IN THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-10459

ALASKA CIVIL LIBERTIES UNION,
DAN CARTER and AL INCONTRO,
LIN DAVIS and MAUREEN LONGWORTH,
SHIRLEY DEAN and CARLA TIMPONE,
DARLA MADDEN and KAREN WOOD,
AIMEE OLEJASZ and FABIENNE PETER-CONTESSE,
KAREN STURNICK and ELIZABETH ANDREWS,
THERESA TAVEL and KAREN WALTER,
CORIN WHITTEMORE and GANI RUTHELLEN, and
ESTRA BENSUSSEN and CAROL ROSE GACKOWSKI,

Appellants,

v.

STATE OF ALASKA, and
MUNICIPALITY OF ANCHORAGE,

Appellees.

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

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I. INTRODUCTION.

The State and the Municipality labor mightily to distract this Court's attention from the basic facts lying at the heart of this case. In Alaska, the state constitution categorically excludes the class of lesbian and gay couples from the opportunity to marry. The State and the Municipality use marriage as the exclusive touchstone for determining which of their employees' and retirees' lifelong partnerships they will support with important benefits. In doing so, the State and the Municipality categorically exclude the class of lesbian and gay couples from the opportunity to enjoy such support. This is in direct contravention of the very text of the equal protection clause of the state constitution, which provides that "all persons are . . . entitled to equal . . . *opportunities* . . . under the law."[1] Significantly, the language and history of multiple statutory and constitutional provisions make clear that not only the effect but also the purpose of the State's and the Municipality's policies is to deny lesbian and gay couples the opportunity to enjoy important benefits that are available to heterosexual couples.

In the face of such purposeful discrimination, which violates the equal protection clause of the state constitution under any level of scrutiny, the State and the Municipality are left to argue that the Marriage Amendment[2] is extraordinarily expansive

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[1] Alaska Const. art. I, § 1 (emphasis added); *see also Schafer v. Vest*, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, J., concurring) (noting that the equal protection clause of the state constitution specifically contemplates equal *opportunity* under the law).

[2] Alaska Const. art. I, § 25.

in its sweep. The Marriage Amendment, however, only excludes lesbian and gay couples from the opportunity to marry, an exclusion that is not at issue in this case. It does not impose on the State and the Municipality a roving mandate to deny equal treatment to lifelong lesbian and gay partnerships in all aspects of public life. Nothing in the Marriage Amendment suggests that, apart from the opportunity to marry, the State and the Municipality must treat lesbian and gay couples as second-class citizens in order to preserve the institution of marriage as it is defined by the state constitution. Indeed, it would raise serious concerns under the federal constitution if the Marriage Amendment were interpreted to impose such broad and undifferentiated disadvantages on lesbian and gay couples.[3]

The State and the Municipality would have this Court pretend that the invidious discrimination at the heart of their policies does not exist. Their attempt at obfuscation, however, cannot change the basic facts of this case. By restricting benefits to couples who marry, the State and the Municipality categorically exclude lesbian and gay couples – who are categorically excluded as a matter of constitutional law from the opportunity to marry – from the opportunity to enjoy such benefits.

[3] *See Romer v. Evans*, 517 U.S. 620 (1996).

II. CLASSIFICATIONS BASED ON MARRIAGE ARE ALSO CLASSIFICATIONS BASED ON SEXUAL ORIENTATION AND THEREFORE ARE SUBJECT TO HEIGHTENED SCRUTINY.

A. Classifications Based on Marriage Are Also Classifications Based on Sexual Orientation.

1. A classification based on marriage is a classification based on sexual orientation on its face.

Unquestionably, a classification can be based on two considerations, one a proxy for the other. A classification disfavoring those who wear yarmulkes discriminates between Jews and non-Jews (*i.e.*, based on religion) as surely as it discriminates between those who wear yarmulkes and those who do not (*i.e.*, based on headwear).[4] A classification disfavoring those who are of Japanese ancestry discriminates between Asians and non-Asians (*i.e.*, based on race) as surely as it discriminates between those who are of Japanese ancestry and those who are not (*i.e.*, based on national origin).[5] A classification disfavoring those who are pregnant discriminates between women and men (*i.e.*, based on sex) as surely as it discriminates between those who are pregnant and those who are not (*i.e.*, based on pregnancy).[6] In the same way, a classification that favors those who are married discriminates between heterosexual couples and lesbian and gay couples (*i.e.*, based on sexual orientation) as surely as it discriminates between those who are married and those who are not (*i.e.*, based on marriage).

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[4] *See Hartmann v. Stone*, 68 F.3d 973, 985 (6th Cir. 1995).
[5] *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).
[6] *Cf. General Elec. Co. v. Gilbert*, 429 U.S. 125, 134-36 (1976).

