IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Petitioner, v. Alaska Civil Liberties Union, et al., Respondents.	))))))))) Supreme Court No. S-12480)

Trial Court Case No. 3AN-99-11179 CI

PETITION FOR REVIEW

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Virginia B. Ragle
Virginia B. Ragle
Assistant Attorney General
Alaska Bar No. 8311169
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600

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I. Introduction and Statement of the Issues

This petition[1] presents two issues that must be resolved before the case proceeds further in the superior court. After reviewing the regulations adopted by the commissioner of administration to provide employment-related benefits for same-sex domestic partners of state employees and retirees, the superior court ordered the commissioner to make specific revisions to them. The state asks this Court to grant interlocutory review and overturn this order because, by rewriting the regulations, the superior court has encroached upon the executive branch's power. Alternatively, even if the superior court has authority to rewrite the regulations, the court erred in finding the adopted regulations to be unconstitutional. Interlocutory review is necessary because compliance with the superior court order might create, in the PERS, TRS, and JRS participants who are actively employed, vested rights under Article XII, section 7 of the Alaska Constitution that cannot be reversed later by this Court on review.

II. Statement of the Case

In *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) ("*ACLU v. State*"), this Court found that the state's employment benefits programs

[1] The state has not filed an expedited petition for review because the superior court granted, pending resolution of this petition, a stay of its October 30 order requiring adoption of specified regulations. Instead, in its order granting the stay, the court directed the state to provide a draft of regulations (but not to adopt or implement them). The state can comply with the latter order if the superior court grants the state's motion for a small adjustment to the deadline. This most recent superior court order does not create the same risk that benefits plan participants could obtain vested rights to benefits while the petition for review is pending and, thus, eliminates the emergency. Therefore, although the state does not object to expedited consideration of its petition, it does not believe that this is imperative.

violate equal protection because they fail to provide benefits to same-sex domestic partners. After supplemental briefing on the remedy, the Court issued an order on June 1, 2006, requiring the state to provide benefits to same-sex partners by January 1, 2007. In this order, the Court remanded the case to the superior court, directing it to "enter such orders as may in the judgment of the superior court be necessary to ensure . . . expeditious compliance with this court's opinion by the [January 1] deadline . . . ."

The state then submitted to the superior court a schedule of steps it would take to comply with the January 1 deadline. *See* Appendix 1. The state has substantially complied with all steps set forth in this schedule through October, including the commissioner of administration's adoption on October 13 of regulations to provide employment-related benefits for same-sex domestic partners of state employees and retirees. *See* Appendices 2, 3. This petition will not impact the state's provision of benefits to same-sex partners under the adopted regulations.[2] In accordance with the

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[2] The commissioner adopted the regulations under his authority in AS 14.25.003, 14.25.005, 22.25.027, 39.35.003, 39.35.005, 39.37.090, and 39.30.090 - .095. To the extent the regulations affect active employee medical benefits under AS 39.30.090 –.095, the commissioner adopted the regulations under the Administrative Procedures Act (APA). The APA requires that regulations be lodged with the lieutenant governor for filing and provides that they become effective 30 days after filing. *See* AS 44.62.060, 44.62.080. To the extent the regulations affect benefits under the state's retirement systems, the regulations are not covered under the APA and become effective 30 days following adoption. The difference is significant. Although the APA regulations have been lodged with the lieutenant governor, he has not filed them. Instead, he has questioned the authority of the commissioner to adopt them. Although the commissioner believes he has appropriate authority, he asked the governor to call a special session of the legislature to provide the legislature the opportunity to address the subject. In the meantime, the regulations affecting benefits under the state's retirement systems, adopted under the commissioner's direct authority, are effective on November 12. The remaining regulations will be effective 30 days following filing by the lieutenant governor.

approved schedule, enrollment materials that include the criteria established by the adopted regulations were prepared and submitted to the printer and are scheduled for mailing to approximately 14,250 active employees and retirees on November 6, 2006. Appendix 1 at 5. The state seeks review only of the superior court's order mandating the commissioner to revise these regulations.

After the commissioner adopted the regulations, the plaintiffs ("the ACLU") filed a motion for emergency relief. Appendix 4. The ACLU asked the superior court to declare that the state's regulations violate both *ACLU v. State* and equal protection, and to order the state to promulgate by October 27 the emergency regulations that the ACLU drafted and attached to its motion. *Id.* at 15. The superior court then issued an order stating that, "[t]he State of Alaska is ordered to modify its October 17 [sic], 2006 regulations . . . ." Appendix 5 at 3. The court stated that, "in an effort to preserve, as much as possible, the proposed regulations that do meet the Alaska Supreme Court's mandate, I am ordering only a partial revision of these regulations." *Id.* The court then specified the required modifications, and ordered the state "to immediately incorporate this court's order into its regulations or otherwise modify its regulations so that they comply with the Alaska Supreme Court's mandate." *Id.* at 5. The state asked the court to stay this order while it sought Supreme Court review.

