IN THE SUPREME COURT OF THE STATE OF ALASKA

The State of Alaska, and
The Municipality of Anchorage,

Appellants,

v.

Julie Schmidt, Gayle Schuh, Julie Vollick, Susan Bernard, Fred Traber, and Laurence Snider,

Appellees.

Supreme Court Case **No. S-14521**

Superior Court Case # **3AN-10-0519-CI**

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

BRIEF OF APPELLEES

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By:_________________________

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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 3. Civil Rights
No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section.

Article I
Section 22. Right of Privacy
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

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

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.

Section 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.

Anchorage Municipal Code

12.15.015 - Real property exemptions.

A. *Applications for exemptions.* The municipal assessor or designee shall grant or deny applications for exemptions.

B. *Definitions.* For purposes of this section **12.15.015** only, the following words are defined as:

Real property shall include a mobile home, regardless of the classification of a mobile home as personal or real property elsewhere in this Code.

Primary residence and *permanent place of abode* shall mean a dwelling in which the person resides at least 185 days in the year prior to the exemption year and when absent, the dwelling is not leased or rented to another.

Resident shall mean a person who has a fixed habitation in the State of Alaska for at least 185 days per calendar year, and when absent, intends to return to the State of Alaska.

C. Strict enforcement of deadlines to file an exemption application and annual certification.

1. Properties qualifying for an exemption under this section must be owned and in use on January 1 of the applicable tax year. There shall be no proration of taxes under this section.

2. A written application for real property exemption under this section, including required documentation, must be received by the assessor no later than March **15** of the tax year in which the exemption is requested.

3. If an exemption has been approved, and there is no change in ownership or use, the owner of record may qualify annually for the exemption in successive tax years by providing annual certification to the assessor that the exempt use of the property remains consistent with the use described in the approved application.

4. Annual certification shall be in the form prescribed by the assessor, and received by the assessor by no later than March **15** of the current tax year, or the exemption expires and a new application is required.

a. For a disabled veteran exemption, see section **12.15.015** D.2., below.

b. Annual certification is not required for residential real property exemption if there is no change in ownership, residency or permanent place of abode.

c. For a nonprofit religious, charitable, cemetery, hospital or educational exemption, see section **12.15.015** D.3 below.

5. The deadline for filing an application for exemption, filing an annual certification, requesting an administrative review from the assessor, and filing an appeal to court, shall be strictly enforced and shall not be waived.

6. If the assessor determines a property is not eligible for an exemption, all taxes, penalty, and interest due for all tax years beginning the year the property should have been subject to taxation shall be due and owing.

7. No exemption shall be available under this section if the real property has been conveyed to the person or organization seeking the exemption for the primary purpose of obtaining the exemption.

D. *State exemptions.*

1. *Senior exemption.* The first $150,000.00 of assessed value of real property is exempt from taxation if it has been owned and occupied as the primary residence and permanent place of abode of an eligible applicant prior to January 1 of the exemption year. To qualify for exemption:

a. Upon initial application, the applicant must have been a resident of the State of Alaska for the entire year prior to the exemption year; and

b. In each subsequent year the property must be owned and occupied as the primary residence and permanent place of abode for at least 185 days prior to January 1 of the exemption year. The applicant must be:

i. A resident who has reached the age of 65 prior to January 1 of the year for which the exemption applies; or

ii. A resident who has reached the age of 60 prior to January 1 of the year for which the exemption applies and is also a widow or widower of a person who qualified to receive a senior tax exemption under this subsection in a previous assessment year.

c. Only one exemption under section D. may be granted for any residence in any assessment year.

i. If two or more persons are eligible for an exemption for the same residence, it is the responsibility of the parties to determine who is to receive the benefit of the exemption.

d. If the property is occupied by a person other than the eligible applicant and the applicant's spouse and minor children, this exemption applies only to the portion of the property occupied by the eligible applicant and the applicant's spouse and minor children as primary residence and permanent place of abode.

e. A qualified senior citizen need not file an application for successive tax years if there is no change in ownership, in residency or permanent place of abode, or other factor affecting qualification for the exemption.

i. The assessor may require written proof under this section at any time.

ii. It shall be the responsibility of every person who obtains an exemption under this section to notify the assessor of any change in ownership, property use, residency, permanent place of abode or other factor affecting qualification for the exemption.

f. The assessor may waive, up to and including May **15** of the current tax year, the claimant's failure to make timely application for exemption under this subsection for that year and accept the application as timely filed where a serious medical condition of the applicant, or a member of the applicant's immediate family, causes the applicant to miss the deadline.

i. For the purposes of waiver of claimant's failure to make timely application under this subsection, the chief financial officer is authorized to grant a waiver after denial by the assessor.

2. *Disabled veteran exemption.* The first $150,000.00 of assessed value of real property is exempt from taxation if it has been owned and occupied as the primary residence and permanent place of abode of an eligible applicant prior to January 1 of the exemption year. To qualify for exemption:

a. Upon initial application the applicant must have been a resident of the State of Alaska for the entire year prior to the exemption year; and

b. In each subsequent year the property must be owned and occupied as the primary residence and permanent place of abode for at least 185 days prior to January 1 of the exemption year; and

c. Prior to January 1 of the exemption year:

i. Separated from the Military Service of the United States under conditions which are not dishonorable and whose disability was incurred or aggravated in the line of duty in Military Service of the United States, and whose disability is rated as 50 percent or more by the branch of service in which that person served or by the U.S. Department of Veterans Affairs; or

ii. Served in the Alaska Territorial Guard, whose disability was incurred or aggravated in the line of duty while serving in the Alaska Territorial Guard, and whose disability is rated as 50 percent or more.

d. A widow or widower of a person qualified for a disabled veteran tax exemption in a previous assessment year shall be deemed eligible to apply if the widow or widower is a resident who timely meets the residency, ownership and occupancy requirements applicable to the exemption for a disabled veteran prior to January 1 of the year for which the exemption applies.

e. Only one exemption under section D. may be granted for any residence in any assessment year.

i. If two or more persons are eligible for an exemption for the same residence, it is the responsibility of the parties to determine who is to receive the benefit of the exemption.

f. If the property is occupied by a person other than the eligible applicant and their spouse and minor children, this exemption applies only to the portion of the property occupied by the eligible applicant and their spouse and minor children as primary residence and permanent place of abode.

g. After a disabled veteran exemption is granted, an application for successive tax years is not required if there is no change in ownership, in residency or permanent place of abode, status of disability, or other factor affecting qualification for the exemption.

i. A disabled veteran who has less than a permanent disability may submit an official disability percentage letter each year prior to March **15**.

ii. The assessor may require written proof or an updated letter on the official disability percentage on a case-by-case basis under this section at any time.

iii. It shall be the responsibility of every person who obtains an exemption under this section to notify the assessor of any change in ownership, property use, residency, permanent place of abode, status of disability or other factor affecting qualification for the exemption.

iv. Failure to timely notify the assessor within 30 days of a change in the official disability percentage determination affecting qualification for the exemption is a violation of code and a violation of the public trust. Upon the assessor's determination that a disabled veteran who has less than a permanent disability did not timely report a change in the status of disability, the exemption shall be nullified and deemed denied retroactively for every year in which an annual official disability percentage letter was not submitted by the disabled veteran verifying eligibility for the exemption. This remedy is in addition to all penalty and enforcement provisions applicable under 1.45.010

h. If the final disability rating required for exemption under this subsection is not determined until after the period of timely filing for exemption has expired, the assessor may waive the claimant's failure to make timely application and accept the application as timely filed for a prior calendar year, only if the applicant files the application for exemption with the assessor within 30 days of applicant's receipt of the final disability rating.

i. For the purposes of waiver of claimant's failure to make timely application under this subsection, the chief financial officer is authorized to grant a waiver after denial by the assessor.

3. *Nonprofit religious, charitable, cemetery, hospital or educational exemption.*

a. Property used exclusively for nonprofit religious, charitable, cemetery, hospital or educational purposes is exempt from taxation under this chapter for the calendar year in which application is timely filed, if the assessor or designee determines the application demonstrates the property qualifies for exemption under Alaska Statutes.

b. The applicant organization shall provide the following information to the assessor or designee to support a determination of exempt status:

i. The articles of incorporation.

ii. Documentation to support the organization's not-for-profit status (e.g., 1RS § 501(c)(3) determination letter, or equivalent).

iii. Description of the use of the property and consistency with the requested exemption.

iv. Contracts of any type describing or memorializing use of the property by a person or entity other than the applicant organization.

v. Description of any remuneration received by the applicant organization including:

(1) Any property, or portion of property, from which rentals or income are derived.

(2) Actual operating expenses, excluding debt service or depreciation.

vi. Where property is leased by the organization to other entities, financial statements for the past tax year including income and expense reports, and description of any debt service or depreciation included in the financial statements for the property.

vii. For property used for an educational purpose, the detail of course curriculum and classroom space.

viii. For property used as a religious residence, the detail of the resident's ordination, commission or license (according to the standards of the religious organization), and proof of resident's employment by the religious organization as its minister.

c. The municipal assessor or designee may request additional information prior to its determination, as reasonably necessary to determine the exempt status of a property in accordance with municipal code and regulations and state law.

d. Annual certification and reporting requirements.

1. All change of ownership or use shall be reported to the assessor within 30 days of the change.

2. Unless specifically requested in the discretion of the assessor for audit, cause, annual or routine review, annual certification is not required after an exemption has been approved under this subsection D.3 for property used exclusively for nonprofit religious, charitable, cemetery, or educational purposes, if there is no change in ownership or use.

3. Hospital property approved for exemption requires annual certification.

E. *Municipal exemptions.*

1. *Residential real property exemption.* Ten percent of the assessed value of residential real property, up to a maximum of $20,000.00 of assessed value, shall be exempt from property taxation if:

a. Upon initial application, the eligible applicant must have been a resident of the State of Alaska for the entire year prior to the exemption year; and

b. The property has been owned and occupied as the primary residence and permanent place of abode of an eligible applicant for at least 185 days in the year prior to January 1 of the exemption year.

c. In each subsequent year, the property shall be owned and occupied as the primary residence and permanent place of abode of the eligible applicant for at least 185 days in the year prior to January 1 of the exemption year.

d. The residential real property exemption may be combined, in whole or in part, with an exemption provided in subsection **12.15.015** D. above.

e. An owner-occupied unit in a multi-family housing structure is eligible for the exemption as long as the structure is used as the eligible applicant's primary residence and permanent place of abode for at least 185 days in the year prior to January 1 of the exemption year.

f. Only the owner of record shall file the application for an exemption under this section.

g. An appeal of a decision by the assessor to deny a residential real property exemption is not subject to administrative review. An appeal from denial of a residential real property exemption shall be filed with the Superior Court, Third Judicial District, Alaska.

i. Only the owner of record may appeal an exemption denial under this subsection; and

ii. An appeal must be filed within 30 days of receipt of written notice from the assessor of such denial.

h. The deadline for filing an application for the residential real property exemption shall be strictly enforced and cannot be waived.

2. *Community purpose exemption.* In order to qualify for a community purpose exemption:

a. An applicant shall be duly organized for not-for-profit; and

b. The organization's property is used exclusively for community purposes; and

c. Any income derived from rental of property shall not exceed the actual cost to the owner of the use by the renter.

d. Community purpose property is:

i. Property dedicated to use by the general public and provides a benefit to the community as a whole; or

ii. Vacant land owned by a single nonprofit organization exclusively for uses which qualify for exemption under AS 29.45.030.

(1) Vacant land qualifies for an exemption only if it is placed in use within two years from January 1 of the first tax year for which an application is filed.

