IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JULIE A. SCHMIDT, GAYLE SCHUH, JULIE M. VOLLICK, SUSAN L. BERNARD, FRED W. TRABER, and LAURENCE SNIDER,

Plaintiffs,

vs.

THE STATE OF ALASKA, and THE MUNICIPALITY OF ANCHORAGE,

Defendants.

Case No. 3AN-10-9519 CI

DECISION AND ORDER

I. INTRODUCTION

Before the court is plaintiffs' motion for partial summary judgment and defendants' cross-motion for summary judgment.[1] Plaintiffs argue that a real property tax exemption (the "Tax Exemption") that confers a greater benefit on married couples than on other property co-owners discriminates against them based on their sexual orientation. Specifically, plaintiffs argue that the Tax

[1] A party may move for summary judgment on all of its claims (complete summary judgment) or on only some of its claims (partial summary judgment). Alaska R. Civ. P. 56(c),(d). The plaintiffs in this case are three couples. The plaintiffs moved for summary judgment for only two of the three couples because the State and the Municipality of Anchorage ("the State") raised separate defenses as to the third couple. The court rejects the State's separate defenses and grants complete, not partial, summary judgment for the plaintiffs.

Exemption violates the Alaska Constitution because it denies them equal rights, opportunities, and protection under the law,[2] discriminates against them based on sex,[3] and infringes on their right to privacy.[4] The court finds that the Tax Exemption violates Alaska's equal protection clause because it disparately burdens similarly situated taxpayers. The court does not reach plaintiffs' latter two arguments.

The State of Alaska and the Municipality of Anchorage are defendants in this case. The plaintiffs allege that the State enacted the unconstitutional Tax Exemption, and that the Municipality, in turn, applies the exemption unconstitutionally. This decision refers to the defendants as "the State" because the Municipality does not have a choice in how it applies the allegedly unconstitutional legislation. As the Municipality points out in its answer, the Tax Exemption's implementing regulations "do not provide for any discretion by the [tax] Assessor."[5] The State provided the substantive briefing for the defendants. The court grants summary judgment against both defendants.

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[2] ALASKA CONST. art. I, § 1.

[3] *Id.* at art. I, § 3.

[4] *Id.* at art. I, § 22.

[5] Ans. Mun. of Anchorage, Affirmative and Other Defenses ¶ 1 (Oct. 13, 2010).

II. FACTS

A) The Challenged Tax Exemption.

The challenged Tax Exemption allows seniors over the age of sixty-five and disabled veterans to exclude from their real property tax the first $150,000 of the assessed value of their primary residence.[6] An eligible person who is married may exempt the full value of his or her property.[7] However, if an eligible person co-owns or co-occupies property with a person to whom the eligible person is *not* married (such as a same-sex domestic partner, a friend, or a relative) the eligible person may exclude only the value proportionate to his or her ownership interest.[8] The statute's implementing regulation provides that a married person may claim the full $150,000 exemption "regardless of whether the property is held in the name of the husband, wife, or both."[9] Therefore, married people can receive a larger benefit from the Tax Exemption than unmarried property co-owners or cohabitants.

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[6] ALASKA STAT. § 29.45.030(e).

[7] *See* ALASKA ADMIN. CODE tit. 3, § 135.085(a),(c).

[8] "[S]tate regulations, as interpreted by the State and the Municipality of Anchorage, deem each member of a same-sex domestic partnership to occupy only one-half of the home . . . ." Pl.'s Compl. at 3 (Aug. 3, 2010).

[9] ALASKA ADMIN. CODE tit. 3, § 135.085(a).

The marital classification prevents co-owners or co-occupants from obtaining the full value of the exemption when one person qualifies for the exemption and the other does not. If both people qualify for the exemption, then each person could exempt one-half of the property's assessed value and they would receive, in combination, the exemption's full value. If unmarried people co-own or co-occupy property with an assessed value greater than $300,000, the marital classification does not prevent the eligible person from obtaining the full benefit. At that point, the eligible person's one-half ownership interest is greater than $150,000—the maximum value of the tax exemption.

B) The Plaintiff Couples.

The plaintiffs are three same-sex couples who were unable to obtain the full value of the Tax Exemption in Tax Year 2010.[10] They allege that the Tax Exemption discriminates against them based on their sexual orientation because they are unable to marry.[11] Plaintiffs seek a declaratory judgment that the Tax Exemption violates the Alaska Constitution, an injunction requiring the State and

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[10] The State conceded at oral argument that the three plaintiffs are same-sex couples. Oral Argument 01:22:50–01:23:00 (Sep. 8, 2011). Also, in its briefs, the State lists several factors that distinguish this case from *ACLU v. State*, 122 P.3d 781 (Alaska 2005), but does not list plaintiffs' relationship status as one of these distinctions. *See* Def.'s Memo. in Support of the State of Alaska's Cross-Motion for Summary Judgment and Opposition to Pl.'s Mot. for Partial Summary Judgment at 2 (July 11, 2011) [hereinafter "Def.'s Memo."].

[11] Pl.'s Compl. at 2–3 (Aug. 3, 2010).

