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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

ALASKA STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ARGUMENT

Nearly a decade ago in *ACLU v. State*, 122 P.3d 781 (Alaska 2005), this Court recognized that the categorical exclusion of lesbians and gay men from benefits the government provides to spouses could not be squared with equal protection guarantees, rejecting the same arguments that Appellees ("Millennium") try to re-litigate here. Millennium cannot satisfy the heavy burden of *stare decisis* to overturn that decision. While the Marriage Amendment bars marriage for same-sex couples under the Alaska Constitution, this Court correctly held that it does not bar providing benefits to same-sex couples that are also provided to married couples. To the contrary, because the Marriage Amendment did not wholly carve lesbians and gay men out of the Alaska Constitution, both state guarantees of equal protection and due process, as well as analogous federal guarantees, forbid the State's exclusion of same-sex partners from death benefits. That exclusion should be subject to heightened scrutiny, but, as in *ACLU*, it fails even the lowest level of scrutiny, because it is not fairly and substantially related to any legitimate government interest. It also causes profound harm. The state and federal constitution do not permit the State to treat Deborah Harris and her departed, intimate partner in life as legally inconsequential to one another and to deny Ms. Harris the same life-vest of death benefits the State extends to others.

I. Alaska's Marriage Amendment Does Not Authorize the Absolute Exclusion of Same-Sex Partners from Death Benefits.

This Court has already considered and rejected the argument that Millennium spends the bulk of its brief attempting to re-litigate. In *ACLU*, both the Municipality of

Anchorage and *amici curiae* in that case argued that "the Marriage Amendment precludes challenges by same-sex couples" seeking access to benefits that the government provides to married couples.[1] This Court correctly rejected that argument in 2005, and nothing has changed since then to warrant abandoning that holding.

A. *Stare Decisis* Principles Preclude Reversal of this Court's Equal Protection Ruling in *ACLU*.

Millennium's attempt to overturn *ACLU* contravenes the respect for precedent commanded by *stare decisis*. "The *stare decisis* doctrine rests on a solid bedrock of practicality: no judicial system could do society's work if it eyed each issue afresh in every case that raised it."[2] The doctrine enables individuals to order their affairs with assurance against unfair surprise and preserves public confidence in the judiciary.[3]

A party who seeks to overturn a prior decision "bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."[4] This Court "will overrule a prior decision only when [1] clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and [2] that more good than harm would result from a departure from precedent."[5] Millennium has not even attempted to satisfy this heavy burden, nor could it do so. This, in itself, is fatal to Millennium's argument. The Marriage Amendment's plain meaning, statutory context,

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[1] 122 P.3d at 786.
[2] *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004) (italics added; internal quotation marks omitted).
[3] *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173, 1175 n.4 (Alaska 1993) (internal quotation marks omitted).
[4] *Thomas*, 102 P.3d at 943.
[5] *Khan v. State*, 278 P.3d 893, 901 (Alaska 2012) (internal quotation marks omitted).

legislative history, and national context all controvert Millennium's arguments, which fail to even come close to meeting its weighty burden.

1. *ACLU* Was Neither Originally Erroneous Nor Have There Been Changed Circumstances to Warrant Its Abandonment.

A decision may be originally erroneous if it fails to address key points and a party can demonstrate that it "would *clearly* have prevailed if the points had been fully considered," or if the decision has proved to be unworkable in practice.[6] Alternately, a party may demonstrate that changed circumstances have made the decision no longer sound.[7] In short, Millennium must demonstrate original or current unsoundness, and it must do so by a clear and convincing showing.[8]

Plain Meaning. *ACLU* was not originally erroneous, and it correctly rejected the same arguments Millennium advances here. Millennium urges the Court to look anywhere but the plain meaning of the text of the Marriage Amendment to determine its scope. But, as this Court recognized in *ACLU*, the "clear words" of the Marriage Amendment ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.") bar marriage for same-sex couples—nothing more and nothing less.[9] There is no reference whatsoever in the Marriage Amendment to "benefits," and no language in it that supports Millennium's argument that the Amendment not only bars same-sex couples from marriage but also from any benefits provided to married couples. This Court has regularly rejected constitutional

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[6] *Id.* at 901 (emphasis in original).
[7] *Id.*
[8] *Thomas*, 102 P.3d at 945-46.
[9] Alaska Const., art. I, § 25; *ACLU*, 122 P.3d at 786.

interpretations that would contravene the plain meaning of the language used.[10] The plainer the meaning, the greater the burden to justify a contrary interpretation.[11] Given how plainly the language of the Marriage Amendment addresses only "marriage" by same-sex couples, Millennium's argument must be rejected.

