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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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

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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

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[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.

their children are harmed because they cannot access these statutory protections and obligations. (Peplau Aff. ¶ 28; Dixon Aff. ¶ 30.)

Without the protections and obligations automatically provided to different-sex couples who marry, same-sex couples and their families can be treated like legal strangers, with direct emotional and economic consequences. For example, when Plaintiff Mary Leslie's former partner of eight years, Erika, died in an employment-related ski accident, Mary was treated as a legal stranger—she was denied access to Erika's remains; she was denied bereavement leave by her employer; she was unable to prevent Erika's parents from entering her home and removing many of Erika's possessions (Erika died without a will and the State's intestacy laws did not apply); and she was disqualified from receiving Workers' Compensation benefits or seeking damages against Mary's employer in a wrongful death suit, which Erika's parents instead filed. (Leslie Aff. ¶ 5.) Ultimately, Mary was forced to sell the home that she and Erika had purchased and lived in together because she could not access the financial safety net that would have been available to her if her relationship with Erika had been legally recognized. (Leslie Aff. ¶ 5.)

Under current Montana law, there is relatively little that same-sex couples can do to protect their relationships. Same-sex couples in Montana are to some extent able to make legal arrangements to protect their joint property and make medical decisions for one another, through health care powers of attorney, jointly held titles to property, and wills.[6] These arrangements are limited, however, and cannot of course alter the couples' ineligibility for state benefits.[7] It is also difficult, if not impossible, for couples to anticipate and plan for every contingency (Mary and

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[6] *See supra*, footnote 3.

[7] *See, e.g.*, § 2-18-601, MCA (bereavement leave for state employees limited to death or illness in employee's "immediate family" – generally interpreted as spouse and children) §§ 15-7-307, 15-30-2110, 15-30-2114, MCA (tax exemptions limited to married spouses); §§ 19-17-405, 19-18-605, MCA (pension distribution to surviving spouse upon death); §§ 39-51-2205, 39-71-723, MCA (distribution of accrued employment benefits to surviving spouse).

Erika, for example, had taken some precautions, but nonetheless were treated as complete legal strangers after Erika's death (Leslie Aff. ¶ 5)). Further, the arrangements are expensive (*see, e.g.*, Gibson Aff. ¶ 6) and therefore inaccessible to many couples, and even when made, they may not be respected in an emergency, when they are most needed. For example, a medical professional refused to disclose treatment information to Plaintiff Jan Donaldson when her partner, Mary Anne Guggenheim, was in the hospital, because he did not have the appropriate release in his possession. (Donaldson Aff. ¶ 7.)[8] All Plaintiffs worry that in times of greatest need, such as serious illness or death, their relationship to their life partner will not be recognized, and they will be denied even the most basic courtesies that are extended without question to any spouse.[9]

No less important than the denial of economic and legal protections, the State's exclusion of same-sex couples from a legally recognized relationship and family status conveys the message that the couple's private relationship is of lesser value and unworthy of legal recognition and support, thereby inflicting stigmatic or dignitary harm. Although marriage is the relationship status that our society most values and respects, legal recognition of same-sex relationships through statuses other than marriage provides some formal acknowledgment of the value and importance of these relationships to the State, which in turn reduces social stigma. (Peplau Aff. ¶¶ 27, 29.) By excluding same-sex couples from legal relationship recognition, the State perpetuates the stigma historically associated with gay and lesbian relationships. (Peplau Aff. ¶ 29; Chauncey Aff. ¶ 5.) History and social science demonstrate the many negative effects of this stigma on lesbian, gay, and bisexual people—social ostracism, discrimination, and even violence. (Peplau Aff. ¶ 29; Chauncey

[8] *See also* Leslie Aff. ¶¶ 4, 5; Haugland Aff. ¶¶ 6, 7; Gibson Aff. ¶ 9; Guggenheim Aff. ¶ 7; Donaldson Aff. ¶ 7.

[9] Leslie Aff. ¶ 6; Haugland Aff. ¶ 6; Gibson Aff. ¶ 9; Boettcher Aff. ¶ 7; Owens Aff. ¶¶ 7, 8; Williams Aff. ¶ 7; Wagner Aff. ¶ 6; Stallings Aff. ¶ 8; Long Aff. ¶ 7; Parker Aff. ¶¶ 4, 5; Guggenheim Aff. ¶ 7; Donaldson Aff. ¶ 6.

Aff. ¶¶ 16 et seq.) In addition, social stigma can lead to or exacerbate what is referred to in social science as "minority stress," which has harmful health effects. (Peplau Aff. ¶¶ 30-31.)

All of the Plaintiffs have suffered the stigmatic or dignitary harm that results from the State's exclusion of their relationships and families from legal recognition.[10] In constant, everyday ways, Plaintiffs and other intimate, committed same-sex couples in Montana suffer the indignities and insults associated with being in a relationship that is not legally recognized. Because of the stigma associated with being in a same-sex relationship, each couple had to face initially how they would present their relationship to society. They could choose to "hide" their relationship and thereby not suffer societal stigma but still suffer the dignitary harm of having to "hide," or they could choose to be "out," subjecting themselves and their families to many of the admitted forms of stigma and prejudice associated with being gay or lesbian in Montana. Plaintiff Jan Donaldson talks about being cautious not to "advertise" their relationship when she and Mary Anne worked in their medical practice. (Donaldson Aff. ¶ 5.) Mike Long describes the difficulty of his decision to "come out" in Glendive, Montana, and then later suffering the lengthy demeaning and hostile testimony targeted at same-sex couples during a recent Bozeman City Council meeting. (Long Aff. ¶ 4.) And Plaintiff Stacey Haugland describes how something as simple as applying for a family gym membership can turn into a lengthy, frustrating, and demeaning ordeal. (Haugland Aff. ¶ 5.) Legal recognition of Plaintiffs' relationships and those of other intimate, committed same-sex couples would not of course eliminate private prejudice, but the State would no longer be complicit in perpetuating such discriminatory treatment.

[10] Leslie Aff. ¶¶ 3-5; Haugland Aff. ¶¶ 3-7; Gibson Aff. ¶¶ 6-8; Boettcher Aff. ¶¶ 4-7; Owens Aff. ¶¶ 5, 9; Williams Aff. ¶¶ 5, 6; Wagner Aff. ¶¶ 6, 7; Stallings Aff. ¶¶ 5, 8; Long Aff. ¶¶ 4, 6, 7; Parker Aff. ¶¶ 3, 4; Guggenheim Aff. ¶ 7; Donaldson Aff. ¶¶ 5, 7.

