

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-CONTESSA,
KAREN SURNICK and ELIZABETH ANDREWS,
TERESA 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 CIV

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Jennifer Middleton
Staff Attorney
Lambda Legal Defense and
Education Fund, Inc.
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585
California Bar No. 178546

Rebecca L. Maxey
Law Offices of
Rebecca L. Maxey, L.L.C.
310 K Street, Suite 200
Anchorage, AK 99501
(907) 264-6677
(907) 264-6678 (facsimile)
Alaska Bar No. AK0006024

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INTRODUCTION

This Court previously has addressed whether an arm of state government is obligated to provide health and pension benefits for the domestic partners of its lesbian and gay employees.¹ In that case, the Court recognized that the University of Alaska's failure to provide such coverage discriminated against unmarried employees.² Notwithstanding that ruling, however, the same discrimination continues in state employment, and its burdens fall disproportionately on the state's gay and lesbian workers. They are denied the equal opportunity to enjoy these basic employment benefits relied on by all other employees to protect their families. Even though lesbian and gay employees perform the same work as their non-gay peers, the state has chosen to limit access to these benefits to those employees who are legally married, a status the Alaska Constitution makes unattainable for those with same-sex partners.³

To establish employee benefits for all, and then condition their availability on a status that is both unavailable to a disfavored subset of employees and unrelated to ability to perform on the job is discrimination, plain and simple. If an employer decided to provide sick leave for employees with prostate or testicular cancer, but not for those with any other forms of reproductive cancer, the sex discrimination inherent in imposing such an insurmountably sex-based, non-work-related condition would be easy to recognize.

¹ University of Alaska v. Tumeo, 933 P.2d 1147 (Alaska 1997).

² *Id.* at 1149.

³ *See* Alaska Const. Art. I, § 25.

This is no different. By choosing a pre-condition to benefits that employees with same-sex partners are barred from meeting under Alaska law, the state provides gay and lesbian workers less compensation for the same work as their heterosexual counterparts. Unlike many more subtle forms of discrimination, however, this one is easy for the state to remedy. Equal pay for equal work can be achieved with a simple policy that has been adopted by thousands of employers nationwide, including the University of Alaska.

Amicus Lambda Legal concurs with appellants that state employees have exceedingly important, constitutionally-protected interests in freedom from discrimination on the basis of their sexual orientation and sex that are denied by the challenged benefits programs. Appellants ably address these issues in their brief, and Lambda Legal will not repeat them here. Rather, this *amicus* brief seeks to provide vital context to appellants' arguments by addressing why these benefits are so important to employees with domestic partners. *Amicus* presents this information because under Alaska' sliding scale approach to equal protection, the factual context surrounding the particular right at issue is a critical inquiry. Indeed, the degree of importance in securing access to family insurance protections is the primary factor that will determine the level of scrutiny to which the state's discriminatory benefits plan must be subjected.⁴

This brief then reviews the data demonstrating that providing these benefits to domestic partners is administratively easy and inexpensive, and explains why including lesbian and gay employees in dependent coverage is both a sound business practice and

⁴ See, e.g., Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 268 (Alaska 1984).

good public policy. Data revealing that domestic partner benefits programs are neither costly nor burdensome likewise provides the basis for an accurate assessment of the final component of the constitutional inquiry required in this case: the relationship between the state's claimed purposes and its exclusionary policy.

Finally, this brief also highlights how appellants' equal protection claim is bolstered by another provision of the Alaska Constitution's Bill of Rights: the guarantee to all citizens of the right to "the enjoyment of the rewards of their own industry."⁵ Under Alaska's sliding scale approach to equal protection, appellants' protected interest in equal pay – together with the low cost of, easy administration of, and sound reasons for providing domestic partner benefits – means that the state no longer may use marriage as the exclusive gateway to these employment benefits so important to protecting employees' financial security and peace of mind.

PRELIMINARY STATEMENTS

Amicus adopts appellants' statements of jurisdiction, parties, issues presented for review, standard of review, facts and proceedings below.

⁵ Alaska Const. Art. I § 1.

ARGUMENT

I. **Limiting Eligibility for Family Coverage to Married Employees Means Paying Lesbian and Gay Employees Less for the Same Work.**

Domestic partner benefits are a simple matter of employment equity. According to standard professional estimates, employee benefits routinely comprise between thirty and forty percent of total employee compensation.⁶ These benefits include various types of insurance coverage, pension rights, and other significant privileges. Coverage is routinely extended not only to employees, but also to their spouses and children. When a state employer does not provide unmarried employees with families the wide array of benefits provided to their married co-workers, however, the unmarried employees, in a very concrete way, do not receive “equal pay for equal work.”⁷

This basic principle -- that providing unequal levels of compensation is discriminatory -- has inspired many leading companies and institutions to change their benefits policies to include domestic partners. Many, such as Stanford University,

⁶ See, e.g., Melody A. Carlsen, Domestic Partner Benefits: Employer Considerations, Employee Benefits Practices, 3 (Int'l Found. Employee Benefit Plans, 4th Quarter 1994) [“Int'l Found.”]; Michelle Neely Martinez, Recognizing Sexual Orientation is Fair and Not Costly, 38 HRMagazine 66 (June 1993); Stanford University Committee on Faculty and Staff Benefits, Report of the Subcommittee on Domestic Partners' Benefits ii (June 1992) (a comprehensive report issued following an extensive study).