The argument that classifications based on marriage are not also classifications based on sexual orientation because they treat unmarried lesbian and gay couples and unmarried heterosexual couples equally reflects flawed reasoning. Classifications based on marriage treat unmarried lesbian and gay couples and unmarried heterosexual couples *unequally* because unmarried heterosexual couples *can* marry and thereby avail themselves of the benefits at issue, but unmarried lesbian and gay couples *cannot*.[7]

The argument that classifications based on marriage are not also classifications based on sexual orientation because they necessarily exclude some heterosexual couples, *e.g.*, consanguineous heterosexual couples, as well as all lesbian and gay couples, also reflects flawed reasoning. First, it is irrelevant whether a classification penalizes members of a class other than the class bringing a challenge. It is enough that the classification penalizes members of the class bringing the challenge. For example, if an employer were to close one of its factories because of its bias against black employees who work there, the fact that the closure of the factory also penalizes white employees who work there would not make the race discrimination disappear. In the same way, in this case, the fact that the benefits classification also penalizes some

[7] In *Trombley v. Starr-Wood Cardiac Group, PC*, 3 P.3d 916 (Alaska 2000), a case that does not present a constitutional claim and whose outcome was driven by a public policy consideration absent in this case (adultery), this Court analyzed distinctions between married heterosexual couples and unmarried heterosexual couples, who *can* marry. It did not analyze distinctions between heterosexual couples with lesbian and gay couples, who *cannot* marry. Thus, the dictum on which the State relies is irrelevant.

heterosexual couples does not make the sexual orientation discrimination disappear. It is enough that the benefits classification penalizes all lesbian and gay couples.

Second, this case seeks nothing more than equal treatment of lesbian and gay couples and heterosexual couples. For example, this case does not challenge the fact that consanguineous heterosexual couples are necessarily excluded from the opportunity to enjoy the benefits at issue. Rather, it accepts the fact that consanguineous lesbian and gay couples are similarly excluded. In other words, this case does not contend – indeed, it cannot contend – that there is differential treatment between consanguineous lesbian and gay couples and consanguineous heterosexual couples. Rather, it contends that there is differential treatment between *non*-consanguineous lesbian and gay couples and *non*-consanguineous heterosexual couples.[8]

In addition, lesbian and gay couples constitute the vast majority of couples who *cannot* avail themselves of the benefits at issue. Even if it were true, however, that lesbian and gay couples constitute only a small fraction of such couples, it would be irrelevant. First, it is enough that the benefits classification penalizes all lesbian and gay couples. It is irrelevant whether it penalizes other couples, too.

Second, the fact that a class is relatively small does not deprive it of equal protection under the law. Equal protection jurisprudence recognizes even a "class of one."[9] Indeed, the smaller the class, the greater the need for such protection.

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[8] Similar reasoning applies to polygamous units and single individuals.
[9] *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

2. A classification based on marriage is a classification based on sexual orientation as applied.

In both statutory[10] and constitutional[11] contexts, this Court has recognized that a classification discriminates against a class if it has a disparate impact on the class. Thus, a classification based on marriage discriminates against lesbian and gay couples because it has a disparate impact on such couples. The cases on which the State and the Municipality rely to argue that classifications based on marriage are not also classifications based on sexual orientation do not hold otherwise because they do not even purport to engage in a disparate impact analysis.[12]

a. Disparate impact.

Significantly, the State and the Municipality do not dispute that a classification based on marriage has a disparate impact on lesbian and gay couples as a matter of fact.[13] Rather, they dispute that a classification based on marriage has a

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[10] *See Thomas v. Anchorage Tel. Util.*, 741 P.2d 618, 628 (Alaska 1987); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

[11] *See Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 402 (Alaska 1997) ("The plaintiffs have not shown that they have been disparately affected."); *Pharr v. Fairbanks N. Star Borough*, 638 P.2d 666, 669 (Alaska 1981) ("[The plaintiff] would have to present some evidence that the Borough's conduct was discriminatory in impact or purpose."); *Williams v. Zobel*, 619 P.2d 422, 424-25 (Alaska 1980) ("[T]he effect of the statute will be that few long-term residents of Alaska will ever have to pay income taxes, while anyone moving to Alaska will have to pay taxes for three years."); *id.* at 432 (Rabinowitz, J., concurring) ("Proportionately, a new resident is much more likely than an old resident to be subjected to an income tax under this scheme."); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976).

[12] *See, e.g., Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

[13] State's Br. at 12; Municipality's Br. at 32.

disparate impact on lesbian and gay couples as a matter of law. Their arguments are without merit.

First, disparate impact analysis does not turn on the absolute size of the disparately impacted class. Nothing in disparate impact jurisprudence suggests that the absolute size of the disparately impacted class is a relevant consideration in determining whether a classification has a discriminatory effect on the class.

Second, disparate impact analysis does not turn on the relative size of the disparately impacted class. In this regard, the facts of *Griggs v. Duke Power Co.* are illustrative. In *Griggs*, the relevant consideration was the *percentage* of black applicants denied jobs relative to the *percentage* of *white* applicants denied jobs. It was not the *number* of black applicants denied jobs relative to the *number* of *all* applicants denied jobs. Similarly, in this case, it is irrelevant whether the number of lesbian and gay couples denied benefits relative to the number of all couples denied benefits is relatively large or small. It is relevant only that the percentage of lesbian and gay couples categorically denied benefits (100%) is disproportionately higher than the percentage of heterosexual couples categorically denied benefits (0%).[14]

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[14] *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 341 n.23 (1977) ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers . . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from the inexorable zero.") (quotation omitted).

