IN THE SUPREME COURT OF THE STATE OF ALASKA

Deborah Harris, Appellant, vs. **Millennium Hotel; New Hampshire Insurance Co.,** Appellees.	Supreme Court Case No. S15230

AWCAC Appeal No. **13-005**

APPEAL FROM THE
ALASKA WORKERS' COMPENSATION APPEALS COMMISSION
COMMISSIONERS JAMES RHODES, S.T. HAGEDORN, AND LAURENCE KEYES

BRIEF OF APPELLANT

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Constitution of Alaska

Article I - Declaration of Rights

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

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

§ 7. Due Process
No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

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

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

Alaska Statutes

§ 25.05.013. Same-sex marriages

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

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

§ 23.30.215. Compensation for death

(a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons: . . .

(2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased: . . .

(B) 50 percent for the widow or widower with one child and 40 percent for the child; . . .

(e) Death benefits payable to a widow or widower in accordance with (a) of this section shall abate as that person ceases to be entitled and does not inure to persons subject to continued entitlement. In the event a child ceases to be entitled, that child's share shall inure to the benefit of the surviving spouse . . .

§ 23.30.395. Definitions

In this chapter, …

(25) "married" includes a person who is divorced but is required by the decree of divorce to contribute to the support of the former spouse; …

(40) "widow" includes only the decedent's wife living with or dependent for support upon the decedent at the time of death, or living apart for justifiable cause or by reason of the decedent's desertion at such a time;

(41) "widower" includes only the decedent's husband living with or dependent for support upon the decedent at the time of death, or living apart for justifiable cause or by reason of the decedent's desertion at such a time. …

U.S. Constitution

Amend. XIV

§ 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Appellant Deborah Harris is the surviving same-sex partner of Kerry Fadely, who was a food and beverage manager at the Millennium Hotel in Anchorage. In 2011, Ms. Fadely was shot and killed at work by a hotel worker whose employment had recently been terminated. At the time of her death, Ms. Fadely was in a loving, committed, and intimate relationship with Ms. Harris. Although the two had been together for more than a decade, they were unable to marry under Alaska law solely because they were a same-sex couple.

Because Alaska limits workers' compensation death benefits to surviving *spouses*, Ms. Harris has been precluded from access to those benefits. That exclusion is particularly cruel. Not only does it send a message that the State of Alaska views Ms. Harris and Ms. Fadely's relationship as of no significance whatsoever, but it cuts Ms. Harris off—for no adequate reason—from a critical financial protection. Death benefits serve as a social safety net to minimize the substantial disruption that a worker's unexpected death can have upon those left in its wake, following one of the most painful moments imaginable in life.

The exclusion of surviving same-sex partners like Ms. Harris from death benefits unquestionably discriminates against lesbian and gay people. The financial and emotional devastation that Ms. Fadely's death has wreaked on Ms. Harris's life is no less consequential than that experienced by the widows and widowers that the state workers' compensation law protects. The precipitous loss of household income for Ms. Harris left her with little choice but to abandon the home that she and Ms. Fadely shared—one of

many needless hardships that death benefits exist to prevent. Yet the State has nevertheless carved out surviving same-sex partners from the protection of the law. As this Court's jurisprudence makes clear, the constitutional promise of equality and liberty demands more of the government in its treatment of lesbian and gay people.

JURISDICTIONAL STATEMENT

Deborah Harris appeals the final decision of the Alaska Workers' Compensation Appeals Commission issued on June 28, 2013 disposing of all claims involving all parties. This Court has jurisdiction pursuant to AS 23.30.129.

PARTIES TO THE CASE

Appellant: Deborah Harris.

Appellees: Millennium Hotel and New Hampshire Insurance Co.

ISSUES PRESENTED FOR REVIEW

Does the absolute exclusion of same-sex partners from eligibility for death benefits under the Alaska Workers' Compensation Act violate the right to equal protection on the basis of sexual orientation or sex and the rights to liberty, due process, and privacy under the Alaska and U.S. Constitutions?

STATEMENT OF THE CASE

I. Statement of Facts

A. Relationship Between Deborah Harris and Kerry Fadely

Deborah Harris ("Ms. Harris") and Kerry Fadely ("Ms. Fadely") shared a loving, committed, and intimate relationship for more than a decade. Exc. 12. During most of their relationship, the two lived together in Anchorage. Exc. 13. Ms. Harris is now 53

years old, and Ms. Fadely was 55 years old at the time of her death in 2011. Exc. 12.

Although Alaska bars same-sex couples from marrying,[1] the relationship between Ms. Harris and Ms. Fadely was comparable to that of a married, different-sex couple. Like other married couples, for example, they cared for one another in times of sickness and health. Exc. 14, 46. When Ms. Fadely needed to have a major surgery, Ms. Harris cared for her during the time of the procedure and the recuperation that followed. Exc. 14. Likewise, Ms. Fadely was mindful of Ms. Harris's health and often took her to the dentist or doctor. Exc. 14. In order for Ms. Harris to access health insurance coverage provided through one of Ms. Fadely's prior employers, the two of them submitted a joint affidavit of domestic partnership in 2008 attesting that they were in an intimate, committed relationship of mutual caring and support. Exc. 25-26.

Both Ms. Harris and Ms. Fadely had children from prior relationships, and they shared parenting responsibilities. Exc. 14, 45. Ms. Harris helped to raise Ms. Fadely's son, who is now 24 years old and was living with the couple at the time of Ms. Fadely's death. Exc. 45. Ms. Fadely also had a particularly close relationship with Ms. Harris's youngest child, Hannah Large, who was 13 years old when she first met Ms. Fadely. Exc. 44-45. Ms. Large regarded Ms. Fadely as her stepmother, and Ms. Fadely regarded Ms. Large as her stepdaughter. Exc. 14, 45. Ms. Large viewed Ms. Fadely as a mother "in every way that mattered" and sought her advice with respect to major life decisions. Exc. 45. In addition, Ms. Fadely was close to Ms. Harris's grandchildren, who referred

[1] Alaska Const., art. I, § 25; AS 25.05.011, AS 25.05.013.

to Ms. Fadely as "Grandma Kerry." Exc. 45.

Ms. Harris and Ms. Fadely were in a financially interdependent relationship. They held joint credit cards and shared responsibility for household expenses, with Ms. Fadely often paying the rent, and Ms. Harris often paying for groceries, dining, phone bills, and other expenses. Exc. 14. In the past, they jointly leased an apartment. Exc. 14. At the time of Ms. Fadely's death, the couple lived together in a small rented house but had begun looking for a house to purchase jointly. Exc. 14-15, 28. Each of them also supported the other if one was unemployed at the time. Exc. 50.

Because Alaska bars same-sex couples from marrying, Ms. Harris and Ms. Fadely were never able to marry each other or celebrate a single wedding anniversary together. Despite this prohibition, they nevertheless chose an anniversary on which to celebrate their love and commitment to each other. Exc. 13, 50. In 2005, Ms. Harris and Ms. Fadely began wearing matching rings to signify their love and commitment for one another. Exc. 13. Ms. Fadely surprised Ms. Harris with the rings on a beach at Anchor Point, where they enjoyed camping, and asked Ms. Harris if she would be committed to Ms. Fadely, to which Ms. Harris said yes. Exc. 13. In addition to wearing rings, the two held themselves out as a couple to others by referring to one another as "partner" or "spouse." Exc. 13. For example, Ms. Fadely listed Ms. Harris as her "spouse" on her profile on Facebook, a social media website, and stated that the two were in a domestic partnership. Exc. 13, 23. Each considered the other to be her immediate family. Exc. 13.

Ms. Harris and Ms. Fadely would have married one another if permitted to do so

in Alaska. Exc. 15. They discussed that issue with each other, as well as with friends. Exc. 15, 50. The couple even discussed the possibility of marrying elsewhere, in a jurisdiction that permitted same-sex couples to marry; however, they felt it was futile to do so based upon their understanding that, once they got back home to Alaska, their marriage would likely not be recognized. Exc. 15. Despite their inability to marry, the two intended to remain together for their entire lives. Exc. 15.

