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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JULIE A. SCHMIDT, GAYLE SCHUH, JULIE M. VOLLICK, SUSAN L. BERNARD, FRED W. TRABER, and LAURENCE SNIDER Plaintiffs vs. THE STATE OF ALASKA, and THE MUNICIPALITY OF ANCHORAGE, Defendants.	Case No. 3AN-10-9519 CI **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION

In *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005), the Supreme Court of Alaska held that the government must make employment benefits for married employees equally available to the employees in committed same-sex relationships. This case involves a similar instance of unconstitutional governmental discrimination.

Plaintiffs Julie Schmidt and Gayle Schuh, and Julie Vollick and Susan Bernard, are two lesbian couples who live together in committed same-sex domestic partnerships.[1] Each couple jointly owns and shares a home in the Municipality of Anchorage. The Alaska Senior Citizen and Disabled Veteran Tax Exemption, AS 29.45.030(e), provides a property tax benefit to qualifying senior citizens and disabled veterans and their spouses**.** The State and the Municipality of Anchorage refuse to make this Tax Exemption equally available to plaintiffs, who cannot marry but who are otherwise qualifying senior citizens and disabled veterans living together with their longtime partners. The Court should grant plaintiffs' motion for partial summary judgment against defendants, and should declare unconstitutional the spousal limitation imposed by AS 29.45.030(e), 3 AAC 135.085, and defendants' policy applying those provisions for three independent reasons:

First, the Tax Exemption violates Alaska's Equal Protection Clause because it treats similarly situated couples differently and facially discriminates against same-sex domestic partners. *See* Alaska Const. art. I, § 1; *Alaska Civil Liberties Union v. State* ("*ACLU*"), 122 P.3d 781, 783 (Alaska 2005) (denying employee benefits to same-sex partners of public employees violated equal protection).

Second, the Tax Exemption violates plaintiffs' liberty and privacy rights under the Alaska Constitution because it penalizes plaintiffs for living in same-sex domestic partnerships, thereby infringing on plaintiffs' fundamental right to autonomy in personal

[1] A third plaintiff couple, Fred Traber and Laurence Snider, also challenge defendants' policy. Because defendants have asserted separate defenses regarding Mr. Traber and Mr. Snider, this motion is based only on the undisputed facts regarding Ms. Schmidt and Ms. Schuh, and Ms. Vollick and Ms. Bernard.

life choices, intimate association, and privacy in the home. Alaska Const. art. I, §§ 1, 22; *Ravin v. State*, 537 P.2d 494, 500, 503-04 (Alaska 1975) (Alaska Constitution confers fundamental right to autonomy in personal life choices and privacy in the home); *see also Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003) (gay people have constitutional right to choose with whom to intimately associate).

Third, the Tax Exemption violates plaintiffs' right to be free from sex discrimination under the Alaska Constitution's Civil Rights Clause, because it denies each plaintiff the full tax exemption based on her sex and the sex of her partner. Alaska Const., art. I, § 3.

Because defendants' policy fails to survive any level of scrutiny under each of these constitutional provisions, the Court should enter partial summary judgment declaring that defendants' application of the Tax Exemption is unconstitutional. *See ACLU*, 122 P.3d at 790.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Plaintiffs Are in Same-Sex Domestic Partnerships and Cannot Marry Under Alaska Law.

1. Julie Schmidt and Gayle Schuh

Plaintiffs Julie Schmidt and Gayle Schuh are sixty-seven and sixty-two years old, respectively. Compl. ¶ 10. They have lived together in a long-term, committed, interdependent, intimate relationship for thirty-two years. *Id.*[2] They intend their relationship to be permanent. *Id.* Schmidt and Schuh have built their lives around their relationship and take care of and support one another physically, emotionally, and financially. *Id.* Schmidt and Schuh have also supported one another through illnesses, surgery, and rehabilitation. *Id.* For instance, in 2002, Schmidt postponed a double-knee

[2] The Alaska Supreme Court uses the terms "domestic partnership" and "committed relationship" to describe "relationships between adult couples who reside together in long-term, interdependent, intimate associations." *ACLU*, 122 P.3d at 784 n.5. The term "domestic partners" refers to people in these relationships and includes both same-sex and opposite-sex couples. *Id.*

replacement when Schuh was diagnosed with breast cancer and had to undergo her own surgery and treatment. *Id.* Throughout that year, each took care of the other through their medical challenges. *See id.*

Schmidt and Schuh share joint finances, including joint savings, checking, and money market accounts. *Id.* They jointly own their home and another investment property. *Id.* Schmidt and Schuh list each other as the primary beneficiary on each others' wills, and they have medical and durable powers of attorney for one another. *Id.*

Both Schuh and Schmidt are retired schoolteachers, who now spend their time volunteering for local organizations. *Id.* ¶ 11. They have lived in Alaska since 2003. *Id.* ¶ 12. Schmidt and Schuh jointly purchased their house in Eagle River in 2006. *Id.* ¶ 13. Together they have spent the past four years remodeling much of the house to make it their home. *Id.* For the 2010 tax year, Schmidt and Schuh's home was assessed with a value exceeding $150,000. *Id.* ¶ 14. In 2007, Schmidt and Schuh were married in Vancouver, Canada, as an expression of their permanent commitment. *Id.* They cannot marry under Alaska law, however; nor does Alaska law recognize their marriage. Alaska Const. art I, § 25; AS 25.05.011; AS 25.05.013; *ACLU*, 122 P.3d at 784 & n.6.

2. Julie Vollick and Susan Bernard

Julie Vollick and Susan Bernard are forty-five and forty-one, respectively. *Id.* ¶ 17. They have lived together in a long-term, committed, interdependent, intimate relationship for seven years and intend for their relationship to be permanent. *Id.* Their family includes their four children, two each from previous relationships of Vollick and Bernard. *Id.* ¶ 18. Vollick and Bernard take care of and support one another and all of their children physically, emotionally, and financially. *Id.* ¶ 19. Vollick and Bernard share their finances, including a joint savings account, and they jointly own a home, car, and camper. *Id.* They have lived in Alaska for fifteen and seven years, respectively. *Id.* ¶ 21.

