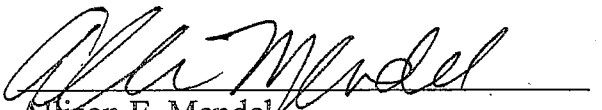
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the ruling of the trial court.

[205] Alaska Const. art. I, § 25.

Dated this 22nd day of May, 2002.

Respectfully submitted,



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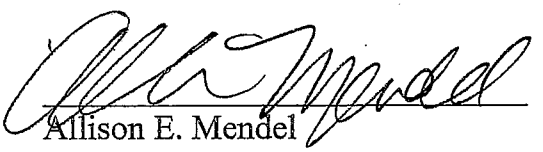

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