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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

CAROL SNETSINGER, NANCY SIEGEL, CARLA GRAYSON, ADRIANNE NEFF, and PRIDE, INC., a Montana Non-Profit Corporation, Plaintiffs, vs. MONTANA UNIVERSITY SYSTEM, STATE OF MONTANA, RICHARD CROFTS, in his official capacity of Commissioner of Higher Education, and MARGIE THOMPSON, ED JASMIN, LYNN MORRISON-HAMILTON, CHRISTIAN HUR, JOHN MERCER, RICHARD ROEHM and MARK SEMMENS, in their official capacities as members of the Board of Regents, Defendants.	**Cause No. CDV-2002-097** **BRIEF IN OPPOSITION TO MOTION TO DISMISS**

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INTRODUCTION

By moving to dismiss, Defendants ask this Court to ratify a policy that singles out lesbian and gay employees and their partners and denies them the opportunity to obtain the family benefits that are offered to all married employees. Defendants concede that their policy discriminates against lesbian and gay employees, but argue that the discrimination is justified because Montana prohibits lesbian and gay couples from marrying. Defendants' motion is based on two faulty premises: (1) that this case turns on whether Montana's marriage statute is constitutional, and (2) that lesbian and gay families are not protected by the same constitutional rights that apply to everyone else and therefore should be directed to the Legislature to seek relief from discrimination. The first premise is flawed because Plaintiffs have not asked the Court to allow same-sex couples to marry. As a result, this case is not about whether the legislature can exclude same-sex couples from the institution of marriage. It is about whether the Montana Constitution allows Defendants to discriminate against lesbian and gay Montana University System employees and their families without any justification beyond a desire to disadvantage same-sex couples.

Defendants' second contention, that the legislature should be Plaintiffs' only recourse, distorts the role of the courts in a constitutional democracy. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). As the Montana Supreme Court explained in another case involving discrimination against lesbian and gay Montanans, "it remains the obligation of the Courts . . . to scrupulously support, protect and defend those rights and liberties guaranteed to all persons under our Constitution." *Gryczan v. State,* 283 Mont. 433, 454-54 (1997).

The Complaint alleges that Defendants' policy violates Plaintiffs' right to equal protection under the Montana Constitution. Whatever emotional reactions certain individuals may have toward lesbian, gay and bisexual Montanans, it is the role of the Courts to ensure that every Montanan receives equal treatment under the law, including equal pay - and equal benefits

- for equal work. Defendants' policy classifies employees based on sex, sexual orientation and marital status. Both sex and sexual orientation are suspect classifications, and are therefore subject to strict scrutiny for purposes of equal protection review, because sex and sexual orientation are rarely relevant to governmental action and historically have been used to promote discrimination for its own sake. In addition, all three challenged classifications are subject to strict scrutiny because the policy discriminatorily restricts Plaintiffs' access to certain fundamental rights under the Montana Constitution: rights to dignity, to privacy, to pursue life's basic necessities, and to seek safety, health and happiness.

Defendants' motion to dismiss the equal protection claim must fail because Defendants cannot establish as a matter of law that their policy withstands strict scrutiny, which requires Defendants' policy to be narrowly-tailored and necessary to further a compelling governmental interest. Indeed, Defendants have not argued that their discriminatory policy rationally furthers a legitimate purpose, as required under even the most lenient standard of equal protection review, the rational basis test.

In addition to the equal protection violation based on differential access to fundamental rights, the Complaint properly that Defendants' policy directly violates Plaintiffs' fundamental rights. As a direct violation of Plaintiffs' fundamental rights also triggers strict scrutiny, Defendants' motion to dismiss these claims must also be denied.

STATEMENT OF FACTS

The individual Plaintiffs are lesbian couples in long-term, committed, intimate relationships. Complaint, ¶ 2. Plaintiffs Carol Snetsinger and Carla Grayson are government employees in the Montana University System who share their lives, homes and financial obligations with their respective same-sex domestic partners, Plaintiffs Nancy Siegel and Adrianne Neff. *Id*. Plaintiff PRIDE, Inc. is a nonprofit organization of lesbian, gay, bisexual and transgender Montanans and their supporters with members who are employed by the Montana

University System and members who are same-sex domestic partners of Montana University System employees. *Id.* Plaintiffs seek equal access to health insurance, disability coverage and other basic necessities of modern life that Defendants offer to employees with opposite-sex partners but deny to Plaintiffs. *Id.*

Montana statutes authorize the Montana University System's Board of Regents to establish hospitalization, medical, health, disability, accident and life insurance plans "for the benefit of their officers and employees and their dependents." *Id.,* ¶ 4 (quoting Mont. Code Ann. § 2-18-702). In administering the health, disability and other insurance plans established for state employees, Defendants have established a policy interpreting "dependents" to include the opposite-sex solemnized and common-law spouses of heterosexual employees while excluding the same-sex domestic partners of lesbian and gay employees. *Id.*

Although Plaintiffs Carol Snetsinger and Nancy Siegel consider themselves married, hold themselves out to their families and their community as members of a committed, marital relationship, and would enter into a civil marriage if they were permitted to do so, there is no action they can take to be recognized as legal spouses in Montana. *Id.,* ¶¶ 12, 59. The same is true for Plaintiffs Carla Grayson and Adrianne Neff and for many PRIDE members. *Id.,* ¶¶ 26, 42, 59. Like all lesbian and gay employees of the Montana University System, Plaintiffs are not permitted to purchase benefits for their same-sex partners because Defendants limit dependent benefits to legal spouses. *Id.,* ¶ 52. In contrast, opposite-sex couples may obtain dependent benefits merely by signing an Affidavit of Common Law Marriage or entering into a solemnized marriage. *Id.,* ¶ 60. By conditioning receipt of critical employment benefits on solemnized or common-law marriage, Defendants discriminatorily deprive Plaintiffs of adequate and affordable insurance protection for their family members, violating their fundamental rights under the Montana Constitution. *Id.,* ¶ 1.

Defendants condition benefits on marriage precisely because doing so precludes lesbian and gay employees and their families from enjoying these benefits. *Id.,* ¶ 64. As Plaintiffs allege, Defendants' only motives for denying equal employment benefits to lesbian and gay employees and their families are to express disapproval of and to disadvantage lesbians and gay men. *Id.,* ¶ 62. These motives are patently unconstitutional. Defendants' motion asserts no other motive for the discriminatory policy because there is no legitimate justification for depriving lesbian and gay employees of the benefits other employees receive as compensation for their work.

ARGUMENT

I. Motion to Dismiss Standard

The standard on a motion to dismiss is well established. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true." *Trankel v. State, Dep't of Military Affairs,* 282 Mont. 348 (1997).

II. Plaintiffs' Equal Protection Claims Cannot Be Dismissed

On this motion, Defendants admit that they offer health insurance and other benefits to heterosexual university employees for their opposite-sex spouses but not to lesbian and gay employees for their same-sex life partners. By its own terms, Defendants' policy classifies employees and their partners based on their sex, their sexual orientation and their marital status. The policy is subject to strict scrutiny because it classifies Plaintiffs based on two suspect criteria - sex and sexual orientation - and because it provides Plaintiffs with differential access to fundamental rights. Defendants cannot satisfy strict scrutiny on this motion, for they cannot

show, as a matter of law, that their policy is both narrowly-tailored and necessary to further a compelling governmental interest. "[D]emonstrating a compelling interest entails something more than simply saying it is so." *Wadsworth v. State,* 275 Mont. 287, 303 (1996).

Indeed, Defendants' motion fails even under rational basis review. Rather than arguing that the challenged classifications based on sex, marital status and sexual orientation were rationally selected to advance a legitimate state interest and that alternative means to effectuate that purpose are unavailable, Defendants assert that their policy is "inherently rational" because of "the nature of marriage since the founding of the republic" and "the centrality of marriage as a societal institution." Motion at 14-15. According to Defendants, "[w]hen state law restricts marriage to opposite-sex couples, policy and practices that flow naturally from that policy cannot be said to be improper discrimination . . . ." *Id.* at 14. In essence, Defendants ask the Court to set aside established principles of equal protection review and to dismiss Plaintiffs' case because the challenged discrimination is long-standing and "natural." The Montana Constitution demands a more exacting review. The challenged classifications must *themselves* rationally promote a legitimate state interest. It is hard to imagine how denying lesbian and gay employees and their partners dependent benefits based on their sex, sexual orientation and marital status promotes any state interest at all, much less a legitimate one.