Third, disparate impact analysis does not turn on whether the disparately impacted class is a "protected" class.[15] To conclude otherwise would be to contravene fundamental equal protection principles. *All* classes are protected by the constitutional guarantee of equal protection of the laws.[16]

Moreover, such an argument is without merit even if the term "protected" class is synonymous with "suspect" or "quasi-suspect" class. Nothing in disparate impact jurisprudence suggests that the level of scrutiny to which a disparately impacted class is subject is a relevant consideration in determining whether a classification has a discriminatory effect on the class.

b. Discriminatory intent.

i. Need for evidence of discriminatory intent.

The State concedes that Oregon's and Alaska's equal protection analyses are similar.[17] Thus, the fact that, in *Tanner v. Oregon Health Sciences Univ.*,[18] an Oregon

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[15] *See* Municipality's Br. at 31-33; *see also* Amici North Star Civil Rights Defense Fund, Inc., and Marriage Law Project's Br. at 13 (suggesting that the class of newspaper vendors and carriers is not protected by the constitutional guarantee of equal protection of the laws).

[16] Alaska Const. art. I, § 1.

[17] State's Br. at 14 n.12.

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

appellate court found no need for evidence of discriminatory intent is persuasive.[19] Indeed, *Tanner* is consistent with the case law of this Court.[20]

ii. Evidence of discriminatory intent.

The State and the Municipality have admitted that "the *purpose* . . . of Article I, section 25 [of the state constitution] was to prevent same-sex couples from entering into the legal institution of marriage in Alaska."[21] Thus, they have necessarily admitted that, in Alaska, classifications based on marriage reflect animus against lesbian and gay couples.

In addition to the State's and the Municipality's admissions, evidence of such animus abounds. First, the motivation for the amendment of AS 18.80.220, a statutory prohibition on employment discrimination based on marital status, was a court

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[19] *Tanner* properly relied on *Zockert v. Fanning*, 800 P.2d 773 (Or. 1990). In *Zockert*, the court looked to the discriminatory effect, not the discriminatory intent, of a law that provided counsel to parents whose rights were subject to termination. *Id.* at 778. Indeed, the court expressly concluded that the state legislature had no discriminatory intent when it enacted the law. *Id.*

[20] *See Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 402 (Alaska 1997) (discussing need for evidence of disparate impact but not discriminatory intent); *Pharr v. Fairbanks N. Star Borough*, 638 P.2d 666, 669 (Alaska 1981) ("[The plaintiff] would have to present some evidence that the Borough's conduct was discriminatory in impact *or* purpose.") (emphasis added); *Williams v. Zobel*, 619 P.2d 422, 424 (Alaska 1980) ("*Regardless of the lack of evidence of purposeful discrimination*, the effect of the statute will be that few long-term residents of Alaska will ever have to pay income taxes, while anyone moving to Alaska will have to pay taxes for three years.") (emphasis added) (footnote omitted); *see also id.* at 432 (Rabinowitz, J., concurring) ("I would not require [a showing of discriminatory intent] when the effect of the legislation is shown – or is stipulated – to impact unequally on groups according to whether or not they have exercised their constitutional right.").

[21] [Exc. 380, 391 (emphasis added)].

ruling concluding that the denial of health benefits to the same-sex partners of lesbian and gay state employees violated AS 18.80.220.[22] Significantly, the amendment occurred at the same time as the enactment of AS 25.05.011 and 25.05.013, statutory exclusions of lesbian and gay couples from both marriage and benefits conditioned on marriage.

Second, the enactment of AS 25.05.011 and 25.05.013 was not "purely symbolic."[23] Fundamental canons of statutory construction militate against a conclusion that AS 25.05.011 and 25.05.013 are merely hortatory. It does not matter whether AS 25.05.011 and 25.05.013 are merely hortatory, however, because the motivation for their enactment was litigation seeking marriage for lesbian and gay couples, a reflection of animus against lesbian and gay couples.[24]

Third, the motivation for the proposal and ratification of the Marriage Amendment, a constitutional exclusion of lesbian and gay couples from marriage, was a court ruling concluding that the exclusion of lesbian and gay couples from marriage

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[22] *Tumeo v. University of Alaska*, No. 4FA-94-43 Civ., 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995). The State contends that its denial of health benefits to the same-sex partners of lesbian and gay state employees under AS 39.30.090 could not have violated AS 18.80.220 prior to its amendment. Its contention is flatly contradicted by *University of Alaska v. Tumeo*, 933 P.2d 1147, 1154-56 (Alaska 1997).

[23] State's Br. at 5.

[24] State's Br. at 6 n.6 (discussing *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), and *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993)).

violated the state constitution absent a narrowly-tailored compelling interest.[25] Indeed, the State has admitted as much.[26]

When the State amended the definition of marriage to exclude lesbian and gay couples, it necessarily amended the benefits classification to do the same.[27] Thus, it is irrelevant whether the benefits classification has reflected animus against lesbian and gay couples since the time of its creation. It is enough that the benefits classification has reflected animus against lesbian and gay couples since the time of its amendment. In other words, even if the benefits classification did not reflect animus prior to the amendment of the definition of marriage, it reflects animus now.