Municipality of Anchorage to apply the Tax Exemption "on terms identical to those that would apply . . . if they were in marriages the State of Alaska recognized," and any further relief the court deems appropriate.[12]

Plaintiffs Julie Schmidt and Gayle Schuh, respectively sixty-seven and sixty-two years old, are same-sex domestic partners and have co-owned a home in Eagle River since 2006.[13] The home was assessed at $254,200 in Tax Year 2010.[14] Schmidt qualifies for the Tax Exemption. She is unable to exempt the full value of her home because 3 AAC 135.085(c) deems her to occupy only one-half of the house.[15] If she and her partner Schuh were married, she would have received a $359.31 greater tax benefit from the exemption.[16]

Plaintiffs Julie Vollick and Susan Bernard were in a same-sex domestic partnership for eight years and separated in 2011. Vollick and Bernard co-owned

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[12] *Id.* at 11–12.

[13] Ans. of Mun. of Anchorage ¶ 13 (Oct. 13, 2010).

[14] Def.'s Memo. at 8. This assessed value means that Schmidt would have been able to take advantage of the full value of the tax exemption *if* she included the full value of the home she co-owns. Because she and Schuh are not married and own the home as tenants in common, she could exempt only one-half the value of the house—$127,100.

[15] Def.'s Memo. at 9; ALASKA ADMIN. CODE tit. 3, § 135.085(a),(c).

[16] Def.'s Memo. at 9.

a home in Eagle River from 2004 until 2010.[17] The home was assessed at $232,600 during Tax Year 2010.[18] Vollick is a military veteran and is permanently disabled.[19] She qualifies for the disabled veteran tax exemption.[20] She is unable to exempt the full value of her home because 3 AAC 135.085(c) deems her to occupy only one-half of the house.[21] If she and Bernard had been married, Vollick would have received a $528.76 greater tax benefit from the exemption.[22] Bernand and Vollick recently separated, but challenge the discriminatory application of the exemption during the course of their domestic partnership.

Plaintiffs Fred Traber and Laurence Snider, respectively sixty-two and sixty-nine years old, are same-sex domestic partners and share a condominium in Anchorage. Snider qualifies for the tax exemption. However, the home is held

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[17] Ans. of Mun. of Anchorage ¶ 19 (Oct. 13, 2010). Bernard and Vollick recently separated. The court does not know if they still co-own the residence. They remain plaintiffs for the purpose of challenging the Tax Exemption's application during their relationship.

[18] Def.'s Memo. at 9.

[19] *Id.*; Ans. Mun. of Anchorage ¶ 24 (Oct. 13, 2010).

[20] Def.'s Memo. at 9; Ans. Mun. of Anchorage ¶ 26 (Oct. 13, 2010).

[21] Def.'s Memo. at 9.

[22] *Id.* at 10.

only in Traber's name.[23] Because Traber and Snider are not married, Snider is unable to claim any part of the Tax Exemption for his sole residence. The plaintiffs argue that "[i]f Snider and Traber were a married couple . . . , the full tax exemption would apply" regardless of which spouse held the property.[24]

III. DISCUSSION

A) Summary Judgment Standard of Review.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."[25] The party moving for summary judgment must establish, through admissible evidence, the absence of genuine factual disputes and entitlement to judgment.[26] A genuine factual dispute exists when reasonable jurors could disagree on the resolution of a factual issue.[27] The trial court must draw all reasonable inferences of fact in favor of the nonmoving party.[28] Once the

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[23] *Id.*

[24] Pl.'s Compl. ¶ 33 (Aug. 3, 2010); ALASKA ADMIN. CODE tit. 3, § 135.085(a).

[25] Alaska R. Civ. P. 56(c).

[26] *Shade v. CO & Anglo Alaska Serv. Corp.*, 901 P.2d 434, 437 (Alaska 1995).

[27] *Pederson v. Barnes*, 139 P.3d 552, 556 (Alaska 2006).

[28] *Cladbaugh v. Bottcher*, 545 P.2d 172, 175 (Alaska 1976).

moving party has made a prima facie case for the absence of genuine issues of material fact, the adverse party may avoid summary judgment by demonstrating, with admissible evidence reasonably tending to dispute the moving party's evidence, that a genuine issue of material fact remains to be litigated.[29] The evidentiary threshold necessary to preclude summary judgment is low.[30] But mere assertions of fact by the adverse party in pleadings and memoranda are insufficient.[31] All parties agree that there are no genuine issues of material fact and that summary judgment is appropriate in this case.[32]

B) Alaska Supreme Court Precedent: *ACLU v. State.*

The Alaska Supreme Court addressed discrimination based on sexual orientation in *American Civil Liberties Union v. State* ("*ACLU*").[33] Because defendants have not sufficiently distinguished this case from *ACLU*, the Alaska Supreme Court precedent entitles plaintiffs to summary judgment. When the Alaska Supreme Court addressed discrimination based on sexual orientation, it

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[29] *French v. Jadon, Inc.*, 911 P.2d 20, 23–24 (Alaska 1996).

[30] *See Meyer v. State*, 994 P.2d 365, 368 (Alaska 1999).