Finally, for purposes of this motion, Defendants have admitted that their "only motives for denying equal employment benefits to lesbian and gay employees and their families are to express disapproval of and to disadvantage lesbians and gay men." Complaint, ¶ 62. Under *Romer v. Evans,* 517 U.S. 620, 635 (1996), this sort of governmental purpose is discrimination for its own sake and a violation of equal protection.

A. Standards of Equal Protection Review

Defendants argue at length that the discrimination challenged in this case must be addressed through the legislature, but "it is the express function and duty of . . . [Montana's

courts] to ensure that all Montanans are afforded equal protection under the law." *Davis v. Union Pacific R. Co.,* 282 Mont. 233, 240 (1997). Article II, § 4 of the Montana Constitution guarantees that "no person shall be denied the equal protection of the laws" and "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Montana Dep't of Corrections,* 305 Mont. 462, 470 (2001).

Montana's equal protection clause "provides for even more individual protection" than the federal equal protection clause. *Cottrill v. Cottrill Sodding Serv.,* 229 Mont. 40, 42 (1987); *see also Pfost v. State,* 219 Mont. 206, 215 (1985) (holding Art. II, § 4 "provides a separate ground on which rights of persons within this state may be founded"), *overruled on other grounds by Meech v. Hillhaven West, Inc.,* 238 Mont. 21 (1989). As a result, while federal cases and cases from other states may be informative, *see* Motion at 12 (citing *In re C.H.,* 210 Mont. 184, 198 (1984)), Montana courts

> [should] not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution . . . [and are not] bound by decisions of the United States Supreme Court where independent grounds exist for developing heightened and expanded rights under our state constitution.

Butte Community Union v. Lewis, 219 Mont. 426, 433 (1986).

In addressing an equal protection challenge, the Court "must first identify the classes involved and determine whether they are similarly situated." *Henry v. State Compensation Ins. Fund,* 294 Mont. 448, 455 (1999). A law or policy may be challenged if "by its own terms [it] classifies persons for different treatment." *State v. Spina,* 294 Mont. 367, 391 (1999) (quoting John E. Nowak, et al., *Constitutional Law* 600 (2d ed. 1983)). In addition, a law or policy that contains an apparently neutral classification will violate equal protection if "in reality [it] constitut[es] a device designed to impose different burdens on different classes of persons." *Id.*

"The next step . . . is to determine the appropriate level of scrutiny." *Henry,* 294 Mont. at 456. That task requires the Court to "determine whether a suspect classification is involved or

whether the nature of the individual interest involves a fundamental right, either of which would trigger a strict scrutiny analysis." *Id.* To satisfy strict scrutiny, the State must establish that the challenged classification is "necessary to achieve a compelling state interest" and that "there is no less onerous alternative by which its objective may be achieved." *Pfost,* 219 Mont. at 216 (citation omitted). Montana courts apply middle-tier scrutiny when the right involved has its origin in the Montana Constitution but is not found in the Declaration of Rights. *Butte Community Union,* 219 Mont. at 434. Middle-tier review requires the State to demonstrate that its classification is reasonable and that the State interest advanced by the classification is more important than the interests of the individual whose rights are infringed. *Id*.

In most circumstances, classifications that do not affect fundamental or important constitutional rights or burden a "suspect class" are reviewed under the rational basis test. "This test requires the government to show that the objective of the statute is legitimate and bears a rational relationship to the classification[.]" *In re S.L.M.,* 287 Mont. 23, 32 (1997). "A careful inquiry is required into . . . 'the rationality of the connection between legislative means and purpose and the existence of alternative means for effectuating the purpose.'" *In re C.H.,* 210 Mont. at 198 (citations and internal marks omitted).

B. Plaintiffs Have Properly Alleged that Defendants' Policy Illegally Discriminates Based on Sex

Defendants' contention that their policy does not classify employees and their partners based on sex is untenable in light of their admission, for purposes of this motion, that the policy treats a female employee with a female partner less favorably than a male employee with a female partner. Complaint, ¶ 82. Defendants' argument rests on the faulty presumption that using marriage to define eligibility for benefits makes their policy gender neutral and insulates it from equal protection review. In reality, however, Defendants' policy classifies employees and their partners based on sex *because* they use "spouse," a specifically sex-based term, to

determine eligibility for benefits. Defendants acknowledge that freedom from sex discrimination is a fundamental right under the Montana Constitution, Motion at 13, and they do not argue that their policy can withstand strict scrutiny. As a result, the fact that Defendants' policy entails a sex-based classification means their motion must be denied.

1. Denying benefits to employees with same-sex partners while providing benefits to employees with opposite-sex spouses creates a sex-based classification.

Defendants' policy classifies similarly situated employees and their partners on the basis of sex by using the term "spouse" to define "dependents," thereby importing Montana's sex-based definition of marriage into a policy defining eligibility for employment benefits. *See* Affidavit of Linda Ryckman, Exh. 1 (attached to Defendants' motion to dismiss). Equal protection guarantees that "persons similarly-situated with respect to the legitimate purpose of the law must receive like treatment." *State v. Renee,* 294 Mont. 527, 899 (1999). Employees with same-sex partners are similarly situated to employees with opposite-sex partners with respect to Defendants' statutorily-defined goal of providing health insurance and other benefits to state employees and their dependents. Complaint, ¶ 3 (citing Mont. Code Ann. § 2-18-702). For purposes of this motion, Defendants admit that their policy allows all employees with opposite-sex partners to obtain dependent benefits by entering into a solemnized marriage or signing an Affidavit of Common-Law Marriage. Complaint, ¶ 53. In contrast, employees with same-sex partners can never obtain dependent benefits because Defendants condition benefits on marriage and the State prohibits them from marrying their partners. *Id.* at ¶ 56-59. The policy thus draws a line based on sex. Whether an individual employee can obtain dependent partner benefits depends on the sex of the employee and the sex of his or her partner.

Defendants' argument that their policy is gender neutral because (1) "[b]oth men and women are equally capable of marrying and having legal spouses" and (2) "the rule affects

unmarried males and unmarried females equally" misconstrues a core tenet of equal protection jurisprudence. Motion at 13. Equal protection law is

> concern[ed] with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class."

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal marks omitted). The proper question in this case is whether an *individual's* eligibility for dependent benefits depends on sex. Under Defendants' policy, a female employee with a female partner is denied dependent benefits while a male employee with a female partner may obtain dependent benefits. Likewise, a male employee with a male partner is denied benefits while a female employee with a male partner may obtain benefits. Such a policy doles out benefits based on the sex of the individual employee and his or her partner, classifying them on the basis of sex. *See Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978) (finding statutory violation where policy treated female employee "in a manner which but for that person's sex would be different").

The United States Supreme Court has applied this principle in a series of equal protection challenges to state laws and policies that affect couples differently depending on their race or sex. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court struck down a Virginia law that criminalized interracial marriage and rejected an argument that precisely paralleled Defendants' argument here. Virginia argued that its miscegenation law did not discriminate on the basis of race because the prohibition applied equally to whites and non-whites. *Id.* at 7-8. The Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* at 8; *see also McLaughlin v. Florida,* 379 U.S. 184, 191 (1964) ("Judicial

inquiry . . . does not end with a showing of equal application among the members of the class defined by the legislation.") The Court did not require disparity between the class of whites and the class of non-whites; it was enough that the classification was defined in terms of the race of the members of a couple. *Loving,* 388 U.S. at 11.

The same reasoning is reflected in cases involving sex-based classifications. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court struck down a policy conditioning spousal benefits on spousal dependency for servicewomen but not for servicemen. The classification created no disparity between men as a class and women as a class because, although servicewomen were disadvantaged vis-à-vis servicemen, the husbands of servicewomen were also disadvantaged vis-à-vis the wives of servicemen. The Court nevertheless held the classification was impermissible discrimination based on sex. *Id.* at 688; *see also Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding policy conditioning survivor benefits on spousal dependency for widowers but not for widows was unconstitutional classification based on sex). Similarly, in *Baehr v. Lewin,* 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court concluded that although the restriction of marriage to opposite-sex couples arguably applied equally to men and women, "on its face and . . . as applied . . . the state's regulation of access to the status of married persons [discriminated] on the basis of the applicants' sex." *Id.* at 60.