B. Ms. Fadely's Death

Ms. Fadely was employed as a food and beverage manager at the Millennium Hotel in Anchorage. Exc. 15. On Saturday, October 29, 2011, prior to leaving for work, Ms. Fadely shared a meal together with Ms. Harris, which would be the last time Ms. Harris saw Ms. Fadely alive. Exc. 15. Just before leaving the house, Ms. Fadely kissed Ms. Harris goodbye and told Ms. Harris that she loved her. Exc. 15. Ms. Harris responded that she loved Ms. Fadely too. Exc. 15.

Later that day, a former employee of the hotel (hereafter, "the shooter"), whose employment had been terminated nine days earlier, returned to the hotel. Exc. 16. As detailed in the criminal complaint, the shooter entered the hotel and asked an employee for Ms. Fadely's whereabouts. Exc. 34. The employee informed the shooter that Ms. Fadely would return shortly. Exc. 34. A short time later, that same employee heard the shooter swear at Ms. Fadely and say words to the effect of, "If I'm going down, then you are all going down," followed by multiple gunshots. Exc. 34. A hotel maintenance worker also reported seeing the shooter pull out a pistol and ask Ms. Fadely "Do you want some of this?" before firing two shots. Exc. 34. The maintenance worker then saw

Ms. Fadely attempt to flee to the kitchen, with the shooter in pursuit, and witnessed him fire another three to four shots in a downward direction. Exc. 34.

Ms. Harris was at home preparing a meal for Ms. Fadely when her neighbor knocked on the door and told Ms. Harris that she heard something bad had happened at the hotel. Exc. 15. Ms. Harris immediately got in her car to drive to the hotel. Exc. 15-16. She sent text messages to Ms. Fadely's cell phone to confirm that she was okay, without receiving a response. Exc. 16. When Ms. Harris arrived at the hotel, the police were on the scene. Exc. 16. She asked one of the people gathered outside the hotel what had happened, and he informed her that a manager by the name of Kerry Fadely had been shot. Exc. 16. Ms. Harris dropped to her knees in the snow, in horror and disbelief. Exc. 16. A police officer subsequently drove her to the command center, where it was confirmed that Ms. Fadely had died from multiple gunshot wounds. Exc. 16.

C. Aftermath of Ms. Fadely's Death

Ms. Harris was treated as a legal stranger to Ms. Fadely in the aftermath of the latter's death,[2] including in the workers' compensation proceedings described below. Ms. Fadely's death was both emotionally and financially devastating for Ms. Harris. Because the two of them were financially interdependent, Ms. Harris knew that she would be unable to continue living in their home based on her income alone. Exc. 17.

[2] Without any basis for asserting a legal relationship to Ms. Fadely, Ms. Harris was omitted from Ms. Fadely's obituary and precluded from speaking at the funeral due to the religious views held by members of Ms. Fadely's family about same-sex relationships. Exc. 17. Ms. Harris also was only allotted a small window of time in which to view Ms. Fadely's remains at the mortuary before Ms. Harris was required to leave. Exc. 17.

Less than a month after Ms. Fadely's death, Ms. Harris had to move in with one of her children and abandon the home that she and Ms. Fadely had shared. Exc. 17.

II. Statement of the Proceedings

On or around April 9, 2012, Ms. Harris filed a timely claim for death benefits with the Alaska Workers' Compensation Board ("Board"), which administers the Alaska Workers' Compensation Act ("Act").[3] In exchange for immunity from suit, employers must obtain insurance or a self-insurance certificate and provide compensation prescribed under the Act for work-related injuries.[4] Death benefits reflect a percentage of the decedent's wages and are provided to the decedent's "widow" or "widower," as well as certain other family members and dependents, but not a lesbian or gay worker's dependent life partner.[5] The Act provides that a "'widow' includes only the decedent's wife living with or dependent for support upon the decedent at the time of death, or living apart for justifiable cause or by reason of the decedent's desertion at such a time."[6] In response to Ms. Harris's claim, Appellees Millennium Hotel and New Hampshire Insurance Co. (collectively, "Millennium") filed an answer and notice of controversion,

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[3] Exc. 2; AS 23.30.001 *et seq.*

[4] AS 23.30.055, 23.30.075. Included among these are individuals who were divorced from a decedent but were supported by the decedent pursuant to a divorce decree. AS 23.30.395(25); *see Burgess Constr. Co v. Lindley*, 504 P.2d 1023, 1024-25 (Alaska 1972).

[5] AS 23.30.215.

[6] AS 23.30.395.

opposing Ms. Harris's claim on the basis that she and Ms. Fadely were not married. Exc. 4-7.

On September 24, 2012, Ms. Harris provided notice of her intent to challenge the exclusion of same-sex couples from eligibility for death benefits on state and federal constitutional grounds. Exc. 8-9. Given the Board's lack of authority to address questions of constitutional law,[7] Ms. Harris requested a final decision and order so that she could complete the administrative process and ultimately pursue her claims before this Court. Exc. 8-9. In order to preserve the factual context of her constitutional arguments, Ms. Harris submitted evidence describing her relationship with Ms. Fadely, including a declaration from herself, her daughter, and a mutual friend of Ms. Harris and Ms. Fadely, as well as documentary evidence. Exc. 12-68. Ms. Harris also submitted evidence regarding the number of fatality case files opened annually in the Division of Workers' Compensation and the number of same-sex households in Alaska reported by the U.S. Census. Exc. 051-070. Millennium objected to the evidence on grounds of relevance and hearsay. Exc. 69-70. The parties subsequently filed a stipulation of facts on December 19, 2012, agreeing that the Board need not consider evidence in order deny Ms. Harris's claim, given that Ms. Harris and Ms. Fadely could not marry each other

[7] *Dougan v. Aurora Elec.*, 50 P.3d 789, 795 n.27 (Alaska 2002) (holding that the Board lacks jurisdiction to decide issues of constitutional law); *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) (holding that the Alaska Workers' Compensation Appeals Commission and other "[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law").

under Alaska law, which was dispositive of the claim for purposes of Board proceedings. Exc. 71-74.

The Board issued a final decision and order on March 21, 2013. Exc. 79. First, the Board confirmed that Ms. Harris was not entitled to death benefits under the Act because she was not, and could not be, married to Ms. Fadely under Alaska law. Exc. 89-90. Second, the Board held that it lacked jurisdiction to adjudicate Ms. Harris's constitutional arguments. Exc. 90-93. Accordingly, the Board denied Ms. Harris's death benefits claim. Exc. 93.

Ms. Harris timely appealed to the Alaska Workers' Compensation Appeals Commission ("Commission"). On June 28, 2013, the Commission issued a final decision affirming the Board's decision. Exc. 101. Like the Board, the Commission recognized that Ms. Harris was not a "widow" under the Act and that it had no jurisdiction to decide constitutional questions, Exc. 104-06, but noted that the parties had appropriately postured the case to preserve those questions for this Court's resolution, Exc. 102.

STANDARD OF REVIEW

This Court exercises independent judgment in reviewing questions of law that do not involve agency expertise.[8] This Court also applies independent judgment to questions of constitutional law and adopts the rule of law most persuasive in light of precedent, reason, and policy.[9]

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[8] *Shehata v. Salvation Army*, 225 P.3d 1106, 1113 (Alaska 2010).

[9] *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005).

ARGUMENT

I. The Absolute Exclusion of Same-Sex Partners from Eligibility for Death Benefits Violates the Equal Protection Guarantees of the State and Federal Constitutions.

The state and federal constitutional guarantees of equal protection require that the government treat similarly-situated individuals equally,[10] a promise that the State of Alaska (the "State") has violated here. The state Equal Protection Clause provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[11] This provision "protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause."[12] This Court has recognized its leeway and obligation to afford greater protection under the state constitution in keeping with "the intention and spirit of our local constitutional language" and in order to ensure "the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."[13]

A. The State Workers' Compensation Law Treats Similarly-Situated Individuals Differently Based on Their Sexual Orientation and Sex.