[31] *State v. Green*, 586 P.2d 595, 606 (Alaska 1978).

[32] Def.'s Reply in Support of the State of Alaska's Cross-Motion for Summary Judgment at 1 (Aug. 19, 2011) [hereinafter Def.'s Reply]; Pl.'s Memo. in Support of Pl.'s Mot. for Partial Summary Judgment at 8 (May 10, 2011).

[33] 122 P.3d 781 (Alaska 2005).

explained that "personal, moral, or religious beliefs" are "[i]rrelevant to the analysis."[34] The court's role is "to define the liberty of all, not to mandate [their] own moral code."[35] That guidance applies to this court as well.

In *ACLU*, the Alaska Supreme Court found that a marital classification in a state employment benefits scheme violated the Alaska Constitution's equal protection clause.[36] The Tax Exemption challenged here is constitutionally similar to the employment benefits scheme challenged in *ACLU*. Therefore, the Tax Exemption is similarly unconstitutional.

The State argues that the court should not reach the merits of the plaintiffs' equal protection claim for the following reasons: 1) The Alaska Constitution's Marriage Amendment precludes consideration of the claim; 2) the plaintiffs and married couples are not similarly situated; and 3) the tax exemption is not facially discriminatory. Each of these arguments fails and the court will therefore reach the merits of plaintiffs' equal protection challenge.

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[34] *ACLU*, 122 P.3d at 783 (2005).

[35] *Id., quoting Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

[36] *ACLU,* 122 P.3d at 794.

C) The Marriage Amendment Does Not Preclude Consideration of Plaintiffs' Case.

The State argues that the Marriage Amendment of the Alaska Constitution precludes consideration of the plaintiffs' claims.[37] The Marriage Amendment states that Alaska legally recognizes only marriages between one man and one woman.[38] The State claims that this amendment impliedly prohibits same-sex couples from obtaining the "benefits of marriage" under state laws.[39] However, the Marriage Amendment speaks only to the *definition* of marriage and does not mention the associated *benefits* of marriage.

For support, the State cites a state statute that expressly excludes same-sex couples from "being entitled to the benefits of marriage."[40] However, the Marriage Amendment does not incorporate this statute. The legislature chose not to include language about benefits in the amendment, and the court will not read in a further provision. As the plaintiffs point out, this statute "cannot acquire constitutional dimension because of the Marriage Amendment, and cannot

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[37] Def.'s Memo. at 11–12.

[38] ALASKA CONST., art. I, § 25.

[39] Def.'s Memo. at 12.

[40] ALASKA STAT. § 25.05.013.

supersede or supplant the constitutional right to equal protection."[41] In *ACLU*, the Alaska Supreme Court explained that though the amendment "effectively prevents same-sex couples from marrying," it "does not automatically permit the government to treat them differently in other ways."[42] Therefore, the Marriage Amendment does not preclude the court from considering plaintiffs' claims.

D) Plaintiffs and Married Couples are Similarly Situated.

The Alaska Constitution's equal protection clause prohibits the government from treating "similarly situated persons differently."[43] As a threshold matter, plaintiffs must demonstrate that they are "similarly situated" with married couples who co-occupy or co-own property, and that the Tax Exemption therefore treats same-sex and opposite-sex couples differently on the basis of their sexual orientation. The State argues that the plaintiffs and married couples are *not* similarly situated because the plaintiffs have a different property ownership status from most married couples. The court finds that plaintiffs are similarly situated with married couples.

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[41] Plaintiffs' Reply in Support of Plaintiffs' Motion for Partial Summary Judgment and Opposition to Defendant State of Alaska's Cross-Motion for Summary Judgment at 4 [hereinafter "Pl.'s Reply"].

[42] *ACLU*, 122 P.3d at 787. See also the full discussion of the issue at 785–87.

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

The State argues that the Tax Exemption classifies people by their property ownership status, not by marital status.[44] It argues that the exemption's marital classification is a proxy and is meant to distinguish between tenants in the entirety and tenants in common.[45] Only married couples may own property as tenants in the entirety.[46] Alaska law presumes that a married couple acquires property as tenants in the entirety.[47] Tenancy in the entirety is the default property ownership status for married couples, though they may opt to hold their property in a different manner.[48] Plaintiffs, unmarried domestic partners, must co-own property as tenants in common.[49]

The court disagrees that the Tax Exemption strictly tracks a difference in property ownership status. The statute does not refer to tenancy in the entirety or tenancy in common. When interpreting a statute, the court should assume that the legislature intended to give meaning to each word and used "no superfluous

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[44] Def.'s Memo. at 16–17 (July 11, 2011).

[45] Def.'s Memo. at 3–4, 16.

[46] ALASKA STAT. § 34.15.110(a),(b).

[47] ALASKA STAT. § 34.15.110(b).