In addition, it is irrelevant that the Municipality was not the government actor that amended the definition of marriage. It is enough that the Municipality uses marriage as the exclusive touchstone for determining which of its employees and retirees can avail themselves of the benefits at issue, and that it does so knowing that classifications based on marriage now reflect animus against lesbian and gay couples by

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[25] *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).
[26] *See* [Exc. 380].
[27] *See, e.g., Apache Survival Coalition v. United States*, 21 F.3d 895, 902 (9th Cir. 1994) ("[A legislature] can modify a statute directly or indirectly, the form is not decisive.") (citing *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440-41 (1992)).

the State.[28] A government actor that gives effect to a third party's bias, as opposed to its own bias, still discriminates.[29]

B. Classifications Based on Sexual Orientation Are Subject to Heightened Scrutiny.

Heightened scrutiny is the level of scrutiny to which classifications based on sexual orientation should be subject. The State and the Municipality do not dispute the existence of circumstances that demand a high degree of suspicion where classifications based on sexual orientation are at issue. They do not dispute that sexual orientation is rarely relevant to government action. Moreover, they do not dispute that there is a historical pattern of prejudice directed against lesbian and gay individuals.[30] Because government action implicating lesbian and gay individuals is so often invidious, it should be viewed with a high degree of suspicion.

Lesbian and gay Alaskans are not politically powerful. If nothing else, the state constitution would not deny marriage to lesbian and gay Alaskans if they were politically powerful. Indeed, it is especially telling that it is the state constitution that

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[28] *See* [Exc. 391].

[29] *See S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

[30] Ironically, Amici contend that a high level of constitutional protection for lesbian and gay individuals is inappropriate where there is no historical pattern of legislative protection for such individuals. Amici North Star Civil Rights Defense Fund, Inc., and Marriage Law Project's Br. at 14-15. To the contrary, the absence of legislative protection for such individuals suggests, at best, indifference to and, at worst, complicity in a historical pattern of prejudice. It thereby *supports* the proposition that classifications based on sexual orientation should be subject to heightened scrutiny.

denies marriage to lesbian and gay Alaskans. Given that heightened scrutiny is appropriate where "prejudice [directed against a class] . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,"[31] it is appropriate in Alaska, where prejudice directed against lesbian and gay individuals is so pervasive that it altered the very device that frames the way in which the government interacts with its citizens, thereby changing the very rules of the political game.

The employment benefits statistics to which the State points as evidence of political power are in fact evidence of political disempowerment. All other evidence of political disempowerment aside,[32] the employment benefits statistics reveal a *lack* of parity between lesbian and gay couples and heterosexual couples at the federal level, in over four out of five states, in untold tens of thousands of municipalities, and in untold hundreds of thousands of businesses.

The fact that the lesbian and gay community outside of Alaska has enjoyed limited political success does not change the fact that government action implicating the lesbian and gay community is so often invidious that it should be viewed with a high

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[31] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

[32] The State suggests that, even if sexual orientation classifications in other contexts merit heightened scrutiny, sexual orientation classifications in the employment benefits context do not because lesbian and gay individuals are politically powerful in the employment benefits context. Its suggestion, however, is at odds with the equal protection jurisprudence. The identification of a class as a suspect or quasi-suspect class is a recognition of the fact that prejudice against the class is so pervasive that government action that implicates the class in *any* context must be viewed with a high degree of suspicion.

degree of suspicion. In this regard, the lesbian and gay community is no different than other minority communities. It would be perverse to penalize such communities for their efforts to protect themselves from the pervasive prejudice that they face.

Moreover, the contention that, "[u]nder federal equal protection jurisprudence, sexual orientation is not a suspect classification"[33] is misleading. The United States Supreme Court has never addressed the level of scrutiny to which classifications based on sexual orientation should be subject.[34] Thus, the level of scrutiny to which classifications based on sexual orientation should be subject is an open question in federal equal protection jurisprudence.

In addition, the federal authority to which the State cites is unpersuasive in this jurisdiction. As the State itself notes, federal courts that have declined to subject classifications based on sexual orientation to heightened scrutiny have "generally [found] that such status would be inconsistent with *Bowers v. Hardwick*."[35] Thus, such authority relies on a federal privacy ruling that the State concedes is inconsistent with state privacy jurisprudence.[36] More significantly, because the United States Supreme Court expressly declined to rule on an equal protection theory in *Bowers*,[37] *Bowers* says nothing about whether classifications based on sexual orientation should be subject to heightened

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[33] State's Br. at 19 (citations omitted).
[34] *See* Tobias B. Wolff, Case Note, Principled Silence, 106 Yale L.J. 247 (1996).
[35] State's Br. at 20 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).
[36] *Id.*
[37] *Bowers*, 478 U.S. at 196 n.8.

scrutiny.[38] Most significantly, the federal authority to which the State cites is inconsistent with the high level of protection afforded by the state constitution. 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."[39] Thus, classifications based on sexual orientation should be subject to some level of heightened scrutiny on the sliding scale.