ARGUMENT

I. MONTANA'S CONSTITUTIONAL AMENDMENT BANNING SAME-SEX COUPLES FROM MARRYING DOES NOT PRECLUDE PLAINTIFFS' CLAIMS.

Defendant's argument that the Marriage Amendment precludes Plaintiffs' constitutional claims is entirely without merit. According to Defendant, "the Montana Constitution as amended cannot now be construed to require the extension to same-sex couples 'the statutory protections and obligations that are offered by the State to [married] couples and their families through the legal status of marriage.'" (D. MTD p. 5 (quoting Compl. ¶ 4).) The Marriage Amendment, however, does not operate to constitutionally "immunize" the legislative acts that have provided protections and obligations to different-sex couples who marry. The Marriage Amendment defines only those couples who may carry the legal status or designation of being married; it says nothing about limiting or restricting relationship and family protections provided by the State Legislature. As such, the statutory protections and obligations afforded to certain couples, but not to others, must still meet constitutional muster under Article II of the Montana Constitution.

As an initial matter, there is no legal support for Defendant's attempt to conflate the status or designation of marriage with the protections and benefits sought by Plaintiffs here. Several state supreme courts have recently affirmed that marriage is a unique legal and social status that has significant meaning and importance outside the specific protections and obligations that the State has traditionally provided to married persons. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 401, 434 (Cal. 2008) (describing the "familiar and highly favored" and "historic and highly respected" designation of marriage in finding it unconstitutional under the California Constitution for the state to exclude same-sex couples from marriage, even where same-sex couples had access to all the same benefits and obligations as spouses under the state's domestic partner registry); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (finding it unconstitutional for the State of Connecticut to exclude same-sex couples from marriage even where those couples had access to all

the same benefits and obligations under the state's civil union law: "Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' As we have explained, the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not."); *see also* Peplau Aff. ¶ 27 (noting that "marriage is the relationship status that our society most values and respects").

It is also clear from its text that Montana's Marriage Amendment applies to the legal status or designation of marriage only, and not to the statutory protections and obligations that the State has given to married couples. The entirety of the Marriage Amendment provides that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Mont. Const., art. XIII, § 7. Notably, the Amendment does not constrain the State from providing the relief sought here; the Amendment is wholly silent on the statutory protections and obligations traditionally associated with marriage, separate and apart from the status or designation of marriage. This silence can only be construed as strategic: most of the state constitutional marriage amendments were enacted in the past decade, and over half of the twenty-nine total amendments not only exclude same-sex couples from marriage, but also exclude them from statutory protections and obligations traditionally associated with marriage. *See, e.g.*, Neb. Const. Art. I, § 29 ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").[11] If the proponents of Montana's

[11] *See also* Ala. Const. Art I, § 36.03(g) ("A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state . . . ."); Ark. Const. Amendment 83 ("Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas . . . ."); Ga. Const. Art. I, § IV, Para. I(b) ("No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."); Idaho Const. Art. III, § 28 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); Kan. Const. Art. 15, § 16 ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."); Ky. Const. § 233a ("A legal status identical or substantially similar to that

Marriage Amendment had wanted to prevent the State from recognizing alternative relationship statuses for same-sex couples or from providing same-sex couples with protections and obligations traditionally associated with marriage, then they could have included language to that effect in the Amendment, but they did not.

Of the state constitutional amendments that do not contain additional language about alternative relationship statuses, two have been subject to interpretation by state supreme courts, and, in both courts, the court concluded that the amendment applied only to the status or designation of marriage. *See Strauss v. Horton*, 207 P.3d 48, 77 (Cal. 2009); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 786 (Alaska 2005). In *Strauss*, the California Supreme Court explained that California's marriage amendment—which, like Montana's Marriage Amendment, just provided that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const. Art. I, § 7.5—applied solely to the designation of marriage and did not abrogate the remaining constitutional rights of same-sex couples:

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of marriage for unmarried individuals shall not be valid or recognized."); La. Const. Art. XII, § 15 ("No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); Mich. Const. Art. I, § 25 ("[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); Ohio Const. Art. XV, § 11 ("This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."); S.C. Const. Art. XVII, § 15 ("This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated."); S.D. Const. Art. XXI, § 9 ("The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."); Tex. Const. Art. I, § 32(b) ("(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."); Utah Const. Art. I, § 29 ("(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized or given the same or substantially equivalent legal effect."); Va. Const. Art. I, § 15-A ("This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage."); Wis. Const. Art. XIII, § 13 ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.").

> [A]lthough Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated "marriage," in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, the core set of basic *substantive* legal rights and attributes traditionally associated with marriage, including, most fundamentally, the opportunity of an individual to establish with the person—with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibility and entitled to the same respect and dignity accorded a union traditionally designated as marriage.

Strauss, 207 P.3d at 77 (internal quotations omitted) (emphasis in original); *see also Alaska Civil Liberties Union*, 122 P.3d at 786 ("The Marriage Amendment effectively precludes same-sex couples from marrying in Alaska, but it does not explicitly or implicitly prohibit public employers from offering to their employees' same-sex domestic partners all benefits that they offer to their employees' spouses. It does not address the topic of employment benefits at all.").

Under well-established rules of constitutional interpretation, this Court should similarly interpret the Marriage Amendment. The Amendment is unambiguous on its face; there is no constraint on the ability of the State or this Court to provide the relief sought by Plaintiffs. Where "constitutional language is unambiguous and speaks for itself, the court's obligation is to interpret the language from the provision alone without resorting to extrinsic methods of interpretation." *Montanans for Equal Application of Initiative Laws v. Montana ex rel. Johnson*, 2007 MT 75, ¶ 47, 336 Mont. 450, 154 P.3d 1202.

Moreover, by its own actions, the State has already construed the Marriage Amendment as excluding same-sex couples from the legal status of marriage only—not from the protections and obligations traditionally associated with marriage. Defendant recognizes that "the state of Montana is among those employers that do provide, in its proprietary capacity, domestic partner benefits under its sexual orientation anti-discrimination policy." (D. MTD p. 3; *see also* D. RFA Resp. No. 14.) If the Marriage Amendment prohibited the provision to same-sex couples of any protections traditionally accorded only to spouses (which it does not), then the State would not have provided those domestic partnership benefits. *See Alaska Civil Liberties Union*, 122 P.3d at 786-87

("Because the public employers' benefits programs could be amended to include unmarried same-sex domestic partners without offending the Marriage Amendment, that amendment does not foreclose plaintiffs' equal protection claims here. That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways.").

In sum, the Marriage Amendment prevents Plaintiffs and other intimate, committed same-sex couples from entering into the legal status of marriage in Montana, but it does not preclude them from constitutionally challenging the legislative acts granting protections and obligations to one set of couples who can marry, but denying them to another set who cannot.

II. THE STATE'S EXCLUSION OF PLAINTIFFS FROM STATUTORY RELATIONSHIP AND FAMILY PROTECTIONS DENIES PLAINTIFFS EQUAL PROTECTION UNDER THE LAW.

