IN THE SUPREME COURT OF THE STATE OF ALASKA

THE STATE OF ALASKA, Appellant, v. JULIE A. SCHMIDT, GAYLE SCHUH, JULIE M. VOLLICK, SUSAN L. BERNARD, FRED W. TRABER, and LAURENCE SNIDER and THE MUNICIPALITY OF ANCHORAGE, Appellees.	)	Supreme Court Case No. S-14521

Superior Court Case No. 3AN-10-9519 CI

CERTIFICATE OF SERVICE AND TYPEFACE

I certify that I am employed by the Office of the Attorney General, Anchorage, Alaska and that on this day I caused to be served true and correct copies of the *Brief of Appellant* and *Appellant's Excerpt of Record Volume I of I* by first class mail postage pre-paid, on the following:

Thomas Stenson ACLU of Alaska Foundation 1057 W. Fireweed Lane, # 207 Anchorage, AK 99503	David Oesting Davis Wright Tremaine LLP 701 W. Eighth Avenue Anchorage, AK 99501	Pam Weiss Office of the Municipal Attorney PO Box 196650 Anchorage, AK 99519

I further certify that the above-named document is in Times New Roman, 13 point typeface.

Angela Plucker 3-7-12

Angela Plucker, Law Office Assistant I Date

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

IN THE SUPREME COURT OF THE STATE OF ALASKA

The State of Alaska, and **The Municipality of Anchorage,** Appellants, v. **Julie A. Schmidt, Gayle Schuh, Julie M. Vollick, Susan L. Bernard, Fred W. Traber, and Laurence Snider,** Appellees.	Supreme Court Case No. **S-14521**

RECEIVED MAR 8 2012

Superior Court Case No. **3AN-10-9519 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE FRANK PFIFFNER, PRESIDING

BRIEF OF APPELLANT

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

Kevin M. Saxby
Sr. Assistant Attorney General
Department of Law
1031 W. Fourth Ave., Suite 200
Anchorage, AK 99501
(907) 269-5100
Attorney for the State of Alaska
AK Bar No. 8611132

Filed in the Supreme Court
of the State of Alaska, this
___ day of February, 2012.

Marilyn May, Clerk

By: _____

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

AUTHORITIES PRINCIPALLY RELIED UPON

Constitution of Alaska

Article I
Section 1. Inherent Rights
This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article I
Section 25. Marriage
To be valid or recognized in this State, a marriage may exist only between one man and one woman.

Article IX
Section 1. Taxing Power.
The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

Article IX
Section 3. Assessment Standards.
Standards for appraisal of all property assessed by the State or its political subdivisions shall be prescribed by law.

Article XII
Section 9. Provisions Self-executing
The provisions of this constitution shall be construed to be self-executing whenever possible.

Alaska Statutes

Sec. 25.05.013. Same-sex marriages

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

(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Sec. 29.45.030. Required exemptions

(a) The following property is exempt from general taxation:

(1) municipal property, including property held by a public corporation of a municipality, state property, property of the University of Alaska, or land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, except that

(A) a private leasehold, contract, or other interest in the property is taxable to the extent of the interest; however, an interest created by a nonexclusive use agreement between the Alaska Industrial Development and Export Authority and a user of an integrated transportation and port facility owned by the authority and initially placed in service before January 1, 1999, is taxable only to the extent of, and for the value associated with, those specific improvements used for lodging purposes;

(B) notwithstanding any other provision of law, property acquired by an agency, corporation, or other entity of the state through foreclosure or deed in lieu of foreclosure and retained as an investment of a state entity is taxable; this subparagraph does not apply to federal land granted to the University of Alaska under AS 14.40.380 or 14.40.390, or to other land granted to the university by the state to replace land that had been granted under AS 14.40.380 or 14.40.390, or to land conveyed by the state to the university under AS 14.40.365;

(C) an ownership interest of a municipality in real property located outside the municipality acquired after December 31, 1990, is taxable by another municipality; however, a borough may not tax an interest in real property located in the borough and owned by a city in that borough;

(2) household furniture and personal effects of members of a household;

(3) property used exclusively for nonprofit religious, charitable, cemetery, hospital, or educational purposes;

(4) property of a nonbusiness organization composed entirely of persons with 90 days or more of active service in the armed forces of the United States whose conditions of service and separation were other than dishonorable, or the property of an auxiliary of that organization;

(5) money on deposit;

(6) the real property of certain residents of the state to the extent and subject to the conditions provided in (e) of this section;

(7) real property or an interest in real property that is

(A) exempt from taxation under 43 U.S.C. 1620(d), as amended or under 43 U.S.C. 1636(d), as amended; or

(B) acquired from a municipality in exchange for land that is exempt from taxation under (A) of this paragraph, and is not developed or made subject to a lease;

(8) property of a political subdivision, agency, corporation, or other entity of the United States to the extent required by federal law; except that a private leasehold, contract, or other interest in the property is taxable to the extent of that interest unless the property is located on a military base or installation and the property interest is created

under 10 U.S.C. 2871 - 2885 (Military Housing Privatization Initiative), provided that the leaseholder enters into an agreement to make a payment in lieu of taxes to the political subdivision that has taxing authority;

(9) natural resources in place including coal, ore bodies, mineral deposits, and other proven and unproven deposits of valuable materials laid down by natural processes, unharvested aquatic plants and animals, and timber;

(10) property not exempt under (3) of this subsection that

(A) is owned by a private, nonprofit college or university that is accredited by a regional or national accrediting agency recognized by the Council for Higher Education Accreditation or the United States Department of Education, or both; and

(B) was subject to a private leasehold, contract, or other private interest on January 1, 2010, except that a holder of a private leasehold, contract, or other interest in the property shall be taxed to the extent of that interest.

(b) In (a) of this section, "property used exclusively for religious purposes" includes the following property owned by a religious organization:

(1) the residence of an educator in a private religious or parochial school or a bishop, pastor, priest, rabbi, minister, or religious order of a recognized religious organization; for purposes of this paragraph, "minister" means an individual who is

(A) ordained, commissioned, or licensed as a minister according to standards of the religious organization for its ministers; and

(B) employed by the religious organization to carry out a ministry of that religious organization;

(2) a structure, its furniture, and its fixtures used solely for public worship, charitable purposes, religious administrative offices, religious education, or a nonprofit hospital;

(3) lots required by local ordinance for parking near a structure defined in (2) of this subsection.

(c) Property described in (a)(3) or (4) of this section from which income is derived is exempt only if that income is solely from use of the property by nonprofit religious, charitable, hospital, or educational groups. If used by nonprofit educational groups, the property is exempt only if used exclusively for classroom space.

(d) Laws exempting certain property from execution under AS 09 (Code of Civil Procedure) do not exempt the property from taxes levied and collected by municipalities.

(e) The real property owned and occupied as the primary residence and permanent place of abode by a resident who is (1) 65 years of age or older; (2) a disabled veteran; or (3) at least 60 years of age and the widow or widower of a person who qualified for an exemption under (1) or (2) of this subsection is exempt from taxation on the first $150,000 of the assessed value of the real property. A municipality may by ordinance approved by the voters grant the exemption under this subsection to the widow or widower under 60 years of age of a person who qualified for an exemption under (2) of this subsection. A municipality may, in case of hardship, provide for exemption beyond the first $150,000 of assessed value in accordance with regulations of the department. Only one exemption may be granted for the same property, and, if two or more persons

are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. The determination of the assessor may be appealed under AS 44.62.560 - 44.62.570.

(f) To be eligible for an exemption under (e) of this section for a year, a municipality may by ordinance require that an individual also meet requirements under one of the following paragraphs: (1) the individual shall be eligible for a permanent fund dividend under AS 43.23.005 for that same year or for the immediately preceding year; or (2) if the individual has not applied or does not apply for one or both of the permanent fund dividends, the individual would have been eligible for one of the permanent fund dividends identified in (1) of this subsection had the individual applied. An exemption may not be granted under (e) of this section except upon written application for the exemption. Each municipality shall, by ordinance, establish procedures and deadlines for filing the application. The governing body of the municipality for good cause shown may waive the claimant's failure to make timely application for exemption and authorize the assessor to accept the application as if timely filed. If an application is filed within the required time and is approved by the assessor, the assessor shall allow an exemption in accordance with the provisions of (e) of this section. If the application for exemption is approved after taxes have been paid, the amount of tax that the claimant has already paid for the property exempted shall be refunded to the claimant. The assessor shall require proof in the form the assessor considers necessary of the right to and amount of an exemption claimed under (e) of this section, and shall require a disabled veteran claiming an exemption under (e) of this section to provide evidence of the disability rating. The assessor may require proof under this subsection at any time.

(g) The state shall reimburse a borough or city, as appropriate, for the real property tax revenues lost to it by the operation of (e) of this section. However, reimbursement may be made to a municipality for revenue lost to it only to the extent that the loss exceeds an exemption that was granted by the municipality, or that on proper application by an individual would have been granted under AS 29.45.050(a). If appropriations are not sufficient to fully fund reimbursements under this subsection, the amount available shall be distributed pro rata among eligible municipalities.

(h) Except as provided in (g) of this section, nothing in (e) - (j) of this section affects similar exemptions from property taxes granted by a municipality on September 10, 1972, or prevents a municipality from granting similar exemptions by ordinance as provided in AS 29.45.050.

(i) In (e) - (i) of this section,

(1) "disabled veteran" means a disabled person

(A) separated from the military service of the United States under a condition that is not dishonorable who is a resident of the state, whose disability was incurred or aggravated in the line of duty in the military service of the United States, and whose

disability has been rated as 50 percent or more by the branch of service in which that person served or by the United States Department of Veterans Affairs; or

(B) who served in the Alaska Territorial Guard, who is a resident of the state, whose disability was incurred or aggravated in the line of duty while serving in the Alaska Territorial Guard, and whose disability has been rated as 50 percent or more;

(2) "real property" includes but is not limited to mobile homes, whether classified as real or personal property for municipal tax purposes.

(j) One motor vehicle per household owned by a resident 65 years of age or older on January 1 of the assessment year is exempt either from taxation on its assessed value or from the registration tax under AS 28.10.431. An exemption may be granted under this subsection only upon written application on a form prescribed by the Department of Administration.