(a) Any vacant land which initially qualifies for an exemption under this section, but which is not placed in use within two years from January 1 of the first tax year, for which an application is filed, shall be subject to taxation in each tax year, retroactive to the first tax year for which the exemption was granted.

(2) No single organization shall receive more than four (4) exempt parcels, and the exemption for any one (1) parcel shall not exceed the average assessed value of a single, similarly zoned property, as determined by the assessor on an annual basis.

(3) The assessed value of ail vacant land for which the taxpayer claims this exemption shall be aggregated with the assessed value of all other vacant land for which another claims this exemption and in which the taxpayer has any ownership or effective controlling interest of any kind, either direct or indirect, and regardless of whether such interest is legal, equitable, prospective, anticipatory, future, contingent or not in writing.

e. Actual costs are costs necessary for operating expenses, excluding only debt service or depreciation.

f. To determine the exempt status of property under this subsection, the applicant organization shall provide the following information to the assessor or designee:

i. The articles of incorporation.

ii. Documentation to support the organization's not-for-profit status (i.e., IRS § 501(c)(3) determination letter, or equivalent).

iii. Description of the use of the property and consistency with the requested exemption.

iv. Contracts of any type describing or memorializing use of the property by a person or entity other than the applicant organization.

v. Description of any remuneration received by the applicant organization including:

(1) Any property, or portion of property, from which rentals or income are derived.

(2) Actual operating expenses, excluding only debt service or depreciation.

vi. Financial statements for the past tax year including income and expense reports, and description of any debt service or depreciation included in the financial statements for the property.

vii. Under this subsection, there shall be no proration of taxes for exemptions. Properties qualifying for an exemption shall be in use under the exempt purpose as of January 1 of the year for which the exemption is granted.

viii. The municipal assessor or designee may request additional information prior to its determination, as reasonably necessary to determine the exempt status of a property in accordance with Municipal Code and regulations and state law.

F. *Administrative review of denial of exemption.*

1. If an application for exemption under this section **12.15.015** is denied, the assessor or designee shall state the reason for the denial in written notice to the owner of record.

2. A denial by the designee is subject to administrative review by the assessor if written request from the owner of record is received by the assessor no later than 30 days after the denial.

3. Only an owner of record may request administrative review of the denial of an exemption.

4. For purposes of computing time, the date of mailing the written notice shall be deemed the date of the denial and the government postmark date shall be deemed the date of receipt by the assessor of the request for administrative review.

G. *Judicial appeal of denial of exemption.*

1. Only the owner of record may appeal a decision by the assessor to deny an exemption under this section to the Superior Court, Third Judicial District, Alaska.

2. An appeal of the assessor's denial of an application for exemption under this section **12.15.015** must be filed with the Superior Court within 30 days of the assessor's denial.

3. For purposes of computing time, the date of mailing by the assessor, as shown by the U.S. Postal Service postmark, shall be deemed the date of the assessor's denial.

(AO No. 86-211(S-1); AO No. 88-158; AO No. 92-56; AO No. 94-228(S-2), § 1, 2-7-95; AO No. 95-199, § 1, 1-1-96; AO No. 97-146, § 1, 1-1-98; AO No. 2003-149, § 1, 11-4-03; AO No. 2008-18, § 1, 2-12-08; AO No. 2009-133(S-1), § 2, 1-12-10; AO No. 2011-16, § 2, 2-1-11; AO No. 2011-37(S), § 1, 4-12-11; AO No. 2011-108(S), § 1, 11-22-11, retro eff. 1-1-10)

Editor's note—

Section 2 of AO No. 2011-108(S), passed November 22, 2011, states this ordinance shall be retroactive as of January 1, 2010 upon passage and approval by the assembly.

State law reference— *AS 29.45.050(b)(A); AS 29.45.030(e).*

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the superior court correctly conclude that the Marriage Amendment, Alaska Const. art. I, § 25, does not bar Plaintiffs' claims because the Amendment speaks only to the definition of marriage, not to the benefits of marriage, as this Court held in *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005)?

2. Did the superior court correctly hold that the Senior Citizen and Disabled Veteran Tax Exemption found in AS 29.45.030(e), 3 AAC 135.085, and the State and Municipality's policy implementing those provisions (collectively the "Tax Exemption"), violates Alaska's Equal Protection clause because:

(a) same-sex domestic partners and married couples are similarly situated;

(b) the Tax Exemption classifies people by their marital status, not their type of property ownership;

(c) the Tax Exemption facially discriminates on the basis of sexual orientation by permitting spouses (a status that same-sex couples cannot attain) to receive the full exemption, regardless of percent of occupation or who holds title, while limiting all same-sex domestic partners to half the exemption, at most, and depriving some same-sex domestic partners of any exemption; and

(d) the Tax Exemption fails minimal scrutiny under the sliding-scale test because the inability of same-sex domestic partners to obtain the full benefit available to married couples economically burdens same-sex domestic partners, and because limiting the full benefit to married couples does not bear a fair and substantial relation to legitimate government interests in administrative efficiency, cost control, or promoting marriage?

4. Even if the Tax Exemption survived minimal scrutiny, would it nevertheless be unconstitutional under heightened scrutiny?

5. Did the superior court correctly hold that Plaintiffs Fred W. Traber and Laurence Snider would be eligible for the Tax Exemption but for the spousal limitation, because its implementing regulation provides that the exemption is available when an applicant and his or her spouse occupy the same permanent home, regardless of who holds title?

6. Did the superior court correctly find that the fee rates and hours that Plaintiffs claimed were reasonable, and that Plaintiffs are "public interest litigants" under AS 09.60.010(c), justifying the fee award under AS 09.60.010(c) and Alaska Rule of Civil Procedure 82?

II. STATEMENT OF THE CASE

Defendants the State of Alaska and the Municipality of Anchorage offer a Senior Citizen and Disabled Veteran Property Tax Exemption to married couples when at least one spouse is a senior citizen or qualifying disabled veteran. But the State and Municipality do not offer the same full Tax Exemption to same-sex domestic partners – treating them as if they were mere roommates occupying shared spaces, rather than as couples who, like spouses, have committed to share their lives together. All opposite-sex adult couples may marry and thereby become eligible for the full Tax Exemption. No same-sex couple can become eligible for the full Tax Exemption, however, because same-sex couples cannot marry in Alaska. The spousal limitation in the Tax Exemption results in Defendants treating same-sex couples in committed, interdependent domestic

partners relationships differently than it treats married couples.

In *Alaska Civil Liberties Union v. State* ("*ACLU*"), 122 P.3d 781 (Alaska 2005), this Court held that denying to public employees with same-sex domestic partners the benefits available married employees with spouses facially discriminates against same-sex domestic partners and violates Alaska's Equal Protection Clause by failing to meet even the most minimal scrutiny. In this case, Plaintiffs Julie Schmidt, Gayle Schuh, Julie Vollick, Susan Bernard, Fred Traber, and Laurence Snider cannot receive the full benefit of the Tax Exemption *because of* their same-sex domestic partnerships, unlike opposite-sex married couples. The State's justifications for the spousal limitation in the Tax Exemption mirror those the defendants in *ACLU* presented and this Court rejected. *ACLU* governs this case and compels the conclusion that the spousal limitation in the Tax Exemption offends Alaska's Equal Protection Clause. The Court should affirm the superior court's grant of summary judgment and its award of attorneys' fees to Plaintiffs.

A. Statement of Facts

1. Plaintiffs' Same-Sex Domestic Partnerships

a. Julie Schmidt and Gayle Schuh

Plaintiffs Julie Schmidt and Gayle Schuh are over sixty-nine and sixty-four years old, respectively, and have lived together in a long-term, committed, interdependent, intimate relationship for thirty-four years and intend their relationship to be permanent.[1] Schmidt and Schuh support one another physically, emotionally, and financially, and

[1] Exc. 5-6.

share joint finances.[2] In 2007, Schmidt and Schuh were married in Vancouver, Canada.[3] Schuh and Schmidt, who have lived in Alaska since 2003, jointly purchased their house in Eagle River in 2006.[4]

b. Julie Vollick and Susan Bernard

When Plaintiffs filed the lawsuit and their motion for partial summary judgment, Vollick and Bernard had lived together in a long-term, committed, interdependent, intimate relationship for seven years, and intended for their relationship to be permanent.[5] Vollick and Bernard supported one another and their four children (two each from previous relationships) physically, emotionally, and financially, and shared their joint finances.[6] They have lived in Alaska for over fifteen and seven years, respectively.[7] After briefing closed on the parties' summary judgment motions but shortly before oral argument, Vollick and Bernard separated.[8]

Vollick retired from the United States Air Force after twenty years of service, including in the Middle East, during which time she endured injuries in the line of duty.[9] The Department of Veterans Affairs has classified her as 70% permanently disabled.[10] In

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[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 7.
[6] *Id.*
[7] *Id.*
[8] The State and Municipality have never taken the position that Vollick and Bernard lack standing to pursue their claim for declaratory relief based on their prior application for the Tax Exemption.
[9] Exc. 7-8.
[10] *Id.*

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2004, Vollick and Bernard jointly purchased their house in Eagle River.[11]

c. Fred Traber and Laurence Snider

Fred Traber and Laurence Snider are over sixty-three and seventy-one, respectively, and have lived together in a long-term, committed, interdependent, intimate relationship for thirty years, and intend their relationship to be permanent.[12] Traber and Snider support one another physically, emotionally, and financially, and share joint finances.[13] Snider is a beneficiary of Traber's benefits from his 15 years of employment with the Municipality.[14] Traber and Snider married in California in 2008, and held a 200-person reception in Alaska.[15] Traber and Snider have been residents of Alaska since 1975 and 1974, respectively.[16] They live in a condominium in Anchorage.[17] The condominium is held in Traber's name, but the couple has made the condominium their home together, and both view the home as belonging to both of them.[18] The condominium has an assessed value exceeding $150,000.[19]

2. The State Requires the Municipality to Implement the Tax Exemption to Benefit Senior Citizens and Disabled Veterans.

The State mandates the Tax Exemption in AS 29.45.030(e), which creates a state-

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[11] *Id.* at 7.
[12] *Id.* at 8.
[13] *Id.*
[14] *Id. at 8-9.*
[15] *Id.* at 9.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 9-10.
[19] *Id.* at 9.

wide partial exemption to municipal property taxes.[20] AS 29.45.030(e) provides, in relevant part, that: "The real property owned and occupied as the primary residence and permanent place of abode by a (1) resident 65 years of age or older; (2) disabled veteran; . . . , is exempt from taxation for the first $150,000 of assessed value."[21] The value of the Tax Exemption depends on the value of the home and the local property tax rate.

3. The State and Municipality Have Adopted a Spousal Limitation on Couples Who May Receive the Full Tax Exemption.

Statutory language that limits a benefit to spouses creates a "spousal limitation."[22] 3 AAC 135.085, which sets forth the eligibility requirements for the Tax Exemption, contains a spousal limitation. 3 AAC 135.085(c) provides: "If property is occupied by a person ***other*** than the eligible applicant and his or her ***spouse***, an exemption, to be eligible for reimbursement, applies ***only*** to the portion of the property permanently occupied by the eligible applicant and his or her spouse as a place of abode."[23]

In addition, under 3 AAC 135.085(a), married couples may obtain the full Tax Exemption "regardless of whether the property is held in the name of the husband, wife, or both." The Alaska Association of Assessing Officers' Standard on Procedural Issues for the Application of the Senior Citizen / Disabled Veteran Property Tax Exemption Program (the "Standard") guides local governments on administering the Tax

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[20] *See* AS 29.45.030; Anchorage Municipal Code ("AMC") 12.15.015.D; Exc. 135-151 (Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 6-7, 9)).
[21] AS 29.45.030(i) defines "disabled veteran" to mean a person who, among other criteria, is no longer in military service, not dishonorably discharged, and a resident of the State of Alaska, and who incurred or aggravated a disability "in the line of duty" that a qualifying branch of service or department has rated as 50% or more.
[22] *See ACLU*, 122 P.3d at 784 n.4.
[23] 3 AAC 135.085(c) (emphasis added).