Although Plaintiffs are prevented from marrying in Montana, the Marriage Amendment, as discussed above, does not abrogate any of their other rights under Article II of the Montana Constitution, including the right to equal protection. Equal protection embodies "a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dept. of Corrections*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992. Plaintiff couples are in every relevant respect similarly situated to different-sex couples who wish to marry, but the State treats them differently—the State provides different-sex couples with access to a statutory structure of relationship and family protections through the legal status of marriage, but it excludes same-sex couples from comparable access, such as through registered domestic partnerships. Given the history of discrimination against gay and lesbian people and same-sex couples, this Court should apply strict scrutiny to the State's exclusion, but even on rational basis review, this Court should conclude that there is simply no reason for the State to exclude Plaintiffs and their families from the statutory structure.

A. Plaintiffs Are Similarly Situated to Different-Sex Couples Who Wish to Marry.

Each of the Plaintiff couples—intimate, committed, life partners—is similarly situated to different-sex couples who wish to marry. Each individual Plaintiff has chosen the one person with whom he or she wants to enter into a legally recognized relationship.[12] Like different-sex couples who marry, Plaintiff couples are fully committed to one another, share intimate and domestic life together, are intertwined financially, emotionally, and socially, and intend to spend the rest of their lives together.[13] Were it available in Montana, each Plaintiff couple would choose to enter into a legally recognized relationship—such as a registered domestic partnership.[14] As described above, Plaintiffs' experience of being similar to different-sex couples who wish to marry is supported by social science, set forth by Plaintiffs' experts. (Peplau Aff. ¶¶ 8, 26; Dixon Aff. ¶ 12.) As also described above, Plaintiff couples and their families are harmed in economic, emotional, and other ways by the State's withholding of statutory protections and obligations, as well as a legally recognized relationship status. (*See* Statement of Uncontroverted Facts IV, *supra*; Peplau Aff. ¶¶ 27-33; Dixon Aff. ¶ 30.)

Defendant attempts to recast Plaintiffs' equal protection claim as one between "married couples, who by definition are capable of receiving spousal benefits, and unmarried couples, who by definition are not capable of receiving spousal benefits." (D. MTD p. 9.) Defendant then reasons that "[m]arried couples are not similarly situated to unmarried couples of either the same or opposite sex." *Id.* This argument is flawed. Plaintiffs agree that the Marriage Amendment—by definition—prevents them and other same-sex couples from becoming "spouses" under Montana law. However, as discussed above, the Marriage Amendment does not require that state-provided protections and obligations be limited to spouses. Instead, the Montana Legislature made the

[12] *See generally* Pl. Affs. ¶¶ 3-4.

[13] *See supra*, footnote 2.

[14] *See supra*, footnote 3.

decision to limit the State's provision of certain statutory relationship and family protections and obligations to spouses, and it is this action that Plaintiffs challenge as unconstitutional. (Compl., Prayer for Relief.) The State may not avoid constitutional scrutiny of its exclusion of same-sex couples from state-provided protections by referencing the definition of "spouse," when it is the Legislature's decision to *limit benefits to spouses* that is being challenged.

The proper comparison for the equal protection analysis here is between different-sex couples who wish to marry and same-sex couples, such as Plaintiffs, who would enter into a legally recognized relationship status if it were available. *See Alaska Civil Liberties Union*, 122 P.3d at 787-88 (holding that where a constitutional marriage amendment prevented same-sex couples from marrying, the differential treatment at issue was between same-sex couples and different-sex couples—not married and unmarried couples). In both instances, individuals enter into similar types of relationships and life commitments. Yet in the case of different-sex couples, the State provides a legal status—marriage—through which the couple can access a wide range of protections, benefits, obligations, and responsibilities that serve to support their relationship and family. In the case of same-sex couples, and solely because of their sexual orientation, the State provides no recognized legal status, and it excludes these couples and their families from the wide range of protections, benefits, obligations, and responsibilities available to different-sex couples who marry, to the undeniable detriment of same-sex couples.

B. The State's Exclusion of Plaintiffs from Statutory Relationship and Family Protections Requires a Heightened Level of Scrutiny.

1. The State Discriminates Against Plaintiffs in the Exercise of Their Fundamental Rights, Requiring the Application of Strict Scrutiny.

As set forth in Argument Sections II and III, the rights of privacy, dignity, the pursuit of life's basic necessities, safety, health, and happiness, and due process are fundamental rights and liberty interests under Montana law. Because the State's exclusion of Plaintiffs from relationship and family recognition and protections infringes upon these fundamental rights, this Court should

apply strict scrutiny to the exclusion. *See, e.g., Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 17, 302 Mont. 518, 15 P.3d 877.

2. The State Discriminates on the Basis of Sexual Orientation in Excluding Plaintiffs from Statutory Relationship and Family Protections.

The State's exclusion of Plaintiffs from statutory relationship and family recognition and protections constitutes discrimination on the basis of sexual orientation. The State provides statutory recognition and protections to intimate, committed different-sex couples through the legal status of marriage. (D. RFA Resp. No. 1.) Plaintiffs, however, cannot marry due to their choice of a same-sex life partner. Mont. Const. art. XIII, § 7; § 40-1-103, MCA. And Plaintiffs' choice of a same-sex life partner is due to Plaintiffs' gay, lesbian, or bisexual sexual orientation, which Defendant agrees is part of an individual's identity. (D. RFA Resp. No. 5.) The State's exclusion of Plaintiffs from the statutory relationship and family recognition and protections it provides to different-sex couples who marry therefore constitutes discrimination against Plaintiffs on the basis of their sexual orientation.

3. Classifications Based on Sexual Orientation Are Inherently Suspect, Requiring the Application of Strict Scrutiny.

Courts typically defer to the legislature in classifying between groups of people. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41, 105 S. Ct. 3249 (1985). Classifications based on certain factors, however, warrant a closer degree of judicial review. Factors such as race, alienage, national origin, sex or illegitimacy are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others," and such factors "frequently bear[] no relation to ability to perform or contribute to society." *Id.* "For these reasons and because such discrimination is unlikely to be soon rectified by legislative means," courts apply heightened levels of scrutiny. *Id.* Legislative classifications based on sexual

orientation exactly fit this bill—they are based on prejudice and antipathy, not the ability of gay, lesbian, and bisexual Montanans to contribute to society.

Under Montana equal protection jurisprudence, legislative discrimination against a minority group triggers a suspect class analysis where the group has been "subjected to 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." *Matter of C.H.*, 210 Mont. 184, 198, 683 P.2d 931 (1984) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278 (1973)). The Montana Supreme Court has often followed the U.S. Supreme Court in its recognition of suspect classes, but Montana courts are "not bound by [these] decisions . . . where independent state grounds exist for developing heightened and expanded rights under [Montana's] constitution." *City of Helena v. Brueggeman*, 2000 ML 3771, ¶ 12, 2000 Mont. Dist. LEXIS 1367.

Neither the United States Supreme Court nor the Montana Supreme Court has considered whether sexual orientation is a suspect classification. In the past, some courts declined to deem sexual orientation a suspect classification, but these courts did not analyze whether sexual orientation should be deemed a suspect classification and their decisions largely rested upon the now repudiated decision in *Bowers v. Hardwick* 478 U.S. 186, 106 S. Ct. 2841 (1986), which had approved the criminalization of sodomy between gay people. *See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (citing *Bowers* and then holding "because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes").