Statutory Context. The context of the Marriage Amendment also conclusively rebuts Millennium's interpretation. The Alaska Legislature demonstrated that it knew how to draft language barring same-sex couples from the benefits of marriage—but it omitted that language from the Marriage Amendment. When the Marriage Amendment was considered in 1998, an Alaska statute, enacted two years prior, barred same-sex couples from receiving the benefits of marriage: "A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."[12] This was in addition to other statutory provisions that barred same-sex couples from marrying and from having their out-of-state marriages recognized.[13] While the Marriage Amendment constitutionalized the statutory bar on marriage for same-sex couples, the Legislature did not constitutionalize the statutory bar on benefits. If it had wanted to do so, it could have

[10] *E.g.*, *State v. Jeffrey*, 170 P.3d 226, 236 (Alaska 2007); *State v. Gonzalez*, 853 P.2d 526, 529 (Alaska 1993) ("'the intent underlying . . . constitutional language should first be gathered from the plain meaning of the language itself'"); *Martin v. State*, 517 P.2d 1389, 1394 (Alaska 1974); *Starr v. Hagglund*, 374 P.2d 316, 320 (Alaska 1962).
[11] *State v. Alyeska Pipeline Serv. Co.*, 262 P.3d 593, 597 (Alaska 2011).
[12] AS 25.05.013(b).
[13] 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.").

easily incorporated the "benefits of marriage" language from the statute into the Marriage Amendment, but it did not.

Legislative History. In fact, the legislative history of the Marriage Amendment, both in the Legislative floor discussion and in the public debate, makes clear that the Amendment was meant to prohibit the status of marriage but not to exclude same-sex couples from obtaining benefits or to jettison them from Alaska's constitutional promise of equal protection. For example, Representative Joe Green (R-South Anchorage), then Chair of the House Judiciary Committee, drew a sharp distinction between the status and the "rights" of marriage in his speech sending the Amendment to the voters for ratification:

> I am just saying that [same-sex relationships] should not be considered as marriage, perhaps a union, something else. I am not even standing here to say that they should not be entitled to the same rights of marriage[.]
>
> May 11, 1998, House Floor Debate (emphasis added).[14]

This distinction between the status and the rights of marriage also was made clear to the public by the proponents of the Marriage Amendment. For example, Senator Loren Leman (R-Turnagain), who wrote the Statement in Support of the Marriage Amendment for the Official Election Pamphlet for the 1998 General Election, clarified that the Marriage Amendment would deny same-sex couples the status of marriage but not the guarantee of equal protection: "All Alaskans are equal before the law. But that's

[14] The House floor debate on SJR 42 can be found at http://archives.alaska.gov/AudioTransfer/audio_transfer_zencey/mp3s/House_5_11_98_tape_1_of_4.mp3 (last visited Jan. 31, 2014; note the availability of audio is subject to ongoing digitizing efforts). Representative Green's speech is at 22:04 to 23:23 of that recording.

not what this debate is about."[15] Thus, in both the Alaska Legislature and the public debate, the proponents made clear that while same-sex couples could not obtain the "status" of marriage, they were not excluded from the "benefits" of marriage or (aside from using it to seek marriage) the right to equal protection under the state constitution.

In addition, the particular history of the Marriage Amendment shows that it must be read narrowly and that a broad interpretation would have raised serious questions about its viability as an amendment, as opposed to a revision, to the Alaska Constitution. That concern prompted this Court to strike part of the Amendment's original language, which ostensibly sought to harmonize the Amendment with other parts of the Alaska Constitution, because it was superfluous yet raised the "possibility that the sentence in question might be construed at some future time in an unintended fashion which could seriously interfere with important rights."[16] Expanding the scope of the Marriage Amendment as Millennium urges would thus be contrary to this Court's precedent construing the Amendment narrowly.

National Context. Other states have amended or revised their state constitutions to expressly bar benefits for same-sex couples or any official recognition of same-sex

[15] Ballot Measure 2, Constitutional Amendment Limiting Marriage, *available at* http://www.elections.alaska.gov/doc/oep/1998/98bal2.htm.

[16] *Bess v. Ulmer*, 985 P.3d 979, 988 (Alaska 1999) (striking sentence that "No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex."). *Bess* cited *Johns v. Commercial Fishing Entry Comm'n*, 758 P.2d 1256, 1264 (Alaska 1988), for the well-understood proposition that a specific provision governs over a more general provision in the state constitution—not for any broader proposition. *Cf.* Appellees' Br. at 15.

relationships,[17] but Alaska charted a different course. For example, the Georgia Constitution provides that "[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."[18] The Kansas Constitution bars marriage for same-sex couples and then instructs that "[n]o relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights and incidents of marriage."[19] The Marriage Amendment in Alaska did not go so far.

Conversely, some states altered their state constitutions to bar the status of marriage for same-sex couples, but, like Alaska, did not bar same-sex couples from receiving benefits provided to different-sex married couples. For example, California (even before allowing same-sex couples to marry), Colorado, Montana, Nevada, and Oregon have all provided same-sex couples with access to some or all of the state law rights and responsibilities of marriage, notwithstanding state constitutional amendments barring same-sex couples from marrying.[20] Providing rights and responsibilities to same-sex couples has not proven unworkable, here or elsewhere.