Exemption.[24] Consistent with 3 AAC 135.085(a), the Standard explains that "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."[25] As a result, an eligible applicant who lives with his or her spouse may receive the full Tax Exemption, while an eligible applicant who lives with someone other than a spouse may receive only a portion of the Tax Exemption.[26] The statute also permits municipalities to grant the Tax Exemption to a "resident at least 60 years old who is the widow or widower of a person who qualified for an exemption" as a senior citizen or disabled veteran.[27]

The Municipality has adopted this spousal limitation in its ordinance, AMC 12.15.015.[28] In addition, the Municipality's application form states that the "[a]pplicant must own and occupy the property."[29] As with the regulation and ordinance, the application form provides that:

> If property is occupied by anyone other than the eligible applicant, his or her spouse, and minor children, the exemption applies only to the portion of the property permanently occupied by the eligible applicant, his or her spouse, and minor children as a permanent place of abode.[30]

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[24] Exc. 16-17, 26-36.
[25] *Id.* at 32 (emphasis added).
[26] *Id.* 135-161 (Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 4, 6-7, 9); *id.* ¶ 3, Ex. B (MOA Interr. Nos. 3, 15)).
[27] AS 29.45.030(e).
[28] *See* AMC 12.15.015.D.1.d. (senior citizens); AMC 12.15.015.D.2.f. (disabled veterans).
[29] Exc. 171-173 (Schmidt Decl. ¶ 2, Ex. A (p. 2)). Applicants seeking the Tax Exemption must complete a form. *See* 3 AAC 135.020.
[30] *Id.* 171-777 (Schmidt Decl. ¶ 2, Ex. A); (Vollick Decl. ¶ 2, Ex. A (same)).

Further, if "occupancy [is] shared with someone ***other*** than [the applicant's] spouse and/or minor children," the applicant must specify the "***percent*** of the home [the non-spouse] occup[ies]."[31] And the Municipality's form states: "If ownership [of the home] is shared with someone ***other*** than your ***spouse***, list your ***percent*** of ownership."[32]

4. Under the State and Municipality's Policy, "Spouse" Excludes Same-Sex Domestic Partners.

The State has admitted that State Assessor Steve Van Sant provides guidance to local assessors on how to apply 3 AAC 135.085(c) to an applicant with a same-sex domestic partner.[33] According to the State, Mr. Van Sant advises local assessors that "since Alaska statute and the constitution define marriage as between a man and a woman, the term [spouse] as used in 3 AAC 135.085 does not apply to persons not meeting that definition."[34] Thus, the State instructs municipalities that a person in a same-sex domestic partnership may receive an exemption on the portion of property the applicant owns and occupies only – i.e., no more than 50% of a home shared with a same-sex domestic partner.[35] The Municipality has conceded that "[p]ursuant to 3 AAC 135.085, AS 29.45.030(e) and AMC 12.15.015D.1.d. and D.2.f., "if a person other than a spouse or minor child resides in the home, the exemption applies only to that portion occupied by the eligible owner."[36] This Court has interpreted "spouse" to refer to a

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[31] *Id.*
[32] *Id.*
[33] *Id.* 135-151 (Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 6-7, 9)).
[34] *Id.*
[35] *Id.*
[36] *Id.* 130-136, 152-162 (Derry Decl. ¶ 3, Ex. B (MOA Interr. No. 3)).

married partner and to exclude a same-sex domestic partner.[37]

The State mandates the Tax Exemption, which contains a spousal limitation. The Municipality applies the Tax Exemption, including the spousal limitation, at the State's behest and according to Defendants' policy that the term "spouse" excludes same-sex domestic partners.[38]

5. The Plaintiff Couples Qualify for the Full Exemption But Because of Their Relationships, Cannot Obtain It.

At least one partner in each of the plaintiff couples qualifies for the Tax Exemption, yet the couples cannot obtain the full Exemption because of their same-sex domestic partnerships. For instance, Schmidt qualifies for the Tax Exemption because she is over 65 and a full-time Alaska resident.[39] For the 2010 tax year, Schmidt and Schuh's home exceeded $150,000 in value but not $300,000.[40] Because Alaska law does not recognize Schuh as Schmidt's "spouse," Schmidt had to state in her application that she shares her home – in title and possession – with a non-spouse.[41] Schmidt and Schuh share and own their home equally, so Schmidt stated that Schuh owns and occupies 50% of the home.[42] Schmidt would have been able to claim the value of the entire property

[37] *ACLU*, 122 P.3d at 788-89.
[38] In the context of municipal damages liability, the United States Supreme Court has held that even in the absence of an official policy or a custom, "an unconstitutional government policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *see also Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978).
[39] Exc. 6.
[40] *Id.* at 5-6, 49.
[41] *Id.* at 6, 171-173 (Schmidt Decl. ¶ 2, Ex. A).
[42] *Id.* at 171-173 (Schmidt Decl. ¶ 2, Ex. A).

had Schuh qualified as a "spouse" under Alaska law. Because Alaska law does not recognize Schmidt and Schuh's marriage, Schmidt has not received the full Exemption.[43] The State admits that "if Plaintiffs Schmidt and Schuh were married, they would pay roughly $359.31 less in property taxes."[44]

Likewise, Vollick qualifies for the Tax Exemption because she is a full-time Alaska resident and a disabled veteran.[45] In 2010, the assessed value of the home Vollick and Bernard jointly owned exceeded $150,000.00 but not $300,000.[46] Because Alaska law does not recognize Bernard as Vollick's "spouse," Vollick had to state in her application that Bernard owned and occupied 50% of their home.[47] Because of the spousal limitation, Vollick did not receive the full Tax Exemption available to couples with a marriage Alaska recognizes.[48] According to the State, "if Plaintiffs Vollick and Bernard were married, they would pay roughly $528.76 less in property taxes."[49]

Finally, although Snider qualifies as a senior citizen because he is over 65 and a full-time resident of Alaska, Defendants deny him the Tax Exemption because the home he shares with his domestic partner, Traber, is held in Traber's name.[50] Because Alaska does not recognize Snider and Traber's marriage, Snider has not been able to apply for

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[43] *Id.* at 7, 49, 172 (Schmidt Decl. ¶ 3).
[44] *Id.* at 48-49.
[45] *Id.* at 8.
[46] *Id.* at 8, 50.
[47] *Id.* at 8; Exc. 175-177 (Vollick Decl. ¶ 2, Ex. A).
[48] *Id.* at 8, 48, 50.
[49] *Id.* at 48, 50.
[50] *Id.* at 9-10.

the Tax Exemption.[51] None of the plaintiff couples can become eligible for the full Tax Exemption because they cannot marry or have their marriages recognized under Alaska law.[52]

B. Statement of Proceedings

Plaintiffs Schmidt, Schuh, Vollick, and Bernard filed a motion for partial summary judgment, asking the Court to declare unconstitutional the spousal limitation in the Tax Exemption.[53] Plaintiffs argued the Tax Exemption (a) violates Alaska's Equal Protection Clause, Alaska Const. art. I, § 1, because it treats similarly situated couples differently and facially discriminates against same-sex domestic partners; (b) violates Plaintiffs' liberty and privacy rights under Alaska Const. art. I, §§ 1, 22, because it penalizes Plaintiffs for living in same-sex domestic partnerships; and (c) violates Plaintiffs' right to be free from sex discrimination under Alaska Const. art. I, § 3, because it denies each Plaintiff the full Exemption based on her sex and that of her partner.[54] Plaintiffs urged the Court to apply heightened scrutiny to the spousal limitation, but also showed that it cannot meet minimal scrutiny. The State filed a cross-motion for summary judgment on the claims of all three couples, in which the Municipality joined.[55]

The superior court granted summary judgment for all Plaintiffs, concluding the "Tax Exemption violates Alaska's equal protection clause because it disparately burdens

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[51] *Id.*
[52] Alaska Const. art. I, § 25; AS 25.05.011; AS 25.05.013.
[53] Exc. 59-60. Plaintiffs Traber and Snider did not join in the motion because Defendants had asserted unique defenses to their claims.
[54] *Id.*
[55] *See id.* at 78-80.

similarly situated taxpayers."[56] The superior court also granted Plaintiffs' request for reasonable attorneys' fees under Alaska Rule of Civil Procedure 82 and for public interest litigant fees under AS 09.60.010(c).[57] Defendants appeal the superior court's grant of summary judgment and fee award to Plaintiffs.

III. STANDARDS OF REVIEW

This Court reviews the superior court's grant of summary judgment de novo.[58] The interpretation of constitutional, statutory, and regulatory provisions presents questions of law over which this Court exercises independent judgment.[59] Similarly, what level of scrutiny applies to a constitutional challenge to a discriminatory statute presents a legal question.[60] In reviewing legal questions, this Court "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[61]

This Court reviews a "superior court's determination of a litigant's public interest status for abuse of discretion."[62] This Court "will overturn an award of attorney's fees if there was an abuse of discretion or if the award is manifestly unreasonable."[63]

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[56] *Id.* at 60.
[57] *Id.* at 132-134.
[58] *ACLU*, 122 P.3d at 785.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Alaska R.R. Corp. v. Native Vill.*, 142 P.3d 1192, 1197-98 (Alaska 2006).
[63] *Id.* at 1198 (affirming award); *see also State, Commercial Fisheries Entry Comm'n v. Carlson*, 270 P.3d 755, 760 (Alaska 2012) (Rule 82 attorney's fee awards reviewed for abuse of discretion; court reverses only if award is "arbitrary, capricious, manifestly unreasonable, or [if it] stemmed from improper motive" (quoting *Wagner v. Wagner*, 183 P.3d 1265, 1266-67 (Alaska 2008))).

IV. ARGUMENT

A. The Superior Court Correctly Concluded the Marriage Amendment Does Not Bar Plaintiffs' Claims.

The superior court concluded that the Marriage Amendment does not bar Plaintiffs' claims because the Amendment speaks to the definition of marriage, not the benefits afforded married couples.[64] The Marriage Amendment states that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman."[65] The Amendment says nothing about tax exemptions or benefits of any kind.[66] Plaintiffs did not challenge the Marriage Amendment. Instead, Plaintiffs asked the superior court to declare that the spousal limitation in the Tax Exemption violates Alaska's Equal Protection Clause because it treats same-sex domestic partners unequally from married couples without constitutionally sufficient justification.[67]

The State, however, argues that by concluding that Alaska's Equal Protection Clause requires the government to treat same-sex domestic partners and married couples equally for purposes of the Tax Exemption, the court "nullified" the Marriage Amendment.[68] This Court rejected the same argument in *ACLU*:

> Because the public employers' benefits programs could be amended to include unmarried same-sex domestic partners without offending the Marriage Amendment, that amendment does not foreclose plaintiffs' equal protection claims here. That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the

[64] Exc. at 68-69.
[65] Alaska Const. art. I, § 25.
[66] *Id.*
[67] *Id.* at 59-60.
[68] State's Br. at 22.