Vollick retired from the United States Air Force after twenty years of service. *Id.* ¶ 20. She served in Kuwait, Saudi Arabia, Afghanistan, and Pakistan. *Id.* Vollick endured a series of injuries in the line of duty. *Id.* ¶ 24. The Department of Veterans Affairs has classified her as 70% permanently disabled. *Id.* Bernard is a surgical technologist. *Id.* Vollick and Bernard have volunteered together with Veterans of Foreign Wars and are active in community sporting events. *Id.* In 2004, Vollick and Bernard jointly purchased their house in Eagle River. *Id.* ¶ 22. Together they have created a home for themselves and their children, and they have spent the last six years completing major home improvement projects. *Id.* For the 2010 tax year, Vollick and Bernard's home was assessed with a value exceeding $150,000. *Id.* ¶ 23.

3. Alaska's Marriage Amendment

Plaintiffs cannot marry under Alaska Law. Alaska Constitution article I, section 25, provides that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman." *See also* AS 25.05.011 (marriage is between a man and a woman); AS 25.05.013(a)-(b) (same-sex marriages "unenforceable" in Alaska). This provision, the Marriage Amendment, "prohibits marriage in Alaska between persons of the same sex," and "confers validity or recognition in Alaska only on a marriage between one man and one woman." *ACLU*, 122 P.3d at 784 & n.6. *See also* AS 25.05.011; AS 25.05.013(a)-(b). Plaintiffs do not challenge the Marriage Amendment, Compl. at p.3, and a successful challenge to the Tax Exemption would not implicate or offend the Marriage Amendment. *See ACLU*, 122 P.3d at 786-87 ("That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways").

B. The Tax Exemption Is a State-Required Municipal Property Tax Exemption Benefiting Alaska Senior Citizens and Disabled Veterans.

The Tax Exemption in AS 29.45.030(e) creates a state-wide partial exemption to municipal property taxes. *See* AS 29.45.030; Anchorage Municipal Code ("AMC")

12.15.015.D; Declaration of Ryan Derry ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 6-7, 9). AS 29.45.030(e) provides, in relevant part, that: "The real property ***owned and occupied*** as the primary residence and permanent place of abode by a (1) resident 65 years of age or older; (2) disabled veteran; . . . , is exempt from taxation for the first $150,000 of assessed value." (Emphasis added.) AS 29.45.030(i) defines "disabled veteran" to mean a person who, among other criteria, is no longer in military service, not dishonorably discharged, and a resident of the State of Alaska, and who incurred or aggravated a disability "in the line of duty" that a qualifying branch of service or department has rated as 50% or more. The value of the Tax Exemption depends on the value of the home and the local property tax rate.

C. Defendants Have Adopted A Spousal Limitation on Couples Who May Receive The Full Tax Exemption.

Statutory language that limits a government benefit to eligible applicants and their "spouse[s]" is considered a "spousal limitation." *See, e.g.*, *ACLU*, 122 P.3d at 784 n.4.3 AAC 135.085, which sets forth the eligibility requirements for the Tax Exemption, contains a spousal limitation. 3 AAC 135.085(c) provides: "If property is occupied by a person ***other*** than the eligible applicant and his or her ***spouse***, an exemption, to be eligible for reimbursement, applies ***only*** to the portion of the property permanently occupied by the eligible applicant and his or her spouse as a place of abode." (Emphasis added.) As a result, an eligible applicant who lives with his or her spouse may receive the full amount of the Tax Exemption, while an eligible applicant who lives with someone other than a spouse may receive only a portion of the Tax Exemption. Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 4, 6-7, 9); *id.* ¶ 3, Ex. B (MOA Interr. Nos. 3, 15).

The Municipality has likewise adopted this spousal limitation. The Municipality's ordinance, AMC 12.15.015, refers to and applies the State's spousal limitation. *See* AMC 12.15.015.D.1.d. (senior citizens); AMC 12.15.015.D.2.f. (disabled veterans).

Applicants seeking the Tax Exemption must complete a form. *See* 3 AAC 135.020. Municipalities must "develop their own forms for administering property taxes." Derry Decl. ¶ 4, Ex. C (State Req. for Prod. No. 7). The form developed by the Municipality states that the "[a]pplicant must own and occupy the property." Schmidt Decl. ¶ 2, Ex. A (p. 2). As with the State's regulation and the Municipality's ordinance, the application form provides that: "If property is occupied by any one other than the eligible applicant, his or her spouse, and minor children, the exemption applies only to the portion of the property permanently occupied by the eligible applicant, his or her spouse, and minor children as a permanent place of abode." Schmidt Decl. ¶ 2, Ex. A (emphasis added); Vollick Decl. ¶ 2, Ex. A (same). Further, if "occupancy [is] shared with someone ***other*** than [the applicant's] spouse and/or minor children," the applicant must specify the "***percent*** of the home [the non-spouse] occup[ies]." Schmidt Decl. ¶ 2, Ex. A (emphasis added); Vollick Decl. ¶ 2, Ex. A (same). And the Municipality's form states: "If ownership [of the home] is shared with someone ***other*** than your ***spouse***, list your ***percent*** of ownership." Schmidt Decl. ¶ 2, Ex. A (emphasis added); Vollick Decl. ¶ 2, Ex. A (same).

D. Under Defendants' Policy, "Spouse" Excludes Same-Sex Domestic Partners.

An eligible individual who shares his or her home with another person receives only a partial Tax Exemption – except when the home is shared with a "spouse." The State has admitted that State Assessor Steve Van Sant provides guidance to local assessors regarding the application of 3 AAC 135.085(c) to an applicant with a same-sex partner. Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 6-7, 9). According to the State, Mr. Van Sant advises local assessors that "since Alaska statute and the constitution define marriage as between a man and a woman, the term [spouse] as used in 3 AAC 135.085 does not apply to persons not meeting that definition." *Id.* Thus, the State instructs municipalities that a person in a same-sex partnership may receive an exemption on the portion of property the applicant owns and occupies only. *Id.* The Municipality

has admitted that "[p]ursuant to 3 AAC 135.085, AS 29.45.030(e) and AMC 12.15.015D.1.d. and D.2.f., "if a person other than a spouse or minor child resides in the home, the exemption applies only to that portion occupied by the eligible owner." Derry Decl. ¶ 3, Ex. B (MOA Interr. No. 3). The Alaska Supreme Court has previously interpreted the word "spouse" to refer to a married partner and to exclude a same-sex partner. *ACLU*, 122 P.3d at 788-89.