Other courts have rejected attempts to interpret state laws similar to the one in Alaska, which only bar marriage for same-sex couples, to also bar the government from

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[17] A compilation of all state constitutional amendments and revisions targeting same-sex relationships is available at http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_text-state-constitutional-amendments-revisions-targeting-same-sex-relationships.pdf.

[18] Ga. Const., art. I, § 4 ¶ I.

[19] Kan. Const., art. XV, § 16.

[20] Cal. Fam. Code § 297.5(a); Colo. Rev. Stat. § 14-15-107; *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004); Nev. Rev. Stat. § 122A.200(1)(a); Or. Rev. Stat. § 106.340.

providing benefits to such couples.[21] For example, in *Knight v. Superior Court*, California's courts rejected the argument that a ballot initiative providing that "Only marriage between a man and a woman is valid or recognized in California" barred California's domestic partnership law, which provided same-sex couples with access to the state's rights and responsibilities of marriage.[22] "If that had been its purpose, the initiative easily and effectively could have accomplished that goal by using language akin to words used in laws from other states."[23]

Millennium's Other Arguments. None of Millennium's other arguments for overturning *ACLU* fare any better. First, Millennium's reliance on *Brause* is misplaced—just as it was when *amici* in *ACLU* made the same arguments and had them rejected by this Court.[24] If anything, *Brause* demonstrates that the Marriage Amendment was a response to the possibility of same-sex couples marrying, not their ability to access the benefits of marriage. The *Brause* plaintiffs were a same-sex couple "who sought and [were] denied a license to marry each other by the State of Alaska."[25] Significantly, that was also how ballot materials in support of the Marriage Amendment described *Brause*:

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[21] *See, e.g.*, *Leskovar v. Nickels*, 140 Wn. App. 770, 778-79 (Wash. Ct. App. 2007); *Knight v. Superior Court*, 128 Cal. App. 4th 14, 24 (2005); *Tyma v. Montgomery Cnty.*, 801 A.2d 148, 158 (Md. 2002).
[22] 128 Cal. App. 4th at 24 (2005).
[23] *Id.* at 24.
[24] *Brause v. State*, 21 P.3d 357 (Alaska 2001); *see* North Star Civil Rights Defense Fund, Inc. and Marriage Law Foundation Br. in *ACLU* at 5 (filed Aug. 5, 2002) (arguing that the *Brause* litigation "treated marital status and marital benefits as inseparable" and "resulted in the passage of the Marriage Amendment" and that "the Legislature and the People presupposed this context"), *available at* http://www.marriagelawfoundation.org/publications/Anchorage.pdf.
[25] *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Ak. Sup. Ct. Feb. 27, 1998).

"In 1995, two Anchorage men who describe themselves as homosexuals sued the State of Alaska because they were not granted a marriage license."[26] There is nothing in the ballot materials to support the broader interpretation of the Marriage Amendment that Millennium urges.[27] Indeed, that is why, after passage of the Marriage Amendment, the *Brause* plaintiffs argued that the exclusion of same-sex couples from the benefits of marriage nevertheless violated the Alaska Constitution, although their challenge was dismissed for lack of ripeness without a ruling on the merits.[28]

Second, Millennium trivializes the significance of marriage when it asserts that the Marriage Amendment is rendered meaningless if it "only" withholds marriage certificates from same-sex couples. The word "marriage" is of singular significance; it conveys "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[29] As *Windsor* observed, "marriage is more than a routine classification for purposes of certain statutory benefits."[30] Having access to the benefits of marriage does not mean that one is married.[31] If the State of Alaska abolished the status of marriage and replaced it with domestic partnership, different-sex couples who had previously been

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[26] Ballot Measure 2, Constitutional Amendment Limiting Marriage.
[27] *Cf. Knight,* 128 Cal. App. 4th at 25 (noting no ballot pamphlet materials disclosing intent to limit statutory rights of domestic partners).
[28] 21 P.3d at 358. Millennium also incorrectly asserts that the Marriage Amendment—as opposed to affirmative protections such as equal protection and due process—is the provision of the state constitution upon which Ms. Harris relies. Appellees' Br. at 22.
[29] *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965).
[30] *United States v. Windsor,* -- U.S. --, 133 S. Ct. 2675, 2692 (2013).
[31] Even in states where all or virtually all of the state law rights and responsibilities of marriage are made available to same-sex couples through domestic partnerships or civil unions, same-sex couples and their children still suffer significant injury from their inability to marry. *See, e.g., Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417-20 (Conn. 2008).

considered married would undoubtedly feel that they had lost something precious, even if they retained the same rights and responsibilities.

Third, even if the Marriage Amendment could be expanded beyond its clear and intended scope, Millennium fails to show how death benefits constitute one of the "benefits of marriage," as Millennium has defined that term (which is not even in the Amendment). Millennium first posits that the benefits of marriage are those "accessible only by way of a marriage license," and that death benefits constitute one such benefit.[32] Yet, just pages later, it admits that the Alaska Workers' Compensation Act "does not limit death benefits to married couples," because certain relatives can also qualify for death benefits.[33] In sum, Millennium fails entirely to show that the *ACLU* decision was erroneous.