(k) The department shall adopt regulations to implement the provisions of (g) and (j) of this section.

(l) Two percent of the assessed value of a structure is exempt from taxation if the structure contains a fire protection system approved under AS 18.70.081, in operating condition, and incorporated as a fixture or part of the structure. The exemption granted by this subsection is limited to

(1) an amount equal to two percent of the value of the structure based on the assessment for 1981, if the fire protection system is a fixture of the structure on January 1, 1981; or

(2) an amount equal to two percent of the value of the structure based on the assessment as of January 1 of the year immediately following the installation of the fire protection system if the fire protection system becomes a fixture of the structure after January 1, 1981.

(m) For the purpose of determining property exempt under (a)(7)(A) of this section, the following definitions apply to terms used in 43 U.S.C. 1620(d) unless superseded by applicable federal law, and for the purpose of determining property exempt under (a)(7)(B) of this section, the following definitions apply:

(1) "developed" means a purposeful modification of the property from its original state that effectuates a condition of gainful and productive present use without further substantial modification; surveying, construction of roads, providing utilities or other similar actions normally considered to be component parts of the development process, but that do not create the condition described in this paragraph, do not constitute a developed state within the meaning of this paragraph; developed property, in order to remove the exemption, must be developed for purposes other than exploration, and be limited to the smallest practicable tract of the property actually used in the developed state;

(2) "exploration" means the examination and investigation of undeveloped land to determine the existence of subsurface nonrenewable resources;

(3) "lease" means a grant of primary possession entered into for gainful purposes with a determinable fee remaining in the hands of the grantor; with respect to a lease that

conveys rights of exploration and development, this exemption shall continue with respect to that portion of the leased tract that is used solely for the purpose of exploration.

(n) If property or an interest in property that is determined not to be exempt under (a)(7) of this section reverts to an undeveloped state, or if the lease is terminated, the exemption shall be granted, subject to the provisions of (a)(7) and (m) of this section.

Alaska Administrative Code

3 AAC 135.085. Eligibility

(a) When an eligible person and his or her spouse occupy the same permanent place of abode, the reimbursement described in AS 29.45.030(g) applies, regardless of whether the property is held in the name of the husband, wife, or both.

(b) A resident widow or widower who is at least 60 years old is eligible for the hardship exemption under AS 29.45.030(e) if the deceased spouse of the widow or widower was at the time of his or her death

(1) a resident of the State of Alaska; and

(2) at least 65 years old or a disabled veteran.

(c) 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.

(d) The real property eligible for reimbursement under this chapter includes only a

(1) primary parcel: the entire parcel of real property owned and occupied by an applicant as a permanent place of abode; and

(2) subsidiary parcel: a parcel of real property adjacent to the primary parcel described under (1) of this subsection, subject to approval by the department.

JURISDICTIONAL STATEMENT AND LIST OF PARTIES

This Court has jurisdiction to decide the issues raised below under AS 22.05.010(a) and (b).

ISSUES PRESENTED FOR REVIEW

1. Alaska Statute 29.45.030(e) provides a property tax exemption for real property owned and occupied by an Alaska resident who is a senior citizen, a disabled veteran, or a senior widow or widower of a senior citizen or disabled veteran. Is this statute facially unconstitutional because it refers to "widows" and "widowers"?

2. A regulation implementing AS 29.45.030(e) provides that, when an eligible person and his or her spouse occupy the property, the state will reimburse local governments for revenues lost under the exemption regardless of whether the property is in the husband's name, the wife's name, or both. However, if the property is occupied by someone else, reimbursement applies only to the portion occupied by the eligible applicant and spouse. Is this regulation facially unconstitutional because it uses the terms "spouse," "husband," and "wife"?

3. Married and unmarried couples have many differing obligations and rights under Alaska law. These differences are especially distinct in the areas of property ownership and taxation, since married couples typically own property as tenants by the entirety and unmarried couples cannot do so. Given these differences, are married couples and couples who cannot marry situated similarly with respect to property tax exemptions?

4. Marriage is promoted and subsidized in various ways under Alaska law. Is the State able to continue to do so through the property tax exemptions without also equally promoting and subsidizing unmarried, but presumably committed, homosexual relationships?

5. The Senior Citizen and Disabled Veteran Property Tax Exemption statute requires that an applicant own and occupy the subject property, beyond meeting age or disabled veteran status requirements. Are the State and local governments that administer this law required to ignore this ownership requirement when applicants are in an unmarried, but presumably committed, homosexual relationship?

6. The plaintiffs in the underlying case used at least seven different attorneys to research, draft, and review their briefing, with much of that time spent reviewing each other's work. Yet, they had asserted from the beginning that the case was a simple one that was completely controlled by this Court's decision in *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005). Under these circumstances, was an award of full attorneys' fees for the work of all seven attorneys reasonable?

STATEMENT OF THE CASE

I. Statement of Facts

Three homosexual couples filed this case challenging the constitutionality of Alaska's Senior Citizen and Disabled Veterans Property Tax Exemption, AS 29.45.030(e), alleging that the law violates their rights because they had received

smaller exemptions than would have been the case had they been married.[1] Alaska Statute 29.45.030(e) provides a property tax exemption for real property owned and occupied by an Alaska resident who is a senior citizen, a disabled veteran, or a senior widow or widower of a senior citizen or disabled veteran. They also challenged a regulation implementing this statute because it provides that, when an eligible person and his or her spouse occupy the property, the state will reimburse local governments for revenues lost due to the exemption regardless of whether the property is in the husband's name, the wife's name, or both.[2] However, if the property is also occupied by someone else, reimbursement applies only to the portion occupied by the eligible applicant and spouse.[3]

Each of the three sets of taxpayers who brought this case had different circumstances during the relevant time period. In the case of Messrs. Fred Traber and Larry Snider, neither person met the requirements necessary to claim the exemption.[4] The pleadings allege that Mr. Traber, 62, and Mr. Snider, 69, both occupied an Anchorage condominium, but that the condominium was owned solely by Mr. Traber, who is neither a senior citizen nor a disabled veteran.[5] Mr. Snider was ineligible to claim the exemption because, while he was a senior, he had no interest in the subject property.[6]

---

1 Exc. 1-11.

2 3 AAC 135.085(a).

3 3 AAC 135.085(c).

4 Exc. 9, 45 and 48. Technically, Mr. Snider was not a "taxpayer," as he had no interest in the property, but the term is used here in keeping with the directive in Alaska R. App. P. 212(c) (7).

5 Exc. 8-9.

6 Exc. 9, 45, and 48.

For each of the other two sets of taxpayers, one of the co-tenants met all requirements necessary to claim the exemption while the other did not. So, the qualifying taxpayers received exemptions, but their exemptions were apportioned under 3 AAC 135.085(c). According to the complaint, taxpayers Julie Schmidt, 67, and Gayle Schuh, 62, own a home together in Eagle River.[7] They are not married under Alaska law. Under AS 34.15.110(a) and .130, theirs is a tenancy in common.[8] Ms. Schmidt therefore is presumed to have a fifty percent interest in the property.[9] When Ms. Schmidt turned 65, she applied for, and received, the senior citizen property tax exemption.[10] Her exemption was apportioned according to her fifty percent ownership interest.[11] She received the full exemption available on her fifty percent, but she would have paid an estimated $359.31 less in property taxes to the Municipality of Anchorage had she shared the property with a spouse.[12]

The third set of taxpayers, Julie Vollick, 45, and Susan Bernard, 41, also co-owned a home in Eagle River.[13] They also were not married and so owned as tenants in common, with each having a fifty percent share. Ms. Vollick has a service-related

---

7 Exc. 5-7.

8 *Voss v. Brooks,* 907 P.2d 465, 468 (Alaska 1995). A tenancy in common is "a form of ownership whereby each tenant (*i.e.* owner) holds an undivided interest in the property. Unlike a joint tenancy or a tenancy by the entirety, the interest of a tenant in common does not terminate upon his or her prior death (i.e. there is no right of survivorship)." Black's Law Dictionary 1465 (6th ed. 1990).

9 *Voss*, 907 P.2d at 469.

10 Exc. 5-7.

11 Exc. 49.

12 Exc. 48.

13 Exc. 7-8.

permanent disability from her twenty years in the U.S. Air Force.[14] She applied for the property tax exemption as a disabled veteran and her exemption was apportioned according to her fifty percent ownership interest.[15] Had she shared the property with a spouse, Ms. Vollick would have paid an estimated $528.76 less in property taxes.[16] However, during the lawsuit, Ms. Vollick and Ms. Bernard separated and stopped living together as a couple.[17]

II. Statement of the Proceedings

Ms. Schmidt, Schuh, Vollick, and Bernard filed a motion for partial summary judgment, but no motion was brought by Messrs. Traber and Snider.[18] The State opposed and filed a cross motion, seeking dismissal of all claims by all plaintiffs.[19] The trial court granted summary judgment to all of the plaintiffs on all of their claims, holding that "in combination, Alaska Statute 29.45.030(e) and Alaska Administrative Code, Title 3, Section 135.085, subsections (a) and (c), violate the Alaska Constitution, Art. I, Sec. 1, by imposing a spousal limitation that facially discriminates against same-sex domestic partners."[20] The Court concluded that the tax exemption at issue was similar to the employment benefits at issue in *Alaska Civil Liberties Union v. State of Alaska*[21]

---

14 Exc. 8.
15 Exc. 50.
16 Exc. 48.
17 Exc. 63-64.
18 R. 322.
19 R. 105 and 138.
20 Exc. 94.
21 122 P.3d 781 (Alaska 2005).

("*ACLU*"), and so was likewise unconstitutional.[22] In reaching this conclusion, the Court assumed that any law that refers to a husband, wife, spouse, widow, or widower is facially discriminatory based on sexual orientation.[23] Then, the Court interpreted the regulation as authorizing an exemption to a couple when one partner meets the age or veteran qualifications, so long as the other partner owns the property, despite the statutory language requiring each applicant to meet all ownership and status requirements.[24] Accordingly, the Court held that Messrs. Traber and Snider were entitled to the exemption even though neither had met the eligibility requirements.[25] After entering final judgment, the trial court awarded full requested attorney fees to the plaintiffs, in the amount of $135,475.50.