The State mandates the Tax Exemption. The State regulation implementing the Tax Exemption contains a spousal limitation. The Municipality applies the Tax Exemption, including the spousal limitation, at the direction of the State and according to its policy[3] that the term "spouse" excludes same-sex domestic partners.

E. The Plaintiff Couples Qualify for the Full Tax Exemption But Because of Their Relationships, Defendants Deny Them the Full Exemption.

At least one partner in both plaintiff couples qualifies for the Tax Exemption, yet neither couple can obtain an exemption on the entire value of their homes because they are in same-sex domestic partnerships. For instance, Schmidt qualifies for the Tax Exemption because she is over the age of 65 and a full-time resident of Alaska. Compl. ¶ 15. For the 2010 tax year, Schmidt and Schuh's home was assessed with a value exceeding $150,000. *Id.* ¶¶ 14-15. Schmidt applied for the Tax Exemption on January 4, 2008. *Id.* ¶ 16; Schmidt Decl. ¶ 2, Ex. A. Because Alaska law does not recognize Schuh as Schmidt's "spouse," Schmidt was required to state that she shares her home – both in title and possession – with a non-spouse. Schmidt Decl. ¶ 2, Ex. A. Schmidt and Schuh share and own their home equally, so Schmidt stated that Schuh owns and occupies 50% of the home. *Id.* Schmidt would have been able to claim the value of the entire property

[3] In the context of municipal damages liability, the Supreme Court has held that even in the absence of an official policy or a custom, "an unconstitutional government policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *see also Monell v. New York City Dept. of Soc. Services*, 436 U. S. 658, 690 (1978).

had Schuh qualified as a "spouse" under Alaska law. But because Schmidt and Schuh can never marry under Alaska law, Schmidt has not received the full tax exemption – that is, she has not received an exemption on the first $150,000 of the assessed value of her entire home because she shares that home with her same-sex domestic partner. Compl. ¶ 16; Schmidt Decl. ¶ 3.

The statute has the same discriminatory impact on the other plaintiffs. Vollick, who has endured a series of injuries in the line of duty, is classified by the Department of Veterans Affairs as 70% permanently disabled. Compl. ¶ 24. Vollick qualifies for the Tax Exemption because she is a full-time Alaska resident and a disabled veteran. *Id.* ¶¶ 23, 25. In 2010, the assessed value of the home Vollick and Bernard jointly own exceeded $150,000.00. *Id.* ¶¶ 23, 25. Vollick applied for the Tax Exemption on May 13, 2008, and her application was approved in June 2008. *Id.* ¶ 26. Again because Alaska law does not recognize Bernard as Vollick's "spouse," Vollick was required to provide the percentage of the home she owns and that Bernard occupies. Vollick Decl. ¶ 2, Ex. A. Because she and Bernard share the home equally, Vollick stated Bernard owns and occupies 50% of their home. *Id.* Like Schmidt, Vollick could only claim the value of one-half the home she shares with her family. *Id.* As a result of defendants' spousal limitation policy, Vollick has not received the full Tax Exemption available to couples with a marriage recognized by Alaska – that is, she has not received an exemption on the first $150,000 of the assessed value of her entire home. Compl. ¶ 26. Neither Schmidt and Schuh, nor Vollick and Bernard, can become eligible for the full Tax Exemption because they cannot marry under Alaska law. Alaska Const. art. I, § 25; AS 25.05.011; AS 25.05.013.

III. ARGUMENT

A. Summary Judgment Standard.

"Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *ACLU*, 122 P.3d at

785. To defeat summary judgment, the non-moving party "must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence." *French v. Jadon*, 911 P.2d 20, 23 (Alaska 1996).

The undisputed facts necessary to find for plaintiffs on the instant motion are:

- Plaintiffs are same-sex domestic partners in long-term, committed, interdependent intimate relationships;
- Plaintiff couples cannot marry under Alaska law;
- Plaintiff couples jointly own homes valued above $150,000;
- One partner of each plaintiff couple independently qualifies for the Tax Exemption;
- One partner of each plaintiff couple applied for the Tax Exemption on the home she shares with her same-sex partner;
- Each couple received a partial exemption only on the portion of their home the eligible partner "owns and occupies";
- If either of the eligible plaintiff partners were spouses, she would have qualified for and received the full Tax Exemption.

B. Defendants' Policy Discriminates Against Plaintiffs in Violation of the Alaska Constitution.

1. The Tax Exemption Violates the Alaska Constitution's Equal Protection Clause.

Article I, section 1, of the Alaska Constitution guarantees equal protection, providing that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." *Malabed v. N. Slope Borough*, 70 P.3d 416, 419 (Alaska 2003). The Alaska Supreme Court has "long recognized that the Alaska Constitution's equal protection clause affords greater protection to individual rights" than its federal analogue. *Id.* at 420 (borough's hiring preference unconstitutionally discriminated on

basis of race or political classification). Thus, Alaska courts apply a "more stringent equal protection standard" than do federal courts applying federal law. *See Sands N., Inc. v. City of Anchorage*, 537 F. Supp. 2d 1042, 1054 (D. Alaska 2007) (minimal scrutiny under Alaska's equal protection clause is heightened).

Alaska courts applying this "more stringent equal protection standard" analyze equal protection claims under a "three-step, sliding-scale test," *ACLU*, 122 P.3d at 787 (citation omitted), "[i]nstead of using three levels of scrutiny," *Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 629 (Alaska 1993). Under the Alaska test, the Court first determines the "weight of the individual interest impaired by the classification; second, [it] examine[s] the importance of the purposes underlying the government's action; and third, [it] evaluate[s] the means employed to further those goals to determine the closeness of the means-to-end fit." *Malabed*, 70 P.3d at 421. But before reaching that test, the Court must decide whether, as here, "the challenged law treats similarly situated persons differently," and whether it intentionally or facially discriminates against that group. *See ACLU*, 122 P.3d at 787-88.

a. The Spousal Limitations in the Tax Exemption Affect Similarly Situated Senior Citizens and Disabled Veterans Differently.