Absence of Changed Circumstances. Millennium likewise cannot meet the alternative "changed circumstances" prong of the test for when a controlling decision should be abandoned. Since *ACLU* was issued in 2005, there have been no changed circumstances to suggest that it is no longer sound, such as when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"[34] Rather than the *ACLU* decision being inconsistent with more

[32] Appellees' Br. at 24.
[33] Appellees' Br. at 31 n.88. *See Armijo v. Miles*, 127 Cal. App. 4th 1405, 1424 (2005) (holding that allowing a same-sex domestic partner to sue for wrongful death did not violate then-existing state statute barring same-sex couples from marriage, because the right was not an exclusive benefit of marriage and also included other family members).
[34] *Pratt*, 852 P.2d at 1176 (internal quotation marks omitted).

recent precedent, its reasoning has been adopted elsewhere.[35] Indeed, some courts have gone further and held that the exclusion of same-sex couples from marriage (whether or not equal state benefits are provided) violates the federal constitution.[36] Nor have there been any relevant factual changes since *ACLU* was decided in 2005. This Court's observation still rings true: same-sex couples provide "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."[37]

2. Overturning *ACLU* Would Substantially Harm Same-Sex Couples.

Millennium also cannot clearly and convincingly satisfy the second requirement to overcome *stare decisis*, that more good than harm would result from overturning *ACLU*. Rather, the opposite is true: unwinding this Court's equal protection precedent could harm same-sex couples immeasurably and interfere with vested rights, particularly given Millennium's expansive view of what the Marriage Amendment supposedly precludes.

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[35] Appellant's Opening Br. at 12 n.20 (collecting cases); *see also In re Fonberg*, 736 F.3d 901, 902-03 (9th Cir. Jud. Council 2013) (denial of health benefits to same-sex domestic partner of court employee constitutes discrimination based on sexual orientation and sex) (Kozinski, Clifton, and Beistline).

[36] *See De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014); *Lee v. Orr*, No. 1:13-cv-08719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 U.S. Dist. LEXIS 19080 (E.D. Va. Feb. 14, 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 U.S. Dist. LEXIS 4374 (N.D. Ok. Jan. 17, 2014); *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 U.S. Dist. LEXIS 179550 (S.D. Ohio Dec. 23, 2013); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *appeal dismissed*, 725 F.3d 1140 (9th Cir. 2013).

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

Millennium would apparently seek to strip lesbian and gay public employees of the numerous employment protections identified in *ACLU*. This includes family health insurance coverage for their partners, the termination of which could lead to dire health consequences.[38] Likewise, Millennium would also presumably seek to bar public employees from taking family leave to care for a sick same-sex partner.[39] As to death benefits, Millennium would condemn future surviving same-sex partners like Ms. Harris to hardships and indignities that others are spared.[40]

B. The Marriage Amendment Cannot Override Federal Constitutional Guarantees.

Even if the Marriage Amendment could be interpreted to bar death benefits for same-sex partners under the Alaska Constitution, it could not exempt the State from compliance with the federal Equal Protection and Due Process Clauses.[41] Millennium talks out of both sides of its mouth when it argues that (1) the Marriage Amendment can be expanded to bar relief for Ms. Harris, but (2) whether this expanded Marriage Amendment passes muster under the federal constitution is somehow "not before this

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[38] *See Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011) (finding same-sex partners of public employees would suffer irreparable harm from being stripped of health insurance).
[39] AS 39.20.500(b)(2).
[40] Indeed, the harm may not stop with same-sex couples. For example, Ohio's state constitutional amendment—which bars the creation or recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage"—spawned litigation over whether domestic violence protections extending beyond married couples to include unmarried different-sex couples were valid under the amendment. *State of Ohio v. Carswell*, 114 Ohio St. 3d 210 (2007) (ultimately upholding such protections). *Cf. Ranney v. Whitewater Eng'g*, 122 P.3d 214, 219 (Alaska 2005) (noting that the State provides benefits such as public assistance and disaster relief to unmarried couples).
[41] U.S. Const., art. VI, cl. 2 (Supremacy Clause).

Court" and is for "another day."[42] As Ms. Harris has consistently argued, the federal constitution independently bars the State from excluding same-sex partners from eligibility for death benefits. Exc. 8-9, 98. That is true regardless of whether the exclusion is achieved through a state statute or a state constitutional provision. Indeed, interpreting the Marriage Amendment to bar benefits for same-sex couples would improperly increase the extent to which state law conflicts with the federal constitution.[43]

II. The Exclusion of Same-Sex Partners from Death Benefits Violates State and Federal Equal Protection and Due Process Guarantees.