The reasoning in *Loving, Frontiero, Califano* and *Baehr* is equally applicable here. It is irrelevant whether a sex-based classification creates a disparity between men as a class and women as a class; it is enough that the classification is defined in terms of sex. Defendants' policy is defined in terms of sex because it incorporates a definition of marriage that depends on sex. Even if Defendants' policy does not discriminate between the class of men and the class of women, it classifies individual employees and their dependents based on their sex and the sex of their partners. In doing so, it violates Montana's equal protection clause.

Defendants rely on an illogical argument that employees with same-sex partners are not similarly situated to employees with opposite-sex spouses because same-sex couples cannot marry. Motion at 13 (quoting *Phillips v. Wisconsin Personnel Comm'n,* 167 Wis. 2d 205, 223 (1992)). Simply restating the argument reveals the circular reasoning: Defendants assert that (1) because same-sex couples are prohibited from marrying, (2) they are similarly situated only to unmarried opposite-sex couples and (3) because all unmarried couples are treated equally, using marriage to define eligibility for benefits does not discriminate against same-sex couples. In essence, Defendants contend that their sex discrimination in distribution of employment benefits is immunized from an equal protection challenge because same-sex couples are not permitted to marry under Montana state law. Defendants are wrong.

The United States Supreme Court rejected an analogous argument in *McLaughlin v. Florida,* 379 U.S. 184 (1964). McLaughlin was convicted of violating Florida's law against interracial cohabitation. *Id.* at 187 n.6. When he challenged the law as a violation of the equal protection clause, Florida argued that the interracial cohabitation law was constitutional because it was "ancillary to and served the same purpose as" the state's law banning interracial marriage. *Id.* at 195. The Supreme Court did not reach the constitutionality of the ban on interracial marriage, but it rejected Florida's assertion that the cohabitation law was constitutional simply because it derived from the interracial marriage law. *Id.* As the Court explained,

> even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment. Assuming . . . that the basic prohibition is constitutional, in this case the law against interracial marriage, it does not follow that there is no constitutional limit to the means which may be used to enforce it. . . . [The interracial cohabitation law] must therefore itself pass muster under the Fourteenth Amendment . . . .

Id. Applying the rule from *McLaughlin,* Defendants cannot insulate their policy from equal protection scrutiny by arguing that the policy "takes its shape, form and essence from the very manner in which the state defines marital status." Motion at 14. To paraphrase the Court in

McLaughlin, "[t]he court[] must reach and determine . . . whether there is an arbitrary or invidious discrimination between those . . . covered by [Defendants' policy] and those excluded." 379 U.S. at 191.

Although it is defendants' reliance on marriage that creates the sex-based classification in distribution of benefits, the Court need not rule on the validity of the marriage statutes in order to resolve Plaintiffs' claims. *See McLaughlin*, 379 U.S. at 195. The state has prohibited marriage between persons of the same sex, 40-1-401 MCA, and has defined marriage as a "personal relationship between a man and a woman," 40-1-103 MCA, but that definition of marriage is not challenged here. Instead, plaintiffs challenge the university's decision to use marriage to decide who gets benefits and who does not. The university could have chosen to distribute benefits using any number of guidelines: that only employees themselves get benefits, that employees' children get benefits, that employees' entire extended families get benefits, that employees' same- and opposite-sex domestic partners get benefits, etc. Among these many options, the university chose marriage as the defining line. By definition, using marriage means defining eligibility for benefits in sex-based terms. A challenge to the decision to draw the line at marriage says nothing about the constitutionality of the state's definition of marriage; that is a wholly separate issue. This lawsuit only asks the Court to determine whether Defendants have a compelling reason for using the sex-based definition of marriage to determine eligibility for benefits.

2. Sex-based classifications are subject to strict scrutiny and Defendants cannot satisfy strict scrutiny on a motion to dismiss.

Classifications based on sex are strictly scrutinized because freedom from sex discrimination is a fundamental right enumerated in Montana's Declaration of Rights. *See* Art. II, § 4; *Wadsworth,* 275 Mont. at 299 (holding rights enumerated in Declaration of Rights are fundamental); Motion at 13. Defendants cannot shield their sex-based discrimination from strict

scrutiny by arguing that the definition of marriage, which creates the sex-based classification, justifies use of the classification in distribution of benefits. Equal protection does not allow the government to do in two steps what it is not permitted to do in one step. It is not enough to point out that marriage is limited to opposite-sex couples; Defendants must establish that using the sex-based classification inherent in the definition of marriage to determine an employee's eligibility for dependent benefits is necessary and narrowly-tailored to promote a compelling governmental purpose. They have not suggested any purpose that *requires* this discrimination against same-sex couples. Moreover, because defendants must prove facts to satisfy their burden on strict scrutiny, they cannot prevail on a motion to dismiss. *See Wadsworth,* 275 Mont. at 303 ("[D]emonstrating a compelling interest entails something more than simply saying it is so.").

C. Plaintiffs Have Properly Alleged that Defendants' Policy Illegally Discriminates Based on Sexual Orientation

Plaintiffs' claim that defendants' policy unconstitutionally discriminates against them because of their sexual orientation cannot be dismissed on this motion. Plaintiffs have alleged that the policy treats employees differently based on their sexual orientation, that the state has no proper purpose that would justify such discrimination, and that the policy discriminates for the constitutionally illegitimate purpose of expressing disapproval of lesbian and gay families. Defendants cannot demonstrate that their policy is constitutional as a matter of law, and the motion to dismiss must be denied.

1. Denying benefits to lesbian and gay employees and their partners while providing benefits to heterosexual employees and their spouses creates a sexual orientation-based classification.

Defendants' policy classifies lesbian and gay employees and their partners for different treatment "by its own terms" and because it is "in reality . . . a device designed to impose different burdens on different classes of persons." *Spina,* 294 Mont. at 391 (citation omitted). Although state law requires Defendants to provide benefits "for the benefit of their officers and

employees and their dependents," Mont. Code Ann. § 2-18-702, Defendants' policy limits eligibility for benefits to "a lawful spouse as defined in Montana law." *See* Affidavit of Ryckman, Exh. 1. Montana law explicitly defines marriage as "a personal relationship between a man and a woman," 40-1-103 MCA, and prohibits "marriage between persons of the same sex." 40-1-401 MCA. Thus, by its own terms, Defendants' policy denies lesbian and gay employees dependent benefits for their same-sex domestic partners.

The difference between lesbian and gay individuals and heterosexual individuals is that lesbian and gay people have romantic relationships with people of the same sex, while heterosexuals have romantic relationships with people of the opposite sex. Thus, a classification defined by marriage discriminates based on sexual orientation because it discriminates based on the essential distinction between lesbian and gay people and heterosexual people. To argue otherwise strains credulity. Discrimination against people of Japanese ancestry is racial discrimination. *See Korematsu v. United States,* 323 U.S. 214, 233-34 (1945) (Murphy, J., dissenting) (rejecting majority's conclusion that classification based on Japanese ancestry was not race discrimination). Singling people out and punishing them for wearing particular religious garb, such as a yarmulke, would be religious discrimination. *See Hartmann v. Stone*, 68 F.3d 973, 985 (6th Cir. 1995). And, as Justice Turnage recognized in his concurrence in *Gryczan,* when the state discriminates between same-sex and opposite-sex couples, it is "[c]learly . . . a denial of the constitutional guarantee of equal protection of the law in violation of . . . Article II, Section 4 of the Montana Constitution." 283 Mont. at 456.

Defendants' policy arbitrarily classifies employees based on sexual orientation just as a damages cap for state liability arbitrarily classifies people based on the magnitude of their injuries. In *Pfost,* the Montana Supreme Court recognized that a law limiting state liability for tort damages to a maximum of $300,000 facially discriminated for equal protection purposes because "any person who sustain[ed] damages of less than $300,000 in value [would] be fully

redressed . . . but any person with catastrophic damages in excess of $300,000 will not have full redress." 219 Mont. at 215. Limiting dependents to spouses draws a similar bright line: *No* lesbian or gay couple can obtain dependent benefits while *all* heterosexual couples have an opportunity to obtain benefits by signing an Affidavit of Common Law Marriage or entering into a solemnized marriage.