STANDARD OF REVIEW

This case raises legal questions of constitutional and statutory interpretation, implicating Article I, Sections 1 and 25 of the Constitution of Alaska and AS 29.45.030(e), the Senior Citizen and Disabled Veteran Property Tax Exemption statute. For these types of questions, this Court applies its independent judgment.[26] The case also concerns questions over whether an adopted regulation, 3 AAC 135.085, is constitutional. This Court has repeatedly held that statutes and regulations, once codified,

---

22 Exc. 67.
23 Exc. 73.
24 Exc. 78-80.
25 *Id.*
26 *Alyeska Pipeline Service Co. v. State, Dep't. of Envtl. Conservation*, 145 P.3d 561, 564 (Alaska 2006).

are presumptively valid.[27] This means the Court will presume that the statute or regulation at issue was adopted in compliance with all applicable laws, including the Alaska Constitution, and the burden is on the challengers to prove otherwise.[28] To the extent that the case is deemed to be a facial statutory challenge, the challengers have "the burden to negative every conceivable basis that might support" the tax exemption as it currently exists.[29]

ARGUMENT

Summary of Argument

Statutes and regulations that refer to "husbands," "wives," "spouses," "widows," or "widowers" are not, simply by virtue of having done so, facially discriminatory and therefor unconstitutional. There are hundreds of statutes and several court rules that use these terms in many differing and obviously legitimate contexts. In the areas of property ownership and taxation, married couples typically, and historically, own property differently from all others: as tenants by the entirety. The statute in question makes no facial marital classification that is at issue in this case, and the regulation simply squares the reality of marital property ownership with governments' obligation to apportion tax exemptions so as to maintain a broad tax base. Because there is no facial discrimination, the taxpayers should have been required to show a discriminatory intent or purpose, which they failed to do.

---

27 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001); *Interior Alaska Airboat Ass'n v. State,* 18 P.3d 686, 689 (Alaska 2001).

28 *Id.* and AS 44.62.100.

29 *Andrade*, 23 P.3d at 71.

Nor are the parties herein situated similarly to married couples. The many obligations and rights that are incidental to marriage, especially in the realms of property ownership and taxation, create such a different landscape between married and unmarried couples that it cannot be legitimately said that they are situated similarly for property tax exemption purposes.

And, if the Court delves further and looks to the tax differentials themselves, it should conclude that they are legitimate and fairly and substantially related to the state's purposes. In fact, even without the regulation at issue in this case, apportionment would be required in most cases, anyway, given the realities of differing types of property ownership. Also, since only relatively small economic interests are at stake, and, unlike the situation in the *ACLU* case, the challengers have several ways which they may obtain the same amount of exemption as a married couple, the statute and regulation should survive constitutional scrutiny here. Overall, this Court should conclude that the State is entitled to continue to minimize administrative burdens and promote the institution of marriage without simultaneously being required to promote other relationships, thus fulfilling its obligation to fairly distribute taxation among all those who benefit from it.

In concluding that Messrs. Traber and Snider were eligible to claim the exemption, the trial court made several factual errors, mistook the plain wording of both the statute and the regulation, and ignored other important legal principles. Effectively, the court severed property tax eligibility from ownership of the property in question, an unwarranted and unprecedented leap with no legitimate purpose.

Finally, the trial court awarded full attorney fees to the taxpayers for time spent by all seven of their attorneys, who spent a great deal of time reviewing, rewriting, and, apparently, repeating, each other's work. Since the trial court simply relied on the reasoning of the *ACLU* case, as the taxpayers attorneys had urged it to do from the very beginning, it cannot be legitimately argued that the case was one of first impression, or that a particularly difficult legal concept was at issue. Under these circumstances, the award of full fees for all seven attorneys was unreasonable.

I. The State Can Constitutionally Administer the Senior Citizen and Disabled Veteran Property Tax Exemption in a Manner That Treats Unmarried Homosexual Couples Differently From Married Couples.

The taxpayers allege that the Senior Citizen and Disabled Veteran Property Tax Exemption deny them equal protection. A successful equal protection claim requires that the State treat similarly situated persons differently. In this case, the trial court found disparate treatment based on the language of the challenged statute and regulation.[30] But neither facially discriminates against the taxpayers in this case. Absent a facial disparity, the taxpayers should have been required to show intent to discriminate. While, in application, the tax exemption at issue does sometimes produce minor differences in exemption amounts for married property owners compared to unmarried property owners, that difference is a function of the nature of property rights in Alaska, not of any intent to discriminate. However, if the law is found to intentionally discriminate against unmarried co-owners, then unmarried co-owners—rather than same-sex couples

---

30 Exc. 74-78.

specifically—should be the class for purposes of comparison under the equal protection analysis.

While the law impacts some of the taxpayers in this case differently than it impacts married couples, the two groups are not similarly situated. Married couples generally own real property as tenants by the entirety, and no other type of co-ownership regime carries the same legal rights and obligations. Because married partners are deemed, as a matter of law, to each have a 100 percent, undivided share in their property, with rights of survivorship, based on their essential unities of person, time, title, interest, and possession, and because no other co-tenancies have these characteristics, unmarried couples are not and cannot be situated similarly to married couples with respect to property taxation and exemption.

But, even if the taxpayers in this case are found to be situated similarly to married couples, the tax differentials at issue should be found to be constitutional. Governments and courts have obligations to construe tax exemptions narrowly in order to keep the tax base as broad as possible. And, governments administering property tax programs have no good way, without expensive and intrusive investigations, to assess which unmarried property owners would legitimately qualify as living in a state that is similar to, but not, a marriage. Most importantly, the State has elected to promote marriage by, among other things, allowing married couples to own property as tenants by the entirety and recognizing the realities of that status in its tax exemption, and this is a legitimate action. Requiring equal subsidies to unmarried couples does not meet this

purpose and runs counter to the obligation to keep a broad tax base by allowing exemptions only to people who clearly fall within the scope of legislation on point.

A. The State's Tax Exemption does not Facially Discriminate Against Unmarried Homosexual Couples and does not Intentionally Treat them Differently.

On its face, AS 29.45.030(e) does not treat married couples differently from other couples. While the regulation does treat married and unmarried couples differently, doing so simply tracks the realities of property ownership in Alaska.

The statute's oblique reference to marital status is a reference to a "widow" or "widower," in a context that is not relevant to this case. It provides in part that

> "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; or (3) resident at least 60 years old who is the widow or widower of a person who qualified for an exemption under (1) or (2) of this subsection, is exempt from taxation on the first $150,000 of the assessed value of the real property."[31]

None of the taxpayers in this case have argued that they have been denied equal protection by virtue of this reference to a widow or a widower.

The regulation requires apportionment if the subject real property is owned and occupied by more than one person, unless that person is the eligible applicant's spouse.[32] It also affirms that eligibility may be based on ownership by the husband, the wife, or both, thus tracking the reality that Alaska's default method for real property ownership by married couples is a tenancy under which the husband and wife each have a

---

31 AS 29.45.030(e).

32 3 AAC 135.085.

100 percent ownership and occupancy interest in their property, with rights of survivorship.[33]

However, the trial court concluded that the taxpayers did not even need to show discriminatory intent because the statute and regulation in question were facially discriminatory in using the terms "spouse," "husband," "wife," "widow," and "widower," relying completely on this Court's ruling in *ACLU* that the particular marital classification challenged in that case was facially discriminatory.[34] The trial court determined that these words rendered the law facially unconstitutional "no matter how the court interprets it."[35]

If the trial court's conclusion that, regardless of their effect, all laws using terms like "marriage," "spouse," "husband," "wife," "widow," or "widower" are facially unconstitutional, the consequences will be expansive and severe. A quick word search of the Alaska Statutes illustrates that the words "marriage," "spouse," "husband," "wife," "widow," and/or "widower" are used in 404 different statutes, including many references in the Code of Civil Procedure,[36] dozens in the Uniform Probate Code and related provisions,[37] many more in Alaska's insurance statutes,[38] dozens in the Alaska Marriage

---

33 *Id.* and AS 34.15.110(b).

34 Exc. 72-78. 122 P.3d at 788-789.

35 *See* pp. 25-26 of the trial court's decision, stating that the "marital classification is facially unconstitutional. This means that it is unconstitutional no matter how the court interprets it." Exc. 83-84.

36 AS 09.

37 AS 13.

38 AS 41.

Code,[39] another large block in the State Personnel Act,[40] and other references scattered elsewhere throughout the statutes.[41] A similar search of the Alaska Rules of Court shows at least twenty-one references to these terms, including such noteworthy examples as the Husband-Wife Privileges,[42] several recognized exceptions to the hearsay rule,[43] and various prohibitions in the Code of Judicial Conduct. There is no basis under our constitution, and no identifiable public policy, to require the conclusion that all of these statutes and rules are unconstitutional merely because they refer to marriages or a marital status in some way or another. Rather, as discussed below, any challenge should require a case-by-case demonstration that the law arises from intent to discriminate against unmarried or homosexual couples.

The taxpayers did not even claim that AS 29.45.030(e) is facially discriminatory; they sought a declaratory judgment "that defendants' *application* of the Tax Exemption is unconstitutional."[44] That makes sense, because the tax differential at issue is less a result of the statute or regulation at issue, than it is of the assessment standards interpreting these two facially neutral laws. While local governments that collect property taxes are responsible for applying the exemption, a professional organization, the Alaska Association of Assessing Officers, has issued a "Standard on

---

39 AS 25.24.

40 AS 39.

41 The undersigned hereby certifies that the referenced word searches were performed by a paralegal in the Attorney General's office at my direction, and the results were as indicated.