> government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them.[69]

Similarly, the State could amend the Tax Exemption to provide the full Exemption to same-sex domestic partners without offending the Marriage Amendment.[70]

The State contends that AS 25.05.013, which provides that "a same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage," prohibits the State and Municipality from treating same-sex domestic partners equally with married couples for purposes of the Tax Exemption.[71] According to the State, because this Court did not invalidate AS 25.05.013 in *ACLU*, the statute is presumptively constitutional.[72] Yet constitutional provisions (like the Equal Protection Clause) trump statutory ones.[73] AS 25.05.013 cannot acquire constitutional dimension because of the Marriage Amendment, and it cannot supersede or supplant the constitutional right to equal protection.[74] And as the superior court explained, the legislature chose ***not*** to incorporate the language of AS 25.05.013 into the Marriage

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[69] *ACLU*, 122 P.3d at 786-87.
[70] *See, e.g.,* Nev. Rev. Stat. § 122A.010 *et seq.* & Nev. Const. Art. 1, § 21 (statute granting benefits to same-sex couples notwithstanding state constitutional marriage amendment); O.R.S. § 106.300, *et seq.* & Or. Const., Art. XV, § 5a (same); CA FAM § 297, *et seq.* & Calif. Const., Art. 1, § 7.5 (same); *see also Strauss v. Horton*, 207 P.3d 48, 75-76 (Cal. 2009) (marriage amendment does not preclude official recognition of same-sex couples' relationships through domestic partnership law).
[71] State's Br. at 22.
[72] *Id.* at 22-23.
[73] *See Reid v. Covert*, 354 U.S. 1, 15-18 (1957).
[74] *See ACLU*, 122 P.3d at 787 ("The state equal protection clause cannot override more specific provisions in the Alaska Constitution.").

Amendment.[75] Courts will not read language into a statute that the legislature has not expressly chosen to include.[76]

B. The Superior Court Correctly Concluded the Tax Exemption Violates Equal Protection.

Article I, section 1, of the Alaska Constitution guarantees equal protection, providing that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[77] This Court has "long recognized that the Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."[78] Indeed, Alaska's Equal Protection Clause "guarantees not only equal 'protection,' but also equal 'rights' and 'opportunities' under the law."[79]

1. The Superior Court Correctly Concluded that *ACLU* Governs.

In *ACLU*, this Court held that the State and the Municipality of Anchorage's policy of offering employee benefits to the spouses of public employees while denying those benefits to the same-sex domestic partners of public employees violated Alaska's Equal Protection Clause.[80] In so doing, the Court determined that same-sex domestic partners and married couples are similarly situated; the spousal limitation on benefits facially discriminated against same-sex domestic partners; and the government's

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[75] Exc. 68; Alaska Const. art. I, § 25. .
[76] *See Nickels v. Napolilli*, 29 P.3d 242, 253 (Alaska 2001).
[77] *Malabed v. N. Slope Borough*, 70 P.3d 416, 419 (Alaska 2003).
[78] *Id.* at 420 (borough's hiring preference unconstitutionally discriminated on basis of race or political classification).
[79] *ACLU*, 122 P.3d at 785.
[80] *Id.* at 783.

legitimate interests in cost control, administrative efficiency, and promoting marriage were not fairly and substantially related to excluding same-sex domestic partners from public employee benefits.[81]

The Tax Exemption here suffers the same constitutional infirmities, as discussed more fully below at pages 32-39. The State has admitted that the spousal limitation in the Tax Exemption results in disparate treatment for similarly situated persons – same-sex domestic partners and married couples.[82] Like the spousal limitation on public employee benefits at issue in *ACLU*, the Tax Exemption facially discriminates against same-sex domestic partners.[83] And as in *ACLU*, ***none*** of the purported interests the State presents to this Court – in cost control, administrative efficiency, and promoting marriage – bears a fair and substantial relation to denying the full exemption to same-sex domestic partners.[84]

Attempting to avoid application of *ACLU* to this case, the State argues that this Court limited its holding in *ACLU* to government-as-employer situations.[85] It argues this is so because in *ACLU*, the Court explained that since the government was acting as an employer, the "marital preferences would have difficulty meeting the means-to-end fit

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[81] *Id.* at 787-93.
[82] Exc. 48 (¶¶ 6-7).
[83] 3 AAC 135.085(a), (c).
[84] In the court below, the State also argued that the Tax Exemption's spousal limitation served the government's interest in ensuring senior citizens and disabled veterans can remain in their homes. *See* State's Cross Mot. for S.J. at 20-21. But the State necessarily conceded that providing the full Tax Exemption to same-sex domestic partners would ***advance*** its interest in ensuring that more senior citizens and disabled veterans could remain in their homes. *Id.* at 22; Exc. 89-90.
[85] *See* State's Br. at 24-25, 34-35.

requirement unless they had a fair and substantial relationship *to the governments' roles as public employers*."[86] But that statement merely recognizes the unremarkable fact that the context of the government's conduct in any particular case factors into the equal protection analysis.[87] It does not support the State's argument that equal protection principles apply with less force whenever the government does not act as an employer. Nor does it support the State's suggestion that the Court in *ACLU* invoked a different level of scrutiny than the State believes it should here. The Court in *ACLU* viewed the government action as "affecting an economic interest" and applied minimal scrutiny—the lowest level of scrutiny available.[88]

The State also claims that *ACLU* does not apply outside the public employment context because the Court in that case noted that when the government acts as an employer, the government must also comply with the "constitutional principles guaranteeing Alaskans 'the rewards of their own industry' and requiring public employment be based on merit."[89] But again, the State points to nothing in *ACLU* limiting the Court's Equal Protection analysis to government-as-employer situations. Indeed, the Court did not mention this additional constitutional provision until after it had analyzed and rejected the State's asserted justifications for its discriminatory benefits policy. In other words, the Court did not rely on the guarantee of "the rewards of [one's]

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[86] *Id.* at 34 (quoting *ACLU*, 122 P.3d at 794) (emphasis added in State's brief).
[87] *See ACLU*, 122 P.3d at 794.
[88] *See id.* at 790-91.
[89] State's Br. at 34 (quoting *ACLU*, 122 P.3d at 794).

own industry" in dismissing the State's rationales for the spousal limitation.[90] To the contrary, the Court in *ACLU* analyzed the spousal limitation in the governments' public employee benefits programs under ordinary equal protection minimal scrutiny principles.[91]

2. The Superior Court Correctly Concluded that Same-Sex Domestic Partners and Married Couples Are Similarly Situated.

"A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently."[92] This Court recognized in *ACLU* that same-sex domestic partners are similarly situated to married couples.[93] In particular, the Court wrote: "Many same-sex couples are no doubt just as 'truly closely related' and 'closely connected' as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so."[94] Likewise, Alaska's domestic partnership statute defines a "domestic partner" as "a person who is cohabiting with another person in a relationship that is like a marriage but that is not a legal marriage."[95]

As the superior court correctly recognized,[96] the Plaintiff couples here are similarly situated to married couples because they have been in committed, long-term,

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[90] *See ACLU*, 122 P.3d at 790-94.
[91] *See id.* at 788-94.
[92] *Id.* at 787.
[93] *Id.* at 788.
[94] *Id.* at 791.
[95] AS 39.50.200.
[96] Exc. 69-71.

same-sex domestic partnerships that are like marriages.[97] They have cared for and supported each other, built and shared homes together, and combined finances.[98] Their relationships are like those of committed opposite-sex couples in every way except that they cannot marry under Alaska law. Alaska law recognizes these similarities between same-sex domestic partners and married couples.[99] Indeed, Schmidt and Schuh, and Snider and Traber stand in a particularly compelling position because they have chosen to marry (in places that permit same-sex marriage), demonstrating the seriousness of their commitment.[100]

Moreover, the Tax Exemption treats similarly situated groups – same-sex domestic partners and opposite-sex couples – differently.[101] In *ACLU*, this Court held that when a law contains a spousal limitation preventing same-sex domestic partners from receiving a benefit an opposite-sex partner could receive if married, the law treats similarly situated groups – committed same-sex domestic partners and opposite-sex couples – differently.[102] As the Court explained:

> Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage

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[97] *Id.* at 5-9, 171 (Schmidt Decl. ¶ 1).
[98] *Id.* at 5-9.
[99] *ACLU*, 122 P.3d at 787-88, 791.
[100] Exc. at 6, 9.
[101] *Id.* at 69.
[102] *ACLU*, 122 P.3d at 788.

performed elsewhere recognized in Alaska.[103]

Thus, the Court concluded that the benefits policies "treat[ed] same-sex couples differently from opposite-sex couples."[104]

As with the discriminatory benefits policies at issue in *ACLU*, the Tax Exemption treats committed same-sex domestic partners differently from opposite-sex couples. First, an applicant in a same-sex domestic partnership, unlike a married applicant, must state the percentage of the home she owns and that her same-sex domestic partner (non-spouse) occupies.[105] As a result, the eligible applicant can only claim the Tax Exemption on a portion of her home.[106] Second, an applicant in a same-sex domestic partnership who qualifies for the Tax Exemption but does not hold title to the property cannot apply for the Exemption, even though a married spouse could under the same circumstances.[107] Because the eligible applicant cannot legally marry the applicant's same-sex domestic partner or enter into a marriage Alaska law recognizes, he or she cannot claim the full Tax Exemption in the first situation, and he or she cannot claim the Tax Exemption at all

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[103] *Id.* at 787 (rejecting argument the policies "differentiate[d] on the basis of marital status" only) (emphasis added).

[104] *Id* at 788. Other courts have held likewise. *See, e.g.*, *Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (denying health care benefits to domestic partners of public employees "unquestionably" imposed different treatment on same-sex couples by "mak[ing] benefits available on terms that are a legal impossibility for gay and lesbian couples"; statute enjoined), *aff'd* 656 F.3d 1008 (9th Cir. 2011); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 442-43, 447 (Or. App. 1998) (denying employment benefits to domestic partners of employees disparately impacted same-sex couples because same-sex couples could not marry under Oregon law; statute enjoined).

[105] Exc. 171-173, 175-177 (Schmidt Decl. ¶ 2, Ex. A; Vollick Decl. ¶ 2, Ex. A).

[106] 3 AAC 135.085(c); Exc. 136, 141-144, 154-155, 160-161 (Derry Decl. ¶ 2, Ex. A (State Supp. Interr. Nos. 3, 6-7, 9); *id.* ¶ 3, Ex. B (MOA Interr. Nos. 3, 15)).

[107] Exc. 32, 51-58.

in the second.[108] By contrast, committed opposite-sex couples can marry and thus, can obtain the full Tax Exemption in either scenario.[109] Thus, the Tax Exemption treats committed same-sex domestic partners differently from opposite-sex couples.

The State argues that same-sex domestic partners and married couples are not similarly situated because only married couples can own property by tenancy in the entirety, while unmarried couples must own property as tenants in common.[110] According to the State, the Tax Exemption distinguishes among people based on type of property ownership.[111] The State's arguments fail for at least three reasons.

First, as the superior court recognized, the Tax Exemption explicitly classifies people based on spousal status, not based on type of property ownership. The statute, regulation, and Standard do not mention tenancy by the entirety, tenancy in common, or any other type of common law property ownership.[112] If the legislature wanted to differentiate based on property ownership type, it could have done so. It did not.