More recently, other courts have concluded that sexual orientation is a suspect classification. The California Supreme Court held that sexual orientation is a suspect classification under the state constitution in *In re Marriage Cases*, and it upheld that ruling despite the subsequent amendment of the California Constitution to exclude same-sex couples from marriage. *See In re Marriage Cases*,

183 P.3d at 442 (concluding that "sexual orientation is a characteristic (1) that bears no relation to a person's ability to perform or contribute to society, and (2) that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities. Lesbians and gay men . . . share a history of persecution comparable to that of Blacks and women; Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium, as homosexuals") (internal quotations and citations omitted); *Strauss*, 207 P.3d at 78; *see also Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447 (Or. App. 1998) ("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.").[15] A federal district court has also recently concluded that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).

That sexual orientation is a suspect classification is further supported by Justice Nelson's concurring opinion in *Snetsinger v. Montana University System*. In that case, Justice Nelson described the negative stereotypes of lesbians and gay men as Communists and security risks, the discrimination against lesbians and gay men in the workplace, the subjection of lesbians and gay men to violence and hate crimes, and the struggles of lesbians and gay men to retain custody of their children as evidence in support of his conclusion that "it is overwhelmingly clear that gays and lesbians have been historically subject to unequal treatment and invidious discrimination." *Snetsinger*, 2004 MT 390, ¶ 43, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring). In light of

[15] *See also Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (holding that sexual orientation discrimination warrants at least a heightened level of scrutiny as a quasi-suspect classification); *Kerrigan*, 957 A.2d at 432-33 (same).

this long history of anti-gay discrimination and prejudice, Justice Nelson concluded that "gays and lesbians constitute a suspect class under conventional equal protection analysis. Unequal treatment based on sexual orientation denies the person equal treatment, equal justice, and equal protection under the law." *Snetsinger*, ¶ 86 (Nelson, J., concurring).

Consistent with Justice Nelson's conclusion in *Snetsinger*, the undisputed evidence here compels a finding that sexual orientation constitutes a suspect classification in Montana. Indeed, Defendant admits that sexual orientation is irrelevant to the quality of a person's contributions to society. (D. RFA Resp. No. 5.) Defendant further admits that gay and lesbian people are a minority in Montana, and that they have suffered prejudice, adverse stereotyping, and discriminatory treatment, as well as anti-gay violence. (D. RFA Resp. Nos. 6-9, 11.) As described above, Plaintiffs' experts Professor George Chauncey and State Senator Christine Kaufmann detail the extensive history of discrimination against lesbian and gay people in the United States and in the State of Montana. (Chauncey Aff. ¶¶ 16 et seq.; Kaufmann Aff. ¶¶ 1, 2.) They also describe the great difficulty that lesbian and gay people and their allies have had and continue to have in pursuing any sort of statutory protection against discrimination through the political process. (Chauncey Aff. ¶¶ 4, 8; Kaufmann Aff. ¶¶ 11-17.) For example, although there have been numerous efforts by gay and lesbian advocates, Montana has yet to enact any state statute protecting gay and lesbian people from discrimination or even from hate crimes. (Chauncey Aff. ¶ 80, 82; Kaufmann Aff. ¶ 13, 14, 17.)

For all these reasons, there is no genuine issue of material fact as to whether sexual orientation should be deemed a suspect classification for the purpose of an equal protection analysis under the Montana Constitution. Because the exclusion of Plaintiffs from relationship and family recognition and protections constitutes discrimination on the basis of Plaintiffs' sexual orientation, the Court should apply strict scrutiny. *See, e.g., Powell*, ¶ 17.

C. The State's Exclusion of Same-Sex Couples from Statutory Relationship and Family Protections Cannot Survive Heightened Scrutiny.

The State cannot come close to demonstrating that it has a compelling reason for excluding same-sex couples from statutory relationship and family recognition and protections, or that such interest is narrowly tailored. Under the application of strict scrutiny, the State must show that "the law is narrowly tailored to serve a compelling government interest." *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019. "Necessarily, *demonstrating* a compelling interest entails something more than simply saying it is so." *Wadsworth v. State*, 275 Mont. 287, 303, 911 P.2d 1165 (1996) (emphasis in original). The only interest put forth by Defendant for the State's exclusion of same-sex couples and their families from statutory relationship and family protections, however, is that the State "reasonably could conclude that an option short of marriage would detract from or dilute the uniqueness of the marital bond." (D. MTD pp. 10-11.) Defendant cites no support for this interest, nor could it, as it would be impossible for the State reasonably to conclude that an option short of marriage would detract from or dilute the uniqueness of the marital bond.[16]

As described in Argument Section I above, the designation or status of marriage is unique and special, wholly separate and apart from the protections and obligations to which it provides access. This notion can perhaps best be captured by questioning whether married, different-sex couples would exchange their marriage for another form of relationship recognition, such as a registered domestic partnership. For most couples, the answer is clearly, "No." It is also this uniqueness of marriage as compared to other forms of relationship recognition that has led several state supreme courts to find equal protection violations where same-sex couples have access to all the protections and obligations traditionally associated with marriage, yet are denied the legal status

[16] Defendant makes reference to *Snetsinger*, 2004 MT 390, in which the Montana Supreme Court observed that the "Common Law Spouse" affidavit appeared to dilute or detract from marriage. (D. MTD p.11 (citing *Snetsinger*, ¶ 24).) However, in that case, the Court noted that the use of the term "Common Law" appeared to suggest that signing the affidavit was equivalent to entering into a marriage. It was this flawed equivalency that the Court found to detract from marriage.

or designation of marriage. *See, e.g., In re Marriage Cases*, 183 P.3d at 434; *Kerrigan*, 957 A.2d at 418. Social science research too affirms the paramount social recognition, respect, and value of the status or designation of marriage over other forms of relationship recognition. (Peplau Aff. ¶ 27.)

Where there is little if any likelihood that another form of legally recognized relationship and family status—such as registered domestic partnerships—would be confused with marriage, the State cannot have a "compelling interest" in preventing such a status on the grounds that it would "detract from" or "dilute" the legal status of marriage. Indeed, if preventing the recognition of any other relationship or family status were a compelling state interest—or a state interest of any kind, then the State presumably would not extend any benefits traditionally associated with marriage to same-sex couples. Yet the State does extend employment benefits to the same-sex partners of public employees. (Def.'s RFA Resp. No. 14.)

D. The State's Exclusion of Same-Sex Couples from Statutory Relationship and Family Protections Cannot Survive Rational Basis Review.

Not only does Defendant's stated rationale not constitute a compelling state interest, but it must fail even the lowest level of constitutional review. Rational basis review "requires the government to show that the objective of the statute was legitimate and bears a rational relationship to the classification used by the Legislature." *Powell*, ¶ 19. "A classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws." *Reesor*, ¶ 15. Here, the State cannot demonstrate that there is any rational connection between the legislative classification at issue—the exclusion of same-sex couples and their families from relationship and family status and protections based solely on those couples' sexual orientation—and any legitimate state interest.