In response to the state's motion for a stay, the superior court issued two subsequent orders, dated November 1 and 2. Appendices 6, 7. In these orders, the superior court characterized its October 30 order differently than its actual language suggests; for example, in its November 2 order it refers to the October 30 order as requiring the state to "file revised draft regulations." Appendix 7 at 2. In the same

order, however, the superior court states that because it partially granted the stay, "[t]herefore the State is not required to immediately implement or adopt the regulations at issue in the stay." *Id.* at 1. It seems clear that, absent the stay, the superior court intended to order the state to implement the court's version of the regulations.

III. Interlocutory Review is Necessary to Prevent Constitutionally-Protected Vesting of Rights Under the Regulations Ordered by the Superior Court

This case should be reviewed now because following the superior court's order will create a situation that cannot be remedied later by this Court. If the state were to comply with the October 30 order immediately and revise the regulations, then PERS, TRS, and JRS participants who are actively employed may acquire vested rights in the scheme mandated by the superior court, under Article XII, section 7 of the Alaska Constitution. While this Court could later overturn the superior court's order, there would remain a group of employees with a constitutionally-protected right to the benefits as defined by the superior court's regulations.[3]

Therefore, postponement of review until appeal from a final judgment could result in two different sets of qualifying criteria and two different sets of benefits, which would create unnecessary confusion generally, and unnecessary expense and administrative complications for the state. *See* Alaska R. App. P. 402(b)(1). This issue also will otherwise evade review, at least as to all actively employed PERS, TRS, and JRS participants, because the state will be unable to return those employees to the commissioner's scheme upon retirement of those employees and thus the court's order would be irreversible as to this large group of people. *See* Alaska R. App. P. 402(b)(4).

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[3] *See State v. Allen*, 625 P.2d 844, 846-47 (Alaska 1981).

Finally, by encroaching into the executive branch function of drafting regulations, the superior court has so far departed from the accepted and usual course of judicial proceedings as to call for the appellate court's power of supervision and review. *See* Alaska R. App. P. 402(b)(3).

Upon review, the Court should reverse the superior court's order because it encroaches upon the powers of the executive branch. Alternatively, the Court should find that the adopted regulations are constitutionally sound.

IV. Argument

A. The Superior Court Order Violates the Separation of Powers Doctrine

In its October 30 order, the superior court ordered the state to modify the regulations that the commissioner of administration adopted on October 13. Appendix 3; Appendix 5 at 1, 3. Stating that it was "ordering only a partial revision of these regulations," the court directed the state to make specific changes to the regulations' language: "At a minimum, this court orders the State to revise the draft regulations as follows: . . . ." *Id.* at 1. The court then listed the changes it ordered the state to make:

1. delete the "exclusivity requirement in 2 AAC 38.010(b)(2)";

2. reduce to six months the 12-month provisions in 2 AAC 38.010(b)(2), (3), and (7) for establishing that relationships are long-term; and

3. reinsert in 2 AAC 38.010(c) a subsection (9) that appeared in previous draft regulations, "allowing same-sex domestic partners who are 'jointly responsible for a child through adoption or guardianship' to rely on this status as one of the required criteria," and revise the language of that regulation to make benefits "available to domestic partners who satisfy 2 AAC 38.010(b) and the reinserted

subsection (9), or who satisfy [the attestation requirement of] 2 AAC 38.010(b) and three criteria in subsections (2) through (8)." *Id.* at 3-4.

In addition to these changes to the adopted regulations, the court ordered the state to provide two additional benefits:

1. The right of a state employee to take personal leave upon the medical disability or death of his or her spouse (per AS 39.20.225(b)(2) and (b)(5) and AS 39.20.305(a)(2)); and

2. The right of a state employee's spouse, as the first person on a statutory list of "default" recipients, to receive unpaid compensation of a deceased employee who failed to designate anyone to receive that payment (AS 39.20.360(2)).

Id. at 4-5. The court explained that "[t]hese qualify as employment benefits akin to the benefits at issue in *Alaska Civil Liberties Union v. Alaska*." *Id.* at 5 (citing *ACLU v. State*, 122 P.3d at 783-84 n.4).

This order violates the doctrine of separation of powers. That doctrine "prohibits one branch [of government] from encroaching upon and exercising the powers of another branch."[4] The superior court encroached upon the executive branch's power to adopt regulations by ordering "a partial revision of [the state's] regulations," ordering the state "to revise the draft regulations as follows," and ordering the state "to immediately incorporate [the superior court's] order into its regulations or otherwise modify its regulations." Appendix 5 at 3, 5.

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[4] *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).