Second, married couples receive the full Tax Exemption regardless how they hold their property – as tenants in the entirety or as tenants in common.[113] For instance, "[w]hen 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

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[108] *See* Alaska Const. art. I, § 25; AS 25.05.011; AS 25.05.013; 3 AAC 135.085(c); *ACLU*, 122 P.3d at 788.
[109] *See ACLU*, 122 P.3d at 788; Exc. 51-58.
[110] State's Br. at 17-25, 36-37.
[111] *Id.* at 19-21.
[112] AS 29.45.030(e); 3 AAC 135.085(a), (c); Exc. 32.
[113] 3 AAC 135.085(a). *See* AS 34.15.110(b) (married couples hold property as tenants by the entirety unless they choose otherwise); *Atlas Assur. Co. of Am. v. Mistic*, 822 P.2d 897, 898 (Alaska 1991) (married couple owned "house jointly as tenants in common").

the property is held in the name of the husband, wife, or both."[114] Put simply, the State's regulation contemplates situations in which a municipality will grant an exemption to a married couple that does ***not*** own property in a tenancy by the entirety.[115]

Likewise, the Standard that provides guidance to the Municipality states:

> The first exception to this standard [of determining the exemption based on percent of property ownership of applicant] 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.[116]

Because in a tenancy by the entirety each party owns the entirety of the property,[117] the "percentage of ownership" issue is relevant only if married couples hold property as tenants in common. Even in those instances, however, the State's regulation, the Standard, and Defendants' policy for applying the Tax Exemption mandate that married tenants in common receive the full Tax Exemption.[118] The State's effort to write the spousal limitation out of the Tax Exemption and to write a type of property ownership distinction into the statute lacks merit, and this Court should reject it.[119]

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[114] 3 AAC 135.085(a) (emphasis added).
[115] *Id.*
[116] Exc. 32 (emphasis added).
[117] *United States v. Craft*, 535 U.S. 274, 280-81 (2002).
[118] 3 AAC 135.085(a); Exc. 32.
[119] The State claims it "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." State's Br. at 21 n.75. The State already had the opportunity to develop this record; it did not. *See Harvey v. Cook*, 172 P.3d 794, 802 n.45 (Alaska 2007) ("failure to offer evidence on issue in trial court waives issue for purposes of appeal"). And the record that does exist shows that the type of property ownership has nothing to do with how the Municipality applies the Tax Exemption. No evidence was produced showing that either defendant had a policy of inquiring into the type of property

Third, only married couples can own property as tenants in the entirety in Alaska,[120] and joint tenancy does not exist. Unmarried persons who jointly own property necessarily do so as tenants in common.[121] This means that a couple in a committed, same-sex domestic partnership that wishes to co-own their home cannot own property as tenants in the entirety, but rather only as tenants in common, with an undivided one-half interest in the property to each owner. Thus, even if the State's "type-of-ownership-interest" argument had any merit, which it does not, it still fails for the same fundamental reasons as the arguments of the defendants in *ACLU* – the Plaintiff couples here "are absolutely denied any opportunity to obtain these benefits, because [they] are barred by law from marrying their same-sex partners in Alaska," and thus, they are also barred from holding property as tenants in the entirety.[122]

The State also argues that same-sex domestic partners and married couples are not similarly situated because Alaska law has granted certain rights and imposes certain obligations on spouses, and the Marriage Amendment reserves marriage to opposite-sex

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ownership in enforcing the Exemption. *See* Exc. 136, 156 (Derry Decl. ¶ 3, Ex. B (MOA Interr. No. 6)).

[120] AS 34.15.130 (providing that only married couples may jointly own real property with a right of survivorship); AS 34.15.110(a) (unmarried couples hold property as tenants in common; married couples presumptively hold as tenants in the entirety). *See also Craft*, 535 U.S. at 280 ("A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons."). Nevertheless, married couples may choose to – and do – opt out of this ownership interest for various reasons. *See, e.g.*, *Gottstein v. Kraft*, No. 6664, slip op. (Alaska Apr. 13, 2012) (married couple owned home as tenants in common to avoid risk of lawsuits against attorney-husband).

[121] *See* AS 34.15.110(a).

[122] *ACLU*, 122 P.3d at 788; AS 34.15.130; AS 34.15.110.

couples.[123] According to the State, these laws evidence that same-sex domestic partners and married couples are not similarly situated.[124] But if that were the case, the Court would have had to find the plaintiff couples in *ACLU* not similarly situated, for the same distinctions applied there too.[125] And the Court in *ACLU* rejected the municipality's argument that "because the Marriage Amendment sanctions the marriage relationship," it also sanctions unlawful discrimination.[126]

In any event, the ***other*** ways in which Alaska law may treat married couples differently from unmarried ones are not before this Court. The only issue before this Court is whether same-sex domestic partners and opposite-sex couples are similarly situated for purposes of applying the Senior Citizen and Disabled Veteran Tax Exemption.[127] Under *ACLU*, the superior court correctly concluded that same-sex domestic partners and married couples are similarly situated because same-sex domestic partners make comparable financial and emotional commitments to each other, including buying and sharing a home, yet only opposite-sex couples can marry and thus, obtain the full Tax Exemption.[128] Indeed, the State has admitted that if Plaintiffs Schmidt and Schuh or Vollick and Bernard were married, their households would have paid several

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[123] State's Br. at 17-22.
[124] *Id.*
[125] *See ACLU*, 122 P.3d at 785-88.
[126] *See id.* at 793 ("[T]he marriage relationship sanctioned by the amendment cannot justify unequal treatment unless the means relate to the purpose. No one has suggested that the Marriage Amendment would permit the municipality to double the pay of only its married employees or permit it to hire only married persons.").
[127] *Id.* at 788.
[128] Exc. 71, 5-9, 135-136, 143-144, 154-155 (Derry Decl., Ex. A, State's Supp. Response to Interr. Nos. 6, 7; Ex. B, Municipality's Response to Interr. No. 3); Alaska Const. art I, § 25; 3 AAC 135.085(a), (c).

hundreds of dollars less in property taxes.[129]

3. The Court Correctly Concluded that the Tax Exemption Facially Discriminates Against Same-Sex Domestic Partners.

Under Alaska equal protection law, a plaintiff need not demonstrate discriminatory intent if the challenged law is facially discriminatory.[130] "When a 'law by its own terms classifies persons for different treatment,'" the law is facially discriminatory.[131] In *ACLU*, this Court concluded that policies limiting public employee benefits to "spouses" are facially discriminatory.[132] The Court reasoned:

> Alaska's definition of the legal status of "marriage" (and, hence, who can be a "spouse") excludes same-sex couples. By restricting the availability of benefits to "spouses," the benefits programs "by [their] own terms classif[y]" same-sex couples "for different treatment."[133]

The Court further explained that "because of the legal definition of 'marriage,' the partner of a homosexual employee can never be legally considered as that employee's 'spouse' and hence, can never become eligible for benefits."[134]

Here, the superior court correctly held that the Tax Exemption facially discriminates against same-sex domestic partners. The statute itself expressly refers to spouses and widows, statuses that only members of opposite-sex couples can achieve under Alaska law, and Defendants' policies limits the full Tax Exemption to married

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[129] Exc. 48 (¶¶ 6-7).
[130] *ACLU*, 122 P.3d at 788 (citing *Hamlyn v. Rock Island County Metro. Mass Transit Dist.*, 986 F.Supp. 1126, 1133 (C.D.Ill. 1997)) (discount transit pass program for people with disabilities explicitly excluded persons with HIV/AIDS).
[131] *Id.* (citation omitted).
[132] *Id.*
[133] *Id.* at 788-89 (citation omitted).
[134] *Id.* at 789.

couples. For instance, AS 29.45.030(e) permits local governments to provide additional exemptions to a "widow or widower," a status only available to partners in an opposite-sex marriage.[135] And the State's regulation, the Municipality's application form, and the Standard,[136] explicitly permit an applicant with partial ownership or occupation to claim the value of the entire property based on the applicant's spousal status.[137] Thus, if the eligible applicant shares ownership and possession of the property with a spouse, she can claim the full Exemption, regardless who holds title or the eligible spouse's percentage of ownership.[138] But if the eligible applicant shares the property with a non-spouse same-sex domestic partner, the applicant can only claim the portion of the property that she – as distinguished from her same-sex partner – owns and occupies.[139] This spousal limitation means that an applicant in a same-sex domestic partnership cannot become eligible for the full Exemption because, unlike unmarried heterosexual couples, her same-sex partner "can never be legally considered as [that applicant's] 'spouse.'"[140] As a result, the Tax Exemption facially discriminates against committed same-sex domestic

[135] Alaska Const. art. I, § 25; *see also* Black's Law Dictionary 1735 (9th ed. 2011) (defining "widow" as "A woman whose husband has died and who has not remarried," and a "widower" as "A man whose wife has died and who has not remarried"). The widow or widower must be a resident and at least 60 years old, and must have been married to a qualifying senior citizen or disabled veteran. AS 29.45.030(e).
[136] *See* Exc. 74-75 (interpreting regulation and statute together).
[137] 3 AAC 135.085(c); AMC 12.15.015.D.1.d & 2.f.; Exc. 171-173, 176-176, 136, 154-155, 160-161 (Schmidt Decl. ¶ 2, Ex. A; Vollick Decl. ¶ 2, Ex. A; Derry Decl. ¶ 3, Ex. B (MOA Interr. Nos. 3, 15)); Exc. 32.
[138] 3 AAC 135.085(c); AMC 12.15.015.D.1.d & 2.f; Exc. 32.
[139] 3 AAC 135.085(c); AMC 12.15.015.D.1.d & 2.f.; Exc. 171-173, 176-176, 136, 154-155, 160-161 (Schmidt Decl. ¶ 2, Ex. A; Vollick Decl. ¶ 2, Ex. A; Derry Decl. ¶ 3, Ex. B (MOA Interr. Nos. 3, 15)).
[140] *ACLU*, 122 P.3d at 789.

partners.[141]

In response, the State contends that Plaintiffs never argued the Tax Exemption facially discriminates on the basis of sexual orientation.[142] But that is precisely what Plaintiffs argued and the superior court found below. The State also complains that the statute's reference to a "widow" is merely "oblique," and the Tax Exemption distinguishes based on type of property ownership – tenancy by the entirety or tenants in common.[143] But as discussed, the Tax Exemption does not so distinguish, nor do Defendants apply the Tax Exemption in a way that distinguishes between those who own property in tenancies by the entirety and those who do not.[144]

The State also suggests that if plaintiffs were to prevail in this case, numerous other Alaska statutes and rules that differentiate on the basis of spousal status would be "unconstitutional."[145] The State's parade of horribles is nothing more than a red herring; those other statutes and rules are not before this Court. The Court should not consider the State's efforts to distract from the only issues presented in this case.[146] In any event, the State's argument overlooks that whether a statute or rule facially discriminates does not end the analysis, it merely triggers the means-to-end fit analysis under Alaska's sliding-

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[141] *Id.*
[142] State's Br. at 13-14.
[143] *Id.* at 11.
[144] *See supra* Part V.B.2; 3 AAC 135.085(a); Exc. 32.
[145] State's Br. at 12-13.
[146] *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 631 (1950) ("Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court.").

scale equal protection test.[147]

Nor does the State's argument based on the Standard advance its position. The State claims that in cases of partial ownership, the Standard instructs local governments to apportion the Tax Exemption according to percentage of ownership.[148] According to the State, this language shows that the "statute and regulation do not discriminate against unmarried co-owners on their faces."[149] Even if the Standard could somehow supplant the plain language of the statute and regulation, which it cannot, the Standard ***also*** invokes the spousal limitation, treating same-sex domestic partners differently than married couples. Specifically, the Standard provides that "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."[150] The plain language of the Standard itself confirms that Defendants' policy is to grant the full exemption to married couples, even if they do not own property as tenants in the entirety.[151]

Because the Tax Exemption contains a spousal limitation restricting the full Exemption to married couples, the superior court correctly concluded the Exemption facially discriminates on the basis of sexual orientation.[152] As a result, a discriminatory

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[147] State's Br. at 13; *ACLU*, 122 P.3d at 789.
[148] State's Br. at 14.
[149] *Id.*
[150] Exc. 32 (emphasis added).
[151] *Id.*
[152] Exc. 73; 3 AAC 135.085(a); AMC 12.15.015.D.1.d. & f; Exc. 32.

intent analysis does not apply.[153]

4. The Superior Court Correctly Concluded that the Tax Exemption Applies to Plaintiffs Traber and Snider.

The Tax Exemption's implementing regulation orders the State to reimburse local governments for the full Exemption granted to a married couple, "regardless of whether the property is held in the name of the husband, wife, or both."[154] Consistent with this regulation, the Standard instructs local governments to provide the full Exemption to married couples "irrespective of that percentage of ownership of the [married] applicant."[155] Under the regulation and Standard, if Traber and Snider were in a marriage Alaska law recognizes, Snider could apply for and receive the Exemption because he is a qualifying senior, "irrespective" of his percentage of ownership and despite the fact that the "property is held in the name of" Traber.[156] The superior court held that, regardless of the Municipality's alleged practice of ignoring these directives in some instances, the "legislature intended the exemption to apply" even where the eligible spouse was not an owner of the property.[157] Given the language of the regulation and Standard, the superior court correctly concluded the Tax Exemption applies to Traber and Snider.