The equal protection analysis required here is controlled by this Court's decision

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[10] U.S. Const., amend. XIV, § 1; Alaska Const., art. I, § 1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

[11] Alaska Const., art. I, § 1.

[12] *State v. Planned Parenthood*, 28 P.3d 904, 909 (Alaska 2001).

[13] *Doe v. Dep't of Public Safety*, 92 P.3d 398, 404 (Alaska 2004) (internal quotations omitted).

in *Alaska Civil Liberties Union v. State* ("*ACLU*"). In *ACLU*, this Court unanimously held that, where the government provides employment benefits such as health insurance to the different-sex spouses of public employees, the denial of those benefits to the same-sex partners of public employees cannot survive even minimum scrutiny under the state Equal Protection Clause.[14] Notably, the benefits in *ACLU* also included those triggered upon the death of an employee.[15] The initial inquiry in any equal protection challenge is to ascertain whether the government has treated similarly-situated individuals differently, which the State unquestionably does with respect to death benefits.[16]

As this Court held in *ACLU*, "the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married."[17] The State has divided individuals into two categories: (1) heterosexual employees and their different-sex partners, who can become eligible for death benefits by marrying, and (2) lesbian and gay employees and their same-sex partners, who are denied any means of accessing death benefits. The individuals in these groups are differentiated by their sexual orientation,[18] as well as their sex in relation to that of their partner. The government defendants in

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

[15] *Id.* at 784 n.4 (employment benefits at issue included death benefits in the form of unpaid wages under AS 39.20.360 and survivor annuities under AS 39.35.450).

[16] *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) ("The first step in equal protection analysis is to identify the classification of groups.") (internal quotation marks omitted).

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

[18] *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (finding no difference between a policy of discriminating against lesbian and gay individuals and a policy of discriminating against individuals engaged in "homosexual conduct").

ACLU attempted to argue that the benefit programs instead differentiated between employees on the basis of marital status—rather than on the basis of sexual orientation or sex—but this Court recognized the clear fallacy of that argument:

> Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. . . . The programs consequently treat same-sex couples differently from opposite-sex couples.[19]

Other courts have similarly recognized that, where same-sex couples cannot marry, laws that require marriage as a condition of eligibility discriminate on the basis of sexual orientation.[20] In *Diaz*, for example, the Ninth Circuit held that where the government provides health insurance coverage to different-sex spouses of public

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[19] *ACLU*, 122 P.3d at 788 (footnotes omitted).

[20] *See Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2011) (finding that a spousal limitation "renders access to benefits legally impossible only for gay and lesbian couples"); *In the Matter of Brad Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009) (restricting benefits to married employees "cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation") (internal quotation marks omitted); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (holding that "marital status is not the defining difference" and comparing employees with a same-sex partner to those with a different-sex partner rather than comparing unmarried and married employees); *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 442-43 (Or. Ct. App. 1998) (holding that defendant's argument that all married employees may access insurance benefits for spouses "misses the point" because same-sex couples may not marry); *see also Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345, at *52 (E.D. Mich. Jun. 28, 2013) (holding that the government classifies on the basis of sexual orientation when it "renders access to benefits legally impossible only for gay and lesbian couples").

employees—but denies health insurance to same-sex partners of public employees—it has drawn a distinction "between homosexual and heterosexual employees."[21] The Ninth Circuit held that this sexual orientation-based distinction failed even rational basis review under the federal Equal Protection Clause. *Diaz* is the federal analogue to *ACLU*¸ and this Court correctly forecasted in *ACLU* that "denying benefits to public employees with same-sex domestic partners would arguably offend the Federal Constitution."[22]

Same-sex couples like Ms. Harris and Ms. Fadely are also similarly situated to married different-sex couples in every relevant respect. Ms. Harris and Ms. Fadely were in a financially interdependent relationship, which, as discussed below, is the principal issue for purposes of death benefits. Exc. 014. They were also committed to each other and cared for each other until the very end of Ms. Fadely's life. Exc. 012-015. As this Court recognized in *ACLU*, "[m]any same-sex couples are no doubt just as 'truly closely related' and 'closely connected' as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so."[23]

B. The State Facially Discriminates Against Same-Sex Partners in Access to Death Benefits.

Where a law classifies individuals for differential treatment on its face, "the

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[21] *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).

[22] *ACLU*, 122 P.3d at 786 n.20.

[23] *ACLU*, 122 P.3d at 791.

question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory."[24] This Court recognized in *ACLU* that a statutory scheme limiting employment benefits to "spouses" was facially discriminatory, because "Alaska's definition of the legal status of 'marriage' (and, hence, who can become a 'spouse') excludes same-sex couples."[25]

The same is true here: the statutes circumscribing eligibility for death benefits facially discriminate against same-sex partners. The Act provides that death benefits are payable to a "widow or widower" of the deceased employee.[26] A "widow" is defined to "include[] only the decedent's wife living with or dependent for support on the decedent at the time of death, or living apart for justifiable cause or by reason of the decedent's desertion at such a time"[27] Alaska, however, bars same-sex couples from marrying and also refuses to recognize the marriages of same-sex couples entered out-of-state.[28] Thus, as both the Board and Commission recognized, Exc. 089-090, 104-105, no individual in a same-sex relationship can constitute a "widow" or "widower" for purposes of the Act,

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[24] *Id.* at 788 (internal quotation marks omitted); *accord Wayte v. United States*, 470 U.S. 598, 609 n.10 (1985).

[25] *ACLU*, 122, P.2d at 788-89.

[26] AS 23.30.215(a)(2).

[27] AS 23.30.395(40); *accord* AS 23.30.395(41) (defining "widower" similarly to include only the decedent's "husband").

[28] Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may only exist between one man and one woman."); AS 25.05.011(a) ("Marriage is a civil contract entered into by one man and one woman."); AS 25.05.013(a) ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state.").

because a widow or widower must have been the wife or husband of the decedent, and Alaska bars same-sex couples from marriage. Accordingly, just like the employment benefits in *ACLU*, the death benefits here facially discriminate against same-sex partners.

C. The Proper Standard of Review Is Heightened Scrutiny.

After determining the classification created, the next step in the equal protection inquiry is to ascertain the level of judicial scrutiny appropriate for the classification.[29] Under the federal Equal Protection Clause, heightened scrutiny is warranted where the government employs a suspect or quasi-suspect classification. Under the state Equal Protection Clause, there is a sliding scale of review, with scrutiny intensifying depending on the importance of the individual right at issue and the degree of suspicion warranted for a particular classification scheme.[30] As explained below in the discussion of liberty and privacy, the exclusion of same-sex couples from death benefits infringes upon substantial liberty interests, and deserves heightened scrutiny for that reason. Heightened scrutiny is independently warranted, however, because the State has employed a classification based on both sexual orientation and sex.

1. Governmental Classifications Based on Sexual Orientation Warrant Heightened Scrutiny.

The government's differential treatment of individuals based on their sexual orientation warrants heightened scrutiny under both the state and federal Equal Protection Clauses. There is a well-established framework for determining which classifications of

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[29] *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995).

[30] *State v. Ostrofsky*, 667 P.2d 1184, 1192 (Alaska 1983).

individuals for differential treatment courts should approach with suspicion.[31] The two most important considerations in this analysis are whether a classified group has suffered a history of discrimination, and whether the trait at issue bears upon one's aptitude or ability to contribute to society.[32] Courts have also sometimes considered whether the group has sufficient political power to counter discrimination and whether the trait is immutable or distinguishing, although these are neither necessary nor sufficient conditions for heightened scrutiny.[33] While no consideration is dispositive, each additional reason for concern increases the risk that a particular classification is suspect. This Court has recognized that "more constitutionally suspect" classifications schemes demand commensurately greater scrutiny.[34]

Sexual orientation bears all the indicia of a suspect or quasi-suspect classification, as a rapidly expanding number of state and federal courts—including the Second

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[31] *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013).

[32] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (focusing on those two considerations); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009) (recognizing those two considerations as most important); *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (same).