Montana's exclusion of same-sex couples from a recognized relationship and family status and related protections and obligations is an historical artifact, grounded in prejudice and antipathy toward gay, lesbian, and bisexual Montanans, as opposed to any actual difference between intimate,

committed same-sex couples and married, different-sex couples. (*See* Kaufmann Aff. Att. A ¶¶ 37-44 (describing statements made by state legislators in defeating measures that would have provided same-sex couples and their families with relationship recognition); *see also* Statement of Uncontroverted Facts, Section I (same-sex couples are in all relevant respects similar to different-sex couples who wish to marry).) Disadvantaging one group of its citizens simply for the sake of disadvantaging them is simply not a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 635-36, 116 S. Ct. 1620 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative intent but to make them unequal to everyone else. This Colorado cannot do."); *see also Id.* at 633 (there must be some "independent" government objective that the differential treatment serves in order to "ensure that classifications are not drawn for the [improper] purpose of [simply] disadvantaging the group burdened by the law"); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.") (emphasis in original).

III. THE STATE'S EXCLUSION OF SAME-SEX COUPLES FROM STATUTORY RELATIONSHIP AND FAMILY PROTECTIONS UNCONSTITUTIONALLY BURDENS PLAINTIFFS' RIGHTS TO PRIVACY, DIGNITY, AND THE PURSUIT OF LIFE'S BASIC NECESSITIES, SAFETY, HEALTH, AND HAPPINESS.

Montana's constitutional right of privacy is one of the most stringent privacy protections in the United States, affording significantly broader protections than the U.S. Constitution. *See Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364; *Gryczan*, 283 Mont. at 448. The provision, located in Article II, Section 10, of Montana's Constitution, reads: "The 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." Mont. Const. art. II, § 10. The explicit inclusion of this right in Montana's Declaration of Rights has led the Montana Supreme Court to recognize privacy

as a fundamental right, requiring any legislation that impinges that right to satisfy strict scrutiny. *Armstrong*, ¶ 34; *Gryczan*, 283 Mont. at 450-51.

The intent behind Montana's broad right of privacy was to protect "citizens from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 48. This protection is further enhanced by the fundamental rights of dignity and the pursuit of life's basic necessities, safety, health, and happiness, also included in Montana's Declaration of Rights. *Armstrong*, ¶ 72. Together, these rights provide cohesive and comprehensive protection of a person's most intimate decisions and activities. Montana's statutory scheme that recognizes and provides protections and obligations to different-sex couples who marry, while withholding those same protections and obligations from same-sex couples solely due to the fact that they are in intimate relationship with same-sex partners, interferes with Plaintiffs' personal autonomy and thus constitutes an unconstitutional burden on Plaintiffs' rights of privacy, dignity, and pursuit of life's basic necessities, safety, health, and happiness.

A. The Rights to Privacy, Dignity, and Pursuit of Life's Basic Necessities, Safety, Health, and Happiness Protect Intimate Association with a Same-Sex Partner.

Montana courts have typically applied one of two tests to determine whether an activity is protected by the right of privacy. The first test, primarily used in informational privacy analysis but applied in *Gryczan*, is derived from *Katz v. United States*, 389 U.S. 347 (1967), and requires courts to evaluate whether the individual had an actual expectation of privacy with respect to the conduct at issue and whether the expectation is one that society is willing to recognize as reasonable. *See State v. Nelson*, 283 Mont. 231, 239, 941 P.2d 441 (1997). The second test, focused on personal autonomy privacy, is derived from *Palko v. Connecticut*, 302 U.S. 319 (1937), and evaluates whether a statute or statutory scheme violates those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *See Gryczan*, 283 Mont. at 449-50.

Under either of these tests, an individual's intimate association with a same-sex life partner, and intimate relationships in general, are protected by Montana's broad right of privacy.

Montana courts have already found that individuals have an actual expectation of privacy under the *Katz* test with respect to certain deeply personal decisions and activities. Thus, decisions about whom an individual has an intimate relationship with have been characterized by this Court as "one of the most private areas of a person's life" and thus, well within an actual expectation of privacy. *See Gryczan*, 283 Mont. at 449-50 (citing *Gryczan v. State*, 1996 Mont. Dist. LEXIS 746, at * 9 (1st Dist. Feb. 16, 1996)). Personal medical decisions are also made with an actual expectation of privacy. *See Armstrong*, ¶ 53 ("Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health."); *see also Nelson*, 283 Mont. at 242. Courts have further deemed these expectations "reasonable," even if they involve decisions and activities that do not meet with general societal approval. In *Gryczan*, the Montana Supreme Court acknowledged that "society may not approve of the sexual practices of homosexuals," but the Court nonetheless found that society "recognize[s] that all adults, regardless of gender or marital state, at least have a reasonable expectation that their sexual activities will remain personal and private." *Gryczan*, 283 Mont. at 450.

The personal autonomy component of the right of privacy is even broader than that identified by the *Katz* test, explicitly protecting citizens from "legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 33; *see also Gryczan v. State*, 1996 Mont. Dist. LEXIS 746, at *10 ("Privacy also includes freedom to choose as to intimate personal matters."). The right to personal autonomy "prohibits the government from dictating, approving or condemning values, beliefs and matters ultimately involving individual conscience, where opinions about the nature of such values and beliefs are seriously divided." *Armstrong*, ¶ 68. The scope of the personal autonomy component is "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*, ¶ 38.

As with the actual and reasonable expectation of privacy, Montana courts have already held that private, consensual, same-sex sexual activity, as well as personal medical decisions, is protected by the personal autonomy component of the privacy right. *See Gryczan*, 283 Mont. at 450; *Armstrong*, ¶ 52. In addition, federal courts have long held that deeply personal decisions between couples, including but not limited to decisions involving marriage, contraception, and child-bearing, are protected under the constitutional rubric of privacy. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (striking down a law restricting the use of contraceptives by married couples as "repulsive to the notions of privacy surrounding the marriage relationship"); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) (extending *Griswold* to unmarried couples, finding the right of privacy to protect the *individual*, married or single, from unwarranted governmental intrusion into matters that fundamentally affect a person); *see also Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973). In fact, the recognition of a privacy "interest in independence in making certain kinds of important [personal] decisions" in *Griswold* was favorably referenced and relied upon by delegates to Montana's 1972 Constitutional Convention when drafting Montana's explicit constitutional right of privacy. *See Armstrong*, ¶¶ 46, 48 (internal citations removed). This concept of personal autonomy clearly extends to same-sex couples, who are no different in the way they structure their relationships or conduct themselves within their relationships than different-sex couples who marry. (Peplau Aff. ¶¶ 7,18-26.)