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[153] State's Br. at 15; *ACLU*, 122 P.3d at 788-89 (declining to resolve whether discriminatory intent is an essential element of an equal protection claim because law was facially discriminatory); *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 956 (Alaska 2005) (discriminatory intent is an essential element of an equal protection claim only if the challenged law is facially neutral).
[154] 3 AAC 135.085(a).
[155] Exc. 32.
[156] *Id.*; 3 AAC 135.085(a).
[157] Exc. 80.

On appeal, the State complains that in so concluding, the superior court "[m]isunderstood [w]hat '[e]ligible' [m]eant," misapplied the statute and regulation, and violated basic property laws, and rendered the regulation ultra vires.[158] The State's arguments ignore the record before the court and the court's rationale. The superior court expressly acknowledged that the "statute applies to 'real property owned and occupied' by an eligible applicant."[159] But the superior court also recognized that the regulation, on its face, orders the State to reimburse local governments for the full Exemption provided to married couples, "regardless of whether the property is held in the name of the husband, wife, or both."[160] And the court noted that the Standard likewise instructs local governments to grant the full Exemption to an eligible spouse "irrespective of that percentage of ownership of the applicant."[161] The superior court did not "sever" ownership from eligibility but rather, interpreted the plain language of the regulation, as the law requires it to do.[162] In addition, the superior court recognized that even though the Defendants claim they do not apply the Exemption as the regulation contemplates, the

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[158] State's Br. at 38-45.
[159] Exc. 78.
[160] *Id.* (quoting 3 AAC 135.085(a)). In the superior court, the State argued 3 AAC 135.085 applies only to reimbursements from the State to the municipality. To the extent the State makes the same argument on appeal, the argument fails. The language of 3 AAC 135.085(a) would be meaningless absent an underlying exemption that applies to married couples, "regardless of whether the property is held in the name of the husband, wife, or both." Courts will not interpret statutes in a way that renders words the legislature used meaningless. *See Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 794 (Alaska 1996).
[161] Exc. 79, 32.
[162] *See, e.g.*, *Boyd v. State*, 210 P.3d 1229, 1231 (Alaska 2009) (court interprets regulation by its plain language).

issue here is "the constitutionality" of the Defendants' written policy, including the regulation.[163]

The State also claims the superior court "[v]iolated [b]asic [p]roperty [l]aws" because it held the Tax Exemption applies to Snider even though the home is held in Traber's name.[164] But in holding the Tax Exemption applies to Traber and Snider, the court did not violate "basic principles of property law"; rather, it recognized that for purposes of the Tax Exemption, Defendants treat a senior citizen or disabled veteran spouse as owning 100% of the property, even if he or she does not, and Defendants grant the full Exemption to married couples on that assumption.[165] Indeed, the State spends most of its brief on appeal to this Court explaining why Defendants assume a married applicant owns 100% of the property (i.e., married couples presumptively hold title in a tenancy by the entirety), and goes to great lengths to justify this assumption.[166] The State can hardly complain when the superior court took it (and the regulation) at its word. But more importantly, the State mischaracterizes the superior court's ruling in arguing that the court granted an "exemption to one [Snider] who has no property interests."[167] Quite to the contrary, the superior court correctly recognized that treating same-sex domestic partners who jointly occupy their shared home as having lesser property interests for purposes of the Tax Exemption than married couples do, purely because of their same-

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[163] Exc. 80.
[164] State's Br. at 43.
[165] *See* 3 AAC 135.085(a); Exc. 32, 51-58.
[166] *See* State's Br. at 9-25.
[167] *Id.* at 43.

sex relationship, offends Alaska's Equal Protection Clause. That is all.[168]

5. The Superior Court Correctly Concluded the Tax Exemption Fails Even the Most Minimal Scrutiny.

Because Alaska's Equal Protection Clause affords greater protection than the federal analogue, Alaska courts apply a "more stringent equal protection standard" than do federal courts applying federal law.[169] This "more stringent equal protection standard" involves analyzing equal protection claims under a "three-step, sliding-scale test,"[170] "[i]nstead of using three levels of scrutiny."[171] Under this test, the Court first determines the "weight of the individual interest impaired by the classification; second, [it] examine[s] the importance of the purposes underlying the government's action; and third, [it] evaluate[s] the means employed to further those goals to determine the closeness of the means-to-end fit."[172] And unlike minimal scrutiny under the federal constitution, "Alaska's Equal Protection Clause requires more than just a rational connection between

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[168] *Municipality of Anchorage v. Gallion*, 944 P.2d 436 (Alaska 1997) (*cited in* State's Br. at 42), does not help the State. There, the Court noted that in *Flisock v. State, Div. of Retirement & Benefits*, 818 P.2d 640, 644 n.5 (Alaska 1991), it had held that an employee had the right to statutory benefits when he enrolled in the retirement system but did not have a vested right in an agency's mistaken application of the statutory provision. But here, the State's regulation and the Standard expressly contemplate granting the full Exemption to a senior citizen or disabled veteran spouse, regardless the spouse's percentage of ownership. 3 AAC 135.085(a); Exc. 32.

[169] *Sands N., Inc. v. City of Anchorage*, 537 F. Supp. 2d 1042, 1054 (D. Alaska 2007).

[170] *ACLU*, 122 P.3d at 787 (citation omitted).

[171] State, *Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 629 (Alaska 1993).

[172] *Malabed*, 70 P.3d at 421.

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a classification and a governmental interest; even at the lowest level of scrutiny, ***the connection must be substantial***."[173]

Although Plaintiffs believe, as discussed below, that the Court should analyze their claims under heightened scrutiny, the superior court correctly held that the Tax Exemption fails even minimum scrutiny. "Minimum scrutiny requires a 'fair and substantial relation' between the means (i.e., the classification) and the 'object of the legislation.'"[174] Even "where there is no fundamental right at stake, the equal protection clause of the Alaska Constitution imposes a stricter standard than its federal counterpart."[175] Applying minimum scrutiny, the Court in *ACLU* rejected the only interests the State has identified here – cost control (i.e., ensuring a broad tax base), administrative efficiency, and promoting marriage.[176] The superior court properly concluded these interests do not bear a fair and substantial relation to the means chosen – excluding same-sex domestic partners from the full Tax Exemption available to married couples – and this Court should affirm.

a. Administrative Efficiency.

In *ACLU*, defendants argued that the need to efficiently administer public employee benefits programs justified excluding same-sex couples from equal benefits

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[173] *ACLU*, 122 P.3d at 791 (emphasis added).
[174] *ACLU*, 122 P.3d at 790 (equal protection analysis); *see also Huffman v. State*, 204 P.3d 339, 345-46 (Alaska 2009) (liberty and privacy analysis); *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (civil rights analysis).
[175] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987).
[176] State's Br. at 25-32; *ACLU*, 122 P.3d at 790-94. Because the State did not argue in the superior court that the interest in promoting marriage justifies the discriminatory Tax Exemption, the State has waived that argument on appeal. *See Hoffman Constr. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 355 (Alaska 2001).

eligibility.[177] While this Court viewed the interest as legitimate, it saw no substantial relationship with the law at issue:

> The availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided. We therefore conclude that the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency.[178]

Since the *ACLU* decision, the State and Municipality have determined an administratively workable means to certify relationships for purposes of awarding benefits.[179] And Defendants have failed to present any evidence demonstrating the burden of such a system in the context of tax exemptions beyond baseless and irrelevant conjecture.[180] The State asserts that the administrative efficiency interest "weighs more heavily in this case."[181] But the fact that the Tax Exemption itself relies on sworn statements from spouses contradicts the State's opinion that affidavits or forms may not suffice to verify the legitimacy of a same-sex domestic partnership.[182] Indeed, the State contends that applicants must submit applications under penalty of perjury, and that the Municipality "was entitled to rely on the assertion of ownership in the application in deciding to grant

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[177] *ACLU*, 122 P.3d at 791-92.
[178] *Id.*; *see also see also Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).
[179] State's Br. at 30-31.
[180] The State makes various assertions of fact that are unsupported by the record. *See, e.g.*, *id.* at 30 ("In this case, the starting point is a much larger initial pool [than in *ACLU*]—all potentially eligible real property owners as opposed to identifiable public employees."), 33 ("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.").
[181] State's Br. at 30.
[182] *Id.* at 31.

the exemption."[183]

The State also argues the Court should reverse and uphold the Exemption because the differential in tax payment is "only a few hundred dollars a year," such that the costs of administering the tax exemption to same-sex couples would not justify the constitutional equality that Plaintiffs seek.[184] The Constitution does not give the State a free pass to discriminate so long as the impact is "minor." The State cannot seriously contend, for example, that giving the full Tax Exemption to men only would be constitutionally permissible if the "differential in tax payment" was relatively minor. And a difference of the amount here may be quite substantial to many people, especially disabled veterans and seniors living on a fixed income. The State has offered no evidence to illustrate the potential administrative costs or difficulties of administering the Exemption to same-sex couples. As this Court held in *ACLU*, a court does not conduct a cost benefit analysis of potential remedies once a constitutional violation is found.[185]

b. Cost Control.

This Court concluded in *ACLU* that a discriminatory employment benefits scheme – whose expansion to include same-sex domestic partners posed a potential economic burden on the State – did not pass even minimal scrutiny.[186] In other words, the Court rejected cost control as a justification for the discriminatory policy. That this

[183] State's Br. at 42.
[184] State's Br. at 31, 33, 34.
[185] *See ACLU*, 133 P.3d at 791-792 ("The availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided.").
[186] *ACLU*, 122 P.3d at 790; *see also see also Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).

case involves a Tax Exemption instead of employee benefits does not distinguish it from *ACLU*. The State does not cite any cases supporting its argument that the Court should analyze tax burdens differently than other economic interests. As the superior court determined, tax statutes do not receive special treatment but rather, the same equal protection analysis as other economic interests.[187]

Nor does this case present a question of competing constitutional provisions.[188] Plaintiffs here do not ask the Court to construe the breadth of the Tax Exemption but rather, to declare it spousal limitation unconstitutional because it excludes them on the basis of their sexual orientation. Despite an alleged concern about the tax base, Defendants permit senior citizens and disabled veterans in marriages to claim the entire value of the home (regardless who holds title or the type of property ownership).[189] The State and this Court have recognized that same-sex domestic partnerships are like marriages,[190] and the State does not dispute that extending the Tax Exemption to same-sex domestic partners would further the policy behind the exemption (to keep disabled veterans and seniors in their homes). Because Plaintiffs are similarly situated to other taxpayers who receive the full Exemption (married opposite-sex couples) and treated unequally under the Exemption, extending the Exemption to them does not "'disturb[]' the 'equality' in the tax 'burden,'" but "equalizes it."[191]

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[187] Exc. 83 (citing cases).
[188] State's Br. at 29.
[189] 3 AAC 135.085(a); Exc. 32, 51-58.
[190] *See, e.g.*, AS 39.50.200 ("domestic partner" "means a person who is cohabiting with another person in a relationship that is like a marriage"); *ACLU*, 122 P.3d at 791.
[191] Exc. 85 (citing *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 274 (Alaska 2003)).