A. Heightened Scrutiny Is Required.

1. Classifications Based on Sexual Orientation and Sex

The government may not discriminate against individuals based on their sexual orientation or sex unless it survives the rigors of heightened scrutiny, a burden that it cannot be satisfy here. In *SmithKline*, the Ninth Circuit recently held that classifications based on sexual orientation are subject to heightened scrutiny under the federal Equal Protection Clause.[44] *SmithKline* noted that in analyzing the constitutionality of the so-called Defense of Marriage Act ("DOMA") in *Windsor*, the Supreme Court looked to the actual purposes of the law and the injuries inflicted upon the disadvantaged group and made no presumption that the statute was constitutional—all hallmarks of heightened

[42] Appellees' Br. at 23 n.55.
[43] *Cf. Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (noting that constitutional infirmities should be avoided where possible).
[44] *SmithKline Beacham Corp. v. Abbott Labs.*, 740 F.3d 471, 479-86 (9th Cir. 2014) ("*SmithKline*") (finding that juror had been excluded on the basis of his sexual orientation, the permissibility of which turned on whether sexual orientation classifications are subject to heightened scrutiny).

scrutiny.[45] "In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review."[46] Because, as Millennium admits, the state Equal Protection Clause is even "stronger than that in the federal Constitution," *a fortiori*, the requirement of heightened scrutiny under the federal constitution also applies under the state constitution as well.[47]

Millennium makes the astounding assertion that *Windsor* "is not a sexual-orientation case at all."[48] Instead, Millennium posits that *Windsor* was merely a states' rights decision about federal disrespect for one class of married couples, who just happened to be of the same sex. To the contrary, the government's discrimination on the basis of sexual orientation was central to the decision, which found that this discrimination humiliated lesbians and gay men and their children, marking them with a badge of inferiority.[49] While *Windsor* recognized the role of states in regulating domestic relations, it reiterated a cautionary proviso that Millennium ignores: state laws concerning domestic relations, "of course, must respect the constitutional rights of persons" and states may only legislate in this arena "subject to those guarantees."[50]

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[45] *Id.* at 480-83.
[46] *Id.* at 481.
[47] Appellees' Br. at 36 n.103.
[48] Appellees' Br. at 39. Millennium also cites to out-of-state cases that upheld exclusions of same-sex partners from death or survivor benefits, but these cases denied that there was any discrimination on the basis of sexual orientation at all, as opposed to marital status—which this Court in *ACLU* and many other courts have flatly rejected. *Compare* Appellees' Br. at 37 n.105 *with* Appellant's Opening Br. at 12 n.20 (collecting cases).
[49] *Windsor*, 133 S. Ct. at 2694.
[50] *Id.* at 2691.

Millennium asserts that a majority of courts have held that classifications based on sexual orientation receive only rational basis review, but many of these cases were decided before *Lawrence*, and thus are relics of a bygone era when, as a result of erroneous precedent that *Lawrence* overruled, even criminalizing same-sex intimacy was considered permissible.[51] Other courts have improperly adhered to pre-*Lawrence* precedent without applying a proper heightened scrutiny analysis,[52] or adopted reasoning that cannot be reconciled with this Court's equal protection jurisprudence in *ACLU*.[53] All of these cases also pre-date *Windsor* and pre-date Second and Ninth Circuit and other authority holding that sexual orientation classifications must receive heightened scrutiny.[54]

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[51] *Lawrence v. Texas*, 539 U.S. 558 (2003)

[52] *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008) (noting that plaintiff argued in the district court that "lesbians comprise a suspect class, warranting strict scrutiny . . . [but] does not reassert that claim now on appeal"); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004).

[53] *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006).

[54] *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013); *SmithKline*, 740 F.3d at 480-86; *Obergefell*, 2013 U.S. Dist. LEXIS 179550, at *43-59; *Griego v. Oliver*, 2013 N.M. LEXIS 414, at *41-55 (N.M. 2013). *See also* Appellant's Opening Br. at 17 n.35 (collecting cases); *De Leon*, 2014 U.S. Dist. LEXIS 26236 at *31-37. Millennium's attempts to distinguish the many cases that have held that heightened scrutiny is required miss the mark. *See, e.g.*, Appellees' Br. at 41 (asserting that heightened scrutiny only applied in cases involving DOMA); *id.* at 41-42 (denying *Tanner*'s relevance, even though court analyzed whether lesbians and gay men have historically been subject to prejudice); *id.* at 42 n.122 (mischaracterizing cases concluding that *both* equal protection and due process were violated as only due process cases, and incorrectly stating that the *Perry* district court decision was vacated, where, instead, the *appeal* was dismissed).

Most importantly, Millennium fails to engage on the substance of the heightened scrutiny analysis. Millennium does not refute that the two most important considerations in that analysis are whether the group has suffered a history of discrimination and whether the trait bears upon one's aptitude or ability to contribute to society, and that both are satisfied here.[55] Millennium also does not deny that sexual orientation is an immutable, distinguishing characteristic.[56]

A group need not show that it has no political power in order to receive heightened scrutiny, but lesbians and gay men also remain a small and politically vulnerable minority, both in Alaska and in the United States.[57] This consideration of the heightened scrutiny analysis is satisfied where the group "demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process."[58] Lesbians and gay men satisfy that standard, especially in

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[55] Appellant's Opening Br. at 16-18.