The legislature expressly gave the authority over these programs, including authority to adopt regulations, to the commissioner of administration.[5] While the courts have constitutional authority to determine whether the commissioner's regulations are consistent with constitutional and statutory requirements,[6] they lack authority to rewrite regulations or order the commissioner to adopt specific language by regulation.[7] "When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers."[8]

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[5] AS 14.25.003, 22.25.027, 39.35.003, 39.37.090 (authorizing commissioner of administration to adopt regulations implementing statutory provisions for teachers', judges', public employees', and elected public officers' retirement plans); AS 39.30.090 –.093 (requiring, and granting broad authority to the commissioner over, provision of insurance coverage for employees and retirees).

[6] *See* AS 44.62.300.

[7] *United States v. 18.16 Acres of Land*, 598 F. Supp. 282, 289 (E.D.N.C. 1984) ("While the courts have the power to require the other branches of government to conform to their respective regulations and statutes, our tripartite system of government does not provide the judiciary with the power to rewrite those regulations and statutes."); *United Beverage Co. of South Bend v. Indiana Alcoholic Beverage Comm'n*, 566 F. Supp. 650, 664 (N.D. Ind. 1983) ("It is all too tempting for a judge who is exercising the enormous grant of power under Article III of the Constitution of the United States to dive headlong into areas of social, political and economic policymaking. . . . It is not for this court to subjectively rewrite the Alcoholic Beverage Regulations of the State of Indiana."); *City of Skagway v. Robertson*, --- P.3d ---, 2006 WL 2709543 at *5 n.28 (Alaska Sept. 22, 2006) (courts will excise or construe challenged portion of statute to avoid unconstitutional result where statute is "locally" overbroad, but must strike "systematically" overbroad statute, rather than re-draft it); *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (court's duty is to construe statute to avoid constitutional infirmity where possible, but "it cannot go so far as to redraft defective legislation"); *Bonjour v. Bonjour*, 592 P.2d 1233, 1238 (Alaska 1979) ("The separation of powers doctrine prohibits us from enacting legislation or redrafting patently defective statutes."); *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 & n.70 (Alaska 2001) (courts must strike legislation violating constitution).

[8] *Pub. Defender Agency v. Super. Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

The superior court likely ordered adoption of specific provisions in the regulations to expedite compliance with this Court's June 1, 2006, order. While it may be more efficient for the court to prescribe specific provisions that will satisfy its interpretation of constitutional requirements, efficiency does not justify violation of the separation of powers doctrine. "[W]hether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers."[9] Alaska's delegates infused our constitution with the separation of powers doctrine "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy."[10]

The wisdom of this doctrine is especially evident here because the commissioner has a significant institutional advantage over the superior court in drafting regulations governing the state's benefit programs. The commissioner has available the resources of the division of retirement and benefits, the division of personnel and labor relations, and the department of law to identify and address legal and practical considerations involving these benefits. For example, the commissioner must ensure that changes to the state's benefit plans do not disqualify them under federal tax laws, to

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[9] *State v. A.L.I.V.E Voluntary*, 606 P.2d 769, 779 (Alaska 1980) (rejecting argument that efficiency justified statute allowing legislature to annul administrative regulations by concurrent resolution, without complying with legislation adoption requirements of article II of Alaska Constitution).

[10] *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926)).

avoid having contributions and benefits become taxable income. He also must consider obligations to employees' unions, notice requirements, and enrollment procedures.[11]

"[C]ourts must not intrude into realms of policy exceeding their institutional competence. The judicial branch lacks the fact-finding ability of the legislature, and the special expertise of the executive departments."[12] The superior court failed to observe that caution and denied the commissioner the deference that the separation of powers doctrine requires. The superior court exceeded the constitutional limits on its authority by ordering the state "[a]t a minimum, . . . to revise the draft regulations as follows: . . ." and "to immediately incorporate [the] court's order into its regulations." Appendix 5 at 3, 5. The fact that the superior court would also permit the state to "otherwise modify its regulations so that they comply with the Alaska Supreme Court's mandate," *id.* at 5, does not salvage the order. The superior court ordered the state to make specific changes to the regulations, and as discussed below, it interjected itself into the regulatory process without any evidence that the regulations as adopted will exclude same-sex partners entitled to receive benefits.

The ACLU argued that the court has this authority as part of its equitable power to fashion appropriate remedies. Appendix 4 at 2-8. In support of this argument, the ACLU cited two United States Supreme Court decisions concerning school

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[11] Unlike the litigation process, which addresses only the claims and evidence provided by the specific litigants, the legislative and regulatory processes of the legislative and executive branches are inclusive, reaching out to and considering the comments and concerns of all interested members of the public, expressed in a manner that is unhindered by the technical rules of judicial proceedings.

[12] *Indus. Indem. Co. v. State*, 669 P.2d 561, 563 (Alaska 1983) (discussing separation of powers doctrine as basis for discretionary function immunity).

desegregation and prison conditions. *Id.* at 4-5 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Hutto v. Finney*, 437 U.S. 678 (1978)). These cases have no application here, for two reasons.