42 Alaska R. Evid. 505.

43 Alaska R. Evid. 803 and 804.

44 R. 181.

Procedural Issues" on point.[45] The guidance addresses partial property ownership situations like those at issue here, explaining that because the exemption statute is based on property ownership, in cases of partial ownership the exemption applies only to that portion of the property owned by the eligible applicant.[46] Therefore, if an applicant owns an undivided one-half interest, the property will receive an exemption on 50% of the property's assessed value, up to $150,000.[47] Under this guidance, if both co-owners are eligible for the exemption, the property should receive an exemption of 100% of the assessed value, up to $150,000.[48] Although this standard was provided by the Alaska Association of Assessing Officers and is advisory in nature, "the position of the State Assessor is that the pro ration of the exemption based upon the percentage of ownership is a valid application of the exemption."[49]

Thus, the statute and regulation do not discriminate against unmarried co-owners on their faces and this case is properly characterized as a challenge to the laws *as applied.* The taxpayers therefore should be required to show that the application of the laws was motivated by intent to discriminate against same-sex couples.

For equal protection claims based on the U.S. Constitution, a law that is facially neutral violates the equal protection clause only if, as applied, it has a disparate impact on the plaintiff group and if that disparate impact "can be traced to a

---

45 Exc. 26-36.
46 Exc. 32-33.
47 *Id.*
48 *Id.*
49 Exc. 32.

discriminatory purpose."[50] "Absent a discriminatory purpose, a law that is...neutral on its face does not violate the Federal Equal Protection Clause, even if the impact is disparate."[51] This Court has not determined whether intent to discriminate is an essential element of an equal protection claim brought under the Alaska Constitution.[52] The Court should now determine that it is, because many, if not most, laws have a disparate impact on some class of citizens.[53]

---

50 *Alaska Inter-Tribal Council v. State,* 110 P.3d 947, 956 (Alaska 2005) (quotation omitted).

51 *Id.* at 957.

52 *ACLU,* 122 P.3d at 788.

53 This is the well-established rule adopted by federal and most state courts. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265; 97 S.Ct. 555; 50 L.Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242; 96 S.Ct. 2040; 48 L.Ed. 2d 597 (1976); *State v. Tookes*, 699 P.2d 983, 988 (Haw. 1985) (using federal rule); *People v. Wegielnik*, 605 N.E.2d 487, 492 (Ill. 1992) (holding that "to present a cognizable equal protection claim" regarding a facially neutral law, one "must show that the statute was enacted for a discriminatory purpose."); *Greenberg v. Kimmelman*, 494 A.2d 294, 308 (N.J. 1985) (using federal rule); *Montoy v. State*, 120 P.3d 306, 308 (Kan. 2005) (using federal rule); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 538 (S.C. 1999) ("A neutral law having a disparate impact violates equal protection only if it is drawn with discriminatory intent."); *Citizens Bank of Weston, Inc. v. City of Weston*, 544 S.E.2d 72, 79 (W. Va. 2001) ("Without proof of a discriminatory purpose underlying the law's enactment, a disproportionate impact on one classification will not on its own create a violation of this state's equal protection provision."); *Kim v. Workers' Comp. Appeals Bd.*, 87 Cal. Rptr. 2d 382, 385 (Cal. App. 1999) (using federal rule); *Johnson v. State*, 965 So. 2d 866, 872 (La. App. 2007) ("[A] challenger of a statute that does not classify bears the burden of proving that the statute was enacted for a discriminatory purpose."); *Weinbaum v. Cuomo*, 219 A.D.2d 554, 556 (N.Y. App. 1995). The Alaska Supreme Court has not addressed the question but has expressed doubt that a state equal protection claim could be based on disparate impact alone. *See Johnson v. Alaska Dep't of Fish and Game*, 836 P.2d 896, 909 n.22 (Alaska 1991); *see also Gottschalk v. State*, 36 P.3d 49, 55 (Alaska Ct. App. 2001) ("Equal protection analysis turns on the intended consequences of government classifications. Unless the [prosecutor] adopted a criterion with the intent of causing the [disparate] impact..., that impact itself does not violate the principle of race neutrality.") (quoting *Hernandez v. New York*, 500 U.S. 352, 362 (1991)) (alterations in original).

The distinction between married and un-married co-owners of property in the application of the tax exemption is not based on intent to discriminate against homosexual couples. Discriminatory intent "implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[54] The taxpayers have not even suggested that the application of the tax exemption is motivated by discriminatory animus toward homosexual couples. Rather, the tax exemption is based on well-established principles of taxation and property ownership. In cases of co-ownership, where only one owner is eligible for a tax exemption, the exemption applies to the portion of the property owned by that eligible party. This ownership apportionment applies to all co-owners. When it is applied to married couples, however, their ownership interest is not apportioned because each will have an undivided, 100 percent interest in, and occupancy of, the property in most instances. Thus, apportionment of the exemption simply tracks the different types of property ownership under the law. For this reason, the Court should have drawn a distinction between the economic interests at issue in the *ACLU* case, where the State was acting as an employer, and the historic marital benefits at issue in this case, where the State is acting in its sovereign capacity as a taxing authority, and required a showing of discriminatory intent before concluding that the tax differential was unconstitutional. The tax exemption is not designed to discriminate against the couples who brought this case or any other tenants in common. Therefore, even if the application of the law has a

---

54 *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

disparate impact on some couples, it does not violate equal protection because it has no discriminatory purpose. To the extent that the Court finds intent to discriminate against unmarried co-tenants, the Court should use that classification for the sliding scale equal protection analysis, rather than homosexual couples.

B. Unmarried Couples are not Situated Similarly to Married Couples for Purposes of Real Property Ownership and Taxation.

When two classes are not similarly situated, this "necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."[55] In this case, the proper comparison for purposes of this standard is between married and unmarried co-owners of property in Alaska, including homosexual co-owners. Unmarried co-owners of property are not similarly situated to married couples for purposes of the tax exemption, because they hold different property interests and this is consistent with the long-standing recognition in this nation's laws that marriage carries certain obligations and provides certain financial benefits.

1. Marriage is Historically Treated Differently From Other Relationships, with Good Cause

The long-standing recognition that marriage is worthy of legal protection is founded in policy. For thousands of years, all of us have been products of innumerable unions, each between a man and a woman. Long before the formation of the United States of America, many—probably most—of those unions have been marriages. In fact, we would not be alive today but for our ancestors' marriages. Marriages between biological parents have, over that same time, been most societies' preferred and effective

---

55 *Id.*

method for ensuring that children are properly cared for and integrated into the larger societies. No other human relationship can make these claims. So, marriages between men and women have been and are uniquely important to human history and human existence. This Court has recognized that marriages can lead to family stability, stating that "[g]iven the social benefits potentially inherent in marriage and the Supreme Court's statement that marriage is subject to state regulation, we conclude that the promotion of marriage is at least a legitimate governmental interest."[56]

Because of the importance of marriage in human history and current society, the law treats married couples differently from people in other interpersonal relationships in dozens of ways, granting them different rights and imposing upon them different obligations. For example, much of the law relating to inheritance is designed to ensure the continuing support of the surviving spouse and children.[57] Likewise, surviving spouses and children are the primary beneficiaries of a wrongful death action.[58] A marriage legitimizes children who are born during that marriage or whose parents subsequently marry.[59] Spouses have certain rights and obligations relating to property division and support in a divorce.[60] Public officials may not employ their spouses.[61] And the Alaska Court System recognizes evidentiary privileges applicable solely to husbands

---

56 *ACLU,* 122 P.3d at 793.
57 *See* AS 13.12.102, .202, .301, .404, etc.
58 AS 09.55.580 and 23.25.101.
59 AS 25.20.045 and .050.
60 AS 25.24.160.
61 AS 39.90.020.

and wives.[62] These examples are only a few of the multitude of ways that the law treats married couples differently from all other couples. The distinctions that are most pertinent to this case are those relating to property ownership and taxation.

Under Alaska's property laws, married persons have unique property-related obligations to each other, and therefore are entitled to unique benefits. For example, a spouse cannot execute a will that will deprive the surviving spouse of his or her elective share of the augmented estate plus a statutorily-allowed homestead allowance, exempt property, and family allowance.[63] In a divorce, the property acquired during the marriage must be divided justly between husband and wife.[64] Under AS 16.43.150(h), a spouse automatically receives a transfer of a limited entry permit upon the death of the permit holder. Under AS 21.27.390(a)(1), a similar transfer occurs when a temporary insurance license holder dies. Under AS 45.50.825, a surviving spouse may have a right of first refusal on a new lease of a gasoline products dealership upon the death of the spouse-lessee. Under AS 47.07.055(b), a spouse is exempt from property liens for recovery of medical assistance given to the decedent. And, most significantly to this case, "[a] husband and wife who acquire title in real property hold the estate as tenants by the entirety, except as provided by AS 34.77.100 or unless it is expressly declared otherwise in the conveyance or devise."[65]

---

62 Alaska R. Evid. 505.

63 AS 13.12.202 *et seq.*

64 AS 25.24.160(a) (4).

65 AS 34.15.110(b). AS 34.77.100 deals with community property trusts.

Thus, under Alaska law, the default type of real property ownership for a husband and wife is an undivided joint tenancy with right of survivorship.[66] Moreover, only married couples may own real property in this way.[67] This marital benefit predates our nation, deriving from the English common law.[68] Similarly, under the state property tax law at issue here, married couples are treated as a unit, such that if one spouse meets all eligibility requirements for a property tax exemption, the couple will be credited for the full value of their joint exemption, while all other people who co-own and occupy property will be subjected to apportionment, and each must meet the applicable eligibility standards in order to receive the exemption to which they are individually entitled.[69]

Such statutory rights codify, arise out of, or sometimes modify, the ancient common law principle that a husband and wife are viewed, for many legal purposes, as one person. Stated differently, the marriage itself is often treated as a valuable unit or entity that is protected, subsidized, or otherwise fostered. This ancient principle is still critical to understanding laws relating to marriage in Alaska, where the legislature has codified it. In 1963, the Court thought that the legislature had abandoned the principle of marriage as a unit, stating in *Carver v. Gilbert*[70] that "the statutes of Alaska relating to the property rights of married women have abolished the common law unity of husband and wife, and therefore, a conveyance to husband and wife is a 'conveyance to two or more

---

66 *Id.* and Black's Law Dictionary 1465 (6th ed. 1990).
67 AS 34.15.110(a) and .130.
68 William Blackstone, 2 Commentaries *182.
69 3 AAC 135.085(a)
70 387 P.2d 928 (Alaska 1963).

persons'...."[71] However, in 1970 the Alaska Legislature restored the presumption that a husband and wife exist in a state historically described as the "unity of person," one of the essential unities necessary to find that a tenancy by the entirety exists.[72] It enacted the language currently set forth at AS 34.15.110(b).[73] And, in construing that statute, this Court has recently recognized that a tenancy by the entirety continues to depend on the existence of the essential unities, presumably including the unity of persons.[74]

These are the benefits of marriage that are at issue, the ability of the husband and wife to jointly hold undivided ownership and occupancy (100%) of marital real property with rights of survivorship. These benefits logically lead, among other things, to an un-apportioned property tax exemption.[75] The taxpayers challenging these benefits are not arguing that all co-owners of real property should receive the full exemption. Rather, they are arguing that, despite the many differences under the law between married couples and themselves, including that they hold their property as tenants in common rather than by the entirety, they should be treated like married persons so that, uniquely among all unmarried taxpayers, their eligibility would not be based on their percentages of property ownership. By seeking to avoid apportionment, they

---

71 *Id.*, at 931.