[48] *Id.*

[49] ALASKA STAT. § 34.15.110(a).

words."[50] In fact, the statute and regulation themselves contemplate application to a married couple that does *not* own property in a tenancy in the entirety.[51] The legislature did not distinguish between tenants in common and tenants in the entirety; it instead chose to use the language of married and unmarried co-owners or co-occupants. The regulations clarify that the exemption applies to married couples regardless of the percentage of property each spouse owns.[52] Married couples and same-sex domestic partners make comparable commitments to one another,[53] which reasonably includes the commitment to co-own or co-occupy a home. Therefore, the court finds plaintiffs and married couples to be similarly situated and finds the equal protection clause applicable.

E) The Tax Exemption is Facially Discriminatory.

A plaintiff alleging an equal protection clause violation must show that the state's action is discriminatory.[54] There are two ways to demonstrate

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[50] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 906 (Alaska 1987), *quoting Alaska Transp. Comm'n v. Airpac, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984).

[51] ALASKA ADMIN. CODE tit. 3, § 135.085(a).

[52] *Id.*

[53] *See, e.g.,* ALASKA STAT. § 39.50.200 (defining "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.").

[54] *ACLU*, 122 P.3d at 788.

discriminatory treatment. First, a plaintiff can show that the state action has a "discriminatory purpose."[55] Second, a plaintiff can show that the state action is "facially discriminatory."[56] A law is facially discriminatory when it classifies people expressly "by its own terms."[57]

The parties agree that there is no evidence that the Tax Exemption evinces an intent to discriminate against same-sex partners. The State argues further that the Tax Exemption is not facially discriminatory because it does not explicitly mention marriage or same-sex couples,[58] because the language referring to marital status is in the implementing regulation rather than the statute itself,[59] and because the Tax Exemption does not create an unequal tax burden for *all* unmarried property co-owners and co-occupants.[60] The court finds that the Tax Exemption *is* facially discriminatory for the reasons set forth below. Because the Tax

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[55] *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 956 (Alaska 2005).

[56] *ACLU*, 122 P.3d at 788.

[57] *Id.* (quotation omitted).

[58] Def.'s Memo. at 14; Def.'s Reply in Support of the State of Alaska's Cross-Motion for Summary Judgment, at 7 (Aug. 19, 2011) (arguing that the "challenged statute" is "facially neutral) [hereinafter Def.'s Reply].

[59] Def.'s Memo. at 7–8.

[60] Def.'s Memo. at 8–9.

Exemption is facially discriminatory, the court does not address the State's argument that plaintiffs fail to show discriminatory intent.

1. Language Referring to Marriage Creates a Marital Classification and Discriminates Based on Sexual Orientation.

The State argues that the Tax Exemption is not facially discriminatory because neither the relevant statute nor regulation mentions same-sex couples or marriage.[61] However, the Alaska Supreme Court held that because the Marriage Amendment defines marriage exclusively as a union of one man and one woman, language referring to a husband, a wife, or a spouse is a marital classification.[62] The Tax Exemption expressly refers to spouses, widows, and widowers.[63] In Alaska, a marital classification facially discriminates based on an individual's sexual orientation.[64]

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[61] Def.'s Memo. at 14.

[62] *ACLU,* 122 P.3d at 788–89 ("By restricting the availability of benefits to 'spouses,' the benefits programs 'by [their] own terms classif [y]' same-sex couples 'for different treatment.' Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, 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. We therefore conclude that the benefits programs are facially discriminatory.").

[63] ALASKA ADMIN. CODE tit. 3, § 135.085(a),(b),(c); ALASKA STAT. § 29.45.030(e)(3).

[64] *ACLU,* 122 P.3d at 788–89.

2. The Court Should Interpret the Statute in Combination with its Implementing Regulation.

The State argues that the court should separate the language creating the Tax Exemption from its implementing regulation. After making this separation, the State argues, the statute itself is not facially discriminatory because it does not mention marriage.[65] However, the court finds it appropriate to read the statute in combination with the implementing regulation. Together, the statute and regulation expressly classify individuals according to marital status.

When the court interprets a statute, "[t]here is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used."[66] Further, the Alaska Supreme Court instructs that "[a]dministrative regulations which are legislative in character are interpreted using the same principles applicable to statutes."[67] The court will read

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[65] Def.'s Reply at 7–8. The State also claims that the statute is not facially discriminatory because "the reimbursement regulation, by its own terms, does not mandate the manner in which a municipality applies the tax exemption." *Id.* at 8:8–10. However, though municipalities have leniency in some aspects of implementation, 3 AAC 135.085(a) and (c) clearly restrict a local government's options. *See* Ans. Mun. of Anchorage, Affirmative and Other Defenses ¶ 1 (Oct. 13, 2010).

[66] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 906 (Alaska 1987).

[67] *State Dep't. of Highways v. Green*, 586 P.2d 595, 603 n.24 (Alaska 1978).

the statute in combination with its implementing regulation, and will treat facial discrimination in the regulation as constitutionally comparable to discrimination in the statute. As the plaintiffs point out, the regulation language would be "meaningless and superfluous absent an underlying exemption that applied to married couples."[68]

The Tax Exemption statute mandates that the state reimburse localities for the exemption,[69] and requires the adoption of implementing regulations.[70] To fully and accurately interpret the statute, the court must consider the implementing regulations. The regulations facially distinguish between married and unmarried co-owners or occupants.[71]

Further, the tax exemption statute does extend a benefit to a "widow or widower" that it does *not* extend to a surviving unmarried co-owner or co-occupant.[72] Though this is not a reference to a husband, wife, or spouse, it *is* an express reference to a marriage.