III. CLASSIFICATIONS BASED ON MARRIAGE ARE ALSO CLASSIFICATIONS BASED ON SEX AND THEREFORE ARE SUBJECT TO THE HIGHEST LEVEL OF SCRUTINY.

A. Classifications Based on Marriage Are Also Classifications Based on Sex.

In Alaska, marriage is expressly defined by reference to sex.[40] It necessarily follows that classifications based on marriage are also defined by reference to sex.

The argument that classifications based on marriage are not also classifications based on sex because they apply equally to men and women is without

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[38] *See Romer*, 517 U.S. at 636, 640-41 (Scalia, J., dissenting) (suggesting that *Romer* overrules *Bowers*).

[39] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987) (footnote omitted); *see also Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970).

[40] Alaska Const. art. I, § 25; AS 25.05.011(a), 25.05.013(a).

merit.[41] The flaw in such reasoning is made apparent by the State's response to Amicus Mari Billington. The State contends that "[Ms. Billington] would be in the same position if her state employee partner were male."[42] The State's contention is patently incorrect. If her partner were male, Ms. Billington could marry her partner and thereby avail herself of health benefits through her partner.

More significantly, the State's contention highlights a fundamental principle of constitutional law: Constitutional rights are individual rights, not class rights.[43] Thus, it is irrelevant whether the benefits classification applies equally to men and women in the aggregate. It is enough that the benefits classification denies the benefits at issue to Ms. Billington because of her and her partner's sex.

The observation that *Loving v. Virginia* involved an inherently illegitimate interest in promoting white supremacy, whereas this case does not involve a comparable interest in promoting male supremacy, does not alter the analysis.[44] Whether this case

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[41] *See Califano v. Goldfarb*, 430 U.S. 199 (1977) (classification at issue was based on sex notwithstanding the fact that it applied equally to men and women); *Frontiero v. Richardson*, 311 U.S. 677 (1973) (same); *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993) (same); *see also Loving v. Virginia*, 388 U.S. 1 (1967) (classification at issue was based on race notwithstanding the fact that it applied equally to white and non-white individuals; *McLaughlin v. Florida*, 379 U.S. 184 (1964) (same); *Shelley v. Kramer*, 334 U.S. 1, 22 (1948) (same).

[42] State's Br. at 55.

[43] *See Shelley*, 334 U.S. at 22 ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed *to the individual.* The rights established are *personal* rights.") (emphasis added); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 288 (1978).

[44] *See* Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 UCLA L. Rev. 519, 523 (2001).

involves an inherently illegitimate interest in male supremacy addresses whether the benefits classification is justified, not whether it is based on sex. Because it is not necessary to demonstrate that the benefits classification promotes male supremacy to demonstrate that it is without justification, the fact that this case does not involve an inherently illegitimate interest in promoting male supremacy is not dispositive.

B. Classifications Based on Sex Are Subject to the Highest Level of Scrutiny.

The State and the Municipality do not dispute that classifications based on sex should be subject to the highest level of scrutiny.

IV. THE BENEFITS CLASSIFICATION BURDENS IMPORTANT INTERESTS AND THEREFORE IS SUBJECT TO HEIGHTENED SCRUTINY.

The law recognizes that the numerous and various interests that are burdened by the benefits classification are important interests, if not fundamental rights: intimate association,[45] family decisionmaking,[46] reproductive freedom,[47] health care,[48]

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[45] *See, e.g., State v. Ostrosky*, 667 P.2d 1184, 1192 (Alaska 1983); *see also, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984); *Briscoe v. Reader's Digest Ass'n*, Inc., 483 P.2d 34, 37 (Cal. 1971).

[46] *See, e.g., In re C.L.T.*, 597 P.2d 518, 524 (Alaska 1979); *see also, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

[47] *See, e.g., Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska 1997).

[48] *See, e.g., Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974).

economic endeavor within a particular industry,[49] and enjoyment of the rewards of one's own industry.[50]

This Court has made clear that, to burden an important interest or fundamental right, a classification need not result in a deprivation. It is enough that it result in a penalty for enjoying the important interest or exercising the fundamental right in a particular way.[51] Thus, in this case, it is enough, for example, that the benefits classification penalizes lesbian and gay couples for exercising their right to intimate association – *i.e.*, their right to enter into a lifelong partnership with a same-sex partner, as opposed to an opposite-sex partner – by denying them the benefits at issue.

Moreover, this Court has made clear that the proper analysis by which to determine whether a classification burdens an important interest or fundamental right is as follows:

> The suspicion with which this court will view infringements upon [a right] depends upon the degree to which the challenged law can be said to penalize exercise of the right. *This in turn depends upon the objective degree to which the challenged legislation tends to deter [exercise of the right]* . . . . There is no requirement to demonstrate actual deterrence of [exercise of a right] in federal or state law. *[T]he relevant criteria are the fact and severity of the restriction.*[52]

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[49] *See, e.g., State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 632 (Alaska 1989).
[50] Alaska Const. art. I, § 1; *see also City of Fairbanks*, 471 P.2d at 401-02 (recognizing duty to develop additional fundamental rights); Br. of Amicus Lambda Legal Defense and Education Fund, Inc., at 21-23.
[51] *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 271 n.11 (Alaska 1984); *see also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).
[52] *Brown*, 687 P.2d at 271 & n.11 (emphasis added).