First, neither decision involved a court directing a state official to adopt specified language by regulation. In *Swann*, the Court upheld a district court's order that a school board adopt one of three desegregation plans or come forward with an equally effective plan of its own.[13] The school board "acquiesced" in one of the three plans and the district court ordered that the selected plan remain in place.[14] The district court did not – as the superior court did here – direct a state official to adopt specified language as its plan. Similarly, in *Hutto v. Finney*, the district court did not order a state official to adopt specified language by regulation or other policy.[15] Its order merely set 30 days as the maximum for any punitive isolation of a prisoner.[16]

Second, in both cases, the courts imposed these much less intrusive remedies only after giving the executive branch a chance to remedy the constitutional violations on its own. In *Swann*, the petitioner sought relief three years after the district court initially approved the school system's desegregation plan.[17] At that point, the petitioner presented concrete evidence that the approved plan had not achieved a constitutional level of desegregation.[18] *Hutto* was a "sequel" to two earlier cases finding

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13 *Swann*, 402 U.S. at 11.

14 *Id.*

15 *Hutto*, 437 U.S. at 681-84.

16 *Id.* at 680.

17 402 U.S. at 7.

18 *Id.* at 7-8.

conditions in the Arkansas prison system to be unconstitutional,[19] and came only after the courts permitted prison administrators to devise their own plan for remedying the situation, and monitored conditions for years.[20]

In this case, the state has only just adopted regulations with qualifying criteria, largely based on the plan of the University of Alaska. These regulations could be drafted many different ways and still pass constitutional muster, however. By pinpointing precisely how the state should change the regulations, without any evidence that they will fail to adequately cover same-sex partners in long-term, committed relationships, the court has assumed the role of the commissioner. And the court's alternative order to "otherwise modify [the] regulations" is no less intrusive, because this option is nothing more than an order to develop a different scheme, without evidence that the regulations unconstitutionally exclude anyone and without guidance as to why the regulations are too burdensome.[21]

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19 437 U.S. at 681

20 *Id.* at 683-84.

21 The superior court's only explanation for this conclusion is its finding that the qualifying criteria do not treat married couples and same-sex couples exactly alike. Yet the changes ordered by the superior court also do not result in completely equal treatment. In *ACLU v. State*, this Court mandated that committed same-sex domestic partners be given the same benefits as married partners, not that all same-sex partners who are as committed as the least-committed married partners be given benefits. The Court recognized that, like other public entities that provide benefits to employees' same-sex partners, the state would have to adopt eligibility criteria. The regulations that establish the criteria treat same-sex domestic partners and married couples differently by necessity. For purposes of its equal protection analysis, this Court assumed that a married couple is in a long-term, interdependent, intimate association, even if that is not true in every marriage. *See ACLU v. State,* 122 P.3d at 784 n.5. Because same-sex domestic partners cannot marry, they cannot have that same presumption and must demonstrate evidence of a committed relationship roughly equal to that presumed of married couples.

B. The Superior Court Erred in Finding the Regulations Unconstitutional and in Ordering the State to Provide Other Benefits

Even if the superior court had authority to change the regulations, its ordered revisions are not constitutionally mandated. The court erred both in concluding that the adopted regulations violate the Alaska Constitution's equal protection requirements, and in ordering the state to provide benefits that the ACLU did not seek in its amended complaint and that this Court did not address in *ACLU v. State*.

1. The Adopted Regulations Satisfy Equal Protection Requirements

The superior court erroneously concluded that the adopted regulations violate Alaska's equal protection requirements. To implement those requirements, this Court employs a three-step, sliding-scale test.[22] That test "places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake . . . ."[23]

The first part of the test requires the Court to determine what weight to give the individuals' interests and what level of scrutiny to apply to the state's actions.[24] The Court determined in *ACLU v. State* that the interests at issue here are "undeniably economic." The state's action therefore should receive minimum scrutiny.[25] As the second step, the Court considers the governmental interests advanced by the state's actions.[26] Under minimum scrutiny, these interests need only be legitimate.[27] In its prior

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[22] *ACLU v. State*, 122 P.3d at 781.

[23] *Id.*

[24] *Id.* at 790.

[25] *Id.*

[26] *Id.*

opinion, this Court assumed that the state has a legitimate "interest in controlling costs by limiting benefits to those people in 'truly close relationship[s]' with or 'closely connected' to the employee."[28] The Court also recognized that the state has a legitimate interest in administrative efficiency.[29] The final part of the test requires the Court to evaluate the means chosen to advance the identified governmental interests.[30] Minimum scrutiny requires a "fair and substantial relation" between the means and the governmental interests.[31]

Because the state's eligibility criteria are designed to serve legitimate governmental interests and bear a fair and substantial relationship to those interests, the criteria are constitutional and the superior court should not have ordered changes to them.

The state is not alone in selecting these criteria as a way to determine eligibility. In acknowledging the state's legitimate interest in administrative efficiency, the Court found it significant that other public entities have been providing employment benefits to employees' same-sex partners, pointing to the University of Alaska as an example. The Court set out in detail the university's qualifying criteria[32] and noted that the City and Borough of Juneau ("Juneau") also has established eligibility standards to provide benefits to domestic partners.[33]

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27 *Id.*

28 *Id.* at 790-91.