[33] *Windsor*, 699 F.3d at 181. Classifications based on religion, alienage, and legitimacy all are subject to some form of heightened scrutiny, despite the fact that religious people may convert, undocumented people may naturalize, and illegitimate children may be adopted. *See also Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) (the "Supreme Court has never held that only classes with immutable traits can be deemed suspect").

[34] *Ostrofsky*, 667 P.2d at 1193.

Circuit—and the federal government have all recognized.[35] First, it is undeniable that there has been a long and painful history of widespread discrimination against lesbians and gay men.[36] As the U.S. Supreme Court noted in *Lawrence v. Texas*, which struck down all remaining sodomy laws in this country, "for centuries there have been powerful voices to condemn homosexual conduct as immoral."[37] Indeed, even for much of the last century, homosexuality was stigmatized as a mental illness, and medical professionals attempted, unsuccessfully, to change individuals' sexual orientation with extreme measures that included electroshock treatment and even castration.[38]

Second, sexual orientation bears no relation to one's ability to contribute to society. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some

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[35] *Windsor*, 699 F.3d at 182-85; *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314-33 (D. Conn. 2012); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *appeal dismissed*, 725 F.3d 1140 (9th Cir. 2013); *Varnum*, 763 N.W.2d at 889-86; *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 431-54 (Conn. 2008); *In re Marriage Cases*,183 P.3d at 442-44; *Tanner*, 971 P.2d at 447; Report from Attorney General to Speaker of House of Representatives, February 23, 2011 (issued pursuant to 28 U.S.C. § 530D), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[36] *Windsor*, 699 F.3d at 182 ("It is easy to conclude that homosexuals have suffered a history of discrimination"); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (one would be "hard pressed to deny that gays and lesbians have experienced discrimination").

[37] *Lawrence*, 539 U.S. at 571.

[38] *Pickup v. Brown*, -- F.3d --, 2013 U.S. App. LEXIS 18068, at *9 (9th Cir. 2013).

respect. But homosexuality is not one of them."[39] Indeed, "by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal."[40] This Court recognized this fundamental equality in *ACLU*: same-sex couples provide "the same level of love, commitment, and mutual . . . support" as different-sex couples.[41]

Third, lesbians and gay men constitute a politically vulnerable minority on both the state and national stage.[42] At the state level, lesbians and gay men remain largely unprotected against discrimination in a wide range of contexts, from the most ordinary aspects of life—including in employment, public accommodations, housing, and finance—to the most serious, as when anti-gay hate crime is committed.[43] Indeed, in 2012, Anchorage voters rejected by wide margins a proposed initiative that would have included sexual orientation in an existing nondiscrimination ordinance.[44] Across the country, lesbians and gay men have been the repeated target of ballot initiatives and

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[39] *Windsor*, 699 F.3d at 182.

[40] *Perry*, 704 F. Supp. 2d at 1002.

[41] *ACLU*, 122 P.3d at 791; *accord Windsor*, 699 F.3d at 182-83 ("The aversion homosexuals experience has nothing to do with aptitude or performance.").

[42] *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 960 n.21 (Alaska 1978) (recognizing that lesbians and gay men constitute an "unpopular minority").

[43] AS 18.80.220 (unlawful employment practices), 18.80.230 (unlawful practices in places of public accommodation), 18.80.240 (unlawful practices in sale or rental of real property), 18.80.250 (unlawful financing practices), 18.80.255 (unlawful practices by state or political subdivisions), & 12.55.155 (hate crimes law).

[44] *See* Michelle Books, *Prop 5 Rejected By Wide Margin; Legal Protections for Gay, Lesbian, and Transgender People Proves Polarizing*, Anchorage Daily News (Apr. 4, 2012) (noting that 58 percent voted against proposed initiative).

referenda that have stripped them of antidiscrimination protections[45] or have amended state constitutions to bar them from marriage, including here in Alaska. Likewise, no federal legislation expressly barring sexual orientation discrimination in employment, housing, public accommodation, or education has ever succeeded in passing, despite pervasive, ongoing discrimination. In the education context, for example, a staggering eighty percent of lesbian and gay youth are harassed because of their sexual orientation.[46] Notwithstanding limited political gains in some areas, the reality remains that lesbians and gay men "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public."[47] The limited protections in place for sexual orientation also do not begin to approach the comprehensive legal protections in place for women when sex-based classifications were held to warrant heightened scrutiny under the U.S. Constitution.[48]

Finally, sexual orientation classifications violate the fundamental precept that burdens should not be imposed—particularly by a majority that would not assume such burdens for itself—"upon groups disfavored by virtue of circumstances beyond their

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[45] *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-36 (1996) (holding that Colorado's state constitutional amendment to prohibit any action designed to protect lesbians and gay men violated equal protection).

[46] Joseph Kosciw et al., *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, *available at* http://glsen.org/nscs, at xiv (2012) (reporting that 81.9% of lesbian and gay students had been verbally harassed because of their sexual orientation and 38.3% had been physically harassed).

[47] *Windsor*, 699 F.3d at 185.

[48] *Id.* at 184.

control."[49] A trait is "immutable" for purposes of equal protection when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]."[50] Alternately, a trait may also be "distinguishing" rather than "immutable" where it invites discrimination when it is manifest, thus ringing similar constitutional alarms when used as the basis for a government classification.[51]

Sexual orientation satisfies any and all of these formulations. It is a trait that is resistant to voluntary change, as confirmed by an "overwhelming consensus" of mental health providers and numerous other professional organizations that efforts to change sexual orientation are both "harmful and ineffective."[52] The Ninth Circuit has also held that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."[53] And sexual

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[49] *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

[50] *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

[51] *Windsor*, 699 F.3d at 183.

[52] *Pickup*, 2013 U.S. App. LEXIS 18068, at *34; s*ee also Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *Watkins*, 875 F.2d at 726 ("Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation") (Norris, J., concurring) (emphasis in original).

[53] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005); *accord Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

orientation "calls down" discrimination against lesbians and gay men in public and private spheres alike when manifest.[54]

The level of scrutiny appropriate for sexual orientation-based classifications remains an open question of law under both the state and federal constitutions:[55] this Court can and should resolve that question, at least insofar as Alaska is concerned, in order to avoid foreseeable, continuing confusion around when the government may engage in anti-gay discrimination against its own people.[56] It would also spare future victims of discrimination of needing to expend resources to re-litigate the same question, as well as preserve scarce judicial resources that will otherwise be spent answering that question anew in every case. Deciding this issue is consistent with this Court's acknowledged duty to the Alaska Constitution: "It is our duty to move forward in those areas of constitutional progress which we view as necessary to the development of a civilized way of life in Alaska."[57]

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[54] *Windsor*, 699 F.3d at 185.

[55] *ACLU*, 122 P.3d at 789-90 (declining to decide whether sexual orientation-based classifications require heightened scrutiny); *Windsor*, 699 F.3d at 182-85; *Golinski*, 824 F. Supp. 2d at 985.

[56] *Cf. City of Cleburne*, 473 U.S. at 442-46 (deciding whether classifications based on developmental disability warrant heightened scrutiny, even though the ordinance challenged could not withstand rational basis review); *Golinski*, 824 F. Supp. 2d at 985 & 995 (determining that heightened scrutiny was required for sexual orientation-based classifications, even though law at issue also failed rational basis review).

[57] *Baker v. Fairbanks*, 471 P.2d 386, 401 (Alaska 1970); *accord Doe*, 92 P.3d at 404.

2. The Exclusion of Same-Sex Partners from Death Benefits Is Also Based on Sex and Requires Heightened Scrutiny for That Independent Reason.

The denial of death benefits to surviving same-sex partners like Ms. Harris also constitutes sex-based discrimination, which independently triggers heightened scrutiny under both the state and federal constitutions.[58] The reason is simple: if Deborah Harris had been born Dan Harris, she could have married Kerry Fadely and she would have automatically received death benefits upon Ms. Fadely's death. But, because Deborah Harris is a woman, she is ineligible for the death benefits at issue.

