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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

JAN DONALDSON and MARY ANNE)	
GUGGENHEIM, MARY LESLIE and)	Cause No. BDV-2010-702
STACEY HAUGLAND, GARY)	Hon. Jeffrey M. Sherlock
STALLINGS and RICK WAGNER, KELLIE)	
GIBSON and DENISE BOETTCHER, JOHN)	
MICHAEL LONG and RICHARD PARKER,)	
NANCY OWENS and MJ WILLIAMS, and)	<u>COMBINED BRIEF IN SUPPORT OF</u>
CASEY CHARLES and DAVID WILSON,)	<u>MOTION FOR SUMMARY JUDGMENT</u>
)	<u>AND RESPONSE TO MOTION TO</u>
Plaintiffs,)	<u>DISMISS</u>
)	
vs.)	
)	
STATE OF MONTANA,)	
)	
Defendant.)	

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INTRODUCTION

Plaintiffs are twelve Montanans who are in loving, long-term, committed, and intimate relationships with a same-sex partner. The six Plaintiff couples live together, share their lives, and, in some instances, raise children together. In all material respects, these couples are no different from heterosexual couples who choose each other as life partners and form families together.

The State of Montana, however, treats Plaintiffs very differently from heterosexual couples. Two heterosexual individuals who fall in love and decide to commit to one another and raise a family can marry—a legal status by which the State recognizes both their relationship and their family unit. Once the couple is married, the State provides the couple and their family with a wide range of statutory protections and benefits, as well as imposing on them statutory obligations and responsibilities. Taken together, these statutes form a structure that supports and protects the relationships and families of intimate, committed, different-sex couples.

Plaintiffs and their families are excluded from the statutory structure afforded to different-sex couples who marry, and the important protections and obligations it confers. The State Legislature has limited most of the structure to “spouses,” and under Article XIII, Section 7 of Montana’s Constitution (the “Marriage Amendment”), Plaintiffs are constitutionally prohibited from marrying their same-sex partners. The State does provide same-sex domestic partners with access to public employee benefits, but, unlike many other states, Montana does not offer same-sex couples the opportunity to enter into a recognized legal status, such as a registered domestic partnership, that would provide them the same access to statutory protections and obligations provided to different-sex couples through marriage.

The Montana Constitution has uniquely strong guarantees of equal protection and due process, as well as uniquely strong fundamental rights to privacy, dignity, and the pursuit of life’s basic necessities, health, happiness, and safety. Under these guarantees, Plaintiffs and their families are entitled to full and equal treatment under state statutory law, regardless of their intimate

association with a same-sex life partner. Indeed, given the long history of discrimination against gay, lesbian, and bisexual people and their continuing relative political powerlessness as a minority group, this Court should view any state statute that discriminates on the basis of sexual orientation as inherently suspect. Even without the application of strict scrutiny under either the Montana Constitution's guarantee of equal protection or fundamental rights, there is no legitimate reason to exclude same-sex couples and their families from state statutory relationship and family recognition and protections. Prejudice and antipathy toward gay and lesbian people have long fed hostility, discrimination, and violence against them. As a matter of uncontroverted fact in this case, however, Plaintiffs' relationships and families are in no material way different from those of heterosexual couples who marry. This Court, therefore, should conclude that the State's exclusion of Plaintiffs and their families from statutory relationship and family recognition and protections violates Plaintiffs' rights under the Montana Constitution.

In its Motion to Dismiss, Defendant primarily contends that (1) Plaintiffs' claims are precluded by the Marriage Amendment, and (2) Plaintiffs are not entitled to the relief they seek. First, the Marriage Amendment does not preclude Plaintiffs' claims because it applies only to the designation or status of marriage, and Plaintiffs are not seeking to enter into that designation or status. Although Montana's statutory relationship and family protections have historically been tied to marriage, the Marriage Amendment does not require the State Legislature to exclude Plaintiffs from these protections. Indeed, Defendant concedes that the State could choose to provide these protections to same-sex couples through an alternative legal status, such as registered domestic partnerships, and that the State already does so in certain, limited circumstances. Thus, the Marriage Amendment is simply irrelevant to the question presented: whether the Montana Constitution requires the State to provide the same statutory protections and obligations to Plaintiffs that it provides to different-sex couples who marry.

Second, Plaintiffs are entitled to the relief they seek. Plaintiffs seek declaratory and injunctive relief regarding a specific set of state statutes—the statutes that confer relationship and family protections and obligations but that currently provide them only to different-sex couples who marry or “spouses.” Exclusion from a statutory protection scheme is state action, and statutes that restrict access to benefits are regularly challenged under Montana’s equal protection clause. This Court has the power to determine whether state statutes conform to constitutional guarantees and to order the State Legislature to amend the laws to remedy any violations the Court finds.