29 *Id.* at 791-92.

30 *Id.* at 790.

31 *Id.* (quoting *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d at 911).

32 *Id.* at 791 n.49.

33 *Id.* at 792.

Because the eligibility criteria of the university and Juneau plans seemed sound, the state used them as models for the commissioner's regulations. Those criteria are substantially related to the legitimate objective of providing benefits to domestic partners in long-term, "truly close relationships" with state employees or members of state retirement systems. Using the criteria of the university and Juneau programs seemed particularly prudent given this Court's specific references to those programs, their criteria, and their eligibility standards, and given the ACLU's repeated references to and endorsement of the university's program throughout its briefing in this case.[34] These criteria also closely track the factual allegations and claims set out in the ACLU's complaint in this action – the bases for the plaintiff couples' argument that they were similarly situated to married couples for purposes of equal protection analysis.

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[34] In its opening brief on appeal, the ACLU argued that the state would not "experience the administrative inconvenience envisioned by the superior court" because

> [t]he State already administers a state employment benefits plan that requires it to make the case-by-case determinations of concern to the superior court. The state university now extends health benefits to employees for their domestic partners, including lesbian and gay employees for their same-sex partners. Thus the State has already devised a methodology by which to make the case-by-case determinations of concern to the superior court, a methodology that is equally applicable to the state employment benefits plan at issue.

Apps.' Br. at 38-40 (May 22, 2002). At oral argument before this Court, the ACLU's New York attorney referred to the university's program as "a workable . . . tool for administering these benefits" and stated that "importantly the documentation that the state may require all relate to a menu of objective black and white indicia of commitment." Appendix 9. In its supplemental brief on remedies, the ACLU again cited the university's and Juneau's domestic partner benefits programs, attaching descriptions of those programs as appendices and arguing that the state could easily "implement constitutionally adequate employment benefits programs." Apps.' Suppl. Br. at 7, 10-18 (Nov. 12, 2005).

The eligibility criteria in the adopted regulations differ from the criteria of the university's program in only a few respects. Because the Court had defined "domestic partnership" interchangeably with "committed relationship," with both characterized by "long-term, interdependent, intimate associations," the state included the words "committed" and "intimate" in describing an eligible relationship. Otherwise, the regulations are very similar to the university's program. Nevertheless, the superior court ordered the state to make substantial changes to those criteria on the apparent basis that they failed to satisfy the requirements of equal protection.

a. Removing the word "exclusive" from the requirement that a couple have "been in an exclusive, committed, and intimate relationship with each other . . ." is not constitutionally required

By requiring the state to strike the word "exclusive" from its eligibility criteria, the superior court engaged in micro-management of the regulatory process. The ACLU complained that the "exclusivity" provision could be intended only to require same-sex couples to swear that they are sexually monogamous at all times, which would violate their privacy rights. The term has been used in the standards set for other same-sex domestic partner benefits programs, however; an "exclusive" relationship is required by both the university's and NEA's programs.

In response to the ACLU's and superior court's concerns, the commissioner inserted a comma in the final 2 AAC 38.010(b)(2), to clarify that "exclusive" does not modify "intimate relationship," but modifies "relationship." The commissioner did not remove the word "exclusive," because it helps to ensure that the state's benefits programs are provided to the people entitled to receive them. The word is intended not to mandate fidelity, but to reserve benefits to individuals in long-term, truly close, committed

relationships – people who would marry if they could. Such an application clearly is constitutional and does not encroach on the personal privacy interests of benefits participants.[35] The superior court's order to remove the word conflicts with the presumption of constitutionality and rule of construction requiring the courts to construe a law narrowly to avoid any constitutional infirmity.[36]

b. A reduction of the time that a couple must attest to having been in the relationship and living together is not constitutionally required

Case law in the emerging field of benefit eligibility for same-sex domestic partners of employees does not establish constitutional limits for eligibility criteria, and different public and private entities have adopted a wide range of criteria. The Court recognized that the state would need to establish eligibility criteria for employees' and retirees' same-sex domestic partners, and cited the university and Juneau plan criteria as examples.[37] In addition, the state learned during the period of public comment on the regulations that the NEA Alaska Health Plan provides health coverage to same-sex domestic partners of educational employees of many Alaska school districts. Appendix 11 at ex. 1. All of these Alaska plans include 12-month requirements for the relationship

[35] In the same brief that the ACLU complained about the word "exclusive" in the draft regulations, it also argued that "it is the act of publicly declaring one's exclusive and enduring commitment to a partner that indicates the serious and bona fide nature of the relationship . . . ."