In *Alaska Civil Liberties Union v. State* ("*ACLU*"), the Alaska Supreme Court held that when a law contains a spousal limitation preventing same-sex domestic partners from ever receiving a benefit an opposite-sex partner could if married, the law treats similarly situated groups – committed same-sex couples and opposite-sex couples – differently. *See ACLU*, 122 P.3d at 788. In that case, the Court considered whether public benefits laws and programs that provided benefits to spouses of public employees but not the employees' domestic partners violated Alaska's equal protection clause. *Id.* at 783. In holding it did, the Court first analyzed whether the laws and programs treated committed same-sex couples and opposite-sex couples differently, despite marital status, because opposite-sex couples could marry and thus, could obtain the benefits, while same-sex

couples could not. *Id.* at 788. As the Court explained, "public employees in committed same-sex relationships are ***absolutely denied any opportunity*** to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska." *Id.* at 788 (rejecting argument the policies "differentiate[d] on the basis of marital status" only) (emphasis added). Thus, the Court concluded that the benefits policies "treat[ed] same-sex couples differently from opposite-sex couples." *Id.* at 788.

Other states' courts have held likewise. *See, e.g., Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (denying health care benefits to domestic partners of public employees "unquestionably" imposed different treatment on same-sex couples by "mak[ing] benefits available on terms that are a legal impossibility for gay and lesbian couples"; statute enjoined); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 442-43, 447 (Or. App. 1998) (denying employment benefits to domestic partners of employees disparately impacted same-sex couples because same-sex couples could not marry under Oregon law; statute enjoined).

Here, the plaintiff couples are similarly situated to married couples because they are in committed, long-term, same-sex domestic partnerships that are like marriages, but without the recognition or benefits of marriage. Compl. ¶¶ 10, 13, 17-19, 22; Schmidt Decl. ¶ 1; Vollick Decl. ¶ 1. They have cared for and supported each other, built homes together, combined finances, and, in the case of Vollick and Bernard, raised families together. Compl. ¶¶ 10, 13, 17-19, 22. Their relationships are like those of committed opposite-sex couples in every way except that they cannot marry under Alaska law. As the Alaska Supreme Court recognized in *ACLU*: "Many same-sex couples are no doubt just as 'truly closely related' and 'closely connected' as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so." 122 P.3d at 791. Plaintiffs are in the same situation as

the claimants challenging the spousal limitation in *ACLU* several years ago. Indeed, Ms. Schmidt and Ms. Schuh stand in an even more compelling position because they have chosen to take the step of getting married now that same-sex marriages are permitted in six different states and in Canada. Although their out-of-state marriage is not recognized under Alaska law, the seriousness of their commitment can hardly be assailed as less than that of different-sex spouses.

As with the discriminatory benefits policies at issue in *ACLU*, defendants' policy regarding the Tax Exemption treats committed same-sex couples differently from different-sex couples. An applicant in a same-sex partnership, unlike a married applicant, must state the percentage of the home she owns and that her same-sex domestic partner (non-spouse) occupies. Schmidt Decl. ¶ 2, Ex. A; Vollick Decl. ¶ 2, Ex. A. As a result, the eligible applicant can only claim an exemption on a portion of her home. 3 AAC 135.085(c); Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 6-7, 9); *id.* ¶ 3, Ex. B (MOA Interr. Nos. 3, 15). Because the eligible applicant cannot legally marry her same-sex partner or enter into a marriage Alaska law recognizes, she cannot claim the full Tax Exemption. *See* Alaska Const. art. I, § 25; AS 25.05.011; AS 25.05.013; 3 AAC 135.085(c); *ACLU*, 122 P.3d at 788. By contrast, committed opposite-sex couples could marry and thus, could obtain the full tax exemption. *See ACLU*, 122 P.3d at 788. Thus, the Tax Exemption treats committed same-sex couples differently from opposite-sex couples. *Id.*

b. The Tax Exemption Facially Discriminates Against Same-Sex Domestic Partners.

Under Alaska law, a plaintiff need not demonstrate discriminatory intent if the challenged law is facially discriminatory. *Id.* "When a 'law by its own terms classifies persons for different treatment,'" the law is facially discriminatory. *Id.* (citation omitted). For example, in *ACLU*, the Alaska Supreme Court concluded that policies limiting public benefits to "spouses" are facially discriminatory. *Id.* The Court reasoned: "Alaska's

definition of the legal status of 'marriage' (and, hence, who can be a 'spouse') excludes same-sex couples. By restricting the availability of benefits to 'spouses,' the benefits programs 'by [their] own terms classif[y]' same-sex couples 'for different treatment.'" *Id.* at 789 (citation omitted). The Court further explained that "because of the legal definition of 'marriage,' the partner of a homosexual employee can never be legally considered as that employee's 'spouse' and hence, can never become eligible for benefits." *Id.*

Similarly, although AS 29.45.030(e) does not refer to marital status, the State's regulations and the Municipality's application form, which together implement AS 29.45.030(e), explicitly permit an applicant with partial ownership and/or occupation to claim the value of the entire property based on the applicant's spousal status. 3 AAC 135.085(c); AMC 12.15.015.D.1.d & 2.f.; Schmidt Decl. ¶ 2, Ex. A; Vollick Decl. ¶ 2, Ex. A; Derry Decl. ¶ 3, Ex. B (MOA Interr. Nos. 3, 15). Thus, if the eligible applicant shares ownership and possession of the property with a spouse, she can claim the full exemption. 3 AAC 135.085(c); AMC 12.15.015.D.1.d & 2.f. But if she shares it with a non-spouse, she can only claim the portion of the property she – as distinguished from her same-sex partner – owns and occupies. 3 AAC 135.085(c); AMC 12.15.015.D.1.d & 2.f.; Schmidt Decl. ¶ 2, Ex. A; Vollick Decl. ¶ 2, Ex. A; Derry Decl. ¶ 3, Ex. B (MOA Interr. Nos. 3, 15).

Further, this spousal limitation means that an applicant in a same-sex domestic partnership cannot become eligible for the full exemption because, unlike unmarried heterosexual couples, her same-sex partner "can never be legally considered as [that applicant's] 'spouse.'" *ACLU*, 122 P.3d at 789. As a result, the Tax Exemption and defendants' policy under it facially discriminate against committed same-sex domestic partners. *Id.*

c. The Court Should Apply Strict Scrutiny To The Tax Exemption's Spousal Limitation.