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[68] Pl.'s Reply at 5.

[69] ALASKA STAT. § 29.45.030(g).

[70] ALASKA STAT. § 29.45.030(k).

[71] ALASKA ADMIN. CODE tit. 3 §§ 135.085(a),(c).

[72] ALASKA STAT. § 29.45.030(e)(3).

3. The Tax Exemption is Unconstitutional as to the Entire Relevant Set of Plaintiffs.

The State argues that a law is facially discriminatory only when in "no set of circumstances" can the state apply the statute constitutionally, and argues that the Tax Exemption does not meet this standard.[73] However, the State misstates the relevant set of people to whom the "no set of circumstances" test applies. The court finds that the Tax Exemption is unconstitutional as to the entire set of people *for whom the marital classification is relevant.*

The State claims that the Tax Exemption is not facially discriminatory because it denies the full value of the exemption not only to same-sex partners but also to other unmarried property co-owners and co-occupants.[74] It writes that "plaintiffs do not argue that the challenged statute and regulation are unconstitutional in all circumstances. The differential effect challenged here only applies to a certain sub-set of same-sex couples."[75] If the Tax Exemption is not unconstitutional as to people in the myriad other household arrangements, the

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[73] Def.'s Reply at 6 (citations omitted).

[74] *Id.* at 9.

[75] *Id.* at 8.

State argues, it is not unconstitutional in all circumstances and, accordingly, not facially discriminatory.[76]

The State is correct that the discriminatory aspect of the exemption applies only to a sub-set of people in the sense that it only affects a same-sex couple during a limited time period[77] or when one partner is a disabled veteran. It is also correct that many other unmarried co-owners and co-occupants are not able to claim the full exemption. However, this is not the proper focus.

The Alaska Supreme Court clarifies that the "'no set of circumstances' language is not a rigid requirement" and that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[78] Here, the law is a *restriction* for couples who *would be able* to claim the exemption *but for* their inability to marry due to sexual orientation. The added benefit that the Tax Exemption confers on married couples is irrelevant for people who would not marry if given the option.[79] People who co-own or co-

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[76] Def.'s Reply at 6–7; 8–9.

[77] The limited time period is when one person is above age sixty-five and the other is not.

[78] *State v. Planned Parenthood of Alaska*, 35 P3d 30, 35 (Alaska 2001).

[79] *Cf. Ranney v. Whitewater Engineering*, 122 P.3d 214, 222 (Alaska 2005) (declining to extend a survivor benefit to an opposite-sex domestic partner and finding that "the state's decision to provide benefits to people who choose to exercise a constitutional right does not invariably require it to provide equal

occupy property but are *not* in domestic partnerships have not made a commitment equivalent to that of married couples or same-sex domestic partners, and are not similarly situated with the plaintiffs and married couples.

F) The Tax Exemption Applies to Traber and Snider.

The State claims that plaintiffs Traber and Snider have not raised an issue of triable fact because Traber, who is sixty-nine, does not own the condominium where he and Snider live.[80] The State claims that Traber would not qualify for the exemption *even if* he and Snider were married under Alaska law. It is true that the statute applies to "real property owned and occupied" by an eligible applicant.[81] However, the implementing regulation states that when "an eligible person and his or her spouse *occupy* the same permanent place of abode," the State shall reimburse the municipality for the exemption "regardless of whether the property is held in the name of the husband, wife, or both."[82] The regulation language clearly extends the Tax Exemption to eligible applicants who share a home with their spouse, but who do not own the home. The State argues that the

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benefits to those who *decline to exercise* the right.") (emphasis added). This recognizes the difference between opposite-sex partners who choose not to marry, and same-sex partners who are unable to legally marry.

[80] Def.'s Reply at 26.

[81] ALASKA STAT.§ 29.45.030(e).

[82] ALASKA ADMIN.CODE tit. 3 §§ 135.085(a) (emphasis added).

Municipality of Anchorage does not apply the exemption in this manner.[83] There are several problems with this argument.

First, the plaintiffs have produced records that the Municipality has granted the full exemption to a couple when the non-eligible spouse solely owned the couple's shared home.[84] Second, the Alaska Association of Assessing Officers (AAAO) offers interpretive guidance to local governments on how to apply the exemption,[85] and its guidance suggests that AAC.135.085(a) allows a married applicant to obtain the full tax exemption even if his or her spouse owns the property.[86] AAAO is a private entity and its guidance is advisory only.[87] Under its standards, applicants may receive an exemption for only the portion of property they own.[88] However, AAAO states an "exception" to this rule; when the applicant and his or her spouse "own the same permanent place of abode, the

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[83] Def.'s Reply at 26.

[84] Decl. of Thomas Stenson, ¶ 5 (Aug. 9, 2011).