Thus, this Court recognizes even an indirect burden on an important interest or fundamental right where the fact and severity of the burden objectively tend to penalize the enjoyment of the important interest or exercise of the fundamental right. Indeed, the Court recognized such an indirect burden in *Alaska Pacific Assurance Co. v. Brown*, a case in which it subjected the classification at issue to heightened scrutiny, even though the classification imposed a direct burden on an economic interest in workers' compensation benefits. The Court did so because the fact and severity of the burden objectively tended to deter the exercise of the fundamental right to travel. Similarly, in this case, this Court should subject the benefits classification to heightened scrutiny even if it finds that the classification imposes a direct burden on an economic interest in the benefits at issue. The undisputed facts in the record demonstrate that the fact and severity of the burden – including the categorical exclusion of lesbian and gay couples from the opportunity to enjoy the benefits at issue – objectively tend to penalize the enjoyment and exercise of numerous and various important interests and fundamental rights.[53]

This Court has made clear that the proper analysis by which to determine whether a classification burdens an important interest or fundamental right is not a case-by-case analysis. Rather, it is an analysis of whether the fact and severity of the burden objectively tend to penalize the enjoyment of important interests or exercise of fundamental rights *in the aggregate*. If this were not the case, this Court would be hard-pressed to strike down any classification on its face. For example, in *Brown*, this Court

[53] *See* [Exc. 108-35].

could not have subjected the classification on its face to heightened scrutiny because a case-by-case analysis could have yielded individuals whose economic situations were such that the fact and severity of the burden on their economic interest in workers' compensation benefits would not have objectively tended to deter their exercise of their right to travel. In this case, the undisputed facts in the record demonstrate that the fact and severity of the burden objectively tends to penalize the enjoyment and exercise of numerous and various important interests and fundamental rights in the aggregate.[54] Therefore, the classification must be subject to heightened scrutiny.

V. THE BENEFITS CLASSIFICATION REFLECTS ANIMUS AND THEREFORE IS WITHOUT JUSTIFICATION.

Because the benefits classification reflects animus against lesbian and gay couples, it is inherently without justification.[55] The State and the Municipality do not dispute the principle of law that a classification that reflects animus is inherently without justification. They dispute only the assertion of fact that the benefits classification reflects animus. As discussed above in section II.A.2.b.ii, however, their arguments are without merit. Because the benefits classification is inherently without justification, no further inquiry is necessary.

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[54] *Id.*

[55] *See, e.g., Principal Mut. Life Ins. Co. v. State*, 780 P.2d 1023, 1025 (Alaska 1989); *Romer*, 517 U.S. at 634-35.

VI. THE BENEFITS CLASSIFICATION DOES NOT EVEN RATIONALLY FURTHER A LEGITIMATE INTEREST IN COST SAVINGS AND THEREFORE IS WITHOUT JUSTIFICATION.

It is a fundamental principle of equal protection jurisprudence that "a State may not accomplish [an interest in cost savings] by invidious distinctions between classes of its citizens."[56] In other words, an interest in cost savings, standing alone, never justifies a classification under any level of scrutiny.

A classification is a product of line-drawing, and such line-drawing *always* achieves cost savings. In other words, by drawing a classification that permits some but not all to enjoy a benefit, cost savings are *always* achieved. Accordingly, if an interest in cost savings, standing alone, were a valid justification, even an arbitrarily drawn classification – *e.g.*, employment benefits for right-handed individuals but not left-handed individuals – would be justified. Because there are an infinite number of ways to draw a classification, all of which would achieve cost savings, there must be an independent justification for the choice of one line over the others. Otherwise, an arbitrarily drawn classification would survive, contrary to the requirement that a classification "be reasonable, not arbitrary."[57] This is why the proper inquiry is not whether a classification achieves cost savings but rather whether it does so in a non-arbitrary manner. Thus, an interest in cost savings, standing alone, is never a valid justification.

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[56] *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 910 (Alaska 2001) (quoting *Shapiro*, 394 U.S. at 633).

[57] *Ostrosky*, 667 P.2d at 1193 (quoting *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976)).

This Court did not abandon this fundamental principle after *Reid v. Williams*,[58] as confirmed by *State v. Planned Parenthood of Alaska, Inc.*[59] Indeed, *Reid* is entirely distinguishable from this case. *Reid* concerned a limitation on damages to be recovered by a medical malpractice litigant. Significantly, this Court recognized the State's proffered interest because it was a proffered interest in "reducing the cost and improving the availability of health care" and "control[ling] medical malpractice insurance costs."[60] In other words, this Court recognized the State's interest in cost savings *for private health care providers and consumers*, thereby recognizing an interest independent of an interest in cost savings: promoting the health of the population by keeping the cost of health care services down and the number of health care providers up. This Court did not recognize the State's interest in cost savings *for itself.* In this case, because the State's proffered interest is a proffered interest in cost savings for itself, *Reid* is inapposite.