[56] At most, Millennium implies, without support, that sexual orientation cannot be defined. Appellees' Br. at 39. Yet, when people are asked their sexual orientation, they are able to answer, and legislatures and courts across the country have hardly found the term baffling. Certainly, when the Legislature barred same-sex couples from marriage and the benefits of marriage, and when voters passed the Marriage Amendment, there was no confusion about whom those laws targeted.

[57] This political vulnerability has been recounted in depth by other courts. *See Windsor*, 699 F.3d at 184; *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987-89 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 943-44; *Varnum v. Brien*, 763 N.W.2d 862, 893-85 (Iowa 2009); *Kerrigan*, 957 A.2d at 434-47 & 452-54; *Griego*, 2013 N.M. LEXIS 414, at *46-52; *accord Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 960 n.21 (Alaska 1978). It is not rebutted by the presence of fictional gay characters on television sitcoms or by celebrities and political figures appearing at an LGBT organization's event. *Cf. Amicus Curiae* Br. at 15, 27.

[58] *Kerrigan*, 957 A.2d at 197.

comparison to other groups afforded the protection of heightened scrutiny: the legal protections currently available to lesbians and gay men are far more limited than the comprehensive legislation protecting the rights of women and African-Americans enacted decades ago. For example, when sex-based classifications received heightened scrutiny, Congress had already passed Title VII of the Civil Rights of 1964 and the Equal Pay Act of 1963.[59] Under the metric of political powerlessness that *amicus curiae* attempts to establish, not even African-Americans should qualify for the protection of heightened scrutiny, given that we now have a President who is African-American, federal and state law have long outlawed race discrimination in virtually every context subject to regulation, and African-Americans have certainly attracted the attention of lawmakers.[60] Nationally and in Alaska, lesbians and gay men cannot secure passage of express nondiscrimination protections in a range of settings.[61]

Even if sexual orientation discrimination did not receive heightened scrutiny, the denial of death benefits to Ms. Harris also constitutes sex discrimination, which independently requires heightened scrutiny.[62]

None of Millennium's arguments alters the inescapable conclusion that, had Ms. Harris been born a man, she would have been able to marry Ms. Fadely, and this litigation would not exist. Millennium argues that the State discriminates against men

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[59] *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality).
[60] *Kerrigan*, 957 A.2d at 212 ("'[I]f a group's *current* political powerlessness were a prerequisite . . . it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect [or quasi-suspect] classifications.'").
[61] Appellant's Opening Br. at 18-19.
[62] *See* Appellant's Opening Br. at 22.

and women equally, because both are denied death benefits upon a same-sex partner's death. But the U.S. Supreme Court rejected that same line of argument in *Loving*, when it struck down Virginia's anti-miscegenation law, which applied equally to Caucasians and African-Americans.[63] Millennium also argues that the law "does not single out any gender as a discrete class for unequal treatment," but the U.S. Supreme Court has repeatedly confirmed that the right to equal protection is the right of the individual, not of the class.[64] The fact the State discriminates against men and women equally as classes does not change that Ms. Harris, as an individual, was barred from death benefits because of her sex.[65]

2. Burdens on Liberty and Privacy

The State's denial of death benefits also violates liberty and privacy guarantees protected by the Alaska and U.S. Constitutions. These protections safeguard the right to control one's body, the right to intimate association, and the right to privacy in the

[63] *Loving v. Virginia*, 388 U.S. 1, 8 (1967).
[64] *Mitchell v. United States*, 313 U.S. 80, 97 (1941); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995)*; J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).
[65] Millennium's reliance on cases that have rejected sex discrimination claims in challenges to bans on marriage for same-sex couples fails to respond to these points, and also ignores countervailing authority. *See In re Fonberg*, 736 F.3d at 903 (denial of health benefits to same-sex domestic partner of court employee "amounts to discrimination on the basis of sex"); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009); *Perry*, 704 F. Supp. 2d at 996; *Golinski*, 824 F. Supp. 2d at 982 n.4; *In re Balas*, 449 B.R. 567, 577-78 (Bankr. C.D. Cal. 2011); *Baehr v. Lewin*, 852 P.2d 44, 67–68 (Haw. 1993); *see also Kitchen*, 2013 U.S. Dist. LEXIS 179331 at *57-58.

home.[66] Together, they draw a line the government may not cross unless it can justify doing so under heightened scrutiny.[67]

Millennium is wrong that constitutional protections are only triggered if the State altogether prohibits same-sex relationships. This Court has found that a sixty percent reduction in workers' compensation benefits for moving out-of-state imposed a "substantial penalty" on the right to travel, even though the State did not prohibit residents from doing so.[68] There was also no court injunction forcing the student plaintiff in *Breese* to cut his hair; rather, the school made him choose between his exercise of constitutional rights and expulsion.[69] Similarly, the plaintiffs in *Windsor* and *Witt* were not prohibited from having a same-sex relationship, but they faced tax liability and military discharge, respectively, as a result.[70] The State may not penalize, through indirect means, that which it cannot prohibit.[71]