In *Tanner v. Oregon Health Sciences University,* 971 P.2d 435, 447-48 (Or. Ct. App. 1998), an Oregon appellate court recognized that a marriage-based employment benefits policy discriminates based on sexual orientation even if it treats all unmarried people alike. Rather than engaging in mental gymnastics, the court pointed out the obvious: benefits are not available "on equal terms" as long as the state conditions benefits on marriage and denies lesbian and gay couples an opportunity to marry. *Id.; see also Levin v. Yeshiva Univ.,* 754 N.E.2d 1099, 1104 (N.Y. 2001) (holding university policy restricting housing benefits to married students disadvantaged lesbian and gay students and their partners). To paraphrase a New York Court of Appeals Judge addressing a parallel argument: "[t]he State marriage law merely defines who can and cannot marry; it was not intended to permit . . . [employers] to violate [the state equal protection clause]." *Levin,* 754 N.E.2d at 1111 (Kaye, C.J., concurring and dissenting). Indeed, the state legislature does not have the power to permit Defendants to violate the constitution.

Defendants cite several state appellate court decisions for the proposition that a marriage-based classification does not classify by sexual orientation because it excludes unmarried heterosexuals as well as all lesbians and gay men. Motion at 4-6, 14 (citing *Bailey v. City of Austin,* 972 S.W.2d 180, 186 (1998); *Rutgers, Council of AAUP Chapters v. Rutgers,* 298 N.J. Super. 442, 462 (1997); *Ross v. Denver Dep't of Health & Hospitals,* 883 P.2d 516, 521 (1994); *Phillips,* 167 Wis. 2d at 227; *Hinman v. Dep't of Personnel Admin.,* 167 Cal. App. 3d 516, 526 (Ct. App. 3rd Dist. 1985). While the argument has been recited in several cases, it remains illogical.

In essence, Defendants argue that their policy merely distinguishes between married persons and unmarried persons, completely ignoring the reality that lesbians and gay men cannot marry in Montana. Using much the same logic, General Electric once argued that a policy distinguishing between pregnant persons and non-pregnant persons did not classify individuals based on sex, despite the reality that only women can get pregnant. *General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976), *superseded by statute as stated in Newport News Shipbuilding and Dry Dock Co. v. EEOC,* 462 U.S. 669, 678-79 (1983). In *Gilbert,* the United States Supreme Court held that a classification defined by pregnancy did not discriminate based on sex because, although it burdened women, it excluded both men and non-pregnant women. *Id*. The decision was widely criticized and was ultimately repudiated by congressional action. *See* 42 U.S.C. § 2000e; *Newport News,* 462 U.S. at 684. Just as a classification based on pregnancy discriminates based on sex because it burdens women and not men, a marriage-based classification discriminates based on sexual orientation because it burdens lesbians and gay men and not heterosexuals.

Like most state courts, the Montana Supreme Court refused to follow *Gilbert* and held that, because the ability to become pregnant is unique to women, "any classification which relies on pregnancy . . . is a distinction based on sex." *Bankers Life & Cas. Co. v. Peterson,* 263 Mont. 156, 160 (1993) (quoting *Mountain States Tel. & Tel. Co. v. Comm'r of Labor & Industry,* 187 Mont. 22 (1980)). Similarly because the inability to marry is a unique disability imposed on lesbian and gay couples, any classification which relies on marriage is a distinction based on sexual orientation. As the court explained in *Tanner*:

> [The state] insists that in this case privileges and immunities are available to all on equal terms: All *married* employees - heterosexual and homosexual alike - are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.

971 P.2d at 447-48 (emphasis in original); *see also Levin,* 754 N.E.2d at 1104. Defendants' policy of restricting dependent benefits to married couples classifies employees and their partners based on sexual orientation.

2. Sexual-orientation based classifications should be subject to strict scrutiny.

The second step of equal protection review is "to determine the appropriate level of scrutiny." *Henry,* 294 Mont. at 456. Neither the Montana Supreme Court nor the United States Supreme Court has ruled on the appropriate level of scrutiny for classifications based on sexual orientation. *See Romer,* 517 U.S. at 632-33, 635 (remaining silent on standard of review for classifications based on sexual orientation where classification failed rational basis test); *see also* Tobias Barrington Wolff, *Principled Silence,* 106 YALE L.J. 247 (1996).

Sexual orientation classifications should be subjected to strict scrutiny because a person's sexual orientation is rarely, if ever, relevant to governmental decision-making, and the history of discrimination against lesbian, gay and bisexual individuals is so pervasive and long-standing that classifications based on sexual orientation should be viewed with suspicion. Under Montana equal protection law, any law or policy that disadvantages a suspect class is strictly scrutinized. *Id.* at 455.

> A suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

In re C.H., 210 Mont. at 198 (quoting *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973)). The need for protection from the majoritarian political process is evident in Montana, where it has been only five years since same-sex sexual relationships were decriminalized, and decriminalization was the result of judicial rather than legislative action, *see Gryczan,* 283 Mont. at 456, and where, as recently as 1997, the state legislature passed a law explicitly prohibiting lesbian and gay couples from marrying. *See* 40-1-401 MCA. The very passage of a statute

explicitly prohibiting same-sex marriage demonstrates that lesbian and gay Montanans are powerless to protect themselves in the political process. Lesbians and gay men constitute a suspect class.

In *Tanner v. Oregon Health Sciences University,* an Oregon appellate court concluded that classifications based on sexual orientation are subject to strict scrutiny and held that a state university's restriction of health benefits to married employees violated Oregon's constitutional equivalent of an equal protection clause. 971 P.2d 435, 447 (Or. Ct. App. 1998). As the *Tanner* court recognized:

> Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

Id. The *Tanner* decision should be given particular weight because Montana courts frequently consider interpretation of similar provisions in the Oregon constitution when analyzing claims under the Montana constitution. *See, e.g., Marshall v. State, ex rel. Cooney,* 293 Mont. 274 (1999) (voting); *Hulse v. State, Dept. of Justice, Motor Vehicle Div.,* 289 Mont. 1, 18-19 (1998) (privacy); *State v. Bullock,* 272 Mont. 361, 378-79 (1995) (privacy). Government action toward lesbians and gay men in this country historically has been so invidious that classifications based on sexual orientation should generally be viewed with a high degree of suspicion. *See Watkins v. United States Army,* 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); L. Tribe, *American Constitutional Law,* p. 1616 (2d ed. 1988) (discussing history of discrimination and stating "homosexuality should . . . be added . . . to the list of classifications that trigger increased judicial solicitude.").

In addition, classifications based on sexual orientation should be viewed with suspicion because, like race and sex, sexual orientation is rarely relevant to governmental action. It is irrelevant in nearly every context, from police protection, *see Stemler v. City of Florence,* 126

F.3d 856 (6th Cir. 1997), to public education, *see Nabozny v. Podlesny,* 92 F.3d 446 (7th Cir. 1996), to criminal prosecution, *see Commonwealth v. Wasson,* 842 S.W.2d 487 (Ky. 1992). It is similarly irrelevant in the context of public employment. *See, e.g., Weaver v. Nebo School Dist.,* 29 F. Supp. 2d 1279 (D. Utah 1998); *Glover v. Williamsburg Local School Dist. Bd. of Ed.,* 20 F. Supp. 2d 1160 (S.D. Ohio 1998). Sexual orientation has no bearing on how well an employee performs his or her job or how much an employee needs dependent benefits for his or her same-sex partner and other family members. As a result, sexual orientation discrimination in employment is highly suspicious; the very act of using sexual orientation to classify employees suggests an improper motive. Such governmental action should be closely scrutinized to ensure that it is justified.

Defendants cannot satisfy strict scrutiny because, on a motion to dismiss, they cannot establish the facts necessary to demonstrate that denying lesbian and gay employees and their partners equal employment benefits is necessary to advance a compelling state interest, nor can they establish as a factual matter that their policy is the least onerous method of advancing such an interest.

3. Denial of partner benefits to lesbian and gay employees cannot be justified under any level of scrutiny because it is motivated by animus.

For purposes of this motion, Defendants admit that their policy of denying equal employment benefits to lesbian and gay employees and their families is motivated solely by a desire to express disapproval of and to disadvantage lesbians and gay men. Complaint, ¶ 62. The United States Supreme Court has long held that this sort of discrimination for its own sake is inherently illegitimate. As the Court explained in *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Thus, expressing

"negative attitudes" toward the disadvantaged group is not a legitimate purpose. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 448 (1985). This is so even if Defendants' policy is based not on their own disapproval of lesbians and gay men, but on the animus of another entity, whether public or private. *See Palmore v. Sidoti,* 466 U.S. 429, 433 (1984). In *Romer*, the Court expressly held that these principles apply to government action that disadvantages lesbian and gay individuals. 517 U.S. at 634-35. Conditioning health insurance and other benefits on marriage, while prohibiting same-sex marriages, unconstitutionally fences lesbian and gay employees and their families out of the system. *See id.* at 627 ("Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations[.]"). Because Defendants' policy is a "classification of persons undertaken for its own sake," it cannot be justified under any level of scrutiny, and the motion to dismiss must be denied. *Id.* at 635.