72 *See* R. Bernhardt and A. Burkhart, *Real Property In A Nutshell* 123-127 (6th ed.). The other essential unities are the unities of time, title, interest and possession. *Id.*

73 A tenancy by the entirety is a "tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon death of either, other takes whole to exclusion of deceased heirs." Black's Law Dictionary 1465 (6th ed. 1990).

74 *Smith v. Kofstad*, 206 P.3d 441, 446 n.24 (Alaska 2009).

75 The State will show below that tenancies by the entirety will inevitably lead to a full tax exemption for married couples and tenancies in common lead to apportionment.

essentially seek to have their relationship recognized as a single, separate entity that is like a marriage so that, despite statutes prohibiting tenancy by the entirety except to a husband and wife,[76] each partner in their relationships will be deemed to have a 100 % ownership and occupancy interest in their property. In short, they are seeking one of the ancient "benefits of marriage" under Alaska's property and tax laws, without ever having challenged those laws.[77]

2. The Marriage Amendment Establishes Married Couples as a Unique Class, Entitled to Special Legal Recognition

The Alaska Constitution permits state law to benefit and protect marriage, and the relationships of the three sets of taxpayers in this case are not marriages under Alaska law. Article I, Section 25 of the Constitution of Alaska states that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman." This provision establishes the state-determined framework within which the legal status of marriage exists in Alaska, and its acknowledgement that marriage is "recognized" in law necessarily means that, under our laws, marriage can provide unique benefits and impose unique obligations. By finding that equal protection requires the State to provide married and unmarried couples with the same tax exemptions, the Superior Court has nullified the effect of Article I, Section 25. But Alaska's Equal Protection Clause cannot override this more specific provision.[78] As this Court noted in *ACLU*, it must give effect to every word, phrase, and clause of the Alaska Constitution and "seemingly conflicting

---

[76] AS 34.15.110(a) and .130.

[77] Under AS 25.05.013, "a same-sex relationship may not be recognized by the state as being entitled to the *benefits of marriage*" (emphasis added).

[78] *ACLU*, 122 P.3d at 787.

parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution."[79] The Marriage Amendment has not been challenged in this case. It is a self-executing constitutional provision and must be interpreted in a manner that is meaningful.[80]

Before the Marriage Amendment was adopted, the Alaska Legislature's adoption of AS 25.05.013 in 1996 had already recognized that the marriage relationship is unique.[81] The sponsor's statement for the underlying bill explained that the purpose for subsection (b)—prohibiting extension of "the benefits of marriage" to "a same-sex relationship"—was intended to preclude "the state from recognizing same-sex 'domestic partnerships' which are not legal marriages, but could be deemed to be entitled to the benefits of marriage, especially in the context of employee benefits."[82] This Court held in *ACLU* that denying employment benefits to homosexual couples was unconstitutional, but the Court did not invalidate AS 25.05.013.[83] This statute therefore is presumptively constitutional[84] and the State is still obligated to follow it. Like the Marriage Amendment, it is a statement that strongly supports the idea that, as a matter of law, married couples are not similarly situated to unmarried couples, including those of the same sex.

---

79 *Id.* at 786 (quotation omitted).

80 Alaska Const. Art. XII, Sec. 9 ("The provisions of this constitution shall be construed to be self-executing whenever possible.")

81 Sec. 2 Ch 21 SLA 1996.

82 Senate Committee on Health, Education and Social Services, Sponsor Statement for SB 308, 19th Leg. 2nd Sess. (1996).

83 122 P.3d 781-795.

84 *ACLU,* 122 P.3d at 785 ("A constitutional challenge to a statute must overcome a presumption of constitutionality;"), *Andrade*, 23 P.3d at 71.

This case differs significantly from the *ACLU* employee benefits case, which dealt with the ability of homosexual public employees to obtain the rewards of their own industry, a right explicitly guaranteed under Article I, Sec. 1.[85] The Court in *ACLU* did frame part of the analysis by comparing homosexual couples with married couples because opposite-sex couples could choose to marry and obtain the benefits.[86] But the Court was careful to primarily characterize that case as "a dispute about employment benefits."[87] Here the benefit that the taxpayers seek is a tax exemption, and there is no corresponding constitutional guaranty of a right to tax exemptions. To the contrary, the State and local governments that administer property tax collections have a constitutionally-based obligation to narrowly construe tax exemptions, as discussed in greater detail below.[88]

In this case, the State is not an employer paying unmarried employees less for performing the same work as similarly-situated married people. Rather, the classes' differences are based on all of the factors noted above, and especially on rules for taxation and property ownership. Unmarried co-owners are tenants in common and are considered to have ownership interest in only a portion of the property for tax purposes. Their eligibility for an exemption is apportioned according to their ownership interest. Unless they expressly state otherwise, married couples are tenants by the entirety, so that each partner is considered to have an undivided ownership interest and occupancy in the

---

85 *Id.* at 786-88.

86 *Id.* at 787-88.

87 *Id.* at 786.

88 *Greater Anchorage Area Borough v. Sisters of Charity of House of Providence,* 553 P.2d 467, 469 (Alaska 1976).

entire property. The different classes are not created by the tax exemption; they are the result of Alaska's property ownership laws.

In sum, because the tax exemption in this case is based on the nature of property ownership in Alaska, the proper comparison for the legal analysis is between unmarried co-owners and married co-owners. Because married property owners, as tenants by the entirety, each have a property interest in the entire property and unmarried co-owners, as tenants in common, have only a partial ownership interest, they are not similarly situated for purposes of the tax exemption.

C. The Tax Differential at Issue is Legitimate and Fairly and Substantially Related to the Law's Purpose

Even if the unmarried taxpayers in this case could meet the threshold requirement of demonstrating that they are similarly situated to married co-owners, apportionment of the tax exemption does not violate equal protection because it is legitimate and significantly related to the law's purpose.

This Court takes a multi-step, sliding-scale approach to equal protection analysis.[89] First, the Court determines "the importance of the individual interest impaired by the challenged enactment."[90] The importance the Court attaches to the individual interest dictates the level of importance of the state interest-from mere legitimacy to a compelling interest-that will satisfy equal protection.[91] Next, the Court examines "the importance of the state interest underlying the enactment, that is, the purpose of the

---

89 *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1131 (Alaska 2009) (citing *Wilkerson v. State*, 993 P.2d 1018, 1022-23 (Alaska 1999)).

90 *Id.*

91 *Id.*

enactment."[92] Finally, the Court examines "the nexus between the state interest and the state's means of furthering that interest."[93] The importance of the individual interest also controls the required degree of nexus, from substantial relationship to least restrictive means.[94]

The disparate tax treatment between married property owners and unmarried co-owners should be subject to a low level of scrutiny. This Court has consistently held that "[p]urely economic interests, such as 'freedom from disparate taxation[,] lie...at the low end of the continuum of interests protected by the equal protection clause' and so are subject to the most relaxed scrutiny on our sliding scale."[95] The Court has explained that "[u]nder this relaxed scrutiny, [it] will uphold laws if they serve a legitimate public purpose and impose only classifications that bear a fair and substantial relationship to that purpose."[96]

1. The interest to be free from disparate taxation is afforded minimal weight in equal protection analysis

The individual interests impaired by the challenged enactment in this case are minimal, in the greater scope of interests. This case is simply a challenge to a property tax exemption. And, while the taxpayers acknowledge that they dispute a

---

92 *Id.*

93 *Id.*

94 *Id.*

95 *Lot 04B & 5C, Block 83 Townsite v. Fairbanks North Star Borough,* 208 P.3d 188, 192 (Alaska 2009) (quoting *Stanek v. Kenai Peninsula Borough,* 81 P.3d 268, 270 (Alaska 2003)).

96 *Id.* (quoting *Katmailand, Inc. v. Lake and Peninsula Borough,* 904 P.2d 397, 401 n.6 (Alaska 1995) and *Stanek,* 81 P.3d at 270 (internal quotation marks omitted)).

"disproportionate tax burden,"[97] they have largely ignored Alaska's body of case law governing constitutional challenges to disproportionate taxes. But those tax cases are dispositive and stand for the proposition that "[a]ssuming that individual plaintiffs' interests as taxpayers actually are impaired...these interests are not interests afforded much weight under [the Court's] equal protection analysis."[98] The appropriate analysis for equal protection therefore is the lowest end of the sliding scale–"mere legitimacy."[99]

2. The governmental purposes for the disparate treatment are legitimate and outweigh the individual interest to be free from disparate taxation

The trial court focused on the underlying purpose for the tax exemption itself (keeping seniors and disabled veterans in their homes), concluding that it was legitimate.[100] However, this Court emphasized in *ACLU* that it is the purpose for the marital classification at issue, not the larger statutory enactment within which the classification exists, that must be the focus of such examinations.[101] Moreover, as the Court also recognized in that case, such marital classifications essentially have three purposes: cost control, administrative efficiency, and promotion of marriage.[102] In this

---

97 R. 194.

98 *Matanuska-Susitna Borough Sch. Dist. V. State,* 931 P.2d 391, 398 (Alaska 1997); *see also Lot 04 B & 5C,* 208 P.3d at 192 (applying most relaxed scrutiny to challenge to disparate taxation); *Katmailand,* 904 P.2d at 401 ("[t]he interests involved in taxation challenges lie at the low end of the continuum of interests protected, and thus are reviewed under relaxed scrutiny"); *Atlantic Richfield Co. v. State,* 705 P.2d 418, 437 (Alaska 1985) (holding that freedom from disparate taxation is not afforded much weight under equal protection analysis).