In Alaska, "as the right asserted becomes 'more fundamental' or the classification scheme employed becomes 'more constitutionally suspect,' the challenged law 'is subjected to more rigorous scrutiny." *Pan-Alaska Constr. v. Dep't of Admin., Div. of General Servs.*, 892 P.2d 159, 163 (Alaska 1995) (quoting *Cosio*, 858 P.2d at 629). Alaska's highest level of scrutiny mirrors strict scrutiny under the federal constitution. *See State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983). The proper inquiry is not whether entitlement to the Tax Exemption is a fundamental right, but rather whether the denial of the full Tax Exemption based on plaintiffs' same-sex domestic partnerships burdens a fundamental right or discriminates against a suspect class. Here, both a fundamental right and constitutionally suspect scheme exist, justifying strict scrutiny.

As the Supreme Court of Alaska has explained, "while the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right." *State v. Planned Parenthood of Alaska* (*Planned Parenthood I*), 28 P.3d 904, 909 (Alaska 2001) (citation omitted). Thus, if "'the objective degree to which the challenged legislation tends to deter [the exercise of constitutional rights]' is significant, the regulation cannot survive constitutional challenge unless it serves a compelling state interest." *Id.* (citation omitted). But "[t]here is no requirement to demonstrate actual deterrence" of fundamental constitutional rights. *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 271 n.11 (Alaska 1984). Rather, the "relevant criteria are the fact and the severity of the restriction." *Id.*

The Alaska Supreme Court has applied these principles to require strict scrutiny when the challenged law affects the fundamental constitutional right to "exercise … intimate personal choices," like "the right to reproductive freedom." *Planned Parenthood I*, 28 P.3d at 909 (regulation denying Medicaid funding to "women who

medically require[d] abortions" analyzed under strict scrutiny; regulation violated Alaska's equal protection clause).[4] Alaska courts have also found that where the challenged policy "limit[s] the government benefits distributed to the class of individuals who exercised [a fundamental right]," such as limiting Medicaid or workers' compensation benefits, or refusing to publish material in a public guide, the policy significantly burdens a fundamental right. *See Planned Parenthood I*, 28 P.3d at 909-10 (Medicaid); *Brown*, 687 P.2d at 273-74 (statute reducing workers' compensation for those who left the state "impose[d] a substantial penalty upon the exercise by [plaintiff] and the plaintiff class of the right to travel"); *Alaska Gay Coal. v. Sullivan*, 578 P.2d 951, 960 (Alaska 1978) (municipality's refusal to publish Alaska Gay Coalition in public guide constituted burden on freedom of speech).

In this case, the Tax Exemption penalizes an applicant in a committed same-sex domestic partnership by imposing a disproportionate tax burden on her because she chooses to live with a partner of the same sex. Thus, the Tax Exemption affects plaintiffs' rights of "personal autonomy in choices affecting an individual's personal life," to choose with whom to intimately associate, and to privacy in the home are fundamental constitutional rights. *See Ravin v. State*, 537 P.2d 494, 500, 503-04 (Alaska 1975) (personal autonomy and privacy in the home); *Planned Parenthood I*, 28 P.3d at 909; *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009) (recognizing fundamental right of "personal physical autonomy" under Alaska's liberty and privacy clauses); *see also Lawrence*, 539 U.S. at 567, 578 (gay people have constitutionally protected liberty interest in choosing with whom to intimately associate; statute criminalizing same-sex intimacy unconstitutional). And the Tax Exemption significantly affects those rights because it directly limits the amount of the exemption an eligible applicant in a

[4] *See also Alaska Gay Coal. v. Sullivan*, 578 P.2d 951, 959 (Alaska 1978) ("freedom of speech and the correlative freedom of association are fundamental rights which lie at the foundation of our system of government"; denying gay organization right to publish in municipal guide violated constitutional rights of equal protection and freedom of speech).

committed same-sex domestic partnership can claim and thus, receive. *See Planned Parenthood I*, 28 P.3d at 909-10; *Brown*, 687 P.2d at 273-74. Consequently, the Court should apply strict scrutiny. *See Planned Parenthood I*, 28 P.3d at 909-10; *Brown*, 687 P.2d at 273-74. Strict scrutiny therefore applies to defendants' spousal limitation.

The Court should apply strict scrutiny on the separate ground that the Tax Exemption creates a constitutionally suspect classification system. The Alaska Supreme Court has applied heightened scrutiny to equal protection challenges to hiring preferences based on constitutionally suspect classes. *See Malabed*, 70 P.3d at 421-22 (race and/or political class based hiring preference unconstitutional); *see also State, Dep't of Transp. & Labor v. Enserch Alaska Constr.*, 787 P.2d 624, 633, 634 n.19 (Alaska 1989) (local hiring preference unconstitutional). The level of scrutiny for sexual-orientation based classifications remains an open question in Alaska, and no Alaska court has addressed whether gay and lesbian citizens constitute a suspect class under the State's equal protection law. The U.S. Supreme Court has, however, identified "indicia of suspectness," which provide guidance here. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). That indicia include "a history of purposeful unequal treatment" and "political powerlessness." *Id.* (poor school districts not a suspect class because no "indicia of suspectness" and "large, diverse, and amorphous"). Other courts have found gay and lesbian citizens constitute a suspect class because they have such "indicia of suspectness" – they are a discrete and insular minority that has endured systematic and invidious discrimination based on sexual orientation. *See, e.g.*, *In re Marriage Cases*, 43 Cal. 4th 757, 753 (Cal. 2008), *superseded in part by constitutional amendment as recognized in Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *as modified by* 2009 Cal. LEXIS 5416 (Jun 17, 2009); *Tanner*, 971 P.2d at 447.[5] Courts have also historically

[5] *See also Perry*, 704 F. Supp. 2d at 997 ("gays and lesbians are the type of minority strict scrutiny was designed to protect"); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 472 (Conn. 2008) (concluding, after carefully analyzing federal and state precedent, that "gay

treated classifications as suspect where they rely on a trait which "frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The defendants have not and cannot put forward any evidence that gay and lesbian couples contribute less to society than married, opposite-sex couples.

For instance, in *Tanner v. Oregon Health Sciences University*, plaintiffs challenged a state university's denial of insurance benefits to the same-sex domestic partners of its employees under Oregon's privileges and immunities clause. 971 P.2d at 437. The court held same-sex domestic partners constituted a suspect class because "homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice." *Id.* at 447 (university's classification system unconstitutionally made benefits available on unequal terms).