4. Defendants' policy fails even rational basis review.

Even putting aside the propriety of heightened scrutiny and the fact that, for purposes of this motion, Defendants have admitted an unconstitutional purpose, Plaintiffs' claim cannot be dismissed because the policy fails rational basis review. Denying lesbian and gay employees equal employment benefits does not rationally further a legitimate governmental objective. *See In re S.L.M.*, 287 Mont. at 32. Under Montana law, a "careful inquiry is required into . . . 'the rationality of the connection between legislative means and purpose and the existence of alternative means for effectuating that purpose.'" *In re C.H.*, 210 Mont. at 198 (citations and internal marks omitted).

Defendants have failed to explain how their policy serves any legitimate state interest. Instead, they have asserted that their policy is "inherently rational," offering no further explanation. In the absence of a more specific explanation by Defendants, and in an abundance of caution, Plaintiffs address the three asserted state interests discussed in the cases on which Defendants rely. The Montana Supreme Court has stated, however, that it "would not be fair for

[the] Court to save [a policy] by dreaming up a rational relationship to some governmental purpose . . . ." *Oberg v. Billings*, 207 Mont. 277, 283 (1983).

Defendants' cases identify three interests purportedly furthered by discriminatory benefits policies: cost savings, administrative convenience and promotion of marriage. "Under the rational basis test, [courts] are required to assess both the legitimacy of the expressed state interest and the reasons for the specific classifications the State has chosen to achieve that interest." *McDermott,* 305 Mont. at 472. Although cost-savings, administrative convenience and promoting marriage may be legitimate state interests in the abstract, denying lesbian and gay employees equal benefits does not rationally advance those interests. "A classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws." *Davis,* 282 Mont. at 242-43 (holding venue statute arbitrarily discriminated against victims of nonresident corporations); *see also McKamey v. State,* 268 Mont. 137 (1994) (holding requirement that firefighters be members of military violated equal protection); *Arneson v. State,* 262 Mont. 269 (1993) (applying rational basis test and holding age discrimination in survivor benefits violated equal protection); *Brewer v. Ski-Lift, Inc.,* 234 Mont. 109 (1988) (holding assumption of risk law violated equal protection).

a. The classification cannot be justified based on cost savings.

For purposes of this motion, Defendants have admitted that "Montana University System employees in opposite-sex relationships may elect to pay additional insurance premiums to extend the coverage of such benefit contracts or plans to their dependents, including spouses or opposite-sex domestic partners." Complaint, ¶ 50. It is hard to imagine how allowing Plaintiffs to pay additional premiums to cover the cost of dependent coverage would increase Defendants' costs.

Moreover, it is well established in Montana that a desire to save money is not enough to justify disparate treatment. "[E]ven if the governmental purpose is to save money, it cannot be

done on a wholly arbitrary basis. The classification must have some rational relationship to the purpose" of the challenged policy. *Arneson,* 262 Mont. at 275. As a result,

> Cost-control alone cannot justify disparate treatment which violates an individual's right to equal protection of the law. Discrimination, that is, offering services to some while excluding others for any arbitrary reason, will *always* result in lower costs. We do not, however, allow discrimination merely for the sake of fiscal health.

Heisler v. Hines Motor Co., 282 Mont. 270, 283 (1997); *see also Henry,* 294 Mont. at 459 (same). In *Heisler,* the Court held that requiring prior authorization for some worker's compensation claimants and not others violated equal protection. *Id.* at 284. The effect was "to reduce costs by depriving a certain class of persons of benefits they would otherwise receive." 282 Mont. at 283 (citation omitted). In the absence of any basis for reducing costs by depriving that particular class of persons of benefits, the rule violated equal protection. *Id.* There is no legitimate reason to reduce costs by denying benefits to same-sex couples as compared to any other group, and Defendants' motion should be denied.

b. An interest in administrative convenience does not justify the denial of partner benefits to lesbian and gay employees for their partners.

Montana's recognition of common-law marriage means that Defendants already have a system for administering an employee benefits plan that requires case-by-case determinations of eligibility. Under that system, Defendants extend health benefits to employees for their common-law spouses, requiring no more than signatures on an affidavit establishing the committed nature of the relationship. It is simply not rational to suggest that providing an equivalent affidavit procedure for same-sex couples would create an administrative burden. *See Brewer,* 234 Mont. at 115 (finding "total absence of a minimum rational basis for concluding that . . . [assumption of risk] is required in connection with skiing when such an activity is compared with . . . other activities which in themselves are also to be classed as inherently dangerous, but in which the comparative negligence laws are held to apply."). Defendants would not be

permitted arbitrarily to deny common-law spouses benefits because of administrative convenience, nor can they arbitrarily draw the line at same-sex spouses.

c. An interest in promoting marriage does not justify the denial of partner benefits to lesbian and gay employees for their same-sex partners.

Defendants contend that their policy is "inherently rational" because of "the nature of marriage since the founding of the republic" and "the centrality of marriage as a societal institution." Motion at 14-15. But equal protection requires more than an assertion of "inherent rationality." The very concept ignores the central requirement of the rational basis test: the challenged classification must *rationally advance* a legitimate governmental purpose. Defendants are reduced to arguing that their policy is *inherently* rational because they cannot articulate a rational "connection between . . . means and purpose." *In re C.H.,* 210 Mont. at 198. Denying equal benefits to lesbian and gay couples simply cannot be said to promote marriage between opposite-sex couples.

Indeed, if a sexual orientation classification promoted marriage, Defendants could just as easily argue that it would be rational to allow only married couples to visit state parks because doing so would promote marriage. Where discrimination against lesbians and gay men "is so discontinuous with the reasons offered for it," the classification is "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer,* 517 U.S. at 632. Sexual orientation discrimination in employment benefits bears no rational connection to the government's interest in promoting marriage.

The only legitimate interest in promoting marriage is an interest in promoting the social good that results when two people make a commitment of the highest order: a commitment to become life partners. Defendants admit for purposes of this motion that the Plaintiff couples "share their lives, homes and financial obligations, . . . [have] "intimate, committed, loving relationship[s], . . . consider themselves married and hold themselves out to their families and

their community as a couple participating in a committed, marital relationship. . . . [and] would enter into a civil marriage if it were legal." Complaint, ¶¶ 2, 11-12, 25-26. Carla and Adrianne are raising a child together. *Id.* at 31. Accordingly, for purposes of this motion, it is established that lesbian and gay partners are just as deeply committed as heterosexual partners. As a result, it is entirely arbitrary to adopt an employee benefits program that encourages heterosexual couples to become life partners while discouraging lesbian and gay couples from doing the same. *See Cleburne,* 473 U.S. at 449 (holding state permitting scheme was arbitrary and irrational where state purportedly required permit for group home for developmentally disabled individuals because the home was located in a flood plain where quick evacuation might be necessary, but the state required no such permit for nursing homes or hospitals); *Brewer,* 234 Mont. at 115 (holding assumption of risk for skiing violated equal protection when not required for other similarly dangerous activities despite legitimate interest in "protecting the economic vitality of the ski industry"); *Henry,* 294 Mont. at 460 (holding state lacked rational basis for treating workers injured in one shift differently from workers injured over two or more shifts when benefits would promote policy of early return to work for both classes of workers). Such arbitrary discrimination violates equal protection.

Finally, any asserted interest in promoting committed relationships is belied by the State's own actions. Instead of acting to promote married relationships between committed lesbian and gay couples, the state legislature enacted an explicit prohibition barring marriage between members of the same sex. *See* 40-1-401 MCA. Where an asserted interest is belied by the government's own actions, the interest cannot justify a discriminatory classification. *Cleburne,* 473 U.S. at 449. In *Cleburne,* the city sought to justify a zoning decision excluding a group home for the developmentally disabled by asserting that "[it] was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of [the group home]." *Id.* The Court, however, refused to credit the assertion because

"the school itself [was] attended by about 30 [developmentally disabled] students," belying the proffered interest. In the same fashion, Defendants' asserted interest in promoting committed relationships of the highest order is belied by their efforts to discourage and to deny recognition to such commitments in lesbian and gay relationships.