Inasmuch as the Declaration of Rights is "not simply a cook book of disconnected and discrete rules" but rather "a cohesive set of principles" that overlap and provide redundant rights and guarantees, *Armstrong*, ¶ 71, the protection provided by the right of privacy is materially enhanced by the state constitution's guarantee of the rights of dignity, and the pursuit of life's basic necessities, safety, health, and happiness. Mont. Const. art. II, §§ 4, 3; *see also Snetsinger*, ¶ 64

(Nelson, J., concurring) (observing that the human dignity clause reinforces other values, including privacy); *Smith v. State*, 2010 Mont. Dist. LEXIS 12, at *12 (Jan. 4, 2010) (noting that the dignity clause reinforces and enhances other values in the constitution). The *Armstrong* Court explained that the right of dignity protects personal autonomy interests, as it "demands 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 . . . [and answer] to their own consciences and convictions." *Armstrong*, ¶ 72. The right to pursue life's basic necessities, safety, health, and happiness also includes the right "to make personal judgments affecting one's own health and bodily integrity without government interference." *Id.*

Choosing a romantic partner, entering into a long-term, committed, intimate relationship with that person, and potentially starting and raising a family with that person all fall into the core area of personal, private, and intimate life that is protected not only by Montana's constitutional privacy guarantee, but also by the correlative rights to dignity and the pursuit of life's basic necessities, safety, health, and happiness. Even more, perhaps, than decisions regarding sexual partners and activities and personal medical decisions, decisions about whom we fall in love with and how we structure our lives with that person are some of the most personal and important decisions a person can make. *See Strauss*, 207 P.3d at 74 (upholding the constitutionality of California's constitutional ban on marriage for same-sex couples under the state constitution, but affirming the constitutional right of same-sex couples to a legally recognized relationship and family protection status in part because one aspect of that state's right of privacy is "the constitutional right to establish an officially recognized family").[17] These decisions are without

[17] California case law is especially relevant to analysis involving Montana's right of privacy, as both states added constitutional privacy provisions in the same year and drafters in both states expressed the desire to elevate the judicially recognized right of privacy established in *Griswold* to explicit constitutional status. *See In re Marriage Cases*, 183 P.3d at 420; *Armstrong*, ¶ 46.

question central to Plaintiffs' lives, and to their dignity, health and happiness, and are no less meaningful to Plaintiffs than to different-sex couples.[18]

Even if this Court determines that the right to choose one's life partner and establish a family does not explicitly fall within the Montana Constitution's rights to privacy, dignity, and the pursuit of life's basic necessities, safety, health, and happiness, this Court should nonetheless recognize the right as fundamental, as it is a right without which the rights of privacy, dignity, and the pursuit of life's basic necessities, safety, health, and happiness would have little meaning. *See Butte Comm. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309 (1986) (observing that a right may be "fundamental" if it is a right "without which other constitutionally guaranteed rights would have little meaning") (internal quotation omitted). In *Wadsworth*, the Montana Supreme Court recognized the right to an opportunity to pursue employment as fundamental because "it is primarily through work and employment that one exercises and enjoys" the fundamental right to pursue life's basic necessities. *Wadsworth,* 275 Mont. at 299. Here, as in *Wadsworth*, the enjoyment of the rights of privacy, dignity, and happiness require that one has the right to make deeply personal decisions, including the choice of a life partner or the establishment of a family of one's own choosing.

In sum, when an individual chooses a same-sex life partner and enters into a committed, intimate relationship with that person, those decisions and later decisions and activity within the relationship are all protected by the Montana Constitution's fundamental rights to privacy, dignity, and pursuit of life's basic necessities, safety, health, and happiness.

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

B. Plaintiffs' Privacy Rights Are Unconstitutionally Burdened by Excluding Same-Sex Couples from Legally Recognized Relationship and Family Protections.

The State's exclusion of Plaintiffs and other same-sex couples from legally recognized relationship and family status and protections unconstitutionally burdens Plaintiffs' rights to privacy, dignity, and the pursuit of life's basic necessities, safety, health, and happiness. As discussed in Statement of Uncontroverted Facts Section IV, this exclusion results in direct economic, emotional, and stigmatic or dignitary harm. In addition, the State's decision to provide intimate, committed different-sex couples with a legally recognized relationship and family status and protections (through the legal status of marriage), and to withhold similar status and protections from Plaintiffs based solely upon their constitutionally protected choice of a same-sex life partner burdens Plaintiffs' fundamental rights. *See Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795 (1st Dist. May 22, 1995).

In *Jeannette R.*, this Court evaluated a program in which the State provided benefits to indigent women who carried their pregnancies to term, but withheld benefits to indigent women who decided to obtain an abortion. *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *1-2. Reasoning that the State would not be able to pass a law banning a woman from receiving an abortion, as this choice is protected by the right of privacy in the Montana Constitution, this Court cited *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387, 402 (Mass. 1981) for the idea that the "government is not free to achieve with carrots what [it] is forbidden to achieve with sticks" and that "[b]y injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, this restriction deprives the indigent woman of her freedom to choose abortion over maternity." *Jeannette R.*, 1995 Mont. Dist. LEXIS 795 at *19-20, *22. "[A]lthough the state is under no obligation to fund an individual's choice to a right of privacy, once it has entered an area that is covered by the zone of privacy, the state must be neutral." *Id.* at *24-25; *see also Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d

779 (Cal. 1981). This Court then concluded that it was a violation of Montana's right of privacy for the State to deny benefits based on a woman exercising her right to receive an abortion. *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *4.

The same reasoning applies in this case. The State cannot selectively give protections to one set of couples who have "approved" relationships, while denying those same protections to another set of couples whose constitutionally protected intimate relationships do not have the badge of such "approval" without satisfying strict scrutiny. As previously argued, the collective rights of privacy, dignity, and the pursuit of life's basic necessities, safety, health, and happiness prevent the State from passing a law restricting a person from having a committed, intimate relationship with a same-sex partner. By the same token, the State cannot burden this constitutionally protected decision through the coercive use of selectively provided statutory protections. Simply stated, "when the State of Montana begins conferring benefits in a constitutionally protected area, it must do so in an even handed and neutral manner." *Id.* at *28-29.

Because the State has not conferred relationship and family status and protections in an even-handed and neutral manner, it has unconstitutionally burdened Plaintiffs' rights to privacy, dignity, and pursuit of life's basic necessities, safety, health, and happiness, and must demonstrate a compelling state interest. As previously discussed, the State has failed to meet this burden.[19]

[19] The Ninth Circuit has applied heightened scrutiny in a federal case involving a similar claim that state action burdened an individual's right to choose a same-sex life partner. In *Witt v. Department of the Air Force*, an Air Force reservist claimed that her suspension from the Air Force, solely for being in a loving, committed relationship with a woman, violated her constitutional rights of liberty as established in *Griswold* and further developed in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). *See Witt v. Dept. of Air Force*, 527 F.3d 806, 809, 813 (9th Cir. 2008). The Ninth Circuit agreed, holding that "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Id.* at 819.