Courts have recognized discrimination based on sexual orientation and sex are often linked, because entering into an intimate relationship with someone based on that person's sex "is a large part of what defines an individual's sexual orientation."[59] Thus, for example, when the federal government refused to provide spousal health insurance to the same-sex spouse of an employee (under the so-called Defense of Marriage Act, or DOMA, which was subsequently held unconstitutional), that constituted discrimination on the basis of both sexual orientation and sex.[60] Furthermore, the refusal to afford death

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[58] *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (holding that a statute targeting only female prostitution discriminated on the basis of sex); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that sex-based classifications can only survive if supported by an "exceedingly persuasive justification").

[59] *Perry*, 704 F. Supp. 2d at 996; *accord Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993), *superceded by* Haw. Const., art. I, § 23.

[60] *In the Matter of Brad Levenson*, 560 F.3d at 1147; *Golinski*, 824 F. Supp. 2d at 982 n.4 ("Sexual orientation discrimination can take the form of sex discrimination.").

benefits to same-sex partners is premised on impermissible sex stereotypes that proper women should marry men and proper men should marry women.[61]

The death benefits scheme at issue here is not sex-neutral simply because it denies both men and women who were in same-sex relationships of the right to death benefits. In *Loving v. Virginia*, the U.S. Supreme Court rejected the notion that the mere "equal application" of an anti-miscegenation law could make the law race-neutral, even though the law barred a Caucasian from marrying an African-American, just as it barred an African-American from marrying a Caucasian.[62] The constitutional injury that Ms. Harris has suffered here would not have occurred but for her sex, and thus heightened scrutiny is warranted.

D. The Absolute Exclusion of Same-Sex Partners from Death Benefits Fails Any Level of Scrutiny Under Both the State and Federal Constitutions.

Alaska's "more stringent" Equal Protection Clause calls for a three-step test, which places a progressively greater burden on the State depending on the importance of the right at issue and the nature of the governmental interest at stake.[63] First, the court determines the weight of the individual interest impaired by the government's classification; second, the court examines the importance of the interests behind the

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[61] *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions [based on sex].").

[62] *Loving v. Virginia*, 388 U.S. 1, 8 (1967). *See also Shelley v. Kraemer*, 334 U.S. 1, 21-22 (1948) (holding that it is no defense, in a challenge to racially restrictive covenants, that they may also be enforced against prospective white property owners).

[63] *Malabed v. N. Slope Borough*, 70 P.3d 416, 420-21 (Alaska 2003).

government's action; and third, the court evaluates the means employed to further those interests to measure the closeness of the means-to-end fit.[64]

1. The State's Denial of Death Benefits to Same-Sex Partners Impairs Important Individual Interests.

Any level of scrutiny under both the state and federal constitutions takes into account whether a law implicates important personal interests. Under the first step of this State's sliding-scale test, the more "important" the interest, the more rigorous the scrutiny.[65] Under federal equal protection doctrine, courts also exercise much greater caution in evaluating classifications that disadvantage important "personal relationships" and liberty interests.[66] The U.S. Supreme Court reinforced this principle in *United States v. Windsor* when it held that DOMA, which barred the federal government's recognition of the marriages of same-sex couples, violated both equal protection and due process. The Court first systematically catalogued the harms that DOMA inflicted upon same-sex couples, and then determined that no legitimate government purpose "overcomes" these harms.[67] Wholly apart from whether the State has employed a suspect classification or infringed upon fundamental liberty interests, there are important dignitary interests implicated here, as discussed below.

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[64] *Id.*

[65] *Id.* at 421.

[66] *See Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (collecting cases).

[67] *United States v. Windsor*, -- U.S. --, 133 S. Ct. 2675, 2694-96 (2013).

It would be a mistake to trivialize the harm that Ms. Harris has suffered by casting it as solely an economic injury. This Court has recognized that the Alaska Constitution protects an "individual's interest in preserving his essential dignity as a human being."[68] In *Windsor*, the U.S. Supreme Court did not view the dispute as merely about the tax treatment of a widow—even though that was the context in which the constitutional question arose. Instead, it understood that government discrimination can strip same-sex couples of "equal dignity" in the community and "humiliate" their families.[69]

This Court has distinguished between two different interests that animate antidiscrimination: one relates to access to that which has been deprived—whether that is employment, housing, public accommodation, or, here, a death benefit—and the other relates to the dignitary harm that accompanies discrimination.[70] In *Swanner*, a landlord with religious objections to renting to unmarried couples argued that he should be constitutionally exempt from a housing antidiscrimination law because the unmarried couples could find alternate housing in the marketplace.[71] But this Court recognized that,

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[68] *State v. Glass*, 583 P.2d 872, 880 (1978); *see also State v. Planned Parenthood*, 171 P.3d 577, 581 (2007) (recognizing "dignity against unwarranted intrusions by the State"). Although these observations were made in the context of the right to privacy, safeguarding individual dignity is no less important to equal protection.

[69] *Windsor*, 133 S. Ct. at 2681, 2694.

[70] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282-83 (Alaska 1994).

[71] *Id.*

even if that was true, it only addressed one aspect of discrimination, because an act of discrimination also "degrades individuals" and "affronts human dignity." [72]

Here, as well, both economic and dignitary components of discrimination are implicated. When Ms. Harris is branded by the State as a legal stranger to Ms. Fadely, rather than afforded the dignity of a "widow" in this context, the injury to Ms. Harris cannot be measured in merely financial terms. As Justice Goldberg noted in the context of public accommodation laws, "[d]iscrimination is not simply dollars and cents, hamburgers, and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public."[73]

This Court has held that heightened scrutiny can be required where the denial of a workers' compensation benefit infringes upon an important right;[74] but none of this Court's prior equal protection cases has considered the issue of how to value a workers' compensation benefit in which economic and dignitary injuries are inextricably intertwined. In *Ranney*, for example, this Court characterized an unmarried woman's claim for death benefits as implicating "merely an economic interest," but nothing barred

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[72] *Id.* at 282 (explaining that the government has an "interest in preventing acts of discrimination . . . regardless of whether the prospective tenants ultimately find alternative housing").

[73] *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring, citations omitted).

[74] *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 273 (Alaska 1984) (applying heightened scrutiny where workers' compensation benefits were reduced upon moving out-of-state, thus infringing upon the right to travel).

her from marrying the man to whom she was engaged.[75] There is a wide gulf between when the State tells a woman she is not *yet* a widow and when the State tells a woman that she can *never* be a widow. Different dignitary interests attach to those situations. This Court also noted in *ACLU* that employment benefits are "undeniably economic;" but the denial of those benefits can also implicate "important" non-economic interests, which is an issue that this Court left open for future resolution.[76]

2. The Absolute Exclusion of Same-Sex Partners from Death Benefits Does Not Rationally Advance Any Legitimate Government Interest, Let Alone Do So "Fairly" and "Substantially."

The second and third steps of the sliding-scale test under the Alaska Constitution require consideration of the government interests advanced by a challenged law and the means employed to advance those interests, respectively.[77] The third step involves a "less speculative, less deferential, [and] more intensified means-to-end inquiry" in comparison to some previous applications of federal rational basis review.[78] There must be "more than just a rational connection between a classification and a governmental

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[75] *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 223 (Alaska 2005) (internal quotation marks omitted).

[76] *ACLU*, 122 P.3d at 790 ("we do not need to decide whether the plaintiffs' interests are 'important' or whether a 'fundamental right' is affected").

[77] *Id.*

[78] *Id.* at 791 n.48 (quoting *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), *superseded on other grounds, Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1261 (Alaska 1980)).

interest; even at the lowest level of scrutiny, the connection must be substantial."[79] This Court has long declared that it "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard."[80]

Under federal rational basis review, unsupported and implausible justifications proffered in support of a classification are also inadequate: "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation."[81] The test is not toothless, and courts must undertake a meaningful review to ascertain if a rational basis supports the law. That is why "even in the ordinary equal protection case," the court "insist[s] on knowing the relation between the classification adopted and the object to be attained."[82] This requirement is critical to ensuring that "classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[83]

a. Cost Savings

This Court has held that "the asserted goal of lowering insurance premiums can have no independent force in the state's attempt to meet its burden under the equal

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[79] *ACLU*, 122 P.3d at 791.