⁷ Martinez, *supra*. See also Liz Winfeld & Susan Spielman, Straight Talk About Gays in the Workplace 40 (1995); Int'l Found., *supra*, at 3; City of West Hollywood, Understanding the Domestic Partner Dilemma: Perspectives of Employer and Insurer 4 (Oct. 1993) (a thorough analysis prepared by the City in furtherance of its nondiscrimination policies); Stanford, *supra*, at iii-iv.

recognize what may be “intuitively obvious ... [but] worth spelling out”: that an institution’s use of marital status as the sole basis upon which family benefits may be provided has a disproportionate impact upon lesbians and gay men, who are not presently able to marry in any state and are forbidden from marrying in Alaska under the state’s Constitution.⁸ In a report detailing why it decided to provide the benefits, Stanford also considered the fact that gay people historically have been “victims of group-based animus.”⁹ In light of the continuing, group-based marginalization of gay men and lesbians, the Report concluded, “[a] community that wishes to incorporate [them] as full-fledged citizens would be obliged to avoid such status-based discrimination.... [I]t is illegitimate to subsidize only those from dominant social groups.”¹⁰

⁸ Stanford, *supra*, at 34.

⁹ *Id.* Indeed, dozens of studies over the past 15 years have confirmed the widespread nature of employment discrimination against lesbians and gay men. James D. Woods, The Corporate Closet: The Professional Lives of Gay Men in America 8 (1993). As one leading expert has phrased it: “Job discrimination continues to pose one of the gravest civil rights threats in the lives of lesbian and gay citizens.” John C. Gonsiorek, Threat, Stress, and Adjustment: Mental Health and the Workplace for Gay and Lesbian Individuals, in Homosexual Issues in the Workplace 243, 244-45 (Louis Diamant ed., 1993). At present, gay people receive no federal-level protection against discrimination in private employment. In addition, gay people face disproportionate levels of bias-motivated violence and harassment. *See, e.g.*, Bureau of Justice Statistics, Hate Crimes Reported in NIBRS, 1997 - 99 (September 2001), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/hcrn99.pdf (reporting that thirteen percent of hate crimes reported nationwide were sexual orientation-related, and the majority of them were violent). This Court has decided several cases involving anti-gay bias, and has taken note of the stigma which many attach to lesbians and gay men. *See, e.g.*, Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Alaska 1978); S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985); Faipas v. Municipality of Anchorage, 860 P.2d 1214 (Alaska 1993).

¹⁰ Stanford, *supra*, at 34. *Accord* Romer v. Evans, 517 U.S. 620 (1996) (holding that state action intended to bar a disfavored group from rights and privileges generally extended

A. Because The Family Protections Appellants Seek Are Vital Elements of Employee Compensation, Those Protections Are Of Great Importance.

The importance to employees of the family coverage provided as a part of their employment package cannot be overstated. Medical expenses for a loved one who suffers serious injury or illness can be financially devastating. Purchasing individual health insurance policies in Alaska can be prohibitively expensive, if the coverage is available at all. Many insurers will not extend health insurance to individuals with pre-existing conditions or to those who have not had coverage in recent years, forcing individuals with serious health conditions to rely on public assistance if they need major medical care. In addition, protection for any adult dependent other than a spouse in Alaska's retirement system is simply unavailable. For these reasons, employer benefit coverage of the loved ones of employees in committed relationships is a coveted and highly-appreciated element of compensation.

Lesbian and gay Alaskans value this coverage for the same reasons their heterosexual co-workers do. A great many same-sex couples, including appellants here, make life-long commitments to each other and support each other economically as well as emotionally. The 2000 census showed that gay and lesbian families are living in 99.3 percent of all counties in the United States, including *every* county in Alaska.¹¹ Eleven

to others violates the federal guarantee of equal protection).

¹¹ See U.S. Census Bureau, United States Census 2000, Table PCT22, "Unmarried Partner Households and Sex of Partner," available at <http://factfinder.census.gov/servlet>; Human Rights Campaign, Gay and Lesbian Families in the United States: Same-Sex

hundred eighty Alaska households identified themselves to the Census Bureau as gay or lesbian couples, just shy of one percent of the total coupled households in the state, married or unmarried.¹² A great number of these couples – including some of the appellants in this case – are parents to children, whether through adoption, a prior relationship, or assisted reproductive technologies. Each and every one of these families faces the same burdens of maintaining a joint household, caring for the needs of children, and preparing for a secure retirement as any other family in Alaska. The appellant couples here simply wish to care for each other and their children; the family benefits they seek will allow them to be better partners and parents, in keeping with the purposes of the state’s employee benefits program.