VII. THE BENEFITS CLASSIFICATION DOES NOT EVEN RATIONALLY FURTHER A LEGITIMATE INTEREST IN ADMINISTRATIVE CONVENIENCE AND THEREFORE IS WITHOUT JUSTIFICATION.

Commercial Fisheries Entry Comm'n v. Apokedak states that an interest in administrative convenience "will usually not outweigh the nature and the importance of

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[58] *Reid v. Williams*, 964 P.2d 453 (Alaska 1998).

[59] Because an interest in cost savings, standing alone, never justifies a classification under any level of scrutiny, it is irrelevant that *Planned Parenthood* involved a classification that was subject to the highest level of scrutiny.

[60] *Reid*, 964 P.2d at 459.

the right which it impinges on."[61] The ruling in *State v. Ostrosky* did not override the language in *Apokedak*. Indeed, it was after the *Ostrosky* ruling that this Court reaffirmed the *Apokedak* language in *Deubelbeiss v. Commercial Fisheries Entry Comm'n*.[62]

In addition, the State and the Municipality have existing mechanisms by which they can administer employment benefits for same-sex partners of lesbian and gay employees and retirees. The State already administers employment benefits for same-sex partners of lesbian and gay employees at the University of Alaska.[63] In addition, the State already makes employment benefit eligibility determinations on a case-by-case basis for certain dependent children,[64] a fact that it concedes.[65] Thus, the State can use

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[61] *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 n.45 (Alaska 1980) (citation omitted).

[62] *Deubelbeiss v. Commercial Fisheries Entry Comm'n*, 689 P.2d 487 (Alaska 1984).

[63] *Tumeo*, 933 P.2d at 1149-50; University of Alaska Explanation of Availability of Benefits Based on Financially Interdependent Relationship (http://info.alaska.edu/hr/forms/PDF/B140-FIPExplanation.pdf).

[64] AS 39.30.090; Select Benefits Health Dependent Enrollment Form (http://www.state.ak.us/local/akpages/ADMIN/drb/forms/ben032.pdf). The State notes that it makes such case-by-case determinations because it is compelled to do so by statute. It is irrelevant, however, why the State makes such determinations. It is relevant only that the State does so. Indeed, it is dispositive that the State itself has already developed and implemented mechanisms by which it can administer employment benefits for same-sex partners of lesbian and gay employees and retirees.

[65] State's Br. at 43. The State argues that it is dispositive that, at the time that it created the classification, it could have reasonably thought that the classification would make case-by-case employment benefit eligibility determinations unnecessary. The statute itself, however, calls for such case-by-case determinations. Thus, at the time that it created the classification, the State could not have reasonably thought that the classification would make such case-by-case determinations unnecessary.

existing mechanisms of its own development and implementation to administer employment benefits for same-sex partners of lesbian and gay employees and retirees.

The Municipality can do likewise. Indeed, if the State were to administer pension benefits for same-sex partners of lesbian and gay retirees, the Municipality would be compelled to follow suit because the State and the Municipality participate in the same pension benefits plan. The Municipality could then use the same mechanism to administer other employment benefits for same-sex partners of lesbian and gay employees and retirees.

At bottom, the formulation of such mechanisms would burden neither the State nor the Municipality because such mechanisms are already formulated. Accordingly, the benefits classification does not even rationally further a legitimate interest in administrative convenience.

VIII. THE BENEFITS CLASSIFICATION DOES NOT EVEN RATIONALLY FURTHER A LEGITIMATE INTEREST IN PROMOTING MARRIED RELATIONSHIPS AND THEREFORE IS WITHOUT JUSTIFICATION.

The State proffers an interest in promoting married relationships *for only heterosexual couples*, a fact that it concedes.[66] Thus, its interest is not in promoting

[66] State's Br. at 45; *see also* Alaska Const. art. I, § 25. In *Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904 (Cal. 1983), a case that does not present a constitutional claim, the court analyzed a proffered interest in promoting married relationships in the context of unmarried heterosexual couples, who can marry, not lesbian and gay couples, who cannot marry. Thus, it did not have occasion to consider whether the proffered interest was an interest in promoting married relationships for only heterosexual couples. Accordingly, *Norman* does not inform this case.

married relationships for all couples but rather in advantaging heterosexual couples. This is discrimination for its own sake, which is never justified.[67]

Moreover, to the extent that the State and the Municipality have an interest in promoting married relationships, they have an interest in doing so, not for its own sake,[68] but because of the social good that such relationships promote.[69] The State and the Municipality do not dispute that lesbian and gay relationships and heterosexual relationships are equally capable of promoting such social good. Thus, it is arbitrary for the State and the Municipality not to induce both lesbian and gay couples and heterosexual couples to make a commitment of the highest order to each other. Whether perfect or imperfect in their fit, classifications may not be arbitrary.[70] Thus, the benefits classification is without justification.