[36] *See Grunert v. State*, 109 P.3d 924, 928 (Alaska 2005) (burden is on challenger to prove invalidity of duly adopted regulation); *State v. Blank*, 90 P.3d 156, 162 (Alaska 2004) (narrow construction to avoid constitutional infirmity); *Rollins v. Ulmer*, 15 P.3d 749, 753 (Alaska 2001) ("unsubstantiated fears provide no basis for declaring the law invalid").

[37] *ACLU v. State*, 122 P.3d at 791-92. These criteria are set out in the appendix to the ACLU's supplemental brief on remedies filed with this Court, dated Nov. 21, 2005.

or shared residence of same-sex partners to establish eligibility for benefits. Further, all of the plaintiffs have alleged that they meet this requirement.[38]

After reviewing the state's initial draft of the regulations, the superior court found that the state's proposed 12-month requirement "appears to be 'substantially related' to the State's legitimate interest in 'limiting benefit programs to those in *truly close relationships* with the employee,'" and that it "appears to be arguably consistent with the Supreme Court's understanding that a domestic partnership should be 'long-term.'" Appendix 12 at 3. However, the court observed that "when this requirement is viewed in combination with the other factors the State requires for eligibility, it may be found to be unduly burdensome." *Id.*

In response to public comments, including those of the plaintiffs and the superior court, the commissioner made a number of changes to the regulations to make the requirements clearer and less burdensome.[39] Despite these changes, the superior

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[38] *See* Appendix 10, alleging that plaintiffs resided together and had been in their respective relationships for over 30 years (¶ 17), 11 years (¶ 26), 20 years (¶ 38), eight years (¶49), nine years (¶58), seven years (¶ 67), 16 years (¶ 77), two years (¶ 86), and seven years (¶ 95).

[39] For example, the adopted regulations removed the requirement that couples file affidavits annually (a Juneau plan requirement), instead allowing plan administrators to determine the manner in which eligibility should be confirmed (2 AAC 38.010(e) and 38.070(f)); they changed 2 AAC 38.010(b)(2) to clarify that "exclusive" modifies "relationship"; they reduced the number of items of documentation an employee or retiree must provide under 2 AAC 38.010(c) from six to five and removed one dissimilar item from the list; they changed a number of the documentation provisions to make them less burdensome to same-sex couples than the university requirements; they provided an explanation that partners in a same-sex relationship could change and be absent from the shared residence without experiencing a break in eligibility (2 AAC 38.010(h)); and they clarified that failure or inability to provide documentation at the same time of filing enrollment materials will not necessarily affect the date coverage begins (2 AAC 38.030(c)).

court decided that a six-month period was sufficient to meet the state's interests, and ordered the state to change the regulations accordingly.

There is no constitutional or other legal basis for the superior court's order that the state apply only a six-month requirement for the duration of a same-sex couple's relationship and shared residence. The superior court cites only the six-month periods set out in state statutes that afford protection to children (AS 25.23.050, 25.25.101, and 25.30.300), and a statute allowing eligibility for a permanent fund dividend if a state resident begins an allowable temporary absence during the qualifying year after at least six consecutive months of residency (AS 43.23.008(b)).

The statutes that provide protection to children involve policy considerations completely different than those applicable to the eligibility criteria for the economic benefits at issue in this case. The statutes governing eligibility for the permanent fund dividend do involve similar considerations, however, and they are more restrictive than the regulations at issue here. The permanent fund statutes require a person to be a resident during the entire qualifying year to receive benefits (AS 43.23.005); six months is the minimum residency requirement to be allowed certain absences without losing eligibility. In contrast, 2 AAC 38.010 requires that same-sex couples reside together and have a domestic partnership for one year, but allows temporary absences from the primary residence without specifying any particular period that domestic partners must reside together before a temporary absence may occur.

Further, Alaska has statutory provisions that support a 12-month period to establish a long-term relationship with a level of commitment that warrants eligibility for economic benefits. For example, to be eligible for survivors' benefits under the Judicial

Retirement System, "the surviving spouse must have been married to the justice or judge for at least one year immediately preceding the death of the justice or judge."[40] For purposes of entitlement to most PERS survivor benefits, "surviving spouse" is defined as "the spouse of an employee who has been married to the employee for at least one year at the time of the employee's death."[41] To be eligible for survivors' benefits under the Elected Public Officers Retirement System, "the surviving spouse must have been married to the elected public officer for at least [one year] immediately preceding the death of the elected public officer."[42] Other statutes that require one year of residency – essentially a one-year commitment to the state – to establish eligibility for state benefits include AS 21.55.500(19) (state health insurance plan), AS 43.23.005(a)(3) (permanent fund dividend), and AS 47.45.010 (Alaska Longevity Bonus).

In ruling that the state may only require attestation of a six-month relationship and shared residence for benefits eligibility, the superior court had before it no evidence that the12-month requirements of any of the three large benefits plans that currently provide same-sex benefits for partners of Alaska public employees have unconstitutionally excluded any eligible partners. Yet the superior court's ruling that the state may constitutionally require only a six-month period places these plans – some of which have been providing coverage to same-sex partners of Alaska public employees for over a decade – in legal jeopardy. The 12-month requirements are substantially related to the state's legitimate goal of providing benefits to same-sex couples in long-term,

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40 AS 22.25.030(b).