[80] *Isakson*, 550 P.2d at 362.

[81] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[82] *Romer*, 517 U.S. at 632.

[83] *Id.* at 633.

protection clause."[84] That is because "[a]lthough reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive."[85] The State could also lower insurance costs by excluding all left-handed surviving spouses from death benefits; but the resulting cost savings could not make such an action constitutional. Rather, this Court has recognized that, under both federal and state equal protection doctrine, "[s]uch economizing is justifiable only when effected through independently legitimate distinctions."[86]

ACLU illustrates the proper analysis of cost savings in an equal protection inquiry. This Court analyzed the government's purported interest in excluding same-sex partners from employment benefits not as a matter of cost savings standing alone but, rather, cost savings through limiting benefits to those in "truly close relationships" with or "closely

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[84] *Alaska Pac. Assurance Co.*, 687 P.2d at 272. *See also State v. Planned Parenthood*, 28 P.3d 904, 910 (Alaska 2001) (while "the State has a valid interest in preserving the fiscal integrity of its programs . . . [it] may not accomplish such a purpose by invidious distinctions between classes of its citizens"); *Herrick's Aero-Auto-Aqua Repair Serv. v. Dep't of Transp. and Pub. Facilities*, 754 P.2d 1111, 1114 (Alaska 1988) ("cost savings alone are not sufficient government objectives under our equal protection analysis").

[85] *Alaska Pac. Assurance Co.*, 687 P.2d at 272.

[86] *Id*. *See also Plyler*, 457 U.S. at 227 ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate.") (citation omitted); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) ("a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens"); *Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("The saving of . . . costs cannot justify an otherwise invidious classification") (quotations omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

connected" to the government employee.[87] However, even that reformulation could not salvage the constitutionality of the law, because the exclusion of same-sex couples "fail[ed] to advance" the purported government interest.[88] As this Court had "no doubt" recognizing, same-sex couples are just as intimately and closely connected as different-sex married couples and they provide "the same level of love, commitment, and mutual economic and emotional support."[89]

The same analysis applies here. To the extent the government interest here is to limit death benefits to those in close relationships with the decedent, such as spouses, who were most likely to depend on the decedent's wages,[90] the absolute exclusion of same-sex couples does not advance that interest, let alone do so fairly and substantially. Same-sex couples are barred from marriage in Alaska. Thus, even assuming that marriage serves as a valid proxy for financial dependence in the context of different-sex couples, it cannot serve that function in the context of same-sex couples.

Ms. Harris and Ms. Fadely's relationship exemplified the financial interdependence common among married couples. Exc. 014-15 (noting that both shared

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

[88] *Id.* at 791.

[89] *Id.*

[90] This Court has not resolved whether the Act aims to compensate dependents versus family members, *see Ranney*, 122 P.3d at 220 & 223 n.51, or some combination of both. *Cf. In re Estate of Pushruk*, 562 P.2d 329, 331 (Alaska 1977) ("[b]eneficiaries such as spouses and children were probably enumerated in the [wrongful death] statute because they presumptively suffered such loss"). The precise formulation is immaterial here, because the exclusion of same-sex couples fails to permissibly advance any cost savings-related government interest, no matter how it is framed.

responsibility for paying household expenses). The degree of their financial interdependence became especially apparent in the wake of Ms. Fadely's death. Exc. 017 (noting that Ms. Harris had to immediately abandon the home the couple had shared because she knew she would be unable to shoulder the expenses on her own). Excluding surviving same-sex partners like Ms. Harris from death benefits thus fails to advance a government interest in providing a social safety net for those who were in close relationships with the decedent and who relied upon the decedent's wages for basic life necessities.

The attenuated connection between the law and any cost savings-related goal is weakened even further by another consideration: the cost of providing death benefits to same-sex partners—and the corollary savings gleaned from the pockets of these individuals—is miniscule, by any measure. The reason is because of the confluence of two factors: (1) the infrequency at which employees die from work-related injuries, and (2) the number of same-sex couples in Alaska. Over a ten-year period, 240 Alaska employees died from work-related injuries. Exc. 052, 058-68. Around half of those employees (or 120) were likely married, based on census estimates. *See* Exc. 052, 056-57. Furthermore, for approximately every 113 people in Alaska married to a different-sex spouse, there is one person in a same-sex relationship. *See* Exc. 051-55. Thus, there is likely to be approximately one person every decade whose same-sex partner dies from a work-related injury and who will be in a position to potentially receive death benefits. The cost of those death benefits represents an infinitesimal fraction of the quarter billion-

plus in workers' compensation benefits paid annually in Alaska. Equal protection is not only enforced when doing so is free; but the cost of equality is minimal in this context.

Of course, while the cost of providing a once-a-decade death benefit is negligible—particularly when absorbed through the cost-spreading and risk-spreading that insurance is designed to accomplish—the benefit is of tremendous significance to the surviving same-sex partner: for Ms. Harris, its absence not only reflected the State's disregard of her relationship and her loss, but caused her to abandon the home that she had shared with Ms. Fadely while also coping with immeasurable grief. The Act also provides a longer period of death benefits for those who are older like Ms. Harris, currently 53 years old, because it recognizes that these individuals will face even greater difficulty adapting their financial plans to compensate for the unexpected loss of an income source late in life.[91] As the U.S. Supreme Court recognized in *Windsor*, a law that refuses to recognize same-sex relationships "demeans" same-sex couples and also "denies or reduces benefits allowed to families upon the loss of a spouse . . . benefits that are an integral part of family security."[92]

b. Administrative Efficiency

In addition, a purported concern for administrative efficiency is both legally inadequate and factually unsupportable as a basis for excluding same-sex partners from death benefits. First, although an interest in administrative efficiency may be legitimate in the abstract, it cannot justify an invidious classification like the one here. While

[91] AS 23.30.215(g).

[92] *Windsor*, 133 S. Ct. at 2694-95.

"efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'"[93] This Court has also recognized that "the equal protection clause was designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that is often characterized in the most praiseworthy legislation."[94] Administrative convenience generally cannot outweigh the importance of the right that the law infringes upon.[95]

Any boon to administrative efficiency in this case comes at the constitutionally intolerable price of "distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review" under even the federal Equal Protection Clause.[96] The situation here is materially different from *Ranney*, in which this Court held that the Act's exclusion of unmarried *different-sex*

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[93] *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)); *see also Gomez v. Perez*, 409 U.S. 535, 538 (1973) (issues around proof cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination").

[94] *Isakson*, 550 P.2d at 365; *accord Stanley*, 405 U.S. at 656.

[95] *Deubelbeiss v. Commercial Fisheries Entry Comm'n*, 689 P.2d 487, 489 n.7 (Alaska 1984).

[96] *Diaz*, 656 F.3d at 1014; *accord Collins*, 727 F. Supp. 2d at 806 (holding that administrative efficiency cannot justify depriving same-sex domestic partner benefits); *see also Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (reducing the workload of probate courts through a preference for appointing men as administrators of estates is not "consistent with the command of the Equal Protection Clause"); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (holding that a law excluding service members from the ability to establish a voting residence violated equal protection, even though verifying the residence of service members may present special administrative problems).

couples from eligibility for death benefits was "fair" and "efficient," because those couples "freely choose" not to marry. 122 P.3d at 222-23. Same-sex couples in Alaska have had no such choice.

