IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 11-0451

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, and NANCY OWENS and MJ WILLIAMS,

Plaintiffs and Appellants,

v.

STATE OF MONTANA,

Defendant and Appellee.

On Appeal from Montana First Judicial District Court,
Lewis and Clark County – Cause No. BDV-2010-702
Hon. Jeffrey M. Sherlock

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs—six same-sex couples in loving, intimate, and committed relationships—seek a legal determination that their constitutional rights are violated by the State's restriction of statutory relationship benefits and obligations to spouses, a legal status Plaintiffs are barred from obtaining. Plaintiffs do not seek recognition as spouses, but as they are similarly situated to different-sex couples who marry, they seek equal treatment in the State's discretionary provision of benefits and obligations. And they seek to exercise their rights to privacy, dignity, and the pursuit of safety, health and happiness without harm or penalty from the State.

Nothing in the State's opposition provides any justification—whether legitimate or compelling—that would support the State's differential treatment of Plaintiffs and other intimate, committed same-sex couples. Instead, the State attempts to hide behind the Marriage Amendment, making a tautological argument. The State contends that because the Legislature used the term "spouse" in the statutes Plaintiffs challenge, the state-provided benefits and obligations somehow flow from the constitutional provision itself. Yet the State admits that the Marriage Amendment neither requires the State to provide "spousal benefits" nor prevents the State from extending those same benefits to same-sex couples who cannot marry. The purpose

and effect of the Marriage Amendment is to restrict the legal status of marriage to different-sex couples—nothing more. Accordingly, the Marriage Amendment simply has no bearing on Plaintiffs' requested relief.

Nor are Montana courts powerless to remedy the State's unconstitutional treatment of Plaintiffs. The State's opposition is replete with suggestions that the relief Plaintiffs seek is vague and intangible and therefore incapable of judicial resolution. The relief Plaintiffs seek, however, is concrete: Plaintiffs seek access to the statutory benefits and obligations provided to different-sex couples who marry. Plaintiffs are not asking the Court to legislate—the benefits and obligations to which they seek access already exist. And regardless of the number of statutes implicated by Plaintiffs' claims, each statute suffers from the same deficiency: it limits its application to different-sex couples who marry, unconstitutionally excluding Plaintiffs and other intimate, committed same-sex couples who cannot marry.

Declaration of the unconstitutionality of statutes that exclude Plaintiffs from relationship benefits and obligations is appropriate under the Uniform Declaratory Judgment Act and represents the most optimal use of judicial resources. In addition, Montana courts have broad equitable

authority to redress constitutional violations and appropriate injunctive relief could be crafted here.

For these and the below reasons, the district court's dismissal of Plaintiffs' case was erroneous and should be reversed.

ARGUMENT

I. THE STATE'S EXCLUSION OF PLAINTIFFS FROM THE BENEFITS AND OBLIGATIONS PROVIDED TO MARRIED COUPLES VIOLATES PLAINTIFFS' EQUAL PROTECTION RIGHTS.

A. Montana's Marriage Amendment Has No Bearing on Plaintiffs' Requested Relief.

Montana's Marriage Amendment has a simple purpose—to restrict the legal status or designation of marriage to different-sex couples.[1] Contrary to the State's assertions, the Amendment's plain language does not address—let alone compel—the State's provision of benefits and obligations to those who marry, nor does it require or justify Plaintiffs' exclusion from such

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[1] The State asserts that this interpretation relegates the provision to "empty symbolism." (State Br. at 22.) There is simply no factual or legal support for this statement. Indeed, several recent high court decisions have turned on the conclusion that marriage is a unique legal and social status with significant meaning and importance outside of the incidents traditionally provided to married persons. *See, e.g.*, *Perry v. Brown*, 2012 U.S. App. LEXIS 2328, at *59, 61 (9th Cir. Feb. 7, 2012) ("[W]e emphasize the extraordinary significance of the official designation of 'marriage.' . . . The official, cherished status of 'marriage' is distinct from the incidents of marriage ... ."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008). (*See* Affidavit of Dr. Leticia Peplau ¶ 27.)

benefits and obligations. The State itself admits that there is *no constitutional mandate* for the Legislature to provide for or fund "spousal benefits." (State Br. at 42.) Montana's "spousal benefits" are therefore solely the product of the Legislature's decision to establish statutory relationship benefits and obligations and associate them with the legal status of marriage.

This interpretation is consistent with the plain reading of the Amendment's text and conforms to the findings of high courts in states with similarly worded marriage amendments.[2] *See Strauss v. Horton*, 207 P.3d 48, 77 (Cal. 2009); *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781 (Alaska 2005) ("*Alaska CLU*"). Further, the Marriage Amendment's placement outside of the Declaration of Rights indicates that it should be construed narrowly where it intersects with recognized fundamental rights (e.g. equal protection and privacy). *See Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309 (1986).