99 *L.D.G., Inc.*, 211 P.3d at 1131 (citing *Wilkerson*, 993 P.2d at 1023).

100 Exc. 85-90.

101 122 P.3d at 792-94.

102 *Id.*, at 790-91.

case, the "cost control" argument is better restated in terms of the constitutionally-based principle that tax exemptions must be strictly construed to maintain the broadest possible tax base and equalize the tax burden among the public.[103]

a. Maintaining a broad tax base is a constitutionally-based requirement and therefore weighs heavier in the balance than did "cost control" in the *ACLU* case

Tax exemptions must be interpreted narrowly. Important public policies underlay this requirement. This Court has echoed other courts in pointing out that "[a]ll property is benefited by the security and protection" that the state provides, and therefore "it is only just and equitable that expenses incurred in the operation and maintenance of government should be fairly apportioned upon the property of all."[104] Because "taxation is the general rule," statutes granting tax exemptions—while permissible "based upon various grounds of public policy"—are strictly construed.[105] A taxpayer is not entitled to an exemption unless he shows that he comes within either the express words or the necessary implication of some statute conferring this privilege upon him.[106] Thus, the rule is that, "courts will not utilize the public policy behind the exemption statute to extend its coverage beyond what is clearly included on the face thereof."[107]

This Court has explained that "tax exemptions should be narrowly construed to the end that disturbances to...equality in the distribution of this common burden upon all property which is the object and aim of every just system of taxation be

---

103 *Greater Anchorage Area Borough,* 553 P.2d at 469.
104 *Id.*
105 *Id.*
106 *Id.*
107 *McKee v. Evans,* 490 P.2d 1226, 1230 (Alaska 1971).

minimized."[108] Accordingly, the Court recognizes the public policy of "providing a broad base of taxation,"[109] which arises from the Alaska Constitution. The Constitution expressly gives government the power to tax and the power to set property tax assessment and appraisal standards.[110] And in the same section guaranteeing equal protection under the law, the Constitution provides that "all persons have corresponding obligations to the people and to the State."[111] "One of the corresponding obligations is that of paying taxes should the Legislature impose them."[112] The Constitution also "mandates that a liberal construction be given to the powers of local government and this applies to the taxing authority of local governments."[113]

One constitutional principle cannot override another. This Court gives effect to every word, phrase, and clause of the Alaska Constitution and seemingly conflicting parts are harmonized, if possible, so that effect is given to all parts.[114] Maintaining the broadest possible tax base by strictly construing tax exemptions to ensure that a taxpayer does not receive an exemption unless he shows that he comes within either the express words or the necessary implication of some statute conferring the privilege upon him is, thus just as important as ensuring that equal protection principles

---

108 *Stanek,* 81 P.3d at 274 (quotation omitted).

109 *Sisters of Providence in Washington v. Munic. of Anchorage,* 672 P.2d 446, 452 (Alaska 1983).

110 Alaska Const. Art. IX, Sec. 1, 3.

111 Alaska Const. Art. I, Sec. 1.

112 *Cogan v. State,* 657 P.2d 396, 398 (Alaska 1983).

113 *Stanek,* 81 P.3d at 273 (citing Alaska Const. Art. X, Sec. 1).

114 *ACLU,* 122 P.3d at 789 (citing *Owsichek v. State, Guide Licensing & Control Bd.,* 763 P.2d 488, 496 (Alaska 1988)); *State v. Ostrosky,* 667 P.2d 1184, 1191 (Alaska 1983); *Park v. State,* 528 P.2d 785, 786–87 (Alaska 1974); and C.J. Antieau, Constitutional Construction Sec. 2.06, at 18–20 (1982).

are correctly applied.[115] This broad tax base principle, thus, has much more weight than did the "cost control" argument considered in the *ACLU* case, and the balance between the governmental and individual interests at stake should, correspondingly, be stricken at a different place

Strictly construing tax exemptions to ensure that the broadest possible tax base is maintained logically carries a corollary. This Court has affirmed that "courts will not utilize the public policy behind the exemption statute to extend its coverage beyond what is clearly included on the face thereof."[116] So, if legitimate governmental purposes for a particular classification are identified, interpretations that expand the exemption to include subsidizing a larger than intended class—or a different class altogether—should be disfavored. In other words, if a tax-related classification chosen by the legislature is legitimate, courts should be loath to expand that classification unless absolutely necessary to preserve constitutionality.

b. The administrative efficiency concerns also weigh more heavily in this case

The issue of administrative efficiency this Court examined in *ACLU* concerned the difficulty in identifying state and municipal employees engaged in homosexual, long-term committed relationships.[117] The Court found that to be a legitimate concern.[118] In this case, the starting point is a much larger initial pool—all potentially eligible real property owners as opposed to identifiable public employees. Then, if some,

---

115 *Greater Anchorage Area Borough,* 553 P.2d at 469.
116 *McKee,* 490 P.2d at 1230.
117 122 P.3d at 791.
118 *Id.*

but not necessarily all, homosexual relationships are to be treated like marriages, the local governments administering the programs will be required to look at each case of co-ownership in an effort to separate, among other things, co-owners who are blood relatives, business partners, just friends, or just not interested in committing to each other from those who are in a long-term, committed homosexual relationship.

Given the relatively small amount of the differentials in this case, it is reasonable for governments to seek to limit their costs of administering the tax exemption. The added costs to municipalities of verifying the legitimacy of allegedly committed same-sex relationships in order to grant an additional benefit is not justified for exemptions of only a few hundred dollars a year. While something along the lines of a simple affidavit or form may have been sufficient to make the necessary determinations for purposes of the employment benefits at issue in the *ACLU* case, they will probably not suffice here. Given this Court's direction that, as a matter of constitutional principle, "[a] taxpayer is not entitled to an exemption unless he shows that he comes within either the express words or the necessary implication of some statute conferring this privilege upon him,"[119] municipal and borough assessors' offices likely have the duty to investigate the legitimacy of questionable exemption claims. In the cases of married couples, this is relatively easy, as marriage records exist and are maintained by the State.[120] However, no similar statewide database exists identifying people in relationships like those at issue in this case, so investigations are likely to be more personal and costly. In short, in order to

---

119 *Greater Anchorage Area Borough,* 553 P.2d at 469.

120 AS 18.15.270.

fulfill their constitutionally-based duties to ensure that only valid claims of exemption are recognized, local governments and state officials administering the program are likely to, at least sometimes, have to engage in hitherto unnecessary activities. This will lead to significant administrative burdens and make government more cumbersome, intrusive, and expensive.

c. Expanding the class or creating a new class to include homosexual couples does not serve the legislature's purpose of promoting marriage

The State legitimately may promote marriage,[121] which in Alaska is a union between one man and one woman.[122] A marital classification that provides economic benefits to people in marriages may plausibly be determined to encourage men and women to marry or stay married.[123] But providing those same benefits to homosexual couples does not encourage men and women to marry or stay married. By the reasoning set forth in *ACLU*, doing so would encourage at least some people to engage in long-term, committed homosexual relationships that by definition are not marriages. While the State might choose to promote such relationships through its tax laws, to date it has not done so. As this Court noted, "just because the legislature did not want to promote same-sex marriage does not mean it did not have a sincere interest in promoting 'traditional' marriage."[124] Since promotion of marriage is a legitimate state interest, and the State has a constitutionally-based obligation to keep the tax base as large as possible while

---

121 *ACLU,* 122 P.3d at 793.
122 Alaska Const. Art. I, Sec. 25.
123 122 P.3d at 793.
124 *Id.* at 792.

promoting marriages, this Court should conclude that the State is only constitutionally obligated to also promote homosexual relationships if there is no other basis for upholding the classification at issue. As shown below, there is another basis.

D. The classification at issue is sufficiently narrowly-tailored to meet constitutional scrutiny

The differential in tax payment is relatively minor here—only a few hundred dollars a year—and it only comes into play in limited circumstances. Unlike the benefits at issue in *ACLU*, which applied to every state and municipal employee with a committed homosexual partner, the added tax benefit would not apply in every case in which a senior or disabled veteran is in a committed homosexual relationship. For example, the differential would not affect committed homosexual couples in which both partners qualify, those who rent, those who co-own a property valued at over $300,000,[125] or those who maintain separate residences.

Apportionment of the exemption based on ownership interests furthers the policy of having a broad tax base with limited exemptions. "It is obvious that the statute intends to exempt only that portion of the property owned by the eligible applicant, consequently, a partial ownership should result in a partial exemption."[126] Because most married couples own property as tenants in the entirety, allowing an exemption on the full value of the property simply tracks their ownership interests. Although some married

---

[125] An eligible individual owning 50% of a property with an assessed value of $300,000 will have an ownership interest of $150,000. Therefore, once a property's value reaches $300,000, the eligible individual will be able to take the full $150,000 exemption.