This Court should follow the reasoning in *Tanner*. Alaska's equal protection clause is the functional equivalent of Oregon's privileges and immunities clause and "affords at least as much protection." *See Enserch*, 787 P.2d at 634 n.19 (Alaska does not have a privileges and immunities clause). Alaska courts view Oregon decisions interpreting Oregon's constitution as particularly relevant "because of the closely shared statutory history and legal traditions of the two states." *State v. Gonzalez*, 825 P.2d 920, 933 (Alaska App. 1992) (citation omitted). Like the Oregon court in *Tanner*, the Alaska Supreme Court has recognized that gay and lesbian citizens make up an "unpopular minority." *Alaska Gay Coal.*, 578 P.2d at 960; *Tanner*, 971 P.2d at 447. This, combined with the fact that gay and lesbian individuals have suffered a historical pattern of prejudice, demonstrates indicia of suspectness. *See Rodriguez*, 411 U.S. at 28; *Alaska Gay Coal.*, 578 P.2d at 960; *Tanner*, 971 P.2d at 447. The Court should thus find same-sex couples constitute a suspect class, and classifications based on sexual orientation are evaluated under strict scrutiny based on this separate ground. *See Pan-Alaska*, 892 P.2d at 163.In any event, as will be discussed below, under any level of scrutiny, the Tax

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persons are entitled to heightened judicial protection as a suspect class").

Exemption's spousal limitation violates the equality guarantee of Article I, section 1, of the Alaska Constitution.

2. The Tax Exemption Also Violates Plaintiffs' Liberty and Privacy Rights Under the Alaska Constitution.

Article I, section 1 of the Alaska Constitution broadly guarantees that "all persons have a natural right to life, liberty, [and] the pursuit of happiness." Article I, section 22 provides a more specific privacy right: "The right of the people to privacy is recognized and shall not be infringed." Each section creates enforceable rights. *See Huffman*, 204 P.3d 339, 345-47 (Alaska 2009) (right to make decisions about medical treatments for self and children is fundamental liberty and privacy right). And each guarantees greater protection than the federal constitution. *See Meyers v. Alaska Psych. Inst.*, 138 P.3d 238, 245 (Alaska 2006) (statutes "permitting nonconsensual treatment with psychotropic medications implicate fundamental liberty and privacy interests"); *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972) (court not obligated to interpret parallel state and federal constitutional provisions coextensively).[6]

The core of the Alaska Constitution's liberty right is "the notion of total personal immunity from governmental control." *Breese*, 501 P.2d at 168 (students have fundamental personal right to choose their own hairstyles). In other words, the "right 'to be let alone.'" *Id.* Similarly, the "primary purpose of [section 22] is to protect Alaskans' 'personal privacy and dignity against unwarranted intrusions by the State." *State v. Planned Parenthood* (*Planned Parenthood II*), 171 P.3d 577, 581 (Alaska 2007).

Alaska courts "determine the boundaries of individual rights guaranteed under the Alaska Constitution by balancing the importance of the right at issue against the state's

[6] Because Alaska has a specifically enumerated right to privacy, federal case law interpreting the right to privacy from the "penumbra" of the Bill of Rights is not determinative in Alaska. *See, e.g., State v. Glass*, 583 P.2d 872, 879 (Alaska 1978) as modified by *City & Borough of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984) (Alaska's privacy amendment prohibits secret electronic monitoring of conversations upon mere consent of participant).

interest in imposing the disputed limitation." *Huffman*, 204 P.3d at 345 (quoting *Meyers*, 138 P.3d at 245-46). Courts have recognized that the rights "of personal autonomy in relation to choices affecting an individual's personal life," to intimate association, and to privacy in the home are fundamental constitutional rights. *See Ravin*, 537 P.2d at 500, 503-04 (right of personal autonomy in personal life choices and privacy in the home); *Huffman*, 204 P.3d at 345-46 (parent's right to make medical treatment decisions about children a fundamental right); *Planned Parenthood II*, 171 P.3d at 581-82 (right to make reproductive choices); *Breese*, 501 P.2d at 168 (right to decide hairstyle); *Alaska Gay Coal.*, 578 P.2d 951, 959 (Alaska 1978) ("freedom of association" under free speech clauses is a "fundamental right[]"); *see also Lawrence*, 539 U.S. at 567, 578 (gay people have constitutionally protected liberty interest in choosing with whom to intimately associate).

In particular, the "right of privacy … exist[s] as to activities within the home or with reference to values associated with the home, and, additionally, as a right of personal autonomy, to make decisions that shape an individual's personal life." *Ravin*, 537 P.2d at 514 (Boochever, J., concurring). Indeed, according to the Alaska Supreme Court, "[i]f there is any area of human activity to which a right to privacy pertains more than any other, it is the home." *Id.* at 503. This fundamental right thus protects possession and ingestion of illegal substances "in a purely personal, noncommercial context" in the home. *See id.* at 504-09. "[T]he authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare." *Id.* at 509.

Here, the Tax Exemption subjects eligible applicants in same-sex domestic partnerships to heightened tax burdens because of a choice those applicants have made in their personal lives: to intimately associate and share a home with a person of the same sex. *See* 3 AAC 135.085(c) (limiting full exemption based on spousal relationship);

AMC 12.15.015.D.1.d & 2.f. (same). And it imposes this inequality in the absence of any evidence that committed same-sex domestic partnerships affect others in matters of public health, safety, or general welfare. *See Ravin*, 537 P.2d at 509. In fact, quite the contrary, the Alaska Supreme Court has specifically concluded that committed same-sex domestic partnerships attain the same social good as marriages: "Many same-sex couples are no doubt … providing the same level of love, commitment, and mutual economic and emotional support, as … married couples." *ACLU*, 122 P.3d at 791.