This Court went to great lengths in *ACLU* to make explicitly clear that jurisprudence like *Ranney* dealing with unmarried different-sex couples cannot be foisted upon same-sex couples, who are barred from marriage. It devoted an entire section of the opinion ("*Trombley v. Starr-Wood Cadiac Group* Does Not Control Here") to explain why language in a case about whether an unmarried different-sex cohabitant could bring a loss of consortium claim, *Trombley*, could not be transposed onto same-sex couples:

> Plaintiffs correctly observe that this court there 'analyzed distinctions between married heterosexual couples and unmarried heterosexual couples, who *can* marry. It did not analyze distinctions between heterosexual couples [and] lesbian and gay couples, who *cannot* marry.'[97]

This cautionary instruction in *ACLU* applies with particular force here: this Court was undoubtedly aware of *Ranney* when issuing *ACLU*, given that the opinions in both cases were released within two weeks of each other. Indeed, *Ranney* expressly relied upon *Trombley* to support the notion that the government may limit death benefits to those who are married—but only in the specific context of different-sex couples.[98]

Second, the absolute exclusion of same-sex couples from death benefits does not fairly and substantially advance administrative efficiency. As this Court held in *ACLU*,

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[97] *ACLU*, 122 P.3d at 794 (discussing *Trombley v. Starr-Wood Cardiac Group, PC*, 3 P.3d 916, 923 (Alaska 2000)).

[98] *Ranney*, 122 P.3d at 221 n.36 (discussing *Trombley*).

any concerns about administering benefits to same-sex couples can be satisfied.[99] This Court found it relevant that many other agencies, political subdivisions, and states provide benefits to the same-sex domestic partners of employees.[100] Of course, after this Court's ruling in *ACLU*, there is now an even greater breadth and depth of experience with administering benefits to same-sex couples at all levels of state and municipal government. If administrative efficiency could not justify the denial of benefits to same-sex couples in 2005, it cannot possibly do so now. Indeed, under *ACLU*, the State is already obligated to administer death benefits under AS 39.20.360 and survivor annuities under AS 39.35.450 to the surviving same-sex partners of public employees.[101]

Providing death benefits to same-sex partners is likely to require even less administration, in some respects, than some of the benefits at issue in *ACLU*. While a reasonable number of public employees likely utilize family health insurance coverage for their same-sex partners (just as employees utilize such coverage for different-sex spouses), there is likely to be only one person every decade or so like Ms. Harris who is the surviving same-sex partner of a worker killed on-the-job, as noted above. The marginal administration required to process an extra workers' compensation claim per decade is *de minimis*.

Furthermore, the administration of benefits at issue in *ACLU* did not have the added assistance of the workers' compensation system, which already routinely makes

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[99] *ACLU*, 122 P.3d at 792.

[100] *Id.*

[101] *Id.* at 784 n.4.

determinations regarding the nature of relationships, as it is empowered and equipped to do by design. For example, the Alaska Workers' Compensation Board must decide whether an individual who was married to the decedent, but who was living apart from him or her at the time of death, is nevertheless entitled to death benefits because that individual was either "dependent upon support from the decedent" [102] or was living apart for "justifiable cause."[103] Indeed, given the prevalence of domestic partner benefits in both the public and private sector, it may be easier to confirm the existence of a same-sex couple's relationship than to determine if a different-sex married couple was living apart at the time of the employee's death for "justifiable cause." That is illustrated here by the existence of a joint affidavit, signed by both Ms. Fadely (when she was alive) and Ms. Harris, attesting that they were in an intimate, committed relationship of mutual caring and support and that they shared responsibility for basic living expenses. Exc. 25-26.

Finally, a concern for administrative efficiency may animate the exclusion of unmarried different-sex couples from death benefits; but it is demonstrably false that a similar concern motivates the exclusion of same-sex couples from death benefits.[104] The

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[102] *See, e.g., Irby v. Fairbanks Gold Mining Inc.,* Alaska Workers' Comp. Bd., Dec. No. 05-505, 2005 AK. Wrk. Comp. LEXIS 214, at *43 (Sept. 2, 2005) (finding that wife was dependent on the decedent for support where he had sent part of his paycheck to cover mortgage payments, home repairs, and tuition for children).

[103] *Tonkovich v. Serino, Inc.*, Alaska Workers' Comp. Bd., Dec. No. 08-0137, 2008 AK Wrk. Comp LEXIS 150, at *13 (Jul. 24, 2008) (finding that wife was living apart for justifiable cause because she refused to live with decedent until he stopped drinking alcohol, based on his violent and abusive behavior when inebriated).

[104] *See Isakson,* 550 P.2d at 362 (court will not "hypothesize facts" in evaluating a law's constitutionality).

State excludes *all* same-sex couples from death benefits, even if they have legally married in another jurisdiction. This did not happen by accident. In 1996, the State foresaw that same-sex couples would be able to marry in "another state or foreign jurisdiction" and it chose pass a statute to deprive them of any benefit of marriage.[105] Of course, Alaska's refusal to recognize the out-of-state marriages of same-sex couples substantially deters its citizens from marrying elsewhere, as it did here, Exc. 015, but its treatment of even those who nevertheless marry out-of-state is revealing. A different-sex couple who married in Washington would be eligible for death benefits, but a same-sex couple who married in Washington would not. Thus, the same supposedly administrable rule that the State uses for different-sex couples—the bright-line distinction of marriage—is jettisoned for same-sex couples even when they are married. Equal protection requires "the democratic majority to accept for themselves and their loved ones what they impose on you and me."[106]

c. Promoting Marriage

The exclusion of same-sex couples from eligibility for death benefits likewise cannot be justified by a government interest in promoting marriage. As an initial matter, it is far from clear that death benefits are designed to promote marriage between different-sex couples. It strains credulity that a benefit triggered only upon the rare

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[105] AS 25.05.013.

[106] *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *accord Diaz*, 656 F.3d at 1014 ("'there is no more effective practical guaranty against arbitrary and unreasonable government action than to require that the principles of law which officials would impose upon a minority must be imposed generally'") (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972)).

occurrence of a work-related death would materially affect any individual's decision to marry. Moreover, the State makes death benefits available to even those who were divorced at the time of death but who received financial support from the decedent.[107] Thus, whereas one might argue the government offers health insurance to spouses of employees as an incentive for different-sex couples to stay married,[108] the same cannot be said of death benefits, for which divorce is not an automatic disqualification. This makes the State's differential treatment based on sexual orientation even more striking: different-sex couples who have divorced may sometimes qualify for death benefits, but same-sex couples committed for life can never do so.

Furthermore, excluding same-sex couples from death benefits does not promote marriage because the State bars same-sex couples from marriage. This Court held in *ACLU* that restricting eligibility to persons in a status that same-sex couples can never attain is not even "related" to an interest in promoting marriage.[109] That is confirmed by commonsense. The notion that a heterosexual person—otherwise on bended knee and

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[107] AS 23.30.395(25) (defining "married" to include "a person who is divorced but is required by the decree of divorce to contribute to the support of the former spouse"); *Burgess Constr. Co*, 504 P.2d at 1024-25 ("the decedent, though divorced, was 'married' for purposes of the Workmen's Compensation Act").

[108] *Cf. ACLU*, 122 P.3d at 793.

[109] *Id.* at 783 ("denying benefits to same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage"); *see also Diaz*, 656 F.3d at 1014 ("the denial of benefits to same-sex domestic partners cannot promote marriage, since such partners are ineligible to marry"); *Collins*, 727 F. Supp. 2d at 807 (following *ACLU* and holding that the denial of benefits to same-sex couples "cannot promote marriage [where] gays and lesbians are ineligible to marry").

poised to propose lifelong matrimony—will abandon marriage or flee the institution simply because same-sex couples are eligible for death benefits is preposterous. Equally implausible is the notion that lesbian or gay individuals will disregard their sexual orientation and enter into marriages with different-sex partners in order to obtain death benefits in the rare event of a work-related death. As this Court noted, those would be "sham or unstable marriages" in any event, which the State could not conceivably wish to incentivize.[110]

In sum, *ACLU* forecloses any government interest that could be proffered under the state Equal Protection Clause. In a concluding paragraph in *ACLU*, this Court also noted in passing that its decision was reinforced by constitutional provisions addressing government employment, such as a provision that merit must govern public employment decisions, Alaska Const., art. XII, § 6, and that individuals are entitled to "the rewards of their own industry," Alaska Const., art. I, § 1.[111] In a similar fashion, the U.S. Supreme Court has recognized that the purpose of death benefits in workers' compensation schemes is to compensate those who were in close relationships with the worker, and that

[110] *ACLU*, 122 P.3d at 793.