Based on the uncontroverted evidence, there is no legitimate reason for the State to exclude Plaintiffs and their families from the statutory relationship and family protections that the State provides to different-sex couples who marry, much less a compelling state interest that is narrowly tailored. Plaintiffs are therefore entitled as a matter of law to summary judgment on all their claims.

STANDARD OF REVIEW

In this brief, Plaintiffs respond to Defendant’s Motion to Dismiss as well as provide support for Plaintiffs’ Cross-Motion for Summary Judgment. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” M. R. Civ. P. 56(c). As shown below, there are no genuine issues of material fact that bar entry of judgment for Plaintiffs, and Plaintiffs are entitled to judgment as a matter of law.

STATEMENT OF UNCONTROVERTED FACTS

I. PLAINTIFFS ARE IN INTIMATE, COMMITTED RELATIONSHIPS, SIMILAR IN ALL RELEVANT RESPECTS TO THE RELATIONSHIPS OF DIFFERENT-SEX COUPLES WHO MARRY.

Plaintiffs are twelve Montanans who have lived in Montana most of their adult lives, working and raising families here, and are active in their communities, churches, and schools.¹

Plaintiffs also comprise six couples who are in loving, long-term, committed, and intimate relationships with partners of the same sex (*see generally* Pl. Affs. ¶¶ 3, 4):

1. **Jan Donaldson and Mary Anne Guggenheim** of Helena have been in an intimate, committed relationship for 27 years. Jan and Mary Anne raised four children together and now are proud grandparents. Jan says that they are “in every way, a family, rejoicing in one another, supporting one another when needed.” Mary Anne describes their relationship as “the strongest relationship either of us had ever had” and says that their love and respect for each other has changed their lives forever. (Donaldson Aff. ¶ 6; Guggenheim Aff. ¶ 4, 6.)
2. **Mary Leslie and Stacey Haugland** of Bozeman have been in an intimate, committed relationship for 12 years. Seven years ago, the couple held a commitment ceremony to celebrate their “absolute delight in having found each other” and to publicly declare their love and commitment to each other. They now proudly display a certificate of the ceremony that they had their guests sign on their living room wall. (Leslie Aff. ¶ 3; Haugland Aff. ¶ 3.)
3. **Gary Stallings and Rick Wagner** of Butte have been in an intimate, committed relationship for 21 years. Over ten years ago, Gary and Rick held a commitment ceremony, and they have been actively involved in raising three of their grandchildren. Rick nursed Gary through severe illness, and was described by Gary’s doctor as “the very best caretaker a person could have.” They talk about their relationship as one in which they are “joined at the hip” and “always will be.” (Wagner Aff. ¶¶ 4, 7; Stallings Aff. ¶¶ 4-5.)
4. **Kellie Gibson and Denise Boettcher** of Laurel have been in an intimate, committed relationship for 11 years. Kellie and Denise have two children together, the younger of whom they adopted when Kellie’s brother, the boy’s biological father, could no

¹ *See generally* Affidavit of Mary Leslie (“Leslie Aff.”), Affidavit of Stacey Haugland (“Haugland Aff.”), Affidavit of Kellie Gibson (“Gibson Aff.”), Affidavit of Denise Boettcher (“Boettcher Aff.”), Affidavit of Nancy Owens (“Owens Aff.”), Affidavit of MJ Williams (“Williams Aff.”), Affidavit of Rick Wagner (“Wagner Aff.”), Affidavit of Gary Stallings (“Stallings Aff.”), Affidavit of John Michael Long (“Long Aff.”), Affidavit of Richard Parker (“Parker Aff.”), Affidavit of Jan Donaldson (“Donaldson Aff.”), and Affidavit of Mary Ann Guggenheim (“Guggenheim Aff.”), collectively (“Pl. Affs.”) ¶¶ 2-4.

longer care for him. Denise has been there for Kellie through a rare neurological condition, which has required numerous brain surgeries. Kellie describes her family in this way, “[w]e do what family does: look out for each other and love each other—no matter what.” (Gibson Aff. ¶¶ 5, 6, 8, 9; Boettcher Aff. ¶ 4.)