41 AS 39.35.680(40) (2005 Supplement).

42 Former AS 39.37.060(b), as modified by sec. 51, ch. 117, SLA 1986.

committed, intimate relationships. The superior court's order was not necessary to vindicate the rights of the plaintiffs, all of whom appear to meet the 12-month requirement, and it was not necessary to comply with the Alaska Constitution.

c. The order requiring that joint responsibility for a child be one of the eligibility criteria, and that it be sufficient without any other documentation, is not constitutionally required

Public comment on the proposed regulations, including that of the superior court and the ACLU, urged the commissioner to reduce the number of items of documentation required to qualify. In adopting the final regulations, the commissioner reduced the number of items of documentation an employee or retiree must provide from six to five – the same number required by the university and the NEA. The commissioner also revised the documentation requirements to align them more closely to the university's criteria, deleting the provision for documentation of joint responsibility for a child through adoption or guardianship.[43]

The adopted documentation provisions include items that combine to demonstrate substantial financial and legal commitments of same-sex partners that are fairly easy to establish and substantiate, and that are of a kind likely to endure into the retirement years of a couple in a long-term relationship. Responsibility for a child, on the other hand, generally ends when the child reaches the age of 18 years, so couples relying on joint responsibility for a child to establish eligibility would eventually have to comply with another provision of 2 AAC 38.010(c), upon request of the plan administrator under

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[43] As explained in n.39, *supra*, the commissioner also made a number of changes to the documentation requirements to make them even less burdensome than the university's requirements. *See also* Appendix 11 at 18-20.

2 AAC 38.010(e) or 2 AAC 38.070(f). Further, the division of retirement and benefits advised that a relatively small percentage of current plan members, particularly retirees, enrolled children in the plan. *See* Appendix 11.

Although a number of other indicia also might establish commitment, no case law holds that, as a matter of constitutional law, the state must include every such indicator in its eligibility criteria. The commissioner made a reasonable decision to adopt final regulations that more closely track the requirements of the other plans that provide same-sex partner benefits to Alaska public employees, including deletion of an item dissimilar from the other items that demonstrate financial and legal commitments and that was not included in the other plans. The superior court's order that the removed item be reinstated, and that it stand alone in establishing eligibility of same-sex couples who meet the attestation requirements of 2 AAC 38.010(b), constitutes a substitution of judgment that is not required by the Alaska Constitution.

d. Allowing same-sex couples to provide documentation that they meet only three of the criteria set out in 2 AAC 30.010(c)(1)-(8) is not constitutionally required

The court ordered the state to reduce from five to three the number of qualifying criteria set out in 2 AAC 38.010(c)(1)-(8)[44] that an employee or retiree must satisfy. Appendix 5 at 4. As discussed above, the criteria in 2 AAC 38.010(c) are

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[44] In limiting the criteria to three that an employee or retiree can choose from to provide proof of a qualifying relationship, the superior court referenced only paragraphs (c)(2)-(8), excluding 2 AAC 38.010(c)(1). Appendix 5 at 4 (item 3). However, nothing in the order suggests that the court intended to exclude shared interest in real property as a factor establishing eligibility, and the state believes the omission was an error.

modeled on the university's requirements, and the number of criteria that the employee or retiree must satisfy also is based on the university's plan.

The criteria in 2 AAC 38.010(c) should not be difficult for a couple in a close, committed relationship to establish.[45] The commissioner's judgment that close economic bonds and entanglements increase the likelihood that an employee or retiree is in a genuine domestic partnership is reasonable, and his conclusion that five out of eight draws a fair compromise to serve the goal of providing benefits to domestic partners without exposing the trust to unnecessary financial risk is well within his discretion. Neither the court's order or the record suggests how this decision violates the equal protection rights of public employees. *See* n.22 *supra*.

Requiring an employee or retiree to demonstrate the parties' financial and legal commitment by satisfying five of the eight criteria promotes the state's significant interest as a fiduciary of the group health and retirement trusts to provide benefits only to genuine domestic partners and, thus, satisfies the constitutional test under the equal protection clause.

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[45] They include (1) a joint interest in property, including a rental agreement, which even mere roommates could satisfy; (2) joint ownership or purchase of a vehicle; (3) joint ownership of or liability for a financial asset such as a checking account or car loan; (4) naming the same–sex partner as primary beneficiary of a life insurance; (5) naming the same-sex partner as a primary beneficiary in one of the other plans that the state provides (such as SBS, deferred compensation, etc.); (6) naming the same-sex partner as primary beneficiary in a will; (7) authorizing the same-sex partner in a valid written power of attorney to deal with property; (8) authorizing the same-sex partner to make decisions over the employee or retiree's health, if the employee or retiree becomes incapacitated. 2 AAC 38.010(c).