[85] *See generally* ALASKA ASSOC. OF ASSESSING OFFICERS, STANDARD ON PROCEDURAL ISSUES FOR THE APPLICATION OF THE SENIOR CITIZEN / DISABLED VETERAN PROPERTY TAX EXEMPTION PROGRAM IN ACCORDANCE WITH ALASKA STATUTE 29.45.030(e)–(i) (1996) [hereinafter AAAO STANDARDS].

[86] *Id.* at 6 (under paragraph heading "Standard 1.(b)).

[87] Def.'s Memo. at 8.

[88] AAAO STANDARDS 6 (under paragraph heading "Partial Property Ownership by Program Participants").

exemption applies to the entire value of the property irrespective of that percentage of ownership of the applicant."[89] This suggests Traber would be able to claim the tax exemption if he and Snider were married.

Third, and most importantly, though the State argues that municipalities do not *apply* the exemption in this manner, the State's application is irrelevant to the constitutionality of the legislative language. In the vast majority of situations, the applicant spouse likely owns, or partially owns, the shared residence. However, it appears that the legislature intended the exemption to apply even when this is not the case. Traber is unable to marry Snider under Alaskan law, and therefore unable to claim the Tax Exemption. If Traber were married to Snider, he would be able to claim the exemption. Therefore, Traber has stated a viable equal protection claim.

G) Sliding-Scale Equal Protection Clause Analysis.

The Alaska Constitution guarantees all persons "equal rights, opportunities, and protection under the law."[90] This equal protection provision is "more robust[]" and "affords greater protection to individual rights" than its federal counterpart.[91] Alaska uses a sliding-scale test to determine the level of scrutiny

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[89] *Id.* (under paragraph heading "Standard 1.(b)").

[90] ALASKA CONST. art. I, § 1.

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

with which it reviews the challenged state action.[92] First, and most importantly, the court determines the weight of the individual right burdened.[93] Second, the court determines what governmental objective the challenged action serves.[94] Along the spectrum of review, the court may require the State to show "legitimate" objectives, "at the low end," or "a compelling state interest" "at the high end."[95] Finally, the court evaluates whether the state's means fit appropriately to its ends.[96] If the court uses a relaxed level of scrutiny, the state must show that its means—the challenged action—bear a "fair and substantial relationship" to the ends—the governmental interest.[97] If the court uses its most demanding level of scrutiny, the "fit . . . must be much closer" and the state must show that there is no "less restrictive alternative" that would achieve its objective.[98]

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[92] *ACLU*, 122 P.3d at 787, 789–90.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *ACLU*, 122 P.3d at 790.

[98] *Id.* at 789.

H) Disparate Tax Burdens Receive Similar Minimal Scrutiny to Other Economic Discrimination.

The challenged legislation is a tax exemption. The State overemphasizes this fact. It points to a "body of case law governing constitutional challenges to disproportionate taxation" and argues that the court should deny plaintiffs' challenge because courts review tax laws at the "lowest end of the sliding scale."[99] The State is correct that Alaska courts review disproportionate tax burdens using minimal scrutiny.[100] However, the cases it cites do not distinguish between disproportionate tax burdens and *other* economic burdens.

Economic burdens receive only minimal scrutiny. Yet, in *ACLU*, the court found that the employment benefits scheme—which created an economic burden—did not pass even minimal scrutiny.[101] The State's emphasis that tax exemptions trigger only minimal scrutiny does not change the conclusion here.[102]

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[99] State's Memo at 20.

[100] *See, e.g., Atlantic Richfield Co. v. State*, 705 P.2d 418, 437 (Alaska 1985).

[101] *ACLU*, 122 P.3d at 790.

[102] As discussed later, the court here will follow *ACLU* even though the Alaska Supreme Court indicated that it was considering the government's role, specifically, as an employer. At this time, the Alaska Supreme Court has not indicated whether, or how, the minimal scrutiny analysis differs for the government's role as a tax assessor and collector.

The State's cited cases do not distinguish disproportionate tax burdens from other economic burdens. In *Lot 04B&5C, Block 83 Townsite v. Fairbanks North Star Borough*, the plaintiff challenged a tax exemption under equal protection and the court explained that "economic interests, such as 'freedom from disparate taxation[,]'" are "at the low end" of protected interests and receive "the most relaxed scrutiny on our sliding scale."[103] In *Matanuska-Susitna Borough School District v. State*, the court simply reiterated that freedom from disparate taxation is on the low end of the sliding scale.[104] Again, in *Stanek v. Kenai Peninsula Borough*, the court applied the "most tolerant 'legitimate reason' test."[105] These cases simply put the analysis of tax statutes on par with other economic interests. They do not suggest a special treatment of tax burdens.

The State also points out that the court narrowly construes tax exemptions to further the policy of providing a broad tax base. Again, this is true. However, it does not change the court's conclusion. The statute's marital classification is

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[103] 208 P.3d 188, 192 (Alaska 2009), *quoting Atlantic Richfield Co. v. State*, 705 P.2d 418, 437 (Alaska 1985). In *Atlantic* the court said that "freedom from disparate taxation[] lies at the low end of the continuum of interests protected by the equal protection clause." It did not group disparate taxation with other economic interests. It also did not further comment on the test for disparate taxation.