In addition, an interest in promoting married relationships "does not rest on some ground of difference having a fair and substantial relation to *the object of the*

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[67] *See, e.g.*, *Principal*, 780 P.2d at 1025; *Romer*, 517 U.S. at 634-35.

[68] *See Enserch*, 787 P.2d at 634 (government action may not advantage or disadvantage a class for its own sake); *see also, e.g.*, *Romer*, 517 U.S. at 634-35 (same). The State fails in its attempt to distinguish *Enserch* from this case. *Neither* case involves a deprivation of a benefit already enjoyed. Rather, both cases involve a deprivation of an opportunity to enjoy a benefit in the first instance.

[69] *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988), a case that does not present a constitutional claim, does not suggest otherwise. Social stability is simply one aspect of the social good that married relationships represent.

[70] *Ostrosky*, 667 P.2d at 1193.

legislation,"[71] *i.e.*, the purpose of the *law* (as opposed to the classification). Indeed, an interest in promoting married relationships bears *no* relationship to the purpose of the law: recruiting and retaining qualified employees.[72] Because an interest in promoting married relationships bears no relationship to the purpose of the law, the benefits classification is without justification.

Thus, the benefits classification does not even rationally further a legitimate interest in promoting married relationships.

IX. THE MARRIAGE AMENDMENT DOES NOT ALTER THE ANALYSIS.

By its own terms, the Marriage Amendment does not deny benefits conditioned on marriage to lesbian and gay couples. Instead, it provides only that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman."[73] In contrast, statutory provisions predating the Marriage Amendment do address benefits conditioned on marriage.[74] It must be presumed that, at the time that the

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[71] *Planned Parenthood*, 28 P.3d at 911 (emphasis added) (quoting *Isakson*, 550 P.2d at 362); *see also Romer*, 517 U.S. at 635 (refusing to recognize interests that were "so far removed" from the law at issue).

[72] AS 39.35.010(a); *see also* State's Br. at 37 n.30.

[73] Alaska Const. art. I, § 25; *see also Bess v. Ulmer*, 985 P.2d 979, 995 (Alaska 1999) ("[T]he content of the sentence is simple to express and understand. It relates to only one subject."). The Marriage Amendment also does not address marital status discrimination in any way. Moreover, the concern that parity in employment benefits will "override the specific meaning of the term 'marital' in Art. I, sec. 25" overlooks the fact that the term "marital" does not even appear in the Marriage Amendment. Amici North Star Civil Rights Defense Fund, Inc., and Marriage Law Project's Br. at 8.

[74] It goes without saying that, to the extent that such statutory provisions are at odds with the state constitution, they are invalid.

State proposed the Marriage Amendment, it knew that it had the option of addressing benefits conditioned on marriage but declined to take it.

More significantly, it is a fundamental canon of constitutional construction that a constitutional amendment in derogation of a preexisting constitutional right must be narrowly construed.[75] This canon of construction is inherent in the principle of harmonization discussed in *Bess v. Ulmer*.[76]

The contention that the benefits at issue are inherently marital benefits is incorrect as a matter of fact. It is undisputed that the benefits at issue are available to non-spouses.[77] It is further undisputed that benefits identical to those at issue are available to the same-sex partners of lesbian and gay employees and retirees in jurisdictions that deny marriage to lesbian and gay couples.[78] Indeed, the Municipality concedes that "defendants could offer the benefits" to same-sex partners of lesbian and gay employees and retirees.[79]

The contention that *Brause v. Bureau of Vital Statistics* represents a concession that benefits conditioned on marriage are inherently marital benefits is also incorrect as a matter of fact. To the contrary, *Brause* presented not only a claim for

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[75] *See, e.g.*, *Vannatta v. Keisling*, 931 P.2d 770, 779 (Or. 1997); *State v. Cianci*, 591 A.2d 1193, 1202 (R.I. 1991); *Brimmer v. Thomson*, 521 P.2d 574, 580 (Wyo. 1974); *Howton v. Morrow*, 106 S.W.2d 81, 82 (Ky. 1937).
[76] *Bess*, 985 P.2d at 995.
[77] *See, e.g.*, AS 39.30.090.
[78] *See, e.g.*, Cal. Gov't Code § 22869; Cal. Fam. Code § 308.5.
[79] Municipality's Br. at 3 (emphasis omitted).

marriage but also an alternative claim for benefits conditioned on marriage separate and apart from marriage.[80]

Finally, the contention that benefits conditioned on marriage must be inherently marital benefits because, otherwise, marriage will be devoid of meaning is without merit. Marriage is a unique status with a cultural meaning separate and apart from benefits conditioned on marriage. Indeed, it was the unique status and cultural meaning of marriage, not benefits conditioned on marriage, that was of apparent concern to the proponents of the Marriage Amendment.

For the foregoing reasons, the Marriage Amendment does not alter the analysis in this case.

X. CONCLUSION.

For the foregoing reasons, as well as those set forth in Brief of Appellants, Appellants respectfully request that this Court reverse the ruling of the trial court.

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[80] *See Brause v. State*, 21 P.3d 357 (Alaska 2001) (dismissing the claim seeking benefits conditioned on marriage for lack of ripeness).

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