[111] These provisions may have *confirmed* the outcome of this Court's equal protection analysis, but they were by no means necessary. *Id.* at 794 (mentioning these provisions in a section titled "Equal protection conclusion"). After all, this Court held that the exclusion of same-sex couples from the benefits "violate[d] the Alaska Constitution's equal protection clause"—not the Alaska Constitution's public employment merit principle or its rewards-of-industry provision. *Id.* at 795. The principles and logic set forth in *ACLU* apply equally within and outside the context of public employment.

it violates equal protection to draw invidious distinctions between these individuals unrelated to that purpose.[112]

II. The Denial of Death Benefits to Surviving Same-Sex Partners Also Unconstitutionally Infringes Upon the Rights to Liberty and Privacy Under the State and Federal Constitutions.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[113] The denial of death benefits to same-sex partners tramples upon liberty and privacy interests in intimate family relationships under both the state and federal constitutions, thus requiring heightened scrutiny for that reason as well. The Alaska Constitution expressly guarantees the right to liberty and privacy.[114] Giving substance to those principles is essential to "the character of life in Alaska . . . the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own [lives] which is

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[112] *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 171-74 (1972) (holding that the unequal treatment of illegitimate children in workers' compensation death benefits failed even rational basis review where state law made it "legally impossible" for worker to acknowledge illegitimate children, whom he "nourished and loved"); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that it violated equal protection to bar illegitimate children from wrongful death recovery on behalf of their mother where they were dependent on her and "she cared for them and nurtured them"); *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 74, 75 (1968) (finding no rational basis in barring a mother from bringing wrongful death action on behalf of her illegitimate son).

[113] *Lawrence*, 539 U.S. at 578 (internal quotations omitted).

[114] Alaska Const., art I, § 1 ("This constitution is dedicated to the principles that all persons have a natural right to life, liberty, [and] the pursuit of happiness"), § 7 ("No person shall be deprived of life, liberty, or property, without due process of law"), & § 22 ("The right of the people to privacy is recognized and shall not be infringed."). The right to "privacy" protects not only informational privacy but also individual autonomy. *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997).

virtually unattainable in many of our sister states."[115] *Lawrence* also recognized a fundamental liberty interest in intimate family relationships, and the Ninth Circuit has held that heightened scrutiny must be applied when the government burdens this liberty interest.[116]

Three strands of liberty and privacy are implicated here. The first is the right to control one's body, as "few things [are] more personal than one's body."[117] Indeed, this Court has recognized that the right to control one's body is "necessary for . . . civilized life and ordered liberty."[118] It has jealously guarded this right across a range of circumstances, from those that a less contemplative court might have dismissed as inconsequential—such as a student's right to control his hair length against school coercion[119]—to those that involve government intrusion upon medical decisionmaking[120] and constraint upon reproductive freedom.[121] The right to control one's body must

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[115] *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

[116] *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (holding that the discharge of a lesbian under the military's former "Don't Ask, Don't Tell" policy violated the liberty interest recognized in *Lawrence*).

[117] *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972).

[118] *Valley Hosp. Ass'n*, 948 P.2d at 968.

[119] *Breese*, 501 P.2d at 169.

[120] *Huffman v. State*, 204 P.3d 339, 345-46 (Alaska 2009) (permissibility of mandatory tuberculosis test required heightened scrutiny under privacy and liberty); *Myers v. Alaska Psych. Inst.*, 138 P.3d 238, 248 (Alaska 2006) (administering psychotropic medication without consent and in the absence of emergency implicated privacy and liberty).

[121] *Valley Hosp. Ass'n*, 948 P.2d at 968.

include a freedom as basic as the ability to determine, without government direction, the individual with whom we share a bed by night and build a life by day.

The second strand of liberty implicated here is the right to intimate association. Physical intimacy is "but one element in a personal bond that is more enduring,"[122] and "the constitutional shelter afforded [protected] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others."[123] These highly personal relationships are vital to "the ability independently to define one's identity that is central to any concept of liberty," and thus warrant "a substantial measure of sanctuary from unjustified interference with the State."[124] The bond between two people forged in a relationship that includes physical intimacy is among the most profound in life. Its significance is also reflected in the intense grief felt when that bond is broken by death.

The third strand of liberty and privacy at issue here is the bubble of constitutional protection around the home. Constitutional protections are at their zenith within the home because what people do in the privacy of their own homes—and perhaps especially their bedrooms—will rarely implicate a legitimate government concern. "If there is any area of human activity to which a right of privacy pertains more than any other, it is the

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[122] *Lawrence*, 539 U.S. at 567.

[123] *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

[124] *Roberts*, 468 U.S. at 618-19.

home."[125] That is why this Court has held that the possession of marijuana by adults at home for personal use is constitutionally protected.[126] Because Ms. Harris shared her home and her life with another woman, the State has stripped her of access to the critical social safety net that death benefits provide.

All three strands of protection—the right to control one's body, the right to intimate association, and the right to privacy in the home—converge here, in the relationship between Ms. Harris and Ms. Fadely. The nature and extent of the State's infringement upon these constitutional protections is substantial. Notably, this Court has held that even a partial reduction of workers' compensation benefits—in contrast to the total denial here—can impose a "substantial penalty" on the exercise of a constitutional right.[127] That is illustrated by the fact that Ms. Harris had to abandon her home, and she must now cope with a permanent loss of household income, unmitigated whatsoever by death benefits that others receive. The State's infringement also could not come at a worse time: it takes place on the heels of losing the most cherished person in one's life, a

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[125] *Ravin*, 537 P.2d at 503.

[126] *Id.*

[127] *Alaska Pac. Assurance*, 687 P.2d at 273 (finding that a sixty percent reduction in benefits for moving out-of-state infringed upon the right to travel) & 271 n.11 (holding that "[t]here is no requirement to demonstrate actual deterrence" of the exercise of a right). *See also Lawrence*, 539 U.S. at 578 (holding that the federal constitution protects the "full right to engage in [intimate] conduct without intervention of the government").

time of wrenching anguish. This Court has recognized that an infringement upon privacy can be especially acute when it occurs "during a particularly sensitive period."[128]

The denial of death benefits to same-sex couples also constitutes an impermissible burden on liberty under the federal constitution. In *Windsor*, the U.S. Supreme Court recognized that DOMA impermissibly "burdened" same-sex couples' liberty interests, including through the denial of survivor benefits otherwise available under federal law.[129] Similarly, in *Witt*, the Ninth Circuit held that the liberty interest recognized in *Lawrence* was unconstitutionally burdened when the military discharged a lesbian under "Don't Act, Don't Tell."[130] As these cases makes clear, liberty protections are not only triggered when the government prohibits constitutionally protected conduct outright.

Ranney—again, a case about a heterosexual couple—is not to the contrary. The privacy claim in that case failed for the simple reason that Ranney made the choice not to marry the decedent: this Court explained that providing death benefits to married couples did not impose a significant burden on those "who freely choose not to" marry, a phrase this Court emphasized twice.[131] In other words, any burden could have been easily avoided. Indeed, the couple had no objection to marriage; the decedent had proposed to Ranney the month before he died, but they simply had not married by the time of his

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[128] *Valley Hosp. Ass'n*, 948 P.2d at 968.

[129] *Windsor*, 133 S. Ct. at 2694.

[130] *Witt*, 527 F.3d at 819.

[131] *Ranney*, 122 P.3d at 222.

death.[132] Here, however, Ms. Harris and Ms. Fadely did not "freely choose not to" marry each other. The State made that choice for them. The State cannot then create an impossible double-bind of requiring a status that same-sex couples cannot attain and claim there has been no "burden."

CONCLUSION

For the foregoing reasons, Ms. Harris respectfully requests that this Court hold that the exclusion of same-sex partners from death benefits is unconstitutional, reverse the denial of death benefits affirmed by the Alaska Workers' Compensation Appeals Commission, and remand for further proceedings.

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Respectfully submitted,

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[132] *Id.* at 216.