Studies confirm again and again that health insurance is the most valued benefit that employers provide, followed closely by pension and retirement plans. A recent survey by the Employee Benefits Research Institute found that “[h]ealth insurance and retirement savings plans are the first and second most important employee benefit for the vast majority of workers.”¹³ That survey went on to note that “[e]mployee benefits also continue to be very important in job selection. Seventy-seven percent of workers reported

Unmarried Partner Households (August 2001) (analyzing U.S. Census Bureau data), available at www.hrc.org/familynet/documents/L%census.pdf.

¹² *Id.*

¹³ Rachel Christensen, Value of Benefits Constant in a Changing World, 23 EBRI Notes 1 (March 2002).

that the benefits that a prospective employer offers are very important in their decision to accept or reject a job.”¹⁴

Having insurance and other common employee benefits for oneself and one’s family helps at work, too. It significantly can reduce personal stress and anxiety, thereby improving concentration and productivity.¹⁵ As one leading voice in this field has noted,

In the case of health care, group coverage alleviates, if not eliminates, the financial concern that accompanies the illness of a loved one. The question that follows is whether the illness of a loved one in a nontraditional family is any less stressful or costly than that occurring in a traditional family. This type of reasoning has led some employers to conclude that members of nontraditional households in which there is the functional equivalent of a marriage should be afforded health coverage as well. A similar argument holds true for other benefits relevant in times of crisis, such as family leave or bereavement leave.¹⁶

When an employee’s partner actually needs to use the health insurance, the ability to have access to quality medical care can mean the difference between life and death for the partner, and between stability and grief for the employee.

The importance of the benefits to employees is confirmed by the experience of employers that have found that offering these benefits attracts top-flight employees and

¹⁴ *Id.*

¹⁵ Stanford, *supra*, at 17; West Hollywood, *supra*, at 4; Int’l Found., *supra*, at 3-4. See generally Dawn Anfuso, Creating a Culture of Caring Pays Off, 74 Personnel J. 70 (Aug.1995) [“Anfuso, Culture”]; Martinez, *supra*, at 66.

¹⁶ Int’l Found., *supra*, at 3-4.

helps to keep them on the job.¹⁷ Recruiters, human resource professionals, corporate executives, and governments alike agree that providing domestic partner benefits helps draw qualified job candidates and retain one's best employees.

In a tight job market, extra benefits mean the difference between having workers and looking for them. That may be why more companies nationally are starting to offer health insurance for unmarried partners of their employees....¹⁸

Employers that extend benefits to all employees without discrimination can expect to see improved overall company productivity and competitiveness because their employees will feel supported, will be motivated, and will produce higher quality work.¹⁹

¹⁷ Hewitt Assoc., Domestic Partners and Employee Benefits i, 1 (1994) (landmark study of the concerns employers face when considering extending domestic partner benefits) ["Hewitt Assoc. 1994"]; West Hollywood, *supra*, at 11; Julie Cohen Mason, Domestic Partner Benefits, 84 *Mgmt. Rev.* 53 (Nov. 1995); The Segal Company, 17 Executive Letter 2, 8 (1993) (a nationwide consulting firm specializing in employee benefits and compensation); Jennifer Knight, Firms Add Domestic Partner Benefits for Competitive Edge, 15 *Corporate Cashflow Magazine* 6 (Aug. 1994); BNA, Benefit Policies and Practices, 21 *Pensions & Benefits Rep.* 238 (1994) ("Profit is the motive. Employers want to attract good employees and be perceived as fair."). *See generally* Ed Mickens, The 100 Best Companies for Gay Men and Lesbians (1994).

¹⁸ Mary Landers, "Beneficial Relationships," *Savannah Morning News* (Nov. 4, 2000).

¹⁹ *E.g.*, Sharon Nelton, Adjusting Benefits for Family Needs, *Nation's Business*, Aug. 1995, at 27; West Hollywood, *supra*, at 11; Jennifer J. Laabs, Unmarried . . . With Benefits, 70 *Personnel J.* 62 (Dec. 1991). *See generally* Towers Perrin, Work/Life Programs: Supporting a New Employer/Employee 'Deal' (Dec. 1994) (national survey showing links between the loyalty engendered in employees, the quality of work produced, and bottom line company profits); Jay Lucas and Mark Kaplan, Unlocking the Corporate Closet, *Training & Dev.*, Jan. 1994, at 35; Stanford, *supra*, at 19-20. The Calvert Group stands as a dramatic example. Before expanding its benefits package, Calvert had a 30% turn-over rate and was struggling financially. Anfuso, Culture, *supra*, 70. After it instituted a generous benefits

Finally, employees place enormous intangible value on the basic fairness that domestic partner coverage represents. When employers extend benefits on an equal basis, they convey respect and concern for groups of employees who previously had been ignored and marginalized. The value of that ethic is priceless, and it is completely non-economic. Governor Knowles recently acknowledged the critical role the state plays in ensuring fairness and non-discrimination, both as the state's leader and as an employer. In a March, 2002 Executive Order renewing the state's commitment to non-discrimination on the basis of sexual orientation and other characteristics, the Governor declared:

As a nation and as a state dedicated to democracy and civil liberties, we, as individuals, employers, employees, and communities must do all we can to eliminate discrimination and intolerance from our society and celebrate our diversity. . . . While tolerance and respect for all peoples inherently is the responsibility of each individual, those in leadership and institutional roles should lead this effort and teach by example.²⁰