Defendants' motion also fails because there is no basis from which to conclude that "alternative means for effectuating" the state's purpose are unavailable. *In re C.H.,* 210 Mont. at 198 (citations and internal marks omitted); *Moran,* 350 F. Supp. at 1186. If alternative means of achieving Defendants' goals are readily available, then a decision to classify employees based on sexual orientation cannot be based on a desire to advance the goal. More likely, it is based on animus toward the disadvantaged class: lesbian and gay employees and their partners. Although this sort of inquiry is factual in nature, making a motion to dismiss inappropriate, it is readily apparent that alternative means are available. For example, retaining the existing system while allowing lesbian and gay couples willing to sign an Affidavit of Domestic Partnership to obtain dependent benefits would allow Defendants to encourage heterosexual couples to marry without discriminating against lesbian and gay couples.

The fact that such a nondiscriminatory alternative is available demonstrates "the prejudicial and invidious effects of the . . . rule." *Moran,* 350 F. Supp. at 1186. Defendants' interest in preserving partner benefits for married employees only is nothing more than an interest in favoring heterosexuals. Favoring one class over another for its own sake is the very definition of discrimination for its own sake. *See supra* § II.C.3.; *Romer*, 517 U.S. at 634-35; *Moreno*, 413 U.S. at 534-35. Even the federal equal protection clause does not permit "a classification of persons undertaken for its own sake." *Romer,* 517 U.S. at 635.

By expressly defining marriage to exclude lesbian and gay couples, the state legislature transformed what was once a neutral consideration - marriage as a status - into a discriminatory tool. As a result, Defendants' interest in promoting married relationships is now a discriminatory

interest with respect to lesbian and gay couples. A discriminatory interest can never be a rational basis justifying discrimination. *See supra* § II.C.3.; *Romer*, 517 U.S. at 634-35; *Moreno*, 413 U.S. at 534-35.

D. Plaintiffs Have Alleged that Defendants' Policy Illegally Discriminates Based on Marital Status

Defendants do not dispute that their policy classifies Plaintiffs based on marital status. *See University of Alaska v. Tumeo,* 933 P.2d 1147 (Alaska 1997) (finding statutory violation where policy denied health insurance benefits to domestic partners based on their marital status). Instead, they argue only that their policy flows "naturally" from the state's definition of marital status and is therefore "inherently rational." Motion at 14. Nothing in Defendants' argument explains *why* they rely on marriage in determining eligibility for partner benefits. Defendants have failed to assert any rational basis for their marital status classification, and their motion to dismiss this claim must be denied.

Defendants rely on *Hinman,* where a California appellate court upheld marital status discrimination in the distribution of dental insurance benefits. 167 Cal. App. 3d 516. Applying rational basis review, the *Hinman* court concluded that although the "express purpose" of the law was to "promote the health of state employees, the terms of the state dental plans which restrict coverage to spouses and family of employees . . . [were] reasonably related to the state's interest in promoting marriage." *Id.* at 527-28. This conclusory assertion is all that can be gleaned from *Hinman.* Nothing in the decision explains how a marital status classification that denies dental insurance to the same-sex partners of unmarried employees - who are by definition ineligible to marry - promotes marriage.

Defendants urge this Court to follow *Hinman* and to abandon the obligation to articulate "the rationality of the connection between legislative means and purpose." *In re C.H.,* 210 Mont. at 198. The Court should reject this invitation because there is no rational connection between

Defendants' marital status discrimination and the state's interest in promoting marriage. Indeed, if the equal protection clause allowed marital status discrimination because it promotes marriage, there would be no such thing as an equal protection violation based on marital status discrimination. Under Defendants' reasoning, Montana could adopt a law that allowed only married couples to enter state parks. Such marital status discrimination would be justified despite the absence of any rational connection to administration of the state park system because it would promote marriage. To conclude that marital status discrimination in employment bears a "rational" connection to the government's interest in promoting marriage makes a mockery of the promise of equal protection.

Defendants' policy also fails rational basis review because on this motion there is no basis from which to conclude that "alternative means for effectuating that purpose" are unavailable. *In re C.H.,* 210 Mont. at 198 (citations and internal marks omitted). A Montana federal district court held in *Moran v. Sch. Dist. # 7 Yellowstone Cty.,* 350 F. Supp. 1180, 1186 (D. Mont. 1972), that a school could not prohibit married students from participating in extracurricular activities because of a fear of "moral pollution," explaining that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* at 1187; *see also Kaptein v. Conrad Sch. Dist.,* 281 Mont. 152 (1997) (explaining *Moran*). Although the school board had argued that its goal was to encourage the academic success of married students, the *Moran* court found the policy violated equal protection because "that goal could be achieved in a nondiscriminatory fashion by tying participation in extracurricular activities to academic performance for all students, not just married students." *Kaptein,* 281 Mont. at 159-60. The fact that nondiscriminatory alternatives were available demonstrated "the prejudicial and invidious effects of the . . . rule." *Moran,* 350 F. Supp. at 1187. As discussed above, the goal of promoting the social good that comes from a commitment of the highest order can be achieved in a

nondiscriminatory fashion by tying receipt of dependent benefits to the existence of a commitment to life partnership for all employees, not just married ones.

Even under rational basis review, Defendants must show that the classification based on marital status was rationally selected to advance some legitimate governmental purpose and that nondiscriminatory alternatives are not available. *See In re S.L.M.,* 287 Mont. at 32. Defendants have not satisfied this minimal burden, and their motion should be denied.

E. Strict Scrutiny Applies Even Where the Classification is Not Suspect Because the Policy Affects Plaintiffs' Fundamental Rights

When a governmental classification creates differential access to a fundamental right, that classification is subjected to strict scrutiny under the equal protection clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding city may impose general prohibition against picketing near school but differential treatment of picketers is subject to strict scrutiny because it infringes upon fundamental right to freedom of expression); *see also Henry,* 294 Mont. at 456. Here, Defendants' classifications based on sex, sexual orientation and marital status are all subject to strict scrutiny for equal protection purposes because the policy provides differential access to dignity, to privacy, and to the ability to pursue life's basic necessities and to seek safety, health and happiness. *See, e.g., McDermott,* 305 Mont. 462 (suggesting strict scrutiny would apply if plaintiff's right to individual dignity were threatened); *Oberg*, 207 Mont. at 285 (suggesting strict scrutiny would apply to law allowing police officers, but no other employees, to be subjected to polygraph tests because such law implicates fundamental rights to dignity and privacy). Just as differential access for picketers violated equal protection in *Mosley* even though the government could have barred all picketers, differential provision of benefits to employees and their partners violates equal protection even though Defendants are not constitutionally required to provide any benefits at all.

Strict scrutiny requires Defendants to demonstrate that their policy of limiting "dependents" to spouses, thereby denying dependent benefits for Plaintiffs' same-sex domestic partners and burdening their fundamental rights, is necessary to advance a compelling state interest and is the least onerous method of advancing that interest. *See Pfost,* 219 Mont. at 216. Defendants cannot satisfy strict scrutiny because it requires proof of facts that cannot be established on a motion to dismiss. *See Wadsworth,* 275 Mont. at 303. Moreover, for purposes of this motion, Defendants have admitted that they deny equal employment benefits to lesbian and gay employees and their families solely for constitutionally defective reasons: to express disapproval of and to disadvantage lesbians and gay men. Complaint, ¶ 62. Defendants' motion to dismiss Plaintiffs equal protection claims must be denied.

III. Plaintiffs' Fundamental Rights Claims Cannot Be Dismissed

As discussed in the preceding section, Defendants' policy violates Plaintiffs' right to equal protection, and strict scrutiny applies to each of Plaintiffs' equal protection claims because the policy creates differential access to fundamental rights. Wholly apart from their equal protection claim, Plaintiffs have asserted separate claims alleging that Defendants' policy violates their fundamental rights to dignity, to privacy, to pursue life's basic necessities and to seek safety, health and happiness. *See Armstrong v. State,* 296 Mont. 361, 389 (1999) (holding constitutional rights to dignity, privacy, equal protection, and to seek safety, health and happiness are overlapping rights intended to advance an "ideal of just government"). "Any statute or rule which implicates [a fundamental right] must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *M.E.I.C. v. Dep't of Env. Quality,* 296 Mont. 207, 225 (1999).