5. **John Michael Long and Richard Parker** of Bozeman have been in an intimate, committed relationship for 8 years. John Michael (who goes by Mike) and Rich are raising Mike’s son Kevin together, and Rich describes his long-term commitment to Mike as also being a long-term commitment to Kevin, making “a home for Kevin where he is comfortable, loved, challenged and taught to be a functional member of society.” (Long Aff. ¶ 4; Parker Aff. ¶ 5.)
6. **Nancy Owens and MJ Williams** of Basin have been in an intimate, committed relationship for 18 years and have found that their “lives together have blossomed and become a loving partnership.” They are proud grandparents to Nancy’s son’s four children—all of whom call them both “grandma.” Nancy and MJ “feel very lucky to have found each other and to be together.” (Williams Aff. ¶ 4; Owens Aff. ¶ 4.)

Just like intimate, committed, different-sex couples, Jan and Mary Anne, Mary and Stacey, Gary and Rick, Kellie and Denise, Mike and Rich, and Nancy and MJ have chosen each other as romantic partners, live together, support, care, and sacrifice for each other, and have created family units, some raising children or grandchildren together.² There is no meaningful difference between the quality of Plaintiffs’ relationships and the quality of the relationships of intimate, committed different-sex couples.

The similarity between intimate, committed same-sex couples and different-sex couples who marry, which is evident from Plaintiffs’ affidavits, is also confirmed by social science. As Plaintiffs’ expert witness Psychologist Dr. Leticia Anne Peplau attests, “[r]esearch clearly establishes that same-sex couples closely resemble heterosexual couples both in terms of the quality of their relationships and the processes that affect their relationships.” (Affidavit of Dr. Leticia Peplau (“Peplau Aff.”) ¶ 7.) Same-sex couples can and do form stable, committed relationships that closely resemble the relationships of different-sex, married couples, and on all the factors that are

² See Leslie Aff. ¶ 3; Haugland Aff. ¶ 3; Gibson Aff. ¶ 5; Boettcher Aff. ¶ 5; Owens Aff. ¶ 4, 6; Williams Aff. ¶ 4; Wagner Aff. ¶¶ 5, 6; Stallings Aff. ¶¶ 4, 6; Long Aff. ¶ 5; Parker Aff. ¶ 3; Guggenheim Aff. ¶¶ 5-7; Donaldson Aff. ¶ 4.

known to predict stability and instability in couple relationships, research finds similarity between same-sex and different-sex couples. (Peplau Aff. ¶¶ 12, 19, 22, 24.) Plaintiffs’ expert Behavioral and Developmental Pediatrician Dr. Suzanne Dixon further attests that “[c]hildren raised by same-sex parents are just as likely to be psychologically, emotionally, socially and sexually well adjusted as those raised by heterosexual parents.” (Affidavit of Dr. Suzanne Dixon (“Dixon Aff.”) ¶ 12.)

Plaintiff couples all desire the opportunity to enter into a legally recognized relationship, not only to affirm their commitment to their relationships but also for the protections that such a status would provide.³

II. GAY, LESBIAN, AND BISEXUAL MONTANANS HAVE HISTORICALLY SUFFERED DISCRIMINATION BASED ON THEIR SEXUAL ORIENTATION.

There is a long history in the United States, and in Montana, of discrimination against lesbian, gay, and bisexual people. As Plaintiffs’ expert Yale University Professor George Chauncey attests, gay and lesbian people historically have been and continue to be “subject to widespread and significant discrimination and hostility in the United States, including in the State of Montana.” (Affidavit of Prof. George Chauncey (“Chauncey Aff.”) ¶ 4; *see also Id.* ¶¶ 78-83.) “Through much of the twentieth century, in particular, gay men and lesbians suffered under the weight of medical theories that treated their desires as a disorder, penal laws that condemned their consensual adult sexual behavior as a crime, and federal and state civil statutes, regulations, and policies that discriminated against them on the basis of their sexual orientation.” (Chauncey Aff. ¶ 5.) Although there has been social and legal progress in recent decades, gay and lesbian people continue to suffer the effects of anti-gay bias—for example, in the form of lesbian and gay advocates’ ongoing inability to enact even basic protections against discrimination in employment, housing, and public accommodations in many states, including Montana, and at the federal level; in the demeaning

³ *See* Leslie Aff. ¶ 3; Haugland Aff. ¶ 3; Gibson Aff. ¶ 8; Boettcher Aff. ¶ 7; Owens Aff. ¶ 6; Williams Aff. ¶ 6; Wagner Aff. ¶ 5; Stallings Aff. ¶ 8; Long Aff. ¶ 6; Parker Aff. ¶ 4; Guggenheim Aff. ¶ 7; Donaldson Aff. ¶ 6.

stereotypes and denigrating rhetoric still used by highly regarded institutions and officials; and in the persistence of anti-gay violence. (Chauncey Aff. ¶¶ 79, 80, 82.)