Leading by example in state employment benefits policies would bring the words of the Governor to life. It would affirm the equal rights of all Alaska citizens, a value that far exceeds the price of extending the benefits to all employees' families. And it would engender significant loyalty not only on the part of lesbian and gay employees, but also among citizens who simply appreciate the concern for fairness and employee welfare

package -- including a domestic partner health care subsidy -- the company saw "increased loyalty, high production rates, and low turnover," which its management credits with saving the company from disaster. *Id.*

²⁰ Administrative Order No. 195 (March 5, 2002).

such a change represents.²¹

B. Domestic Partner Benefit Programs Are Easily Administrable.

A growing number of state governments, local governments, private companies, educational institutions, and hospitals have moved to reduce the systemic discrimination in compensation that results when benefits are predicated on marriage. Nine state governments including Washington, Oregon, and California already have taken such action.²² A 2000 survey of a cross-section of U.S. private companies by Hewitt Associates found that twenty-two percent offered domestic partner benefits to employees, up dramatically from the thirteen percent found in a similar survey by KPMG Peat Marwick in 1997.²³ The 2000 Hewitt Associates study also found that thirty-five percent

²¹ For example, Stanford's study concluded: "Our willingness to extend [domestic partner benefits] will have enormous symbolic significance for all gays and lesbians at Stanford, conveying more forcefully than any general statement of nondiscrimination ever could the University's belief that they are full and valued members of this community." Stanford, *supra*, at iv, 19-20. *See also* Andrew Sherman & John J. Fadel, Domestic Partner Benefits Pose New Challenges for Employers, Am. Comp. Ass'n. News 7 (June 1994) (though only a small number of employees may actually utilize the benefits, offering them will be seen as an important goodwill gesture); *See generally* Andrew D. Sherman, Facts of Domestic Partner Benefits, Boston Globe, Nov. 26, 1996 at D4 ["Sherman, Facts"]; Laabs, *supra*, at 62.

²² The others are Hawai'i, New York, Connecticut, Rhode Island, Vermont, and Maine. *See* Human Rights Campaign WorkNet Employer Database (listing state governments offering domestic partner benefits), *available at* www.hrc.org/worknet; *see also* Cal. Fam. Code §§ 297-299.5 (West 2000); Tanner v. Oregon Health Science University, 971 P.2d 435 (Ore. Ct. App. 1998); 15 Vt. Stat. Ann. § 1204 (2000); Angela Galloway, "Locke Extends Benefits to Gay Employees," Seattle Post-Intelligencer, May 24, 2000 at A1.

²³ Hewitt Assoc., Survey Findings: Domestic Partner Benefits 2000 1 (2000) ["Hewitt Assoc. 2000"]; KPMG Peat Marwick, Health Benefits in 1997 Executive Summary 6-7 (June 1997) (reporting results of annual survey of employer-sponsored health benefits).

of the companies that did not offer the benefits indicated they may consider doing so within the next three years.²⁴ Nearly one in three Fortune 500 companies now provides these benefits to employees with domestic partners.²⁵

Employers use a variety of approaches to assure equal pay for their lesbian and gay employees. Sometimes they extend benefits simply by including domestic partners within an existing group plan.²⁶ Alternatively, some purchase separate insurance policies to cover non-marital partners.²⁷ Others offer their employees a “cash equivalent” of the value of the benefits to alleviate the compensation inequity and to assist them in purchasing their own, separate policies.²⁸ In addition, “cafeteria plans” and programs

²⁴ Hewitt Assoc. 2000, *supra*, at 1.

²⁵ Human Rights Campaign WorkNet Employer Database, *supra*.

²⁶ Aetna, CIGNA, and Prudential have included domestic partners in the fully insured health plans of client companies since 1994. Nat'l Lesbian & Gay Journalists Ass'n, Domestic Partnership Benefits: A Trend Toward Fairness 2 (1997) [“NLGJA”].

²⁷ For example, the Village Voice, probably the first private company in the country to provide domestic partner benefits, buys separate, individual policies for the domestic partners of its employees. National Center For Lesbian Rights, Recognizing Lesbian and Gay Families: Strategies for Obtaining Domestic Partners Benefits 34 (1992) [“NCLR”]. The City of West Hollywood, which previously offered domestic partner coverage through a cafeteria plan, announced that it was switching to a pooling arrangement with other California cities to purchase group insurance for the domestic partners of its employees. Memorandum from Mayor Pro-Tem Steve Martin to Councilmember Jeff Prang, dated 8/5/97. *See also* Stanford, *supra*, at app. A, 3.