[104] 931 P.2d 391, 398 (Alaska 1997), *citing Atlantic Richfield*, 705 P.2d at 437.

[105] 81 P.3d 268, 271 (Alaska 2003).

facially unconstitutional. This means that it is unconstitutional no matter how the court interprets it.[106] Also, the plaintiffs present counterarguments to the policy of providing a broad tax base.

In *Sisters of Providence in Washington, Inc. v. Municipality of Anchorage*, the court explained that it construes tax exemption statutes narrowly to promote the "policy of providing a broad base of taxation."[107] The court *also* said, however, that it was "mindful of the policy behind the tax exemption . . . ."[108] The full message, then, is that the court balances the policy behind the exemption and the policy of broad taxation. Here, plaintiffs argue as counterweight to the policy of broad taxation that extending the tax exemption to them would further the policy behind the exemption.

The State also relies on *Stanek* for the proposition that "tax exemptions should be narrowly construed to the end that disturbances to . . . equality in the distribution of this common burden upon all property which is the object and aim

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[106] *See Javed v. Department of Public Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) *quoting United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) ("A statute is facially unconstitutional if 'no set of circumstances exists under which the Act would be valid.'"). As noted above, Alaska courts clarify that the proper focus for this test is the group of people "for whom the law is a restriction . . . ." *State v. Planned Parenthood of Alaska*, 35 P3d 30, 35 (Alaska 2001).

[107] 672 P.2d 446, 452 (Alaska 1983).

[108] *Id.*

of every just system of taxation be minimized."[109] This argument also does not aid the State. Because this court finds that plaintiffs are similarly situated to other taxpayers, with whom they are treated unequally, extending the tax exemption to them does not "disturb[]" the "equality" in the tax "burden."[110] Rather, it equalizes it. This situation distinguishes the case at bar from *Stanek*, in which the court found legitimate reasons to tax people differently based on how they used their property.[111] Ultimately, though, because the statute is facially unconstitutional, the question of its proper construction is irrelevant.

I) The Tax Exemption Fails Minimal Scrutiny Under the Sliding-Scale Test.

Under minimal scrutiny, the State must show that the challenged classification fairly and substantially advances the legislation's legitimate objectives.[112] Here, it must show that the marital classification fairly and substantially advances the governmental interest in helping seniors and disabled

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[109] Def.'s Memo. at 23 *quoting Stanek* at 274 (quotation omitted).

[110] *See Id.* at 274.

[111] *Id.* at 271.

[112] *Id.*

veterans to remain in their homes.[113] The court finds that the marital classification fails under minimal scrutiny.

The clearest difference between this case and *ACLU* is that the *ACLU* court emphasized that it addressed the government in its "specific" role as a "public employer[]" and not in a "broader governmental capacit[y]."[114] Here, the government is acting as a tax assessor and collector. In *ACLU*, the court applied a higher degree of minimal scrutiny to the employment benefits scheme in light of the government's role as a public employer and the constitutional guarantee that citizens enjoy "the rewards of their own industry."[115] However, it did not indicate whether, and how, its analysis would be different when addressing the government's role as a taxing authority. The State argues that this critically distinguishes plaintiffs' claim from *ACLU*; the plaintiffs argue that it does not. In *ACLU,* the Alaska Supreme Court did not offer guidance on which governmental roles are comparably important to the public employer role. It also did not instruct on the analysis for roles that are more or less important than the public employer role. In light of this absence, the court will follow *ACLU* because it provides a

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[113] *See, Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 271 (Alaska 2003).

[114] *Id.* at 794.

[115] *Id., quoting* ALASKA CONST. art. I, § 1; ALASKA CONST., art. XII, § 6.

clear precedent. The court notes that tax collection and assessment are fundamentally and exclusively government functions.[116]

J) The Importance of the Right Burdened by the Tax Exemption's Marital Classification.

The plaintiffs argue that the Tax Exemption burdens their fundamental rights to privacy in the home and personal autonomy, as well as creating a disparate economic burden. If the court found that the Tax Exemption burdened a fundamental right, it would apply a heightened level of scrutiny to the legislation. The court finds that the legislation fails to pass even the minimal scrutiny that economic burdens trigger. Therefore, it does not address the question of whether the Tax Exemption burdens a fundamental right.

The additional benefit that the Tax Exemption confers on married couples is valuable to those who qualify for the tax exemption, and the inability to receive this full benefit economically burdens the plaintiffs. The State repeatedly claims that the economic impact of the additional tax benefit is "minor," and implies that the relatively small amount of money at stake makes the claim less constitutionally significant.[117] However, as the plaintiffs point out, the State's explanation of the

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[116] ALASKA CONST. art. IX, § 1 ("The power of taxation shall never be surrendered.").

[117] *See* Def.'s Memo. at 2 ("relatively minor tax exemption differential") and, 24 ("relatively small amount of the differential").

governmental interest in the Tax Exemption belies this claim.[118] If the additional amount of exempted value is important to help keep seniors in their homes, then an additional value of several hundred dollars is not negligible (especially not for people on a fixed income). The plaintiffs Schmidt and Schuh and Vollick and Bernard had an economic burden of several hundred dollars each year. In Traber's case, he was completely unable to make use of an exemption for which he would be qualified if married.