Both Alaska courts and the U.S. Supreme Court have held that gays and lesbians have a constitutional right to intimately associate with persons of the same sex. In *Lawrence v. Texas*, for instance, the U.S. Supreme Court made clear that under the less protective Federal Constitution, lesbian and gay individuals have a liberty interest in their choice of intimate partners. 539 U.S. at 567, 578. And in *Brause v. Bureau of Vital Statistics*, an Alaska superior court found statutes prohibiting same-sex marriage unconstitutional because "the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. "Though the choice of a life partner is not left to the individual in some cultures, in ours it is no one else's to make." 1998 WL 88743, *4 (Alaska Super. Ct. Feb. 27 1998), *superseded by* Alaska Const. art. I, § 25. Thus, the court held that "the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy," and "[g]overnment intrusion" on this choice "encroaches on the intimate personal decisions of the individual." *Id.*

Under *Ravin*, *Lawrence*, and *Brause*, denying eligible senior citizens and disabled veterans the full Tax Exemption because they have chosen to share a home with same-sex domestic partners and therefore cannot be considered legally married significantly burdens fundamental liberty and privacy rights.

3. The Tax Exemption Also Violates Plaintiffs' Right to Be Free From Sex Discrimination Under the Alaska Constitution.

Article I, section 3 of the Alaska Constitution provides that: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin." Alaska Const. art. I, § 3. In analyzing the constitutionality of sex-based classifications, Alaska courts assess "the purpose of the statute, the legitimacy of the purpose, the means used to accomplish the legislative objective, and 'then determine whether the means chosen substantially further the goals of the enactment.'" *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (anti-prostitution statute rendering the sale of "the body by a female" "invidiously discrimate[d] against females"; means used lacked "rational justification," but striking "by a female" could rid the statute of constitutional infirmities). This level of review parallels the intermediate scrutiny federal courts give sex-based classifications under the federal constitution. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex-based classifications must serve "important governmental objectives" and be "substantially related" to achieving those objectives). And it means that "[p]arties who seek to defend gender-based government action must demonstrate [at least] an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Although no Alaska court has addressed whether spousal limitations discriminate on the basis of sex, other courts have. For instance, in *Perry v. Schwarzenegger*, a federal district court in the Northern District of California held that a state constitutional amendment barring same-sex marriage discriminated on the basis of sex. 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010).[7] The court so held because under the amendment, a man could marry a woman but a woman could not marry a woman because of the woman's sex. *See id.* Thus, the constitutional amendment "operate[d] to restrict [the woman's]

[7] Alaska courts have turned to decisions of California courts interpreting California state constitutional provisions for guidance. *See, e.g.*, *Glass*, 583 P.2d at 879.

choice of marital partner because of her sex." *Id.* Similarly, the Hawaii Supreme Court has held that a law limiting the benefits of marriage to different-sex couples unconstitutionally discriminates on the basis of sex. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *superseded by* Haw. Const. art. I, § 23.[8]

Here, defendants condition the Tax Exemption for cohabiting couples on a status that opposite-sex couples can achieve but same-sex couples never can—marriage—because of their sex. So, for example, Schmidt can never obtain the full tax exemption because her sex bars her from marrying Schuh, while a man could obtain the full tax exemption because he could marry Schuh. *See* Alaska Const. art I, § 25; AS 25.05.011; AS 25.05.013. In this way, the Tax Exemption discriminates on the basis of sex. *Perry*, 704 F. Supp. 2d at 996. Such a marriage-defined classification creates disparities based on sex because a female with a female partner is treated differently than a male with a female partner, and vice versa. Thus, this Court should find that the Tax Exemption's imposition of a spousal limitation on senior citizen and disabled veteran applicants unconstitutionally discriminate on the basis of sex.

C. Because the Tax Exemption Classification Cannot Survive Under Any Level of Scrutiny, the Court Should Enter Partial Summary Judgment of Liability.

Because the Tax Exemption implicates fundamental liberty and privacy rights, and because it implicates a constitutionally suspect classification, defendants must show a compelling interest and no less restrictive means to justify the law's spousal limitation. *See Huffman*, 204 P.3d at 345-46 (liberty and privacy analysis); *Planned Parenthood I*, 28 P.3d at 909 (equal protection); *see also Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (privacy). Even if this case did not involve fundamental rights and a suspect classification, defendants would still need to show a

[8] In addressing first impression constitutional issues, Alaska courts give careful consideration to interpretations that courts have adopted in Hawaii. *State v. Gonzalez*, 825 P.2d 920 (Alaska App. 1992). This is so "because the adoption of the Hawaii Constitution was contemporaneous with the adoption of the Alaska Constitution." *Id.*

legitimate interest that bears a "close and substantial relationship" to the "chosen means of advancing that interest." *Huffman*, 204 P.3d at 345-46 (citation omitted); *see also ACLU*, 122 P.3d at 789-90; *Plas*, 598 P.2d at 968. Significantly, this level of review is higher than the federal rational basis review standard. *See Ostrosky*, 667 P.2d at 1193. Moreover, the Alaska Supreme Court "will no longer hypothesize facts which would sustain otherwise questionable [governmental action] as was the case under the traditional rational basis standard." *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) *superseded on other grounds*, *Commercial Fisheries Entry Com'n v. Apokedak*, 606 P.2d 1255, 1261 (Alaska 1980). The government bears the burden of establishing a justification for its action under any level of scrutiny. *See Brown*, 687 P.2d at 269-70.

Defendants cannot satisfy any level of constitutional scrutiny. As a preliminary matter, 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." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). And "[i]f a law has no other purpose … than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *Planned Parenthood I*, 28 P.3d at 911 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969)) ("government may not allocate state benefits so as to deter citizens' exercise of constitutional rights") *partly rev'd on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974)). In the same fashion, the government may not favor a class "based solely on the object of assisting [that] class over the other." *Enserch*, 787 P.2d at 634.

The State has not identified any interests justifying the Tax Exemption's spousal limitation. Derry Decl. ¶ 2, Ex. A (State Supp. Interr. No. 5). The sole interest the Municipality identified is the interest in "receiv[ing] more tax dollars from *any* reduction in the application or amount of an exemption." *Id.* ¶ 3, Ex. B (MOA Interr. No. 6).

While the Municipality has not produced any estimates of the costs of applying the full tax exemption to same sex couples in Anchorage, courts have previously dismissed the impact of such alterations in municipal tax exemptions as "slight." *Hennefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 202 (N.J. Tax 2005) (ruling that same-sex couple should receive full disabled veteran exemption) (citations omitted), *superseded on other grounds as recognized in Godfrey v. Spano*, 836 N.Y.S.2d 813 (N.Y.Sup. Mar 12, 2007). More importantly, the mere interest in increasing revenues – essentially cost savings – does not amount to a legitimate, let alone compelling, interest. "Although reducing costs to taxpayers or consumers is a legitimate government 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." *Brown*, 687 P.2d at 272 (cost-savings could not justify reducing workers' compensation based on residency).[9] A "[s]tate may not accomplish [limiting expenditures] by invidious distinctions between classes of its citizens." *Planned Parenthood I*, 28 P.3d at 910.