²⁸ Winfeld & Spielman, *supra*, at 108. Employers using this alternative include the University of Minnesota, the University of Iowa, and Xerox Corporation, *id.*, as well as the Morrison & Foerster law firm. Jeff Barge, More Firms Offer Benefits For Gay Couples, 81 ABA Journal 34 (June 1995).

using “benefits credits” are becoming increasingly popular. In these plans, all employees receive the same number of “credits” to spend on themselves and their families and they may select among a range of benefit choices.²⁹

Indeed, the University of Alaska successfully has implemented a domestic partner benefits program without undue difficulty. Under that program, an employee may designate a “qualified financially interdependent partner” by filling out an affidavit attesting to various criteria of commitment and dependency. Having done so, University of Alaska policy states that “[a]ll University of Alaska Policies and Regulations and benefit plan documents that affect employees, their spouses and their families also apply to employees, the qualified financially interdependent partners and dependent children.”³⁰ Thus, the state already has devised a workable program that easily could be replicated throughout state government. Concerns about potential administrability problems are simply without basis in the experience of other employers nationwide.

C. Domestic Partner Benefit Programs Are Not Expensive.

The costs associated with extending employee benefits to domestic partners have been studied closely and early concerns about the potential for inflated expenses have

²⁹ Winfeld & Spielman, *supra*, at 108; Stanford, *supra*, at 26.

³⁰ University of Alaska, “Explanation of Availability of Benefits Based On Financially Interdependent Relationship,” *available at* <http://info.alaska.edu/hr/forms/PDF/B140-FIPExplanation.pdf>.

been put fully to rest. Experience has shown that employers are at no greater financial risk when providing for non-marital partners than when they do so for spouses.³¹ While early estimates predicted large, disproportionate numbers of catastrophic health claims, particularly by persons with AIDS, such fears have proven over time to be unfounded.³² In fact, a 1997 study reported that many companies had found covering a domestic partner typically is *less* expensive than covering a spouse.³³

Fifteen years of actuarial data establish beyond doubt that the costs of domestic partner health benefits are neither disproportionate nor significant. A 1997 study by the Society for Human Resource Management found that 85 percent of employers experienced no cost increase at all as a result of providing domestic partner benefits.³⁴

³¹ Hewitt Assoc. 1994, *supra*, at 7. For example, the Peat Marwick study found that the total costs of coverage for firms who offered domestic partner benefits was “equivalent” to the rates for firms who did not offer such coverage. Peat Marwick, *supra*, at 6; *Accord International Society of Certified Employee Benefit Specialists, Domestic Partner Benefits: Commentary*, Census, May 1995, at 1; Evelyn Gilbert, *Carriers Responding to Gay Market’s Demands*, National Underwriter, Property & Casualty/Risk & Benefits Mgmt. Ed., Oct. 2, 1995, at supp. 3.

³² Andrew Sherman, *Facts of Domestic Partner Benefits*, Boston Globe, Nov. 26, 1996 at D4 [“Sherman, Facts”]. The incidence of AIDS-related claims has been far less than anticipated. *Id.* In addition, the amount of money involved in such claims has not been disproportionate compared to other more common conditions. *Id.*; *see also* Stewart D. Lawrence & John J. Fadel, *Total Compensation Plan Design: The Dollars and Sense of Adding Domestic Partner Coverage*, Comp. & Benefits Mgmt. 83 (Autumn 1993); Gilbert, *supra*, at supp. 3.

³³ Savasta, “Into the Mainstream? Employers Examine Domestic Partnership Benefits,” *Risk Management* (September 1997).

³⁴ Soc. for Hum. Res. Mgmt., “Domestic Partner Benefits Mini-Survey” (1997) [“SHRM”].

This data is confirmed by the most recent study released by Hewitt Associates in 2000, which found that “[e]ighty-five percent of companies indicated that offering domestic partner benefits comprises less than 1% of total benefit costs.”³⁵ Economics Professor Lee Badgett of the University of Massachusetts has studied the issue extensively and concludes, “Overall, the likely cost increase will be roughly the same size as the increase in enrollment, or around 1% in most cases.”³⁶

Contributing to the low cost is employers’ experience that enrollment rates among domestic partners generally are not large. The International Society of Certified Employee Benefits Specialists determined that 56 percent of employers offering partner benefits saw a one percent or smaller increase in enrollment; and that 19 percent of employers reported a two percent enrollment rate for domestic partners.³⁷ A frequently cited 1996 Towers Perrin report likewise found that less than one percent of eligible employees had enrolled their partners, and that medical claims had risen by less than one percent after domestic partner coverage was introduced.³⁸ Data reported in the 1999 Society for Human Resource Management/Commerce Clearing House Recruiting

³⁵ Hewitt Assoc. 2000, *supra*, at 27.

³⁶ Badgett, *Calculating Costs with Credibility: Health Care Benefits for Domestic Partners* (2000), available at www.iglss.org/iglss/pubs/angles/angles_5-1_pl.html.

³⁷ Int’l Soc. of Certified Employee Benefits Specialists, “Domestic Partner Benefits,” Census (May 1995).

³⁸ Towers Perrin, Interest in Domestic Partner Benefits Growing (Nov. 20, 1996).

Practices Survey was consistent.³⁹ The reality is that all the available data suggest that “the most common experience for private employers is a combined [same-sex and different-sex domestic partners] enrollment rate of less than 1%.”⁴⁰

Cost is not a factor in permitting employees to cover domestic partners for pension benefits, either. In the State of Alaska retirement programs, the cost to the system is the same whether an employee selects a survivor option for a spouse or not.⁴¹ That is because, with joint and survivor annuities, the amount of the monthly payment is calculated to account for the additional life span of a spouse or partner, resulting in a lower monthly payment if the partner’s life span is expected to be longer. The total payout to the employee’s family remains the same.