[126] Standard on Procedural Issues for the Application of the Senior Citizen/Disabled Veteran Property Tax Exemption Program in Accordance with Alaska Statute 29.45.030(e)-(1). Exc. 32.

couples may choose to hold property as tenants in common, some over inclusiveness in the means-to-end fit is tolerated at the lowest level of scrutiny. Most importantly, the means-to-fit analysis in this case does not include the element that was critical to this Court's analysis in the *ACLU* decision, the government's role as a public employer. In *ACLU*, the Court found that "because the [benefit] programs at issue govern the governments' actions *in their specific capacities as public employers, rather than in their broader governmental capacities,* the programs' marital preferences would have difficulty meeting the means-to-end fit requirement unless they had a fair and substantial relationship *to the governments' roles as public employers.*[127] When the State acts as an employer, it is subject to the overarching constitutional principles guaranteeing Alaskans "the rewards of their own industry" and requiring public employment to be based on merit.[128] In *ACLU* this Court said that "[p]rograms allowing the governments to give married workers *substantially greater compensation* than they give, for identical work, to workers with same-sex partners cut against these constitutional principles yet further no legitimate goal *of the governments as public employers.*"[129]

In contrast, in this case the state is not acting as a public employer and the interest at stake here is slight—a tax exemption differential of only a few hundred dollars a year. Such a small differential cannot be compared to the employment benefits in the *ACLU* decision. It is not a source of income "that individuals depend on to supply the basic necessities of life," but instead is even less than an economic interest in a

---

127 122 P.3d at 794 (emphasis added).
128 *Id.*
129 *Id.*

permanent fund dividend or a foster child stipend—a "quite different kind of economic interest" from one involving the right to engage in an economic endeavor such as employment.[130]

Further, and again in contrast with the *ACLU* case, co-owners have options to be eligible for the full exemption other than marriage. When both co-owners become eligible—for example, when both turn 65 or when a disabled veterans' partner turns 65, they will receive the exemption on the full value of their property.[131] Additionally, when their property is valued at over $300,000, they will receive the maximum exemption amount even if only one owner is eligible. So, the differential is not only small, it is also likely temporary.

Although the economic interest implicated by a tax exemption falls on the lowest end of Alaska's sliding-scale equal protection analysis, the law in this case would survive a constitutional challenge higher on the scale as well. Under Alaska's middle scrutiny standard, "[l]egislation that impacts important rights must have a close relationship to an important state interest."[132] In order for a law to survive Alaska's strict scrutiny standard, the classification created must be narrowly tailored to promote a compelling governmental interest and be the least restrictive means available to vindicate that interest.[133] To be narrowly tailored, there must be a sufficient nexus between the

---

130 *C.J. v. State, Dep't. of Corrections,* 151 P.3d 373, 379 (Alaska 2006) (quoting *Wilkerson v. State,* 993 P.2d at 1023 n.18).

131 Exc. 32.

132 *Schiel v. Union Oil Co. of California*, 219 P.3d 1025, 1030 (Alaska 2009) (quotation omitted).

133 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 266 (Alaska 2004).

stated governmental interest and the classification created by the law.[134] Here the tax exemption meets both standards.

The classification has a close relationship to several important state interests and is narrowly tailored to promote marriage while maintaining administrative efficiency and meeting the constitutional obligation to provide a broad tax base and keep exemptions narrow. Any less restrictive means will not properly vindicate all of those interests. Extending the full exemption only to homosexual couples, but not other co-owners, would create its own inequities by creating new-subsets of unmarried co-owners. If the full tax exemption were extended to include all co-owners it would invite fraud by allowing an exemption to any number of co-owners regardless of ownership interest or eligibility and it would undermine the public policy of broad taxation.

E. Even in the Absence of the Regulation, Property Laws Would Require Differential Treatment for Married Couples and Non-Married Couples in Most Cases.

The regulation simply re-states a rule that would otherwise apply in almost all cases because of Alaska's property laws and assessment standards. The statutes recognizing tenancies by the entirety and tenancies in common have not been challenged in this case and so remain presumptively constitutional. So, 3 AAC 135.085 is in the category of laws which, while not perfectly applicable, do draw legitimate distinctions between the two classes that generally apply. Because married couples own their real property as tenants by the entirety unless they have specified otherwise, the regulation's

---

134 *Id.* at 266.

statement that the reimbursement will be made regardless of whether the property is in the name of the husband, the wife, or both is superfluous in most cases.

In keeping with the principle that exemptions follow ownership interests, exemptions are construed to provide for the broadest possible tax base and apportionment among owners is required where multiple exemptions apply. The regulation simply clarifies the eligibility and apportionment rules for state reimbursement of tax revenues lost to local governments. If the eligible person is either the husband or the wife—that is, if the husband or wife is at least 65 or a disabled veteran and the property is solely in his or her name—then the regulation is irrelevant. Under AS 29.45.030(e), that person will be entitled to the full exemption, for that property's value. If one of the partners is over 65 or a disabled veteran and the property is owned as a tenancy by the entirety (in both names without specifying otherwise), then the elder or disabled partner, as a matter of law, has an undivided (100%) interest in the property, so the regulation's language is, again, unnecessary. It is only when the husband and wife have elected to specify that their property is held as a tenancy in common, and only one of them is old enough or a disabled veteran, that the regulation matters-a likely very rare occurrence.

On the other hand, since unmarried couples may only own as tenants in common, their eligibility for the exemption must be apportioned according to their percentage of ownership and this, likewise, would be the case regardless of the regulation's language, given accepted assessment standards. So, the regulation should, for all of the reasons argued above, survive constitutional scrutiny.

II. The Trial Court Erred in Severing Property Tax Exemption Eligibility From Property Ownership

Ignoring the State Assessor's interpretation and application of a statute and regulation he administers, the trial court concluded that 3 AAC 135.085(a) extended "the Tax Exemption to eligible applicants who share a home with their spouse, but do not own the home."[135] Based on this error, the court went on to conclude that a person who was 69 years old, but who at no time has held any ownership interest in the relevant real property, nevertheless was entitled to claim the exemption because he was in a relationship with someone who owned the property but did not meet the age requirement.[136] In doing so, the trial court misunderstood the basic underlying facts, misapplied controlling statutes and regulations, ignored or violated basic property law principles, and violated rules of legislative interpretation and administrative law. These errors require reversal of the trial court's ruling on this point.

A. The Court Misunderstood what "Eligible" Meant

The trial court's misunderstanding of the basic underlying facts is evident from his assumption that Mr. Traber was "eligible" for the property tax exemption but for the fact that he could not marry Mr. Snider.[137] [138] In discussing Mr. Traber's claims, the

---

135 Exc. 78.

136 Exc. 78-80. The trial court actually ruled that it was Traber who was entitled to claim the exemption even though the court believed he didn't own the property, apparently mixing up the facts alleged by Messrs. Traber and Snyder. *Id.* The complaint alleges that it is Traber (62) who owns the property and Snyder (69), who does not have an ownership interest. Exc. 8-9. This is a minor example of the trial court's misunderstanding of the basic underlying facts.

137 Exc. 80 ("If Traber were married to Snider, he would be able to claim the exemption.").

judge repeatedly referred to "an eligible person" and his or her spouse occupying the same property, assuming throughout that Mr. Traber was such an "eligible person."[139] However, eligibility must be determined under the terms of the statute, which, among others, sets ownership, occupancy and age as requirements for an applicant seeking the senior citizen exemption. Thus, "[t]he real property owned and occupied as the primary place of abode by a resident (1) 65 years of age or older...is exempt from taxation...."[140]

The regulation does not create an exception to this rule. The regulation's statement that reimbursement for the exemption will be made regardless of whether the property is owned by the husband, the wife, or both is predicated on that person first being eligible. Thus, "[w]hen an *eligible person* and his or her spouse occupy the same permanent place of abode, the reimbursement...applies, regardless of whether the property is held in the name of the husband, wife, or both."[141] In the case of Mr. Traber and Mr. Snider, there is no eligible person in the first place. Mr. Traber is the owner but is not over 65. Mr. Snyder is over 65 but is not the owner. Neither the statute nor the regulation entitles Mr. Traber or Mr. Snider to claim an exemption.

The trial court's misunderstanding of basic facts is also evident in a misstatement about the assessment standards. At page 21 of the decision, the court said, "the Alaska Association of Assessing Officers (AAAO)...suggests that AAC 135.085(a)

---

138 As stated above, it was actually Mr. Traber who was the sole owner, but he was not over 65, during the relevant time periods, while Mr. Snider was well over 65 but had no ownership interest in the real property. Exc. 8-9.

139 Exc. 78-80.

140 AS 29.45.030(e).

141 3 AAC 135.085(a) (emphasis added).

(sic) allows a married applicant to obtain the full tax exemption even if his or her spouse owns the property", citing to standard 1. (b).[142] However, what that standard actually says is,

> The standard for the determination of the exemption when partial property ownership exists is that the exemption is equal to only the percent of property ownership of the *eligible* applicant. The first exception to this standard is when an *eligible* applicant and his or her spouse own the same permanent place of abode, the exemption applies to the entire value of the property irrespective of that percentage of ownership of the applicant.[143]

The exception to the standard, like the regulation itself, is premised on the existence of an eligible applicant, i.e. one who owns and occupies the property in question as well as meeting all other requirements. In fact, the standard says that the first exception applies "when an *eligible applicant and his or her spouse own* the same permanent place of abode."[144] And, it sets forth a limited exception to the rule that, "a partial ownership should result in only a partial exemption."[145] In other words, the standard says the opposite of what the judge thought it said. It ties eligibility to ownership and requires apportionment except when eligible applicants *own* properties with their spouses.[146]

---

142 Exc. 79.

143 Exc. 32 (emphasis added).

144 *Id.,* (emphasis added).

145 *Id.*

146 Other basic misunderstandings underlie the decision. For example, in his discussion about how to interpret the language in 3 AAC 135.085, the court said, "the legislature intended the exemption to apply" even when an applicant spouse does not own or partially own the property. Exc. 80. In fact, like all regulations, 3 AAC 135.085 was adopted by an executive branch agency, not the legislature. AS 44.62.020 *et seq.*

B. The Trial Court Misapplied the Statute and Regulation

In deciding that Mr. Traber would be eligible to claim the exemption if he could marry Mr. Snider, the trial court misapplied both the controlling statute and the regulation. As shown above, ownership is a prerequisite to eligibility for an applicant who is over 65. By holding that a senior who does not own the property may, nevertheless, be eligible, the court has essentially overturned the statutory ownership requirement. Likewise, the court has redefined what "eligibility" means under the statute and regulation. In each case, the court's ruling is contrary to the longstanding application of these terms by the State Assessor's Office.