K) The Govermental Interests in the Tax Exemption.

The second step of the equal protection analysis is to determine the governmental interests in the law.[119] "Under minimal scrutiny, the interests need only be legitimate."[120] In *ACLU*, the State articulated its interests as cost control, administrative efficiency, and promotion of traditional marriage.[121] The court accepted these interests as legitimate, but rejected the argument that the discriminatory classification scheme substantially and fairly advanced them.[122]

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[118] *See* Def's Memo. at 20–21 ("The State's interest . . . is to help this segment of the population remain in their homes despite the probability that they live on a fixed income and have a reduced ability to earn money as property values increase.").

[119] *ACLU*, 122 P.3d at 789.

[120] *Id.* at 790.

[121] *Id.* at 790–93.

Here, the governmental interest in the Tax Exemption is to help seniors and disabled veterans remain in their homes.[123] This interest is undisputedly legitimate.

L) The Means-to-End Fit Between the Classification and the Interests.

The final step of the sliding scale equal protection analysis is to determine how closely the government's means fit its objective.[124] "Minimum scrutiny requires a 'fair and substantial relation' between the means (i.e., the classification) and the 'object of the legislation.'"[125] Here, the State must show that the marital classification in the Tax Exemption fairly and substantially helps seniors and disabled veterans remain in their homes. Because the State has not made this showing, the classification violates the plaintiffs' rights to equal rights, opportunities, and protection under the Alaska Constitution.

The State explains the marriage classification as follows: "Extending the exemption to the full value of the property for married couples enhances [the] purpose because spouses are likely to be economically intertwined with, and

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[122] *Id.* at 793–94.

[123] Def.'s Memo. at 20–21.

[124] *ACLU*, 122 P.3d at 789.

[125] *Id.* at 790.

possible caretakers for, these citizens."[126] This rational actually *supports* extending the full value of the exemption to same-sex partners as well as married couples, which the State acknowledges.[127] The State glosses over this contradiction by explaining that, under minimal scrutiny, the means-to-end fit of law to its objective can be somewhat loose.[128] It also argues that the administrative costs of determining eligibility of domestic partners are "not justified for a minor economic differential of a few hundred dollars a year."[129]

These explanations are not persuasive. The fact that the means-to-end fit can be somewhat loose is not an affirmative reason *for* the classification; it is simply an explanation that the classification does not have to be perfectly well-tailored. As the plaintiffs point out, "the State does not explain how providing the full Tax Exemption to married couples and denying it to same-sex partners is *substantially related* to advancing [its] interest." If the policy underlying the Tax Exemption's additional benefit to married couples is the recognition that people in long term, committed relationships build their lives together, then there is no

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[126] Def.'s Memo. at 20.

[127] *Id.* at 22.

[128] *Id.* at 22–25.

[129] Def.'s Reply at 24.

reason to distinguish between married couples and couples who would make the marital commitment but for their sexual orientation.

The State argues that the administrative costs of determining which same-sex couples qualify for the exemption would outweigh the benefit of the exemption.[130] However, the Alaska Supreme Court has already suggested that the administrative costs of determining domestic partner eligibility for employment benefits would not be too great.[131]

The state then argues that "[a]pportionment of the exemption based on [the nature of] property ownership serves a legitimate public interest. Because eligibility for the tax exemption is based on ownership and occupancy, it makes sense to apportion the exemption based on percentage of ownership and to account for the different types of property ownership under Alaska law."[132] First, married couples and same-same partners co-occupy their homes in the same manner, so this is not a persuasive argument for the classification. Second, the court addressed, and rejected, the State's argument that the Tax Exemption is meant to

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[130] Def.'s Memo. at 24 ("[G]iven the relatively small amount of the differential in this case, it is reasonable for the state to limit the costs of administering the tax exemption.").

[131] *ACLU*, 122 P.3d at 791–92. ("The availability of these benefits [to domestic partners] elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided.").

[132] Def.'s Reply at 23.

distinguish between tenants in common and tenants in the entirety.[133] Therefore, the distinction between types of property ownership is not a persuasive argument for the distinction.

IV. CONCLUSION

The court concludes that the Tax Exemption's marital classification violates the Alaska Constitution's equal protection clause. The plaintiffs' motion for partial summary judgment is granted. The defendants' cross-motion for summary judgment is denied; instead complete summary judgment is rendered in favor of plaintiffs. Plaintiffs shall provide the court with an appropriate form of judgment within ten days of the date of this Decision and Order.

Dated this 16th day of September, 2011, at Anchorage, Alaska.

Frank A. Pfiffner
FRANK A. PFIFFNER
Superior Court Judge

I certify that on 9-16-11 a copy of the above was mailed to each of the following at their address of record:

D. Oesting
T. Stenson
P. Weiss
R. Witty

B Cavanaugh
B. Cavanaugh, Judicial Assistant

[133] *See supra* Part III.D.