IV. THE STATE'S EXCLUSION OF SAME-SEX COUPLES FROM STATUTORY RELATIONSHIP AND FAMILY PROTECTIONS IS ARBITRARY AND THEREFORE VIOLATES PLAINTIFFS' DUE PROCESS RIGHTS.

There is no legitimate reason for the State to exclude same-sex couples from relationship and family status and protections, and therefore the exclusion violates Plaintiffs' due process rights. Article II, Section 17, of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." This guarantee contains both substantive and procedural components. *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517. The substantive component of the Montana Constitution provides more protection than the Fourteenth Amendment of the United States Constitution. *See Plumb v. Fourth Judicial Dist. Court, Missoula County*, 279 Mont. 363, 379-80, 927 P.2d 1011 (1996) (holding that a statute violated the Montana Constitution "independent and separate from" an analysis under the Fourteenth Amendment) (superceded by statute, ¶ 27-1-703, MCA, as stated in *Messick v. Patrol Helicopter*, 2007 U.S. Dist. LEXIS 63839 (D. Mont. Aug. 29, 2007)). And the "essence" of substantive due process "is that the State cannot use its power to take unreasonable, arbitrary or capricious action against an individual." *Newville v. State Dept. of Family Serv.*, 267 Mont. 237, 249-50, 883 P.2d 793 (1994); *see also Egdorf*, ¶ 19 (Substantive due process "bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action.").

As set forth in Argument Section II.C above, there is no legitimate reason for the State to exclude same-sex couples and their families from relationship and family status and protections. The only defense Defendant raises in support of the State's exclusion on Plaintiffs' due process claim is the Marriage Amendment (D. MTD p. 14), which, as discussed in Argument Section I above, does not justify drawing a distinction between same-sex couples and different-sex couples in the provision of statutory relationship and family protections.

V. PLAINTIFFS ARE ENTITLED TO THE RELIEF THEY SEEK.

Plaintiffs are entitled to the relief they seek. Here, Plaintiffs seek as relief (1) declarations that the State's exclusion of same-sex couples from relationship and family status and protections violates Plaintiffs' state constitutional rights to equal protection, privacy, dignity, the pursuit of life's basic necessities, safety, health, and happiness, and due process, and (2) orders enjoining the State from continuing to exclude Plaintiffs from relationship and family status and protections and requiring the State to offer Plaintiffs and their families "a legal status and statutory structure that confers the protections and obligations the State provides to different-sex couples who marry." (Compl., Prayer for Relief.)

Defendant argues throughout its Motion to Dismiss that Plaintiffs are in a variety of ways not entitled to the relief they seek. In addition to complaining generally that Plaintiffs' claims are "novel" (D. MTD p. 5), Defendant contends that Plaintiffs fail to adequately specify the statutes that they allege are unconstitutional (D. MTD p. 4), that "[t]here is no 'state action' that Plaintiffs ask this Court to invalidate or uphold in the exercise of its judicial power under the Montana Constitution" (D. MTD p. 6), and that this Court cannot grant the relief requested because Plaintiffs are asking the Court to enact laws, which is a power vested with the Legislature (D. MTD pp. 7-8). These contentions are wrong as a matter of law.

First, Plaintiffs challenge as unconstitutional the State's "continuing to deny Plaintiffs and their families the ability to obtain the numerous relationship and family protections and obligations available to different-sex couples and their families through marriage." (Compl. ¶¶ 8-9.) In other words, Plaintiffs challenge as unconstitutional as applied to them *all* state statutes that provide benefits or impose obligations based on the legal status of marriage. Plaintiffs have not challenged individual statutes conferring spousal benefits because the essential harm to Plaintiffs is their categorical exclusion from the statutory scheme in which the legal status of marriage (a status

Plaintiffs cannot access) is the key to unlocking a wide range of statutory benefits, protections, obligations, and responsibilities. (D. RFA Resp. No. 1.)

Second, contrary to Defendant's argument, the State's exclusion of Plaintiffs from relationship and family status and protections *is* state action. It is well-established that legislative acts, such as the establishment of a statutory scheme, constitute state action under Montana's equal protection and fundamental rights jurisprudence. *See Zempel v. Uninsured Emp'rs' Fund*, 282 Mont. 424, 428-29, 938 P.2d 658 (1997) (observing that equal protection challenges involve the review of state action or legislation); *Armstrong*, ¶ 35 (noting that Montana's right of privacy was intended to protect citizens from "legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private").

Indeed, statutes that restrict access to benefits to certain classes of people are regularly challenged under Montana's equal protection clause. For example, in *Butte Community Union*, statutory provisions that excluded or reduced welfare benefits to certain people based on age and parental status were found to violate Montana's equal protection clause. *Butte Community Union*, 219 Mont. at 434-35; *see also Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *27 (statutory provisions that excluded women from Medicaid benefits based solely on the women's choice to exercise their constitutional right to obtain an abortion violated equal protection); *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43-44, 744 P.2d 895 (1987) (Workers' Compensation law that excluded from coverage members of an employer's family dwelling in the employer's household violated equal protection); *In re Outfitter's License of Godfrey*, 193 Mont. 304, 309-10, 631 P.2d 1265 (1981) (statute restricting access to residents, and thus excluding non-residents, from an outfitter's license and its associated privileges violated equal protection). The state action at issue here is no different: the State has created a statutory scheme in which it restricts relationship and family protections on the basis of the legal status of marriage, thereby categorically excluding same-sex couples and their families from those relationship and family protections.

Third, Plaintiffs are not asking this Court to invade the province of the Legislature. Plaintiffs simply request that this Court find that Plaintiffs' constitutional rights are being violated, and to direct the State Legislature to amend the laws in order to remedy those violations. The Montana Constitution provides the courts with "the exclusive power to construe and interpret legislative Acts, as well as provisions of the Constitution." *State v. Guillaume*, 1999 MT 29, ¶ 14, 293 Mont. 224, 975 P.2d 312. Courts therefore have the power, and the duty, to determine whether state law conforms to constitutional guarantees. "Constitutional guarantees are not mere vessels to be left empty or filled at the whim of the legislative branch." *Id.*

For example, in *Columbia Falls Elementary School District No. 6 v. State*, 2005 MT 69, ¶ 31, 326 Mont. 304, 109 P.3d 257, the Court directed the Legislature to revise the laws regarding education. Because the right to education in Montana is a constitutional right, the Court had the authority to determine whether the statutory scheme regarding education satisfied the constitutional guarantees. "As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right." *Columbia Falls*, ¶ 19. Similarly, the courts are the final guardians of the constitutional rights to equal protection, privacy, dignity, the pursuit of life's basic necessities, safety, health, and happiness, and due process.