Similarly, industry experts report that the added paperwork involved in offering benefits to domestic partners is minimal.⁴² In general, the costs per person have been comparable to those incurred when an employee marries, which usually are considered routine and rarely affect the per person premium paid by the employer.⁴³ In sum, in the

³⁹ SHRM: Ideas & Trends, No. 460, June 16, 1999.

⁴⁰ Badgett, *supra*, at 3. See generally Liz Winfeld and Susan Spielman, Straight Talk aBout Gays In The Workplace, Chapter 6, *The Ins and Outs of Domestic Partner Benefits*, at 107-28 (2nd ed. 2001).

⁴¹ Appellants’ Exc. 166-7

⁴² Ron Shrinkman, Domestic Dispute: Insurers See Limited Potential in Domestic Partner Benefits, *Modern Healthcare* 40 (March 31, 1997).

⁴³ Sherman, Facts, *supra*, at D4. See also Sherman, DP, *supra*, at 20.

words of one industry expert, “Almost across the board, employers offering domestic partner benefits report, at most, minimal additional costs.”⁴⁴ The experience of employers and the growing availability of domestic partner benefits confirms that the administrative burdens of the programs are minimal and the expense negligible.

II. The Alaska Constitution Requires Equal Treatment Of Lesbian And Gay Employees In State Benefits Programs.

Alaska prides itself on its powerful tradition of equality and its singular protection of individual freedoms. In this state, a government policy of unequal pay for equal work should not be permitted to stand. Unfortunately, the trial court, in ruling on this question, failed to consider the high degree of personal importance to the interests involved in this case – one of the basic factors relevant to Alaska’s equal protection jurisprudence. This was error. Consideration of the appellants’ claims under the standards required by the Alaska Constitution reveals that the government’s reliance on marriage to bar appellants from equal protections for their families cannot be justified and is unconstitutional.

Alaska’s equal protection doctrine uses a sliding scale approach that differs from the federal Equal Protection Clause and “often provides greater protection to individual

⁴⁴ Int’l Found., *supra*, at 4. *See also* SHRM, *supra*, at 3 (for the majority, “costs have remained about the same”); Peat Marwick, *supra*, at 6 (costs of coverage and rates of increase in premiums were “equivalent” when domestic partner benefits were offered and when they were not); The Alexander Consulting Group, Domestic Partner Benefits: An Employer’s Perspective, June 1996, at 6 (“domestic partner plan beneficiaries tend to be less costly than traditional spousal beneficiaries”).

rights than does the U.S. Constitution.”⁴⁵ Under Alaska’s sliding scale, “the applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.”⁴⁶ The higher degree of importance of individual interests, the more difficult the government’s burden is to justify inequalities in government action. The court “scrutinize[s] the importance of the governmental interests which it is asserted that the legislation is designed to serve and the closeness of the means-to-ends fit between the legislation and those interests,” requiring more compelling interests and a closer fit at the higher level of the scale.⁴⁷ “As a minimum, we require that the legislation be based on a legitimate public purpose and that the classification ‘be reasonable, not arbitrary, and . . . rest upon some ground or difference having a fair and substantial relation to the object of the legislation.’”⁴⁸

A. The Appellants’ Personal Interest In Equal Pay For Equal Work Is High.

Here, the appellants’ interests extend beyond the monetary value of the benefits into basic dignitary – and constitutionally-protected – interests in equal treatment and in

⁴⁵ State v. Enserch Alaska Construction, Inc., 787 P.2d 624, 631 (Alaska 1989).

⁴⁶ State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983).

⁴⁷ *Id.* at 1193.

⁴⁸ Ostrosky, 667 P.2d at 1193.

enjoying the rewards of their labor. The lower court erroneously dismissed the gravity of these interests, finding that only economic rights were at stake.⁴⁹

All lesbian and gay employees have a core, civil rights entitlement to equality that, at a minimum, requires that they be paid the same as their similarly situated, heterosexual counterparts. That is not solely a pecuniary interest. It is a deeply personal interest in fairness that is the same no matter how large or small the actual disparity in pay might be. When women received less valuable benefits for their families than their male counterparts, solely because of their sex, the U.S. Supreme Court time and again rejected the argument that their struggle for equal treatment was a matter solely of economic interests.⁵⁰ It was a matter of basic equal protection.⁵¹ The same is true here. No lesbian or gay employee should be denied equal pay merely because, being in a same-sex relationship, the state does not permit that employee to enter a civil marriage with the person sharing his or her life.

⁴⁹ Alaska Civil Liberties Union v. State, No. 3AN-99-11179 CI, slip op. at 6 (Alaska Super Ct. Nov. 16, 2001).

⁵⁰ *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199, 210 (1977); Weinberger v. Weisenfeld, 420 U.S. 636, 644- (1975) (finding that denial of Social Security survivor's benefits to widower was a "pernicious" violation of equal protection because it operated to "deprive women of protection for their families which men receive as a result of their employment.").