Constitutional liberty and privacy protections do not only constrain the State if its coercion had "prevent[ed] Ms. Harris from forming relationships" with women entirely,

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[66] Appellant's Opening Br. at 41-43.
[67] *Breese v. Smith*, 501 P.2d 159, 170 (Alaska 1972) (requiring a compelling state interest to justify encroachments upon liberty); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 816-19 (9th Cir. 2008) (applying heightened scrutiny to burdens on *Lawrence* liberty interest).
[68] *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 273 (Alaska 1984).
[69] *Breese*, 501 P.2d at 162.
[70] *Windsor*, 133 S. Ct. at 2683; *Witt*, 527 F.3d at 810; *see also In re Fonberg*, 736 F.3d at 903 (denial of health insurance for a same-sex partner constitutes a deprivation of due process under *Windsor*).
[71] *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972). Nor can the deprivation of workers' compensation benefits be dismissed as the loss of a subsidy, *see Alaska Pac. Assurance*, 687 P.2d at 273, particularly given that death benefits displace all other liability for damages stemming from a worker's death, AS 23.30.055.

as Millennium suggests.[72] Even Texas's law criminalizing sexual conduct, which was held unconstitutional in *Lawrence*, would not have met this test, as that law did not deter the defendants or all other same-sex couples from forming intimate relationships.[73]

Millennium also conflates two different protections afforded by the right to privacy: the right to personal autonomy (which is relevant here) and one is the right to informational privacy (which, as in *ACLU*, is not relevant here).[74] Millennium's purported concern for the informational privacy of same-sex couples is misplaced. By its logic, torts should not exist either, because they too may involve delving into plaintiffs' medical histories, and loss of consortium claims should be abolished because they would involve "pry[ing] into the intimacy of a couple's relationship."[75] The plaintiffs in those situations choose to place certain facts at issue. Likewise, a surviving spouse who seeks death benefits on the grounds of living apart from the decedent for "justifiable cause" puts that fact at issue.[76]

Millennium recognizes that the privacy claim in *Ranney* was fundamentally different than that here, because Ms. Ranney had freely chosen not to marry the decedent,

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[72] Appellees' Br. at 46. It also is not a legitimate government interest under *ACLU* to encourage lesbians and gay men to enter into "sham or unstable" marriages with different-sex spouses. 122 P.3d at 793.

[73] *Cf. Alaska Pac. Assurance*, 687 P.2d at 271 n.11 ("[t]here is no requirement to demonstrate actual deterrence" of the exercise of a right).

[74] *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Millennium's reliance on *Bess*, 985 P.2d at 995, also conflates this distinction.

[75] Appellees' Br. at 47.

[76] *See, e.g., Tonkovich v. Serino, Inc.*, Alaska Workers' Comp. Bd., Dec. No. 08-0137, 2008 AK Wrk. Comp LEXIS 150, at *13 (Jul. 24, 2008).

a choice that Ms. Harris never had. That absence of choice imposes a substantial burden on Ms. Harris's privacy rights, because she was unable to avoid the burden.[77]

B. The State's Denial of Death Benefits to Same-Sex Partners Cannot Survive Any Level of Scrutiny.

Although Millennium characterizes Ms. Harris's injury as solely economic, it is far more than that, and therefore demands more searching scrutiny under the sliding-scale analysis of the state Equal Protection Clause. The State's denial of death benefits here, unlike the denial of death benefits in *Ranney*, brands Ms. Harris as forever unworthy of the dignity of widowhood, an injury which Millennium simply ignores.[78] As in *ACLU*, however, the State's exclusion here fails under any level of scrutiny.

1. Cost Savings

Millennium does not disagree that any purported government interest of cost savings—whether viewed independently or alongside the interests of speed, efficiency, fairness, and predictability—must be analyzed as attempting to limit death benefits to certain individuals within "the universe of persons in intimate and closely connected relationships."[79] But the State wholly excludes lesbians and gay men from that universe. It does so even though it is incontrovertible that same-sex relationships can be just as "intimate" and "closely connected" as those of married different-sex couples.[80] No

[77] Millennium's assertion that Ms. Harris somehow has waived any argument regarding due process is puzzling, given that the right to liberty is premised upon substantive due process. Appellees' Br. at 49-50; *Lawrence*, 539 U.S. at 565 ("the protection of liberty under the Due Process Clause has a substantive dimension").
[78] Appellant's Opening Br. at 24-27.
[79] Appellees' Br. at 31.
[80] *ACLU*, 122 P.3d at 791

matter the strength of their commitment, the length of their relationship, or the depth of their love, there is nothing any same-sex couple can do to access death benefits.

This was not the case in *Ranney*. Like all different-sex couples, the plaintiff in *Ranney* was free to marry her fiancé and automatically become eligible to receive death benefits. Thus, for different-sex couples, the Legislature could rely upon marriage as a proxy for a close and intimate connection with the decedent. Different-sex couples may meet that proxy test, but same-sex couples cannot. There may be "close cases at the margins" for different-sex couples, as *Ranney* illustrates.[81] But there is no "margin" at all for same-sex couples: nothing they can do will change that one-hundred percent of them are excluded from death benefits. Ms. Harris does not, as Millennium claims, ask the Court to "fine tune" a dividing line; she asks the Court to remove a discriminatory barrier that causes the wholesale exclusion of all lesbians and gay men from a critical protection.