That the effects of anti-gay bias continue in Montana is not in dispute. Defendant admits that lesbians and gay men are a minority in Montana, that they have been the subject of prejudice and adverse stereotyping, that they have experienced discriminatory treatment in Montana workplaces, and that they have been victimized by anti-gay motivated violence. (Defendant's Responses to Plaintiffs' First Discovery Requests ("D. RFA Resp.") Nos. 6-9, 11.) The continuing existence of anti-gay prejudice within the State and in the State Legislature is further demonstrated by State Senator Christine Kaufmann, who describes in her affidavit "the substantial anti-gay bias and discrimination that has prevented the passage of equality legislation" in Montana. (Affidavit of Christine Kaufmann ("Kaufmann Aff.") ¶ 1; *see also Id.*, ¶¶ 11-17.) The failed attempts to pass laws that protect same-sex couples and gay, lesbian, and bisexual people include, for example:

- The Legislature's rejection of several attempts to take off the books a state law criminalizing same-sex sodomy, despite the Montana Supreme Court's decade-plus-old ruling in *Gryczan v. Montana*, 283 Mont. 433, 942 P.2d 112 (1997), that the law is unconstitutional. (Kaufmann Aff. ¶ 12; Chauncey Aff. ¶ 82.) The campaigns around the efforts to repeal the law demonstrate that anti-gay sentiments remain a politically viable message in the state. In connection with one such effort, for example, an organization called Montana Citizens for Decency through Law, Inc. issued a bulletin stating that the organization was aware of "perverted material contained in obscene material . . . and are aware of the many times this material is used by pedophiles to do away with the natural inhibitions that children have, so that these people can act out their perversions on our children If we can just get the prosecutors and judges to lock these people up and throw away the key we would save many children from the continued onslaught." Even today, the Republican Party of Montana continues to run on a platform that includes overtly anti-gay positions, including: "We support the clear will of the people of Montana expressed by legislation to keep homosexual acts illegal." (Kaufmann Aff. ¶ 12; Chauncey Aff. ¶ 82.)
- The defeat in the Legislature of no fewer than ten bills that would have provided basic protections to gay, lesbian, and bisexual Montanans. Between 1993 and 2009, nine bills were introduced to add "sexual orientation" to the State's Human Rights Act, the omnibus law prohibiting discrimination in employment, housing, public

accommodation, and government services, and one bill was introduced that would just have prohibited employment discrimination. All ten bills were defeated; indeed, nine of them failed to pass out of committee. (Kaufmann Aff. ¶ 13; *see also id.*, Att. A ¶¶ 12-21.)

- The repeated failure of legislation since 1993 that would have included sexual orientation in the state's hate crime laws, despite the introduction of numerous bills and continuing acts of violence motivated by anti-gay bias. (Kaufmann Aff. ¶ 14.)

Senator Kaufmann also describes in detail the numerous horrific incidents of anti-gay violence that she was made aware of as the Executive Director of the Montana Human Rights Network and as a State Senator. (Kaufmann Aff. ¶¶ 18-24.) To list but a few:

- In 1995, following a PRIDE rally, a woman was surrounded by 12 men spitting on her and enduring screams of "Fucking Fags, Cocksuckers, Fucking queers, Aids Carriers and Fags go home," after which she was struck in the head by a bottle. One of her assailants later pleaded guilty. (Kaufmann Aff. ¶ 19.)
- In 2001, a Billings man was attacked outside a nightclub frequented by gay men by two men shouting "fucking faggot! You deserve this." The victim sustained severe head injuries and was unable to speak. Also in 2001, a student at Carroll College in Helena was severely beaten with the words "Die Fag" written across his body. (Kaufmann Aff. ¶ 21.)
- In 2007, a Missoula gay man was assaulted by two men he had invited into his apartment. Saying they "didn't like faggots," they bound his hands and ankles with rope, then punched and kicked him, shattering bones in his face, breaking two ribs, and puncturing a lung. (Kaufmann Aff. ¶ 24.)

Recently, lesbian and gay advocates have made modest political gains both in Montana and around the country. (*See* D. RFA Resp. No. 12; Chauncey Aff. ¶¶ 6, 13, 80.) As a minority group, however, gay and lesbian people continue to suffer extraordinary levels of discrimination, prejudice, and violence, and it is clear that they can achieve neither equality nor other legal protections through the political process. (Chauncey Aff. ¶¶ 4, 8; Kaufmann Aff. ¶ 17.)