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[2] The State does not argue that the Marriage Amendment's simple language is ambiguous. Yet, the State attempts to shoehorn its provision of spousal benefits into the Amendment through contradictory and partisan statements from the 2004 Voter Information Packet. This effort must fail. 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. Mont. ex rel. Johnson*, 2007 MT 75, ¶ 47, 336 Mont. 450, 154 P.3d 1202.

The State nonetheless asserts that the only state action that "potentially excludes" Plaintiffs from receiving relationship benefits and obligations is the Marriage Amendment. (State Br. at 15.) This assertion is premised on the purely tautological argument that benefits and obligations somehow "flow from" the Marriage Amendment and adopt the imprimatur of constitutional law because of the Legislature's use of the term "spouse" in the challenged statutes. This argument fails for two reasons.

First, as discussed above, the plain language of the Marriage Amendment does not address, much less require, the State's provision of spousal benefits and obligations. Instead, the statutory scheme of "spousal" benefits and obligations was established by *legislative* action. It is this legislative action that Plaintiffs challenge—not the Marriage Amendment. Second, the State appears to suggest that the only way to invalidate these statutes is to challenge the definition of the term "spouse," which is dictated by the Marriage Amendment. This is false—Plaintiffs are not seeking recognition as "spouses." Plaintiffs challenge the Legislature's decision to restrict relationship benefits and obligations to spouses, thereby excluding same-sex couples who are barred from obtaining that status.

Just as the Marriage Amendment does not require or even address the provision of "spousal" benefits and obligations, the Amendment also does

not bar the State from providing relationship benefits and obligations to intimate, committed same-sex couples. Indeed, the State admits that the Marriage Amendment has not precluded it from providing domestic partnership benefits to its employees. (State Br. at 7.) And the State admits that notwithstanding the Marriage Amendment, the Legislature could confer relationship benefits and obligations to committed intimate same-sex couples. (*Id.* at 20.)

In sum, the Marriage Amendment bars Plaintiffs and other committed, intimate same-sex couples from the legal designation of marriage, but does not preclude them from challenging the Legislature's decision to provide relationship benefits and obligations to one set of intimate, committed couples while denying them to another set of similarly situated couples.

B. Because Plaintiffs Cannot Marry, the State's Association of Benefits and Obligations with Marriage Constitutes Discrimination Based on Sexual Orientation.

Like different-sex couples who marry, Plaintiff couples are fully committed to one another, share financial and emotional interdependence, raise families and intend to spend their lives together. In its opposition, the State cannot point to any facts that contradict Plaintiffs' assertion that committed, intimate same-sex couples are similarly situated to different-sex couples who marry. The State does not refute the lack of any meaningful

difference between Plaintiffs' committed, intimate same-sex relationships and those of different-sex couples who choose to marry, nor does it challenge the significant personal and expert evidence Plaintiffs have presented on this topic. Instead, the State attempts to group intimate, committed same-sex couples with unmarried different-sex couples and characterize the relevant classes in this case as unmarried and married couples. (*See* State Br. at 18 ("The only classification at issue in the State's provision of spousal benefits is therefore a marital classification.").) This argument fails in light of the Marriage Amendment.

The State reasons that all unmarried couples—whether same-sex or different-sex—are similarly situated with regard to "spousal benefits" because they are "by definition" precluded from receiving them. (State Br. at 17.) However, an intimate, committed same-sex couple who is *categorically barred* from marrying is not similarly situated to a different-sex couple who *may choose* to marry and access Montana's statutory scheme of relationship benefits and obligations but declines to do so. Courts addressing similar statutory schemes have found that unmarried same-sex couples are not similarly situated to unmarried different-sex couples in states where only different-sex couples can marry.

For example, in *Alaska CLU*, the municipality argued that its benefits program differentiated based on marital status, not sexual orientation, observing that "no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners." 122 P.3d at 788.[3] The Alaska Supreme Court disagreed, finding the benefit programs treated same-sex couples differently from opposite sex couples "whether or not they are married" because unmarried different-sex couples may become eligible for the benefits by marrying, whereas "employees in committed same-sex couples are absolutely denied any opportunity to obtain these benefits." *Id.*

Similarly, a federal district court rejected Arizona's argument that a benefits scheme providing government health benefits only to married couples was "a neutral policy that treats all unmarried employees equally." *Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010), *aff'd*, 656 F.3d 1008 (9th Cir. 2011). The court held that the statute "'unquestionably

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[3] Alaska case law is particularly relevant in this case, as Alaska and Montana both have Equal Protection clauses that afford greater protection than the federal Fourteenth Amendment. *See Schafer v. Vest*, 680 P.2d 1169, 1172 (Alaska 1984); *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895 (1987). The states alsohave virtually identical marriage amendments. *Compare* Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.") *with* Mont. Const. art. XIII, § 7 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

imposes different treatment on the basis of sexual orientation'" because employees in same-sex partnerships do not have the same right to marry as their heterosexual counterparts under Arizona's marriage amendment, and thus lesbians and gay men are completely barred from receiving family benefits. *Id.* (citation omitted); *see also Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 442-43, 447 (Or. Ct. App. 1998) (denial of employment benefits to unmarried domestic partners of employees had "disparate impact" on lesbians and gay men).