As in *ACLU*, the spousal limitation fails to advance the expressed governmental goal of controlling costs by ensuring a broad tax base. Excluding ***any*** group – i.e., all men – from the full Exemption would broaden the tax base. But the State could not, consistent with Alaska's Equal Protection Clause, exclude all men from the Tax Exemption on the basis that doing so would further the interest in broadening the tax base.[192] Indeed, if ensuring the broadest tax base possible were the State's true interest, then the State and Municipality would also deny the full Tax Exemption to married applicants who share their homes as tenants in common with their spouses. The spousal limitation actually contained in the Tax Exemption bears neither a close nor substantial relation to the purported interest in ensuring a broad the tax base. Moreover, "cost savings alone are not sufficient government objectives under [Alaska's] equal protection analysis."[193]

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[192] *See Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 272 (Alaska 1984) ("Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive. Such economizing is justifiable only when effected through independently legitimate distinctions.").

[193] *Herrick's Aero-Auto-Aqua Repair Serv. v. State, Dep't of Transp.*, 754 P.2d 1111, 1114 (Alaska 1988); *see also Diaz*, 656 F.3d at 1014 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)) (same under federal equal protection analysis); *Golinski v. U.S. Office of Personnel Mgmt.*, 2012 WL 569685, at *22 (N.D. Cal. Feb. 22, 2012) (citing *Lyng v. Int'l Union*, 485 U.S. 360, 376-77 (1988) (explaining court's prior cases make "clear that something more than an invocation of the public fisc is necessary to demonstrate the rationality of selecting [one group], rather than some other group, to suffer the burden of cost-cutting legislation")); *Plyler v. Doe*, 457 U.S. 202, 227, 229 (1982) (preserving government resources cannot justify barring some arbitrarily chosen group from a government program).

c. Promotion of Marriage.

The State argues that "providing [Tax Exemption] benefits to homosexual couples does not encourage men and women to marry or stay married."[194] In *ACLU*, this Court rejected the argument that promoting marriage justifies denying same-sex domestic partners benefits provided to married couples. In particular, this Court explained that while providing a benefit to spouses "is directly related to advancing the marriage interest," "restricting eligibility to persons in a status that same-sex domestic partners can never achieve … cannot be said to be related to that interest."[195] As the Court recognized:

> There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not seem to advance any valid reasons for promoting marriage. In short, there is no indication that the programs' challenged aspect – the denial of benefits to all public employees with same-sex domestic partners – has any relationship at all to the interest in promoting marriage.[196]

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[194] State's Br. at 32.
[195] *ACLU*, 122 P.3d at 793.
[196] *Id.*

The Court determined that "making benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage."[197]

That same-sex domestic partners might someday obtain the full Tax Exemption because both may eventually independently qualify for it does not excuse the Tax Exemption from constitutional scrutiny.[198] In arguing otherwise, the State appears to suggest that Plaintiffs, who are in long-term committed same-sex relationships, can cure the discriminatory nature of the Tax Exemption by selecting a different partner, or that the discriminatory effect of the Tax Exemption on them today is acceptable because they might secure the full Exemption at a future date.[199] For Plaintiffs Schmidt and Schuh, and Traber and Snider, the State's alternative would mean the couple must either separate or wait several years, and pay higher taxes than similarly situated married couples in the interim. These are not "options" for Plaintiffs, any more than suggesting in *ACLU* that employees in committed same-sex relationships could choose to marry an opposite-sex individual. In this case, just as in *ACLU*, these rationales do not substantially relate to or justify the Tax Exemption's discrimination against same-sex domestic partners.

6. The Court May Also Affirm the Superior Court's Decision Under a Heightened Scrutiny Analysis.

"[A]s the right asserted becomes 'more fundamental' or the classification scheme

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[197] *Id.*
[198] *Id.*
[199] State's Br. at 35.

employed becomes 'more constitutionally suspect,' the challenged law 'is subjected to more rigorous scrutiny.'"[200] Strict scrutiny applies whenever the government burdens the exercise of fundamental constitutional rights, whether by completely barring the exercise of the right or by penalizing individuals for doing so. Although the superior court invalidated the spousal limitation under minimum scrutiny, rendering discussion of heightened scrutiny unnecessary, this Court may affirm on any ground.[201]

a. The Tax Exemption Unconstitutionally Infringes on Plaintiffs' Liberty and Privacy Interests.

Article I, section 1 of the Alaska Constitution broadly guarantees that "all persons have a natural right to life, liberty, [and] the pursuit of happiness." Article I, section 22 provides a more specific privacy right: "The right of the people to privacy is recognized and shall not be infringed." Each section creates enforceable rights.[202] And each guarantees greater protection than the federal constitution.[203]

The inquiry here is not whether entitlement to the Tax Exemption is a fundamental right, but whether the denial of the full Tax Exemption because plaintiffs are in same-sex domestic partnerships burdens an important interest or fundamental right. The United States Supreme Court has long held that penalizing the exercise of a fundamental right by

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[200] *Pan-Alaska Constr. v. Dep't of Admin. Div. of Gen. Servs.*, 892 P.2d 159, 162 (Alaska 1995) (quotation omitted).
[201] *Spindle v. Sisters of Providence in Wash.*, 61 P.3d 431, 436 (Alaska 2002).
[202] *See Huffman*, 204 P.3d 339, 345-47 (right to make decisions about medical treatments for self and children is fundamental liberty and privacy right).
[203] *See Meyers v. Alaska Psych. Inst.*, 138 P.3d 238, 246 (Alaska 2006) (statutes "permitting nonconsensual treatment with psychotropic medications implicate fundamental liberty and privacy interests"); *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972) (court not obligated to interpret parallel state and federal constitutional provisions coextensively).

withholding a benefit or privilege (including a tax exemption) triggers strict scrutiny; that standard does not arise only when exercise of the right is barred.[204] Similarly, in *Alaska Pacific Assurance Co. v. Brown*,[205] this Court subjected a workers' compensation benefit classification that disadvantaged nonresident workers to heightened scrutiny, even though the classification imposed a direct burden on an economic interest in workers' benefits. There is no fundamental right to workers' benefits, but the Court recognized that the classification imposed an indirect burden on an important interest or fundamental right (the right to travel), concluding that the state therefore bore a "very high" burden to "justify [the] legislation."[206]

Each Plaintiff's right to engage in an intimate, committed same-sex relationship involves the fundamental right of "personal autonomy in relation to choices affecting an individual's personal life."[207] A disproportionate tax burden imposed on those who choose to live with same-sex domestic partners penalize the exercise of their right of

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[204] *See Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating law penalizing veterans who refused to take loyalty oath by denying them tax exemptions); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (invalidating law that conditioned welfare benefits on residency).
[205] 687 P.2d 264 (Alaska 1984)
[206] *Id.* at 273-74; *see also ACLU*, 122 P.3d at 794 (discriminatory policy unconstitutional regardless level of scrutiny).
[207] *See Ravin v. State*, 537 P.2d 494, 500, 503-04 (Alaska 1975) (personal autonomy and privacy in the home); *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 909 (Alaska 2001); *see also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (homosexual persons have constitutionally protected liberty interest in choosing with whom to intimately associate); *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009) (recognizing fundamental right of "personal physical autonomy" under Alaska's liberty and privacy clauses).

intimate association and privacy.[208] As the United States Supreme Court has explained, "any classification which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[209]

b. Classifications Based on Sexual Orientation Are Suspect, Triggering Heightened Scrutiny.

The level of scrutiny for sexual-orientation based classifications remains an open question in Alaska, and no Alaska court has addressed whether gay and lesbian citizens constitute a suspect class under the State's equal protection law. The U.S. Supreme Court has, however, identified "indicia of suspectness," which provide guidance.[210] This indicia includes "a history of purposeful unequal treatment" and "political powerlessness."[211] Other courts have found gay and lesbian citizens constitute a suspect class because they have such "indicia of suspectness" – they are a discrete and insular minority that has endured systematic and invidious discrimination based on sexual orientation.[212] Recognizing this, the United States government now acknowledges that

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[208] *See Witt v. Dep't of Air Force*, 527 F.3d 806, 818-21 (9th Cir. 2008) (applying heightened scrutiny to substantive due process challenge to military's "Don't Ask, Don't Tell" policy); *Ark. Dep't of Human Servs. v. Cole*, 2011 Ark. 145, *19-24 (Ark. 2011) (law barring unmarried cohabiting couples from adopting or fostering children penalized fundamental right to privacy triggering strict scrutiny).

[209] *Shapiro*, 394 U.S. at 634.

[210] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

[211] *Id.*

[212] *See, e.g.*, *In re Marriage Cases*, 43 Cal. 4th 757, 753 (Cal. 2008), *superseded in part by constitutional amendment as recognized in Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Tanner*, 971 P.2d at 447; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 472 (Conn. 2008) (concluding, after carefully analyzing federal and state precedent, that "gay persons are entitled to heightened judicial protection as a suspect class"); *Golinski*, 2012

gay people are a suspect class for equal protection purposes.[213] Indeed, Alaska's Marriage Amendment evidences that gay and lesbian Alaska citizens are politically powerless and face continued discrimination.

c. The Tax Exemption Discriminates on the Basis of Sex.

Article I, section 3 of the Alaska Constitution provides that: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin."[214] In analyzing the constitutionality of sex-based classifications, Alaska courts assess "the purpose of the statute, the legitimacy of that purpose, the means used to accomplish the legislative objective, and 'then determine whether the means chosen substantially further the goals of the enactment.'"[215] Restricting a government benefit to opposite-sex couples constitutes sex-based discrimination.[216] Any argument by the State that classifications based on marriage are not also classifications based on sex because

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WL 569685, at *11-14 (sexual orientation based classifications subject to heightened scrutiny); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009) (believing it "likely that some form of heightened constitutional scrutiny" applies to sexual-orientation-based classification); *Varnum v. Brien*, 763 N.W.2d 862, 895-96 (Iowa 2009) (analyzing U.S. Supreme Court's factors for evaluating level of scrutiny to apply and concluding sexual orientation based classifications trigger intermediate scrutiny).

[213] *See* Attorney General Eric Holder, U.S. Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011 *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[214] Alaska Const. art. I, § 3.

[215] *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (anti-prostitution statute rendering the sale of "the body by a female" "invidiously discriminate[d] against females"; means used lacked "rational justification," but striking "by a female" could rid the statute of constitutional infirmities).

[216] *See Perry v. Schawarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal.) (equal protection challenge to constitutional amendment prohibiting same-sex marriage "is equivalent to a claim of discrimination based on sex"), *aff'd on other grounds* 628 F.3d 1191 (9th Cir. 2011); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *superseded by* Haw. Const. art. I, § 23.

they apply equally to men and women lacks merit. Constitutional rights are individual rights, not class rights.[217] So it does not matter whether the Tax Exemption discriminates equally against men and women in the aggregate. Here, Defendants deny the full Tax Exemption to Ms. Schmidt because of her sex. Because Ms. Schmidt's sex, and the sex of her partner, prevents Ms. Schmidt from marrying her partner under Alaska law, Ms. Schmidt can never obtain the full Tax Exemption.[218] The same is true for Ms. Vollick and Mr. Snider. Thus, this Court should find heightened scrutiny applies.