⁵¹ *See also* Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 250 (1964) (emphasizing that the "fundamental object" of civil rights enactments is to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access" to generally-available accommodations).

The mere fact that the interests involved have an economic component does not relegate the appellants' interests automatically to the lowest end of the sliding scale. In many equal protection cases that have involved economic issues, Alaska courts nevertheless found that the interests were important and warranted closer constitutional scrutiny. For instance, a long line of cases has affirmed that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes."⁵² And in State v. Planned Parenthood of Alaska, this Court rejected federal precedent to hold that a woman's economic interest in state funding for abortion procedures merits heightened scrutiny, because "the exercise of intimate personal choices," such as reproductive decisions, is affected by the state's denial of medical coverage on a selective basis.⁵³ Where, as here, rights of personal autonomy, equality, and self-determination are at stake within the economic realm, the fact that monetary interests are also implicated does not eclipse the importance Alaska places on these pre-eminent constitutional guarantees.

Finally, the appellants' interest in family protections of their job are constitutionally important because, unlike Permanent Fund Dividends⁵⁴ or state-provided

⁵² State v. Enserch, 787 P.2d 624, 632 (Alaska 1989), quoting Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980).

⁵³ 28 P.3d 904, 909 (Alaska 2001).

⁵⁴ See, e.g., Church v. State Dept. of Revenue, 973 P.2d 1125 (Alaska 1999) (finding that denial of Permanent Fund Dividends on the basis of duration of in-state residence during the year merit a low level of equal protection scrutiny).

unemployment insurance,⁵⁵ they are the rightful bounty of the appellants' labor. The entitlements to insurance coverage for family members, the ability to provide for them through joint and survivor annuities, and the ability to designate them as the beneficiaries of death benefits are all important components of the compensation package earned by state and municipal employees in Alaska. They are not extra financial perks that they receive merely because they choose to live in the State of Alaska, or because the government elects to extend certain relief through a social safety net. Because lesbian and gay employees need these benefits for their partners just as their heterosexual co-workers do, they have an important personal interest in the ability to utilize them to protect the security and health of their families. The state's policy of premising receipt of these benefits exclusively on a status from which appellants are barred by the state constitution puts appellants' deserved remuneration forever out of their reach. And it does so for a reason that bears no relationship to their jobs or their abilities to perform them.

The Alaska Constitution guarantees to all citizens the right to "the enjoyment of the rewards of their own industry."⁵⁶ This guarantee appears in the very first section of the Alaska Constitution and, on its face, encompasses the interests of the appellants here.

⁵⁵ Sonneman v. Knight, 790 P.2d 702 (Alaska 1990) (finding that denial of unemployment insurance because of voluntary relinquishment of work warrants a low level of scrutiny).

⁵⁶ Alaska Const. Art. 1, § 1.

While the provision has never been authoritatively construed, this Court considered its scope in Sonneman v. Knight.⁵⁷ In concluding there that the “rewards of [one’s] own industry” does not include unemployment relief, the Court looked to the proceedings of the Constitutional Convention in which the Alaska Bill of Rights was reviewed.⁵⁸ While it appears there was no direct discussion of the “rewards of industry” provision at the convention, the framers chose to adopt this guarantee while expressly rejecting a separate proposal to include “economic” rights among those protected by Art. 1, § 1.⁵⁹ They feared that a constitutionally-protected “economic” right might be subject to unknown interpretations.⁶⁰ But they nonetheless agreed that rights to be free from discrimination in work opportunities and, as one commentator pointed out, discrimination in insurance, were already encompassed within existing provisions.⁶¹ By retaining the “rewards of industry” clause, then, the framers drew a distinction between a general guarantee of economic welfare and the rewards earned by an individual citizen through the sweat of his or her own brow. The proceeds of one’s work retained special status under the Alaska

⁵⁷ 790 P.2d 702 (Alaska 1990) (finding that the rewards of industry clause did not encompass a law student’s interest in receiving unemployment benefits after he quit his job as a letter carrier in order to matriculate at law school).

⁵⁸ *Id.* at 705.

⁵⁹ 2 Proceedings of the Alaska Constitutional Convention 1290-1294 (January 5, 1956) (minutes of day 44).

⁶⁰ *Id.*

⁶¹ *Id.*

Constitution, enjoying protection from arbitrary denials.⁶² It is this distinction – between *earned* wages and benefits and those economic interests which accrue to all citizens of the State generally – that elevates the appellants’ interest above the low level of scrutiny called for in cases addressing the Permanent Fund Dividend and makes them interests of special constitutional importance.

In this case, the rewards of the appellants’ industry includes the entitlement to protect their families through health insurance and survivor benefits. The appellants have been denied the same opportunity to enjoy this reward of their industry provided to their heterosexual counterparts, even though they share an identical need to provide for their families. This discrimination denies appellants’ important interest in the “enjoyment of the rewards of their own industry,” and requires heightened constitutional scrutiny.

B. No Matter What Level Of Scrutiny The Court Applies, The State Cannot Justify The Disparate Treatment Of Its Benefits Plan.