C. The Superior Court Erred in Ordering the State to Provide Benefits in Addition to those that the ACLU Sought in its Amended Complaint and that this Court Addressed in *ACLU v. State*

1. Leave of Absence Statutes Are Not Subject to Remedial Action in this Case

The superior court improperly ordered the state to provide family and medical leave benefits to state employees and their same-sex partners. Throughout this litigation, the ACLU carefully targeted provisions of public employee health, insurance, and retirement benefit programs that provide greater compensation in the form of valuable benefits to married employees than to employees with same-sex partners who cannot marry. The ACLU never raised the issue of leave of absence statutes.[46] The ACLU never alleged that the leave of absence statutes violated their rights, or that they had ever been denied leaves of absence that would have been granted to married employees under those statutes, and this Court did not rule that the leave statutes are unconstitutional.[47]

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[46] The ACLU's first amended complaint specifies that the plaintiff couples "seek equal access to certain health, pension and insurance rights and privileges that the State offers to government employees . . .." It contends that the state denies the plaintiffs "health coverage, other forms of insurance, and equal participation in pension and retirement plans." The Complaint also sets out allegations regarding the public employee partner in each couple, stating that the employment-related rights and privileges the employee partner received from his or her employer "include health insurance [and other medical insurance], retirement-related health and medical coverage, and a pension" that the couples wished to share. Appendix 10 (First Amended Complaint at ¶¶ 22, 31, 42, 53, 63, 72, 82, 91, 99). On appeal, the ACLU stated that "Defendants offer health pension and other employment benefits to heterosexual employees and their opposite-sex spouses, *e.g.*, pre-retirement and post-retirement health insurance, joint and survivor annuities, death benefits, life insurance, and long-term care insurance ('partner benefits')." Apps.' Br. at 2 (May 22, 2002).

[47] *See Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 360 (Alaska 2001) (dismissed on ripeness grounds, where appellants' brief challenging

In preparing regulations, the commissioner had no reason to consider leave of absence statutes, since they were never mentioned and were not part of the benefits programs that were the subject of the litigation. Moreover, unlike the benefits programs targeted by this litigation, the leave of absence programs are not completely within the commissioner's regulatory authority.[48]

2. The provision for payment of unpaid compensation owed to a deceased employee is not subject to remedial action in this case

Alaska Statute 39.20.360 provides that payment of a deceased employee's unpaid compensation is made to whomever the employee designates in writing. Nothing in the statute prevents a state employee from designating his or her same-sex partner as the recipient of unpaid compensation upon the employee's death. The fact that the employee may not marry his or her same-sex partner does not constrain the employee from providing this benefit to him or her. All the employee has to do is file a designation of the same-sex partner with the department of administration.

The superior court improperly ordered the state to make an employee's same-sex partner the default recipient of the unpaid compensation, as a spouse would be under AS 39.20.360(2), if the employee fails to designate anyone to receive the unpaid compensation upon the employee's death. Although the ACLU mentioned AS 39.20.360

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various state statutes lacked "any assertion that they have been or in their current circumstances that they will be denied rights that are available to married partners").

[48] The leave of absence statutes do not apply to most state employees. *See* AS 39.20.310. The commissioner's regulatory authority regarding leave of absence is limited to leave statutes that apply to employees who are subject to AS 39.20.200 –.330. Under AS 39.20.320, regulations implementing AS 39.20.200 – .330 must be prepared by the director of the division of personnel, and submitted to the commissioner. The commissioner submits the regulations to the personnel board, and the regulations become effective 30 days after they are submitted to the board, if not disapproved.

in its briefing to this Court,[49] it did not argue, and the Court did not hold, that same-sex partners must be given the same "default" status as spouses if an employee neglected (or chose not) to designate anyone to receive a specific benefit that the employee could provide to the same-sex partner. The Court specifically stated that, "[a]s the issue is framed in this case, we need not reach any separate question of the independent right to benefits of a same-sex domestic partner of a public employee."[50]

While the adopted regulations do not provide for a same-sex partner to be the "default" recipient of any benefit, they provide the employee or retiree the opportunity to choose whether to confer the available employment-related health, insurance, or retirement benefits on his or her partner.[51] They therefore implement this Court's opinion by giving employees and retirees the ability to provide valuable health and survivor benefits to their same-sex partners. Requiring an employee or retiree to file the designation of beneficiary form does not offend the Alaska Constitution.

IV. Statement of Relief Sought

For the reasons discussed, the state requests that the Court overturn the superior court's order of October 30, and permit the state's regulations to become effective without revision.

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[49] *ACLU v. State,* 122 P.3d at 784 n.4.

[50] *Id.* at 783 n.2.

[51] 2 AAC 38.100.

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DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Virginia B. Ragle by Jan A DeYoung

Virginia B. Ragle
Assistant Attorney General
Alaska Bar No. 8311169
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600