A. Dignity

Plaintiffs have alleged that Defendants' policy burdens Plaintiffs' choices about how to structure their intimate relationships, stigmatizes their families, and devalues them as members of society, directly infringing their fundamental right to dignity under the Montana Constitution. Complaint, ¶ 68-69. Defendants' motion to dismiss this claim is baseless. They argue only that there is no free-standing right to individual dignity under the Montana Constitution and that the harm to Plaintiffs from the challenged policy cannot, as a matter of law, offend Plaintiffs' right to individual dignity. Motion at 9. Defendants are wrong on both counts.

Article II, § 4 of the Montana Constitution provides that "[t]he dignity of the human being is inviolable." The Montana Supreme Court has invoked the dignity clause in a number of contexts, finding the right to dignity protects the right to bodily integrity, *Armstrong,* 296 Mont. at 389*,* the right not to be subjected to a polygraph test as a condition of employment, *Oberg*, 207 Mont. at 280, the right to certain procedures at a civil commitment hearing, *In re Mental Health of K.G.F.,* 306 Mont. 1, 10-11 (2001), and, more generally, the right not to be "devalued as members of society" or treated as "an inferior second-class of citizens." *Id.* at 12-13; *see also Girard v. Williams,* 291 Mont. 49, 75 (1998) (Nelson, J., specially concurring) ("Under our Montana Constitution, . . . children enjoy the same fundamental rights as adults. At a bare minimum these include inalienable rights . . . to pursue life's basic necessities, to enjoy a safe, healthy and happy life (Article II, Section 3), and to basic human dignity (Article II, Section 4)."); *In re C.R.O.,* 309 Mont. 48, 60 (2002) (Nelson, J., Cotter, J., Leaphart, J., dissenting) (same).

In *Armstrong*, the Court recognized that "[r]espect for the dignity of each individual [is] a fundamental right, protected by Article II, Section 4 of the Montana Constitution." 296 Mont. at 389. Dignity is guaranteed by ensuring that "people have for themselves the moral right and

moral responsibility to confront the most fundamental questions about the meaning and value of their own lives[.]" *Id.* In other words, the right to dignity is infringed when individuals are

> denied the opportunity to direct or control their own lives in such a way that their worth is questioned or dishonored. . . . Dignity may be directly assailed by treatment which degrades, demeans, debases, disgraces, or dishonors persons, or it may be more indirectly undermined by treatment which either interferes with self-directed and responsible lives or which trivializes the choices persons make for their own lives.

Clifford, 61 MONT. L. REV. at 308. To protect the right to dignity, the courts must protect the right of all Montanans to make fundamental decisions about their own lives "answering to their own consciences and convictions" rather than to the pressures or dictates of the political majority. *Armstrong,* 296 Mont. at 389. Under *Armstrong,* the right to dignity protects individual freedom to make decisions about family structure free from governmental interference or pressure. *Id.* And the reason it does so is that the dignity clause embodies the principle of republican government that individuals must be free to lead self-directed lives. *Id.* Because it focuses on the importance of respecting each individual as a full member of the community, the dignity clause also requires that groups of people not be singled out and "devalued as members of society," *K.G.F.,* 306 Mont.. at 12, or treated as "an inferior second-class of citizens." *Id.* at 13. As a result, the right to dignity overlaps with both the right to privacy and the right to equal protection. *Armstrong,* 296 Mont. at 389.

In *Oberg v. Billings*, 207 Mont. 377 (1983), the Court struck down a statutory provision that allowed public law enforcement agencies to require employees to take polygraph tests although every other employer was prohibited from doing so. The Court held the law violated a police officer's right to equal protection even under rational basis review because the legislature had failed to declare its purpose in creating the challenged classification. *Id.* at 283-84. The Court then went on to explain that even if the legislature were to create such a classification for the express purpose of maintaining high standards for police officers, the polygraph statute would violate the officer's fundamental right to dignity. *Id.* at 285. The Court stated:

> Art. II, § 4 of our state constitution provides for the protection of every citizen's "individual dignity." It cannot be doubted that subjecting one to a lie detector test is an affront to one's dignity . . . . [W]e doubt that such an exception would survive a sustained attack under the strict scrutiny test.

Id. Thus, the Court in *Oberg* suggested requiring an employee to take a lie detector test would result in two different constitutional violations: a direct infringement of the employee's fundamental right to dignity and, where one class of employees is singled out, a violation of equal protection. *Id.* at 281-82.

More recently, in *In re Mental Health of K.G.F.,* the Montana Supreme Court held that the fundamental dignity and privacy rights of mentally ill patients require the courts to provide an array of procedural protections in civil commitment proceedings. 306 Mont. at 11, 20. In fact, the Court concluded, several legislative provisions requiring respect for the dignity of mental health patients in civil proceedings are premised on the constitutional right to dignity, including the right to appear at a hearing in one's own clothing, the right to have the hearing conducted in court rather than in a mental health facility, and the right to competent counsel. *Id.* at 10, 16 (citations omitted). As a result, deprivation of any of these protections constitutes a violation of the right to dignity.

Recognizing that the right to dignity involves the right to be free from prejudice that values people based on group characteristics rather than individual attributes, the Court explained in *K.G.F.* that prejudice toward the mentally ill has the same "quality and character" as "prejudices such as racism, sexism, *heterosexism* and ethnic bigotry[.]" *Id.* at 13 (emphasis added, citation omitted). Such prejudice is "repugnant to our state constitution" as the dignity clause protects the right not to be "devalued as members of society" or treated as "an inferior second-class of citizens." *Id.* at 12-13 (citing, *inter alia,* Clifford, at 330-32). The heterosexist prejudice inherent in Defendants' policy is likewise "repugnant" to the Montana Constitution. Discriminatorily denying family benefits to lesbian and gay families violates Plaintiffs' right to

dignity by devaluing Plaintiffs' contributions to society and by treating them as an inferior second-class of citizens.

For purposes of this motion, Defendants have admitted that their policies "deny Plaintiffs the opportunity to control their own lives by negatively affecting Plaintiffs' . . . decisions about whom to choose as a life partner and decisions about how and when to have children. Such decisions about how to structure family life and how to forge one's own identity are fundamental aspects of a self-directed life." Complaint, ¶ 68. Defendants have also admitted that they deny "equal employment benefits to lesbians and gay men and their families . . . in order to enforce a particular set of individual values that condemns lesbians and gay men and their families as unnatural and immoral." *Id.,* ¶ 69. These allegations state a claim for violation of the right to dignity.

Defendants' policy undermines Plaintiffs' ability to maintain their family relationships, to provide responsibly for their families, and to live self-directed lives. For example, because Defendants will not allow Carla to purchase health insurance for her partner Adrianne, they may not be able to afford for Adrianne to continue caring for their toddler full time and she may have to return to work. *Id.,* ¶ 39. Nancy and Carol must forego other expenditures or work additional hours to pay for inferior private health insurance for Nancy. *Id.,* ¶¶ 19, 22. Nancy would be permitted to obtain health insurance from Defendants today if she and Carol were an opposite-sex couple. *Id.,* ¶ 50. If Defendants had a policy of refusing to offer benefits to families with more than two children, such a policy would violate the right to dignity by intruding on the individual right to make highly personal choices about family size. Here, the indignity is far greater because the policy reinforces historical prejudice against lesbians and gay men. By penalizing Plaintiffs for choosing same-sex partners, Defendants' burden their right to resolve "the most fundamental questions about the meaning and value of their own lives . . . answering to their own consciences and convictions." *Armstrong,* 296 Mont. at 389.

Defendants miss the mark by arguing that the deprivation of health insurance benefits is not a sufficient indignity to warrant constitutional protection. Following this argument to its logical conclusion, racial segregation of lunch counters would not have been an affront to dignity because African Americans were deprived of nothing more than the right to buy a sandwich in a particular location. Of course, the indignity of racial segregation in this country was not the fact that an African American woman *could not get a sandwich* at the whites-only lunch counter but that she could not get a sandwich there *because of her race*. In this case, it is not the deprivation of dependent benefits that offends Plaintiffs' dignity. The affront to dignity lies in the fact that Defendants' policy singles out lesbian and gay employees and their partners and penalizes their decisions about how to structure their families.

Defendants' policy punishes Plaintiffs for choosing same-sex life partners. By refusing to recognize that same-sex domestic partners who consider themselves married - like opposite-sex domestic partners who consider themselves married - are dependents for purposes of family benefits, Defendants trivialize Plaintiffs' relationships, treating them as second-class citizens and undermining their ability to direct the course of their own lives. The allegations of the complaint state a claim under the dignity clause, and Defendants' motion to dismiss this claim should be denied.