Under any level of constitutional scrutiny, the burden of justifying the state’s use of a marriage classification to exclude the appellants from family coverage rests squarely on the state.⁶³ Even if this Court were to apply only the lowest level of scrutiny, the state still would have to show that its use of marriage to bar the appellants from ever having

⁶² Of course, all people also have a corresponding duty to the state, which includes the duty to pay income taxes. Cogan v. State, Dept. of Revenue, 657 P.2d 396 (Alaska 1983).

⁶³ See Herrick’s Aero-Auto-Aqua Repair Service v. State, 754 P.2d 1111, 1114 (Alaska 1998).

the opportunity to protect their families through their employment benefits is “reasonable, not arbitrary, and . . . rest[s] upon some ground or difference having a fair and substantial relation to the object of the legislation.”⁶⁴

The state does not, and cannot, claim that the exclusion at issue here serves any purpose that is the least bit related to the legislature’s object in providing family insurance coverage to government employees. That goal is set forth in the statutes creating the benefits: “to encourage qualified personnel to enter and remain in the service of the state or political subdivision or public organization of the state by establishing a system for the payment of retirement, disability, and death benefits to or on behalf of the employees.”⁶⁵ The same goal underlies the state’s provision of health insurance.⁶⁶ Indeed, the state’s objective of recruiting and retaining qualified employees militates strongly in favor of non-discriminatory coverage.

Instead, the state has recited three interests to justify its discriminatory treatment of the appellants: cost saving, ease of administering its benefits program, and promotion of marriage. But the uncontradicted findings of study after study discussed at Section I, above, refute once and for all the notion that covering domestic partners adds any significant cost or administrative burden to an employer’s benefits program. As a purely

⁶⁴ Ostrosky, 667 P.2d at 1193.

⁶⁵ AS 39.35.010.

⁶⁶ Appellants’ exc. 166-7, Appellants’ exc. 154-5.

empirical matter, then, these state interests are not enough to justify its use of marriage as a classification to exclude the appellants. This is particularly true in light of the simple, non-discriminatory alternative available to redress the inequality that use of a marriage classification creates. As a legal matter as well, the appellants have demonstrated that neither cost savings nor administrative interests standing alone are sufficient to justify an unreasonable exclusion from state protections. The conditioning of benefits on marriage is no more rationally related to the state's interest as an employer in providing these benefits than would be the state limiting benefits to those whose last name begins with the letters A through W. That too would save the state some money, but would be just as unreasonable, arbitrary, and lacking "some ground or difference having a fair and substantial relation to the object of the legislation" as is conditioning these benefits on marriage -- and therefore just as much a violation of Alaska's constitutional guarantee of equal protection.

The state's incantation of an interest in promoting the institution of marriage rings similarly hollow.⁶⁷ Since the state's Constitution already prohibits the appellants from

⁶⁷ This case does not seek to challenge the state constitution's reservation of the institution of marriage in Alaska to different sex couples, nor the state's provision in general of preferential benefits to those who are married. Rather, this case questions, in the particularized fashion required by Alaska's equal protection clause, whether the state's provision to its employees of family health and pension benefits can be denied to employees with domestic partners without violating the Alaska Constitution. That inquiry requires a context-based examination of the appellants' interest in those particular benefits and of the relationship between the state's purposes and the exclusion of those with domestic partners from obtaining access to those specific benefits.

marrying their partners, even though they would be happy to do so, there can be no connection between denying them benefits and encouraging them to wed. The state likewise can demonstrate no connection between denying the appellants these benefits and encouraging non-gay people to marry, or to stay married. It is not reasonable to believe that even one employee considering getting married would skip his or her nuptials if these benefits also were made available to employees in same-sex relationships. Likewise, the benefits would be no less valuable to heterosexual employees if they were equally available to their lesbian and gay co-workers. Denying these benefits to lesbian and gay employees with domestic partners therefore does absolutely nothing to promote the institution of marriage.

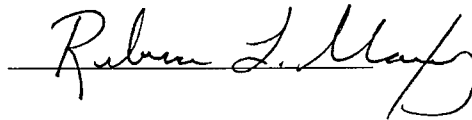
The state simply cannot refute what thousands of employers both public and private have discovered: providing employment benefits to lesbian and gay employees on a non-discriminatory basis not only is simple and inexpensive, it serves important values in creating an open and welcoming workplace and achieving equal treatment. There is no legitimate reason to continue to discriminate. Because of that, the state cannot justify its policies here. The Alaska Constitution demands equal treatment of the appellants, and extending family coverage to them through a domestic partner program is the straightforward way to achieve it.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be REVERSED and this Court should find that the appellees' policy violates the appellants' constitutionally-protected rights.

Dated: May 22, 2002

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Rebecca L. Maxey", written over a horizontal line.

Rebecca L. Maxey
Law Offices of Rebecca L. Maxey, L.L.C.
310 K Street, Suite 200
Anchorage, AK 99501
(907) 264-6677

Jennifer Middleton
Staff Attorney
Lambda Legal Defense and Education Fund
120 Wall Street
New York, NY 10005
(212) 809-8585