State Assessor Steve Van Sant explained that the guidance his office has supplied on administration of the tax exemption is contained within the Alaska Association of Assessing Officers standards discussed above.[147] Likewise, the Municipality of Anchorage verified that exemptions are not granted unless applicants meet the ownership, occupancy and other requirements in AS 29.45.030(e), and that apportionment is applied in cases where the property is owned and/or occupied by another resident except for a legal spouse or minor child.[148]

One of the trial court's rationales for severing property ownership from exemption eligibility was the conclusion that, "the plaintiffs have produced records that the Municipality has granted the full exemption to a couple when the non-eligible spouse

---

147 Exc. 20-21 and 24.

148 Exc. 38-39 and 42.

solely owned the couple's shared home."[149] However, it does not matter that the challengers' attorneys located a single instance that they interpret as proof that the Municipality did not tie eligibility to ownership.[150] Their interpretation is incorrect, or, at least, it is unreasonable given the documents submitted. The first paragraph in the application provided in support of their argument explicitly states that the applicant must be an owner of the subject property.[151] The application was signed under penalty of perjury and certifies that the husband who supposedly did not own the property did, in fact, own it.[152] While a separate record seems to indicate that the non-eligible wife owned the property, the application's certification that the otherwise eligible husband has an ownership interest meets the statutory requirements.[153] The Municipality was entitled to rely on the assertion of ownership in the application in deciding to grant the exemption.[154] Moreover, even if the property was solely owned by the otherwise non-eligible spouse and the exemption was improperly granted, a mistake does not justify an incorrect legal interpretation.[155] Rather, the proper course is for the mistake to be corrected.

---

149 Exc. 79.

150 Exc. 52 and 79.

151 "Upon initial application the owner must have been a resident of the State.... Additionally, in each subsequent year the property must be owned and occupied as the primary residence...." Exc. 55.

152 *Id.*

153 Many ownership interests go unrecorded, but that does not change the fact that, as between conveyor and conveyee, a valid ownership interest is passed. AS 34.15.010 and *Morency v. Floyd*, 2 Alaska 194 (1904).

154 In its interrogatory responses, the Municipality certified that it bases its decisions on eligibility on the criteria set forth in AS 29.45.030(e). Exc. 42.

155 *Municipality of Anchorage v. Gallion,* 944 P.2d 436, 441 (Alaska 1997) (holding that a claimant has no right to an agency's mistaken application of a statutory provision).

C. The Trial Court Violated Basic Property Law Principles

The trial court's grant of an exemption to one who has no property interest violates basic property law principles. Tax liability derives from ownership, as does a tax exemption.[156] So, the right to claim a tax exemption is part of the "bundle of rights" that comprises real property ownership.[157] The trial court cited no precedents for the revolutionary leap allowing a property tax exemption to one who merely occupies, rather than owns, the subject property, and the State has located none.

D. The Trial Court Ignored Principles of Legislative Interpretation and Administrative Law

Every word in a statute is presumed to have been deliberately chosen and is to be read as having meaning.[158] The statute says that the subject property must be "owned *and* occupied" by the resident who is 65 years of age and older.[159] Here, the word "and" is to be interpreted as requiring both of the terms it connects.[160] The trial court's reading ignores this rule of statutory construction, as well as the ordinary rules of grammar.

---

156 *Sisters of Providence in Washington, Inc. v. Municipality of Anchorage*, 672 P.2d at 450-52. (Owner's use of property for profit negated tax exemption claimed by lessee.)

157 *See, Gillis v. Aleutians East Borough*, 258 P.3d 118, 124 n.30 (Alaska 2011) (Ownership is defined as the "bundle of rights" allowing one to use, manage and enjoy property.)

158 *Rubey v. Alaska Comm'n on Postsecondary Educ.,* 217 P.3d. 413, 416 n.9 (Alaska 2009); *Homer Elec. Ass'n v. Towsley,* 841 P.2d 1042, 1045 (Alaska 1992).

159 AS 29.45.030(e) (emphasis added).

160 *Employment Security Comm'n v. Wilson*, 461 P.2d 425, 428-29, especially n.6 (Alaska 1969) (ordinary rules of grammar apply in construing statutes, "and" is to be interpreted as requiring all items in list).

Also, an interpretive regulation must be consistent with its authorizing statute.[161] Thus, a regulation cannot delete or excuse a statutory requirement. Yet, here, the trial court concluded that 3 AAC 135.085 "clearly extends the Tax Exemption to eligible applicants who share a home with their spouse, but do not own the home" even though the court had previously recognized that "the statute applies to 'real property owned and occupied' by an eligible applicant."[162] This conclusion violates the above principle of regulatory law by concluding that the regulation excuses a requirement that the statute requires.

Because the statute requires ownership for eligibility, the regulation would be *ultra vires*, and therefor void, if it excused the ownership requirement.[163] Yet, regulations that have been codified are presumptively valid.[164] Nowhere does the trial court recognize the disconnection between this presumption of legal and procedural validity and the implication in the ruling that the regulation is inconsistent with the statute. So, another basic principle of administrative law, the presumption of validity, has also been ignored. This is especially critical because the ruling negates the agency's own interpretation of the statute and regulation. As shown above, the State Assessor affirmed that his office interprets the statute and regulation as precluding eligibility for Mr. Snider because ownership is a necessary element of that eligibility.[165] Courts are to give

---

161 AS 44.62.020 and .030; *Kelley v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971).
162 Exc. 78.
163 AS 44.62.020 and .030.
164 *Grunert v. State,* 109 P.3d 924, 937 (Alaska 2005), (Carpeneti, J., dissenting). *Interior Alaska Airboat Ass'n v. State,* 18 P.3d 686, 689 (Alaska 2001).
165 Exc. 48.

deference to contemporaneous agency interpretation of their controlling statutes and regulations when such interpretations fall within the agency's expertise and are reasonable.[166] For all of the reasons given above, the trial court's ruling that Messrs. Traber and Snider are eligible for the exemption should be reversed.

III. The Court Erred in Awarding Attorney Fees for Work That was Duplicative, and in an Amount That is Unreasonable and Excessive

For all of the reasons given above, the trial court's judgment in favor of the taxpayers challenging AS 29.45.030(e) and 3 AAC 135.085 should be reversed. In that event, the taxpayers would not be prevailing parties and the award of costs and fees to them should also be reversed. However, if the judgment is not reversed, this Court should reduce the $135,475.50 award of attorney fees to the taxpayers because it is based on work that is excessive and duplicative.[167] The award is inconsistent with the taxpayers' position, maintained from the inception of this litigation, that this case is exactly like the *ACLU*[168] case so that all the trial court needed to do was to track that ruling. It is excessive because, in the *ACLU* case, this Court awarded attorneys' fees of $60,000.00 for 300 hours of work at $200 an hour.[169] In making that award, this Court considered the complexity of the issues and the previous briefing of similar issues in the superior court and concluded that a full reasonable fee should not exceed $60,000. So, if this case is exactly like the first *ACLU* case, the complexity of the issues and the necessary briefing

---

166 *Wilber v. Commercial Fisheries Entry Comm'n,* 187 P.3d 460, 465 (Alaska 2008) (quoting *Rose v. Commercial Fisheries Entry Comm'n,* 647 P.2d 154, 161 (Alaska 1982)).

167 Exc. 133.

168 *ACLU*, 122 P.3d 781.

169 R. 521.

should have been less than in the previous case because the previous case established the legal framework. In fact, the case below primarily involved briefing for summary judgment motions. There was little discovery and no trial. The taxpayers' arguments were based on the arguments made in the previous *ACLU* case. Therefore, they should recover an amount that is no greater than that awarded for the briefing in that case.

Furthermore, the circumstances of this lawsuit do not support an award of attorney fees for seven attorneys, several of whom appear to have been largely duplicating or reviewing work done by others. For example, Mr. Oesting's participation in the summary judgment briefing seems to have been largely as a reviewer, having spent approximately 17 hours reviewing other attorneys work on summary judgment pleadings and strategy.[170] Leslie Cooper spent approximately 5 hours reviewing and revising the same documents.[171] Mr. Leishman appears to have spent about 22 hours going over the same documents.[172] Mr. Stenson says he spent about 9 hours also going over the summary judgment filings, not counting the research he did in preparation for seeking summary judgment.[173] Mr. Derry spent at least 43 hours, not including research, on the same filings.[174] Zana Bugaighis apparently spent over 60 hours working on the summary judgment filings, not including research.[175] And Ms. Francis spent roughly 33 hours

---

170 Exc.101-103.
171 Exc. 106.
172 Exc. 111-113.
173 Exc. 117.
174 Exc. 122.
175 Exc. 125-127.

working on the summary judgment filings, not including research.[176] In short, apparently a great deal of the over 189 man-hours claimed for the summary judgment filings, not even including research, were devoted to revising and rewriting other peoples' work in a case that, it was asserted, should simply follow an existing decision. Similar duplication among these seven is obvious in looking at the time claimed for drafting and reviewing discovery requests. A trial court should consider objections raised regarding allegedly duplicative and otherwise unreasonable attorney's fees and should then actually review challenged fees for reasonableness.[177] Nothing in the record indicates that the trial court did so here. The fee award should be overturned on that basis, alone.

Further, Mr. Oesting's rate of $435.00 is excessive for this case. Although Mr. Oesting's affidavit establishes him as a seasoned trial attorney who gained national recognition for his work in the Exxon Valdez litigation, this case did not involve a trial. Mr. Leishman's rate of $380.00 an hour and Ms. Cooper's rate of $305.00 are also excessive and, as shown above, their work is duplicative. Again, if this case is exactly like a case the ACLU had already litigated, there is nothing in any of the affidavits to establish the need for six attorneys in addition to the Alaska ACLU counsel. The State of Alaska was represented by only two attorneys and the Municipality of Anchorage was represented by one.

In light of the above facts the trial court's award of the full fees sought by the taxpayers was an abuse of discretion. There are no extraordinary circumstances which

---

176 Exc. 130-131.

177 *Armstrong v. Tanaka*, 228 P.3d 79, 86 (Alaska 2010).

justify such an exorbitant award of fees. If the award is not reversed, it should be significantly reduced. As a benchmark, the State suggests the $60,000 award this Court found to be reasonable in the previous *ACLU* case.

Conclusion

The Court should reverse the judgment of the trial court and enter judgment in favor of the State, finding that AS 29.45.030(e) and 3 AAC 135.085 do not violate equal protection.

DATED at Anchorage, Alaska this 7th day of March, 2012.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: _____ for

Kevin M. Saxby
Senior Assistant Attorney General
Alaska Bar No. 8611132
State of Alaska, Dept. of Law
1031 W 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100