C. The Superior Court Correctly Found Plaintiffs' Attorneys' Fees Were Reasonable, Justifying the Fee Award.

At the inception of this matter, Plaintiffs attempted to avoid the expenses of litigation by suggesting to the State that *ACLU* controlled this action. The State (and the MOA through its adoption of the State's arguments) instead argued throughout the investigation, pleading, discovery, summary judgment – and now appellate – stages that *ACLU* did not apply to the Tax Exemption, and that Defendants' policies were constitutional. Plaintiffs were forced to vigorously litigate the constitutionality of the Tax Exemption and the applicability of *ACLU.* Ironically, Defendants now urge this Court to reduce the attorneys' fees awardable by mechanically applying the 2008 Supreme Court fee award for the appellate phase of *ACLU.* For the reasons set forth below, Plaintiffs respectfully request that the Court affirm the superior court's attorneys' fees award to Plaintiffs in the amount of $135,465.50:

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[217] *See Shelley v. Kramer*, 334 U.S. 1, 22 (1948).
[218] *See Perry*, 704 F. Supp. 2d 921, 996.

First, Plaintiffs were the prevailing party and can recover attorneys' fees under Rule 82 of the Alaska Rules of Civil Procedure and Alaska law, AS 09.60.030(c)(1).

Second, due to their public litigant status, Plaintiffs are due at least the full billable value of the fees incurred in litigating this matter. Contrary to the Municipality's assertion that the superior court did not require Plaintiffs to show they were public interest litigants,[219] the superior court's Final Judgment specifically denied finding without briefing that Plaintiffs were public interest litigants within the meaning of Alaska Statute 09.60.010.[220] Subsequently, this issue was fully briefed in support of (and in opposition to) Plaintiffs' Motion for Attorneys' fees. The superior court granted Plaintiffs' Motion and awarded fees ***under "Rule 82 of the Alaska Rules of Civil Procedure and AS AS [sic] 09.60.010.***"[221] The superior court explained its award of attorneys' fees by granting those fees under AS 09.60.010.

AS 09.60.010(c) provides that "full reasonable attorney fees and costs" should be awardable to a successful plaintiff who prevails "[i]n a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution of the Constitution of the State of Alaska." Such attorneys' fees and costs are recoverable under the statute where "the claimant did not have sufficient economic inventive to bring the suit, regardless of the constitutional claims involved."[222]

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[219] See MOA Br. at 6-7.
[220] Exc. 93-95 (Final Judgment).
[221] Exc. 132-134 (Order on Attorneys' Fees) (emphasis added).
[222] AS 09.60.010(d). *See also Krone v. State, Dept. of Health and Social Servs.*, 222 P.3d 250, 256-57 (Alaska 2009) (upholding application of subsection (c)(1)); *id.* at 256 n.36

The present case is "a civil action . . . concerning the establishment, protection, or enforcement of a right under" the Alaska Constitution.[223] The Court's opinion, summarily adjudicating this matter in Plaintiffs' favor, was clearly grounded in consideration of the equal protection rights of same-sex couples.[224] Also, Plaintiffs' counsel was retained without any payment from the named Plaintiffs and without any expectation of any contingency fee from an award of damages; damages were not requested. The only expectation for payment ever held by Plaintiffs' counsel was limited to the award of attorney's fees in the event of success.[225] The State has continuously quantified the value of the interest at issue as merely "a few hundred dollars a year" in property taxes, [226] which (even if applied over multiple years) would hardly retain an experienced attorney for more than a few hours. Thus, no complex suit could have been brought on a contingency basis. Undeniably, the Plaintiffs lacked a "sufficient economic incentive to bring this litigation."[227]

Third, the hourly rates and total hours set forth in Plaintiffs' fee petition are appropriate and in any case not "an abuse of discretion or ... manifestly unreasonable."[228]

(declining to decide the validity of subsections (c)(2), (d), or (e), where statute was not passed by two-thirds of the legislature).

[223] AS 09.60.030(c).

[224] Exc. 93-94 (Order at 1-2).

[225] *Wise Mech. Contractors v. Bignell*, 718 P.2d 971, 975 (Alaska 1986).

[226] State's Br. At 31, 33, 34.

[227] *See* AS 09.60.010(d)(2); *Simpson v. Murkowski*, 129 P.3d 435, 447-48 (Alaska 2006) (applying Alaska Civil Rule 82 and AS 09.60.010).

[228] *Alaska R.R. Corp.*, 142 P.3d at 1198 (affirming award); *see also State, Commercial Fisheries Entry Comm'n*, 270 P.3d at 760 (Rule 82 attorney's fee awards reviewed for abuse of discretion; court reverses only if award is "arbitrary, capricious, manifestly unreasonable, or [if it] stemmed from improper motive" (quotation omitted)).

Upon a finding that attorneys' fees are recoverable, the Alaska Supreme Court has approved of the application of a twelve equitable factor test in determining whether a fee award should be adjusted upwards or downwards.[229] "The trial court [has] 'considerable discretion in determining the amount of fees that should be considered reasonable'"[230] and "'[i]t is ... for the trial judge to determine whether too much time was spent by attorneys for the prevailing party or whether too many attorneys were employed.'"[231]

Here, the first factor, the "time and labor required" for this lawsuit was substantial, as evidenced by the affidavits submitted in support of a fee award. The "novelty and difficulty" of the questions presented should also be considered as a strong factor in favor of awarding attorneys' fees here. This case involved not only application of *ACLU*, but the analysis of multiple state constitutional provisions in a developing area of the law and extensive analysis regarding the State and Municipality's policy behind the Tax Exemption and practice and procedures in implementing it.

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[229] These factors include:

> (1) the "time and labor required," (2) the "novelty and difficulty of the questions," (3) the "skill requisite to perform the legal service properly, " (4) the "preclusion of other employment by the attorney due to acceptance of the case," (5) the "customary fee," (6) "[w]hether the fee is fixed or contingent," (7) "[t]ime limitations imposed by the client or the circumstances," (8) the "amount involved and the results obtained," (9) the "experience, reputation, and ability of the attorneys," (10) the "'undesirability' of the case," (11) the "nature and length of the professional relationship with the client," and (12) "[a]wards in similar cases."

See Dep't of Health & Soc. Servs. v. Okuley, 214 P.3d 247, 251 n.13 (Alaska 2009) (citing *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974)).

[230] *Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1260–61 (Alaska 2007).

[231] *Belluomini v. Fred Meyer of Alaska, Inc.*, 993 P.2d 1009, 1017 (Alaska 1999) (quoting *Integrated Res. Equity Corp. v. Fairbanks N. Star Borough*, 799 P.2d 295, 304 (Alaska 1990)).

The State and Municipality argue vaguely that Plaintiffs' counsel have largely "duplicat[ed] or review[ed]" work.[232] However, all hours claimed by Plaintiffs were supported by detailed affidavits and unopposed by competent evidence. The State cannot contest the reasonableness of Plaintiffs' counsel's practice of having junior attorneys research and draft briefing while the senior attorneys direct and revise those efforts. To say that these seasoned attorneys' work is "duplicative" of junior associates is disingenuous. Roger Leishman of Davis Wright Tremaine is an attorney with a prominent history of litigating nationwide on behalf of lesbian, gay, bisexual, and transgender (LGBT) clients. David Oesting, also from Davis Wright Tremaine, was the Court-appointed lead counsel for approximately 30,000 plaintiffs in the litigation arising out of the Exxon Valdez grounding and oil spill.[233] Leslie Cooper, a senior staff attorney with the ACLU's National LGBT and Aids Project has been litigating prominent cases on behalf of LGBT clients for years. Thus, Mr. Oesting, Mr. Leishman, and Ms. Cooper's rates in doing such work are also not unreasonable or excessive. And in light of the extensive expertise, skill, and insight into the law of Plaintiff's counsel as a whole, they were able to litigate this complicated constitutional claim to summary judgment.

Another equitable factor in support of an award of full attorneys' fees in this matter is the time taken to litigate the questions in this matter precluded "other employment by the attorney[s] involved in the action" from taking on more profitable litigation. Mr. Leishman and Mr. Oesting (as well as Ryan Derry, Rebecca Francis, and

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[232] State's Br. at 46; MOA's Br. at 8.

[233] *See In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2008).

Zana Bugaighis) both work for a private firm and ordinarily bill for work at rates far exceeding rates requested in the calculations of attorneys' fees in this matter. In an effort to support pro bono work, this Court should heavily weight the value of the for-profit work foregone by the Plaintiffs' counsel who had no assurance of any payment in the absence of the award of fees. Plaintiffs sought only to be compensated for actual time they have put into the case, which was already heavily edited for duplication.[234] No evidence shows the superior court failed to consider these equitable factors.

Fourth, in *ACLU*, this Court discounted the requested attorneys' fees because the Court found overlap with work done at the trial level. The fees of $60,000 quoted by the State were to be awarded for representation ***on appeal***, not for the underlying trial practice.[235] The issues before the Supreme Court in the appellate fee award in *ACLU* are not those presently before this Court in reviewing the superior court's fee award.

Fifth, the Municipality's "undue hardship" claim was not raised below with affidavits or testimony[236] and the Municipality waived its opportunity to separately bring a motion in the superior court regarding apportionment of the award – an issue on which Plaintiffs have no opinion.

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[234] The hours accounted for herein do not include hours worked by attorneys with lesser involvement in this lawsuit. Moreover, they have been reviewed line-by-line and edited and adjusted downwards to reflect a very bare valuation of the hours and services provided.

[235] *See* State Opp'n, filed Nov. 28, 2011, Ex. A at 3 ["Having considered . . . the extent of briefing or similar issues in the superior court, . . . we conclude that a full reasonable fee should not exceed a total of $60,000, . . ."].

[236] AS 09.60.010(e). Although the Municipality argues "no affidavit or testimony would assist the court," the Municipality had the opportunity and obligation to present ***some*** evidence regarding its request. MOA Br. at 6 n.3. Nevertheless, Plaintiffs would not object if this Court were to remand the issue of apportioning fees between Defendants.

V. CONCLUSION

"It is the duty of the courts 'to define the liberty of all, not to mandate [their] own moral code." *ACLU,* 122 P.3d at 783 (quoting *Lawrence*, 539 U.S. at 559). The superior court correctly held that the spousal limitation included in the Tax Exemption set forth in AS 29.45.030(e), 3 AAC 135.085, and Defendants' implementing policies violates Plaintiffs' constitutional right to equal protection because it facially discriminates against same-sex domestic partners and fails even minimal scrutiny. The Tax Exemption also violates Plaintiffs' constitutional rights to liberty and privacy, and freedom from sex discrimination. This Court should affirm the superior court's grant of summary judgment and its attorneys' fee award to Plaintiffs.

DATED this 9th day of May, 2012

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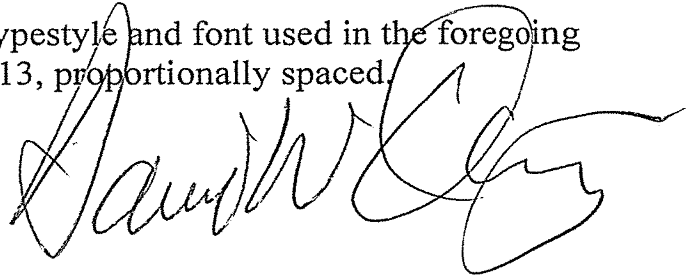
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the typestyle and font used in the foregoing Brief of Appellees is Times New Roman 13, proportionally spaced.



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CERTIFICATE OF SERVICE

I, Janet Eastman, hereby certify that on May 9, 2012, I caused the within BRIEF OF APPELLEES to be served by U.S. Mail, postage paid to the following:

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