B. Privacy

Article II, § 10 of the Montana Constitution explicitly guarantees a fundamental right to privacy, stating that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Indeed, "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States - exceeding even that provided by the federal constitution." *Armstrong,* 296 Mont. at 373-74; *see also Ennis v. Stewart,* 247 Mont. 355, 358 (1991). This heightened protection "reflects Montanans' historical abhorrence and distrust of excessive governmental interference in

their personal lives." *Gryczan,* 283 Mont. at 455. Montana's right to privacy includes broad protection of personal autonomy. *Id.* at 456.

> [T]he personal autonomy component of the right of individual privacy . . . is, at one and the same time, as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government - as in *Gryczan* - and as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.

Armstrong, 296 Mont. at 375.

Here, Defendants' policy of allowing only opposite-sex couples to obtain family benefits condemns lesbian and gay families by refusing to recognize that they exist and by attempting to dictate a single answer to a core question of conscience and individual values: "who is an appropriate life partner." The only acceptable answer under Defendants' policy is "an opposite-sex partner." Plaintiffs have stated a claim for violation of their right to privacy by alleging that they have

> reasonable and actual expectations of privacy in their intimate and personal decisions about how to structure their family relationships, including decisions about whom to choose as a life partner and decisions about how and when to have children. Such decisions are generally considered private. Defendants' . . . [policy] interferes with and unlawfully burdens Plaintiffs' rights to privacy and intimate association . . . by enforcing a particular set of individual values that condemns lesbians and gay men and their families as unnatural and immoral . . . [and] by interfering with Plaintiffs' intimate and personal life choices.

Complaint, ¶¶ 73-75. Indeed, even under the more limited privacy and intimate association rights guaranteed by the federal constitution, Plaintiffs' "activities relating to . . . family relationships" are assured constitutional protection. *Ennis,* 247 Mont. at 359; *see also, e.g., Roberts v. United States Jaycees,* 468 U.S. 609, 618 (1984) (holding Bill of Rights "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State"); *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977) ("[F]reedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth

Amendment."); *Stanley v. Illinois,* 405 U.S. 645, 651-52 (1972) (recognizing that "family relationships unlegitimized by a marriage ceremony . . . [are] often as warm, enduring, and important as those arising within a more formally organized family unit."); *Moore v. City of East Cleveland,* 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the state] from standardizing its children - and its adults - by forcing all to live in certain narrowly defined family patterns.").

Defendants argue that their policy does not violate Plaintiffs' right to privacy because it neither criminalizes Plaintiffs' families nor prohibits them from forming same-sex partnerships. Motion at 11-12. But Montana's right to privacy is not so limited. Any law or policy that "regulates" Plaintiffs' exercise of their fundamental right to make intimate and personal decisions about how to structure their family relationships, including decisions about whom to choose as a life partner and decisions about how and when to have children, "must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *See Gryczan,* 283 Mont. at 449; *see also M.E.I.C.,* 296 Mont. at 225 (holding challenged action that implicates fundamental right must be "the least onerous path that can be taken to achieve the State's objective"). Plaintiffs have alleged, and Defendants cannot at this point dispute, that the challenged government policy *interferes* with Plaintiffs' decisions about how to structure their family lives and condemns their families as unnatural and immoral by penalizing them for entering into same-sex life partnerships. Defendants' policy-making powers

> are defined by the Constitution and . . . [their] ability to regulate morals and to enact . . . [policies] reflecting moral choices is not without limits. . . . [T]he police power should properly be exercised to protect each individual's *right to be free from interference* in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.

Gryczan, 283 Mont. at 454 (emphasis added). Defendants' policy imposes moral views censuring and devaluing Plaintiffs' families and violates Plaintiffs' right to be free from interference in forming and maintaining their familial relationships. Defendants have not asserted that any state interest supports their policy of denying same-sex couples the family

benefits available to opposite-sex couples. "Absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation . . . of this most intimate social relationship will not withstand constitutional scrutiny." *Id.* at 455. Defendants' motion to dismiss Plaintiffs' privacy claim should be denied.

C. Rights to Pursue Life's Basic Necessities and to Seek Safety, Health and Happiness

A right is fundamental under the Montana constitution if it is either enumerated in the Declaration of Rights or is a right "without which other constitutionally guaranteed rights would have little meaning." *Wadsworth,* 275 Mont. at 299 (quoting *Butte Community Union,* 219 Mont. at 430). Section 3 of Montana's Declaration of Rights provides "All persons are born free and have certain inalienable rights. They include . . . the rights of pursuing life's basic necessities . . . and seeking their safety, health and happiness in all lawful ways." Mont. Const. Art. II, § 3. Article II, § 3 establishes that the right to pursue life's basic necessities and the right to seek safety, health and happiness - and any other rights necessary to ensure that these enumerated rights are meaningful - are fundamental rights. *Wadsworth,* 275 Mont. at 299; *see also Girard,* 291 Mont. at 75 (Nelson, J., specially concurring).

Health insurance is a basic necessity of modern life and is essential to Plaintiffs' ability to seek safety, health and happiness. Complaint, ¶¶ 89, 93-94. In fact, the Montana Supreme Court has recognized explicitly that family health insurance obtained through employment is one of life's basic necessities. In *Wadsworth*, the Court explained that,

> [a]s a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care.

275 Mont. at 299. The principle articulated in *Wadsworth* is equally applicable here. Wadsworth challenged the State Department of Revenue's decision to fire him for violating a

rule that prohibited him from working independently as a real estate appraiser. *Id.,* 275 Mont. at 292-93. The Montana Supreme Court acknowledged the reality that "it is primarily through work and employment that one exercises and enjoys" the right to pursue life's basic necessities. *Id*. at 299. Accordingly, the Court recognized that Wadsworth had a fundamental right to "the opportunity to work and to make a living" by obtaining outside employment because the right to pursue life's basic necessities "would have little meaning" without the opportunity to pursue employment. *Id.* at 299, 303 (applying *Butte Community Union*, 219 Mont. at 430). The right to pursue employment is implicit in the guarantee of the right to pursue life's basic necessities - including family health insurance - because employment is typically the only affordable way to obtain such necessities. *Id.* at 299.

The infringement in this case is even more direct. Defendants' policy deprives Plaintiffs of their rights to pursue life's basic necessities and to seek safety, health and happiness by denying them the opportunity to purchase health insurance for their dependents. Whereas in *Wadsworth* the state indirectly deprived Wadsworth of his fundamental right to pursue life's basic necessities by depriving him of the right to pursue outside employment, here, Defendants' policy *directly* deprives Plaintiffs of their fundamental rights by denying them an equal opportunity to obtain one of those necessities: health insurance for their dependents.

Moreover, Defendants' policy denies Plaintiffs equal compensation for their work, implicating their fundamental right to the opportunity to make a living. The Court made it clear in *Wadsworth* that the "life's basic necessities" clause in Montana's Declaration of Rights protects a state employee's right to work at a second job. An interpretation that allowed the state to prohibit employees from obtaining full compensation for their work would be wholly inconsistent with *Wadsworth.* Indeed, where the compensation withheld from employees is itself one of life's basic necessities - here, health insurance - such an interpretation would defeat the

very purpose of adopting a right to seek employment based on the right to pursue life's basic necessities.

These claims cannot be dismissed at this stage because Defendants cannot establish, as a matter of law, that their policy does not burden these rights or that the policy satisfies strict scrutiny. A policy that infringes a fundamental right is subject to strict scrutiny and can only be sustained if the state demonstrates a compelling interest and shows that the challenged action "is the least onerous path that can be taken to achieve the state objective." *Id.* at 302 (citing *Pfost,* 219 Mont. at 216). To justify depriving Plaintiffs of their fundamental rights, Defendants are required to demonstrate a compelling purpose for denying Plaintiffs the opportunity to purchase health insurance for their dependents. "[D]emonstrating a compelling interest entails something more than simply saying it is so." *Id.* at 303. Defendants have not asserted any reason for their policy, let alone the sort of compelling governmental purpose required to justify an intrusion that deprives Plaintiffs of their fundamental rights.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in all respects.

Dated this 6th the day of June, 2002.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

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Holly Jo Franz

Certificate of Service

I hereby certify that a true copy of the *Brief In Opposition Of Motion to Dismiss* has been sent by First Class United States Mail this 6th day of June, 2002 to counsel for defendants in the above-captioned proceeding, addressed as follows:

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