The foregoing considerations conclusively establish the absence of a fair and substantial relationship to any cost savings justification, but that conclusion is reinforced by the requirement that any argument about cost savings "find some footing" in reality.[82] Millennium cannot show that the goal of lower insurance premiums actually motivated the exclusion of same-sex couples from death benefits.[83] Millennium also cannot credibly deny that lesbians and gay men are a small minority and that work-related deaths

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[81] 122 P.3d at 221.
[82] *Heller v. Doe*, 509 U.S. 312, 321 (1993); *ACLU*, 122 P.2d at 790.
[83] *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (refusing to hypothesize facts), *superseded on other grounds*, *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1261 (Alaska 1980); *SmithKline*, 740 F.3d at 482.

are quite rare, as confirmed by the evidence in the record as well as common sense.[84] The amount "saved" by denying death benefits to same-sex surviving partners like Ms. Harris thus lacks a fair and substantial relationship to lowering insurance premiums.

2. Administrative Efficiency

A purported interest in administrative efficiency also cannot justify the exclusion of same-sex couples from death benefits.[85] First, "'the Constitution recognizes higher values than speed and efficiency.'"[86] In addition, the Ninth Circuit expressly rejected the notion that such interests could justify "distinguishing between homosexual and heterosexual employees" under the federal Equal Protection Clause in *Diaz*.[87] It would also be "quick," "efficient," and "predictable"—not to mention much cheaper—to exclude surviving spouses who were Jewish, who were women, or who were intellectually disabled from death benefits.[88] But it would not be constitutional, even if one were applying the lowest level of scrutiny.

Ranney is not to the contrary. Millennium ignores this Court's holding in *ACLU* that precedent implying the reasonableness of government distinctions between married

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[84] Millennium failed to rebut this evidence, Exc. 51-68, despite having the exact same opportunity as Ms. Harris to preserve any factual context for this appeal.
[85] Millennium splits hairs over the meaning of "efficiency," asserting that the term refers to both administrative efficiency and reasonableness of cost to employers, but both sides already address that latter aspect in the context of purported cost savings.
[86] *Frontiero*, 411 U.S. at 690 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)); Appellant's Opening Br. at 33 (collecting cases).
[87] *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).
[88] *Cf.* Appellees' Br. at 31.

heterosexual couples and unmarried heterosexual couples does apply in the context of lesbian and gay couples, who cannot marry.[89]

Second, unlike *Ranney*, an interest in speed, efficiency, or predictability is neither an actual nor conceivable motivation for the State's exclusion here. That exclusion applies even to same-sex couples who marry out-of-state and possess the same marriage certificate that qualifies different-sex couples for death benefits. If Ms. Harris and Ms. Fadely had married elsewhere, the State would still deny Ms. Harris death benefits.

Third, administering death benefits for same-sex partners would require no greater effort than administering the range of benefits at issue in *ACLU*. As noted above, this will only occur in the rare event of a work-related death in which the decedent is survived by a same-sex partner. Millennium does not deny that the workers' compensation system can make a factual determination of whether a same-sex couple would have married but for the State's ban on same-sex couples marrying—just as it makes factual determinations about whether a different-sex spouse was living apart from the decedent for justifiable cause or was dependent on the decedent for support.[90] It does so even though the decedent can no longer give testimony. Here, of course, Ms. Fadely provided written testimony under penalty of perjury when she was alive that she and Ms. Harris

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[89] 122 P.3d at 794. Millennium argues *ACLU* did not expressly distinguish *Ranney*. Appellees' Br. at 34. But *ACLU* distinguished the purportedly "dispositive" case cited by the State, *Trombley v. Starr-Wood Cardiac Group, P.C.*, 3 P.3d 916 (Alaska 2000). That hardly suggests that a different result would have obtained if the State had been able to cite *Ranney*.

[90] AS 20.30.215. While the workers' compensation system also made these determinations when *Ranney* was decided, the State could use the proxy of marriage for different-sex couples, but it cannot do so for same-sex couples.

were in an intimate, committed relationship of mutual caring and support, Exc. 25-26, and the couple's relationship was confirmed by the testimony of third parties, Exc. 44-50.

CONCLUSION

Ms. Fadely lost her life in the course of service to Millennium, who now seeks to deprive her most intimate companion in life of death benefits and strip other same-sex couples across the state of critical legal protections. That outcome cannot be reconciled with the state and federal constitutional promises of equality and liberty for all.

For the foregoing reasons, Ms. Harris respectfully requests that this Court reverse the denial of death benefits and remand to confirm that Ms. Harris would have married Ms. Fadely but for the State's prohibition on same-sex couples marrying and satisfies the requirements for a widow to receive death benefits.[91]

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Respectfully submitted,

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[91] AS 23.30.395(2).