Accordingly, even if the Court were to apply Alaska's minimum level of scrutiny, it should still find the Tax Exemption unconstitutional. "Minimum scrutiny requires a 'fair and substantial relation' between the means (i.e., the classification) and the 'object of the legislation.'" *ACLU*, 122 P.3d at 790 (equal protection analysis); *see also Huffman*, 204 P.3d at 345-46 (liberty and privacy analysis); *Plas*, 598 P.2d at 968 (civil rights analysis). Just as the court in ACLU held that sexual orientation could not be fairly and substantially related to employee benefits, here, sexual orientation is even less related

[9] *See also Brown*, 687 P.2d at 272 n.12 (citing *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources")); *Mem. Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) ("a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens"); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("The saving of welfare costs cannot justify an otherwise invidious classification." (quoting *Shapiro*, 394 U.S. at 633)).

to a property tax exemption. The Court in *ACLU* rejected the only interest defendants have identified here – cost control – even under minimal scrutiny. Specifically, the Court determined that "[a]lthough limiting benefits to 'spouses,' and thereby excluding all same-sex domestic partners, does technically reduce costs, such a restriction fails to advance the expressed governmental goal of limiting benefits to those in 'truly close relationships' with an 'closely connected' to the employee." *ACLU*, 122 P.3d at 791. The Court so reasoned because same-sex domestic partners are in "truly close relationships" with and are "closely connected" to the employee, just like married couples. *Id.* at 790-91.

Nor does the cost savings justification bear a close or fair and substantial relationship to the means chosen. *See Huffman*, 204 P.3d at 345-46; *ACLU*, 122 P.3d at 790. Defendants permit eligible applicants in marriages to claim the entire value of the home. 3 AAC 135.085; AMC 12.15.015. The State has recognized that same-sex domestic partnerships are like marriages. *See, e.g.*, AS 39.50.200 ("domestic partner" "means a person who is cohabiting with another person in a relationship that is like a marriage"). Thus, if cost savings were the true reason, defendants would also deny the full tax exemption to applicants who share their homes with spouses. That they do not reveals that the spousal limitation bears neither a close nor a substantial relation to the sole governmental interest asserted by either defendant.

Even if defendants were to also raise additional purported interests in administrative efficiency or in the "promotion of marriage," those too would fail to justify the spousal limitation under even minimum scrutiny as the Alaska Supreme Court already held in *ACLU*. *See id.* at 792-93. As the Court held in *ACLU*, administrative ease cannot justify unequal treatment of same-sex domestic partners with respect to insurance benefits because "Alaska's Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be substantial." *Id.* at 791. *See also*

Apokedak, 606 P.2d at 1266 n.45 ("While administrative convenience is a legitimate purpose, it will usually not outweigh the nature and the importance of the right which it impinges on.").

Similarly, any purported governmental interest in "promoting marriage" could not warrant the spousal limitation in the Tax Exemption. In *ACLU*, the Court concluded that prohibiting benefits to non-spouse same-sex partners does not advance a purported governmental interest in promoting marriage because "[t]here is no indication … that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry." 122 P.3d at 793. Nothing about the current tax scheme suggests that denying full tax exemptions to same-sex couples would encourage opposite-sex couples to marry, especially since the primary recipients of the exemption are 65 years old or older, and thus long past the age when most couples marry and long past childbearing age. Further, in Alaska, even under minimal scrutiny a Court cannot "hypothesize facts which would sustain otherwise questionable [governmental action]." *Isakson*, 550 P.2d at 362.[10]

As the Alaska Supreme Court instructed: "Irrelevant [to the Court's] analysis must be personal, moral, or religious beliefs — held deeply by many — about whether persons should enter into intimate same-sex relationships or whether same-sex domestic partners should be permitted to marry." *ACLU*, 122 P.3d at 783. Moreover, a statute and a regulation that single out same-sex couples and their families for differential treatment convey to those families a message that their relationships and their familial bonds are worth less than the bonds of married, opposite-sex couples: worth less in abstract terms of value, and worth less in terms of financial value in their tax deductions. The government may not send a message discriminating "against one particular category of

[10] *See also Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (Rabinowitz, J. concurring) (refusing to hypothesize facts to sustain a classification on cost-equalization grounds), *superseded on other grounds by statute as recognized in* 222 P.3d 250 (Alaska 2009).

family" with the effect of reinforcing "'archaic and overbroad' generalizations." *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977). Such discrimination "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Edu.*, 347 U.S. 483, 494 (1954). Same-sex couples and their families face numerous barriers to full integration with the community, both by law and by social custom. The differential treatment of these families in the tax codes serves to further stigmatize an already disfavored group and relies on an antiquated view of social relations.

Because denying same-sex domestic partners tax benefits for which they cannot become eligible is not substantially related to the only interest defendants have identified – cost savings – the Tax Exemption violates the equal protection, liberty and privacy, and civil rights clauses of the Alaska Constitution under any level of scrutiny. *See ACLU*, 122 P.3d at 791.

IV. CONCLUSION

"It is the duty of courts 'to define the liberty of all, not to mandate [their] own moral code.'" *ACLU*, 122 P.3d at 783 (quoting *Lawrence*, 539 U.S. at 559). The Tax Exemption found in AS 29.45.030(e) and 3 AAC 135.085, and defendants' policy under those provisions, violates plaintiffs' constitutional rights to equal protection, liberty and privacy, and freedom from sex discrimination because it limits access to the full Tax Exemption on a status plaintiffs cannot obtain – marriage. For the foregoing reasons, plaintiffs respectfully request the Court grant their motion for partial summary judgment and declare AS 29.45.030(e), 3 AAC 135.085, and the defendants' spousal limitation policy unconstitutional.

DATED this 11th day of May, 2011.

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Certificate of Service

On the _____ day of May, 2011, a true and correct copy of the foregoing document was sent by hand delivery, to the following party:

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