III. THE STATE EXCLUDES SAME-SEX COUPLES FROM STATUTORY RELATIONSHIP AND FAMILY PROTECTIONS.

In line with the discrimination gay, lesbian, and bisexual Montanans have historically suffered, Plaintiffs and other intimate, committed same-sex couples and their families are treated very differently by the State of Montana from different-sex couples and their families.

Despite their undisputed similarity to different-sex couples who can and choose to marry, the State excludes same-sex couples from a legally recognized relationship and family status through which those couples and their families could access the statutory protections and obligations provided to different-sex, married couples. The Montana Constitution prohibits Plaintiffs and other same-sex couples from obtaining the legal status of marriage. Mont. Const. art. XIII, § 7. As discussed below, Plaintiffs fully recognize that the Marriage Amendment prevents them from seeking the legal status or designation of marriage, and they therefore are not seeking that status or designation. (Plaintiffs' Complaint for Injunctive and Declaratory Relief ("Compl.") ¶ 4.) The State of Montana does provide benefits to the same-sex domestic partners of state employees (D. RFA Resp. No. 14), and same-sex couples in Montana are able to enter into certain limited legal arrangements to protect their relationships (Defendant's Brief in Support of Motion to Dismiss ("D. MTD") p. 2). However, "[b]eyond these legal arrangements, Plaintiffs do not have access to spousal benefits available to married couples under Montana law." (D. MTD p. 2.)

Time and time again, the State has withheld from Plaintiffs a legally recognized relationship and family status that would allow them access to the protections and obligations currently provided only to different-sex couples who marry. (Kaufmann Aff. ¶¶ 11, 15 (describing the repeated failure of the State Legislature to enact any comprehensive relationship recognition and family protection scheme).) This is in contrast to the number of other states that do provide or have provided same-sex couples with a legally-recognized relationship and family protection status that provides those couples and their families with all of the statutory protections and obligations provided to married,

different-sex couples. *See* California, Cal. Fam. Code § 297 (registered domestic partnerships); Illinois, SB1716 (pending signature from Governor) (civil unions); Nevada, NEV. REV. STAT. § 122A.100 (registered domestic partnerships); New Jersey, N.J. STAT. ANN. § 37:1-30 (civil unions); Oregon, OR. REV. STAT. §§ 106.300-106.340 (registered domestic partnerships); and Washington, WASH. REV. CODE § 26.60.030 (registered domestic partnerships).⁴

IV. SAME-SEX COUPLES AND THEIR FAMILIES ARE HARMED BY THEIR EXCLUSION FROM STATUTORY RELATIONSHIP AND FAMILY PROTECTIONS.

Plaintiffs and all other committed, intimate same-sex couples in Montana suffer economic, emotional, and other tangible harms by the State's exclusion of them and their families from the statutory relationship and family protections and obligations currently made available exclusively to different-sex couples through the legal status of marriage.

The State's exclusion denies same-sex couples and their families vital economic and legal protections. Montana's Code automatically provides spouses with a wide range of protections and obligations that touch almost every aspect of their relationship (D. RFA Resp. No. 1)—for example, spouses are provided with certain rights in case of their spouse's intestacy or death or injury; a financial safety net under the tax code; decision-making authority in health care and end-of-life situations; and certain obligations on dissolution of the relationship.⁵ Both same-sex couples and

⁴ Prior to allowing same-sex couples to marry, three additional states and the District of Columbia provided same-sex couples and their families with the statutory protections and obligations provided to different-sex married couples: Connecticut, CONN. GEN. STAT. § 46b-38aa (repealed as of Oct. 1, 2010) (civil unions); New Hampshire, N.H. REV. STAT. ANN. § 457-A (eff. until Jan. 1, 2011) (civil unions); Vermont, VT STAT. ANN. tit. 15, § 1201 (civil unions); and District of Columbia, D.C. Law 16-79 (registered domestic partners).

⁵ **Intestacy, Death or Injury:** *See, e.g.,* §§ 2-18-601, 19-2-802, 19-17-405, 19-18-605, 19-20-717, 27-1-513, 33-20-115, 33-22-306, 33-22-307, 37-19-904, 39-51-2205, 39-71-723, 50-15-121, 50-16-522, 50-16-804, 61-3-222, Title 72, Chapter 2, 72-3-502, 72-5-312, 72-5-410, 72-6-215, 72-17-214, MCA; **Tax-related:** *See, e.g.,* §§ 15-7-307, 15-30-2110, 15-30-2114, 15-30-2366, MCA; **Healthcare/End-of-Life Decision-making:** *See, e.g.,* § 50-9-106, MCA. **Relationship dissolution:** *See generally* Title 40, Chapter 4, MCA.