The courts have the power to ensure that the statutory structure enacted by the Legislature that confers benefits and protections on couples complies with the requirements of the Montana Constitution. Because the statutory structure does not, this Court has the authority to direct the Legislature to create a legal status or statutory scheme that does, just as courts in other states have done. *See Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006) (ordering that "the state must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples"; the New Jersey Legislature subsequently enacted civil union scheme for same-sex couples, reserving designation or status of marriage to different-sex couples); *see also Baker v.*

State, 744 A.2d 864 (Vt. 1999) (upholding constitutionality of law excluding same-sex couples from marriage, but nonetheless finding "a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples"; and the Vermont legislature subsequently enacted civil union scheme for same-sex couples, reserving designation or status of marriage to different-sex couples). There is no reason why this Court may not provide the same relief to Plaintiffs as the relief granted by the courts in New Jersey and Vermont.

CONCLUSION

The Marriage Amendment does not "immunize" legislative acts from constitutional scrutiny, and does not abrogate the Plaintiffs' constitutional rights under Article II of the Montana Constitution. The statutes that give protections and obligations to one set of couples, but deny such protections to another set of similarly situated couples, violate the fundamental fairness and teachings of equal protection and privacy under the Montana Constitution. For these and all of the above reasons, this Court should deny Defendant's Motion to Dismiss and grant Plaintiffs' Motion for Summary Judgment.

DATED this 10th day of December, 2010.

GOETZ, GALLIK & BALDWIN, P.C.

By: _____

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The undersigned hereby certifies that the foregoing document was served on the following counsel of record, by the means designated below, this 10th day of December, 2010.

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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Defendant the State of Montana responds to Plaintiff's First Discovery Requests, served July 22, 2010. See Mont. R. Civ. P. 33, 34, & 36.

RESPONSES

REQUEST FOR ADMISSION NO. 1: Intimate, committed, different-sex couples receive an array of statutory protections, benefits, and obligations in the State of Montana through marriage.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 2: Intimate, committed couples, regardless of whether they are different-sex or same-sex, may have to deal with a partner's illness or death.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 3: Intimate, committed couples, regardless of whether they are different-sex or same-sex, may separate.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 4: Sexual orientation is a part of an individual's identity.

RESPONSE: Defining "identity" to mean "the distinguishing character or personality of an individual," Webster's Ninth New Collegiate Dictionary at 597 (1991), admit.

REQUEST FOR ADMISSION NO. 5: Sexual orientation is irrelevant to the quality of a person's contributions to society.

RESPONSE: The State objects to Request for Admission No. 5 as not reasonably calculated to lead to the discovery of admissible evidence. Subject to this objection, admit.

REQUEST FOR ADMISSION NO. 6: Lesbians and gay men have been the subject of prejudice in Montana.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 7: Lesbians and gay men have been the subject of adverse stereotyping in Montana.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 8: Lesbians and gay men have been victimized by anti-gay motivated violence in Montana.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 9: Lesbians and gay men have experienced discriminatory treatment in Montana workplaces due to their sexual orientation.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 10: Discrimination against lesbians and gay men reflects prejudice rather than rationality.

RESPONSE: The State objects to Request for Admission No. 10 as vague and it can neither be admitted nor denied as phrased. There may be other motivations for discrimination against lesbians and gay men that can be categorized as something other than "prejudice" or "rationality." Subject to this objection, the State admits that some discrimination against lesbians and gay men reflects prejudice. The State has made reasonable inquiry and the information known or readily obtainable by the State is insufficient to enable the State to admit or deny all the reasons persons may discriminate against lesbians and gay men.

REQUEST FOR ADMISSION NO. 11: Lesbians and gay men constitute a minority of the voting population in Montana.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 12: Lesbians and gay men have been unsuccessful in their attempts to obtain protections from sexual orientation discrimination through the political branches of Montana's state government.

RESPONSE: Deny. See, e.g., Mont. Code Ann. § 33-20-313 (prohibiting discrimination "in the making of a viatical settlement contract on the basis of . . . sexual orientation"); Mont. Admin. R. 2.21.3702 & 4002 (sexual orientation anti-discrimination policy); Mont. Admin. R. 2.21.4012 & 4013 (sexual harassment policy protects against harassment because of a person's sexual orientation); Mont. Admin. R. 20.9.620 (sexual orientation anti-discrimination policy in juvenile detention facilities); Mont. Admin. R. 23.12.305 (prohibition on collection of criminal intelligence information exclusively regarding sexual orientation); Mont. Admin. R. 24.154.2301 (sexual orientation anti-discrimination policy for addiction counselors); Mont. Admin. R. 24.189.810 & 2309 (sexual orientation anti-bias policy for psychologists); Missoula City Code § 9.64.010, et seq. (sexual orientation included in anti-discrimination ordinance).

REQUEST FOR ADMISSION NO. 13: Intimate, committed, same-sex couples do not have the ability to participate in each other's medical care except through Existing Legal Formalities.

RESPONSE: The State admits that intimate, committed, same-sex couples have the ability to participate in each other's medical care through Existing

Legal Formalities. The State has made reasonable inquiry and the information known or readily obtainable by the State is insufficient to enable the State to admit or deny all the other means through which intimate, committed, same-sex couples have the ability to participate in each other's medical care.

REQUEST FOR ADMISSION NO. 14: The State of Montana provides domestic partner benefits to state employees.

RESPONSE: Admit.

INTERROGATORY NO. 1: Please state the name, address, and qualifications of each law or expert witness who will or may be called at the trial of the case, the subject matter on which the witness is expected to testify, and state in specific detail how the testimony of each may support any of your defenses, or denials, or otherwise relate to any of the Plaintiffs claims.

ANSWER: The State objects to Interrogatory No. 1 as superseded by the Court's scheduling order of September 20, 2010.

INTERROGATORY NO. 2: Please identify each person with knowledge of facts or information which you claim refutes in any way Plaintiffs' allegations in this case.

ANSWER: The State objects to Interrogatory No. 2 to the extent it seeks information protected as the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the State concerning the litigation. Subject to this objection, the State has not answered the Plaintiffs' allegations or made any determination as to what facts or information refutes those allegations.

INTERROGATORY NO. 3: For each person identified in (the interrogatory above), please set forth with specificity the facts or information in his or her possession allegedly refuting in any way Plaintiffs' allegations.

ANSWER: See Response to Interrogatory No. 2.

INTERROGATORY NO. 4: If Defendants deny, partially deny, or qualify their answer to any of Plaintiffs' Requests to Admit, please set forth the grounds of the denial, partial denial, or qualification, identify all documents upon which defendants base the denial, partial denial, or qualification, and identify all persons with knowledge of the facts in support of the denial, partial denial, or qualification.

ANSWER: See Responses to Requests for Admissions, above. With respect to the request for the identity of persons with knowledge of facts supporting the denial, the State objects for the reasons stated in Response to Interrogatory No. 2.

REQUEST FOR PRODUCTION NO. 1: Please provide all documents identified in answers to Plaintiffs' First Set of Interrogatories.

RESPONSE: None.

Dated this 29th day of October, 2010.

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I hereby certify that I caused a true and correct copy of the foregoing Defendant's Response To Plaintiff's First Discovery Requests to be mailed, first class postage prepaid, to:

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DATED: Oct 29, 2010