The State also fails to respond to Plaintiffs' argument that the apparently neutral "spouse"/non-"spouse" classification in the challenged statutes in reality imposes different burdens on same-sex and different-sex couples. But the classification here is no different than the classification between "pregnant" and non-"pregnant" persons, which this Court concluded actually and unconstitutionally classified based on sex inasmuch as only women can get pregnant. *See Bankers Life & Cas. Co. v. Peterson*, 263 Mont. 156, 160-62, 866 P.2d 241 (1993). The Legislature's spouse/non-spouse classification in the challenged statutes is in reality a classification between different-sex couples who can marry and same-sex couples who are barred from marrying. *See Alaska CLU*, 122 P.3d at 789 ("[b]y restricting the availability of benefits to 'spouses,' the benefits programs by [their] own

terms classify same-sex couples for different treatment") (quotations and citation omitted).

Given Montana's Marriage Amendment, any statutory relationship benefits and obligations that are restricted to spouses necessarily discriminate against same-sex couples based on sexual orientation. The State attempts to blur its impermissible classification by noting that other individuals are not able to marry and access "spousal benefits," including "close friends," "family members," and "unmarried older Montanans who wish to live together without sacrificing federal benefits." (State Br. at 18.) However, family members, friends and different-sex couples choosing not to marry are not similarly situated to the Plaintiffs and intimate, committed, different-sex couples who choose to marry.[4]

[4] The State also argues that public policy determinations made by other jurisdictions to recognize different-sex *as well as* same-sex domestic partnerships reinforce spousal benefits as a marital classification. (State Br. at 20.) Again, the State's logic is flawed. While the State is free to offer benefits and obligations above and beyond what is constitutionally required, Montana's equal protection clause requires that it not exclude similarly situated intimate, committed same-sex couples from State-provided statutory relationship benefits and obligations.

C. The State's Exclusion of Plaintiffs from Statutory Benefits and Obligations Provided to Married Couples Fails Even Rational Basis Review.

Because the State is discriminating against Plaintiffs based on their sexual orientation, their exclusion from the statutory benefits and obligations provided to different-sex couples who marry should be subject to heightened scrutiny. Even under the lowest level of constitutional scrutiny, however, it is the State's burden to show that the objective of the statutory scheme at issue is legitimate and that the objective is rationally related to the classification used by the Legislature. *See Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019; *Davis v. Union Pac. R.R. Co.*, 282 Mont. 233, 242, 937 P.2d 27 (1997). The State has simply not met its burden. *See Reesor*, ¶ 25 ("There has been a failure to demonstrate a rational basis for the infringement of such a constitutionally protected right, therefore, we hold that [the statute at issue] is unconstitutional.").

The State has put forth just one purported objective for the exclusion of same-sex couples from the statutory benefits and obligations provided to married couples. This objective is described by the State as follows: "an option short of marriage would detract from or dilute the uniqueness of the marriage bond." (State Br. at 25.) In support of this purported objective, the State cites only this Court's decision in *Snetsinger*—it offers no evidence.

The *Snetsinger* decision, however, does not support the State's position. In *Snetsinger*, this Court held that the State University System's discrimination against same-sex couples in the provision of benefits violated the equal protection clause under rational basis review. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445. Because the Court found that the University System policy in fact allowed *unmarried, heterosexual* couples to access benefits by signing "Affidavits of Common Law Marriage," even where such couples would not be eligible for common law marriage under State law, the Court concluded that the policy did not "promote marriage, and instead, detracts from it." *Id.* at ¶ 24; *see also id.* at ¶ 34 (same assessment, using the term "dilute"). This language says nothing about whether providing intimate, committed same-sex couples—who are barred from marrying—the statutory benefits and obligations afforded to married couples would promote or detract from marriage.

Even assuming the "dilution" of marriage were a legitimate governmental objective, the State still has failed to prove that such objective is rationally furthered by the exclusion of same-sex couples—who are prohibited from marrying—from the statutory benefits and obligations provided to married couples. *See Collins*, 727 F. Supp. 2d at 807 ("the denial of benefits to State employee's same-sex domestic partners, cannot

promote marriage because gays and lesbians are ineligible to marry"). Indeed, the only evidence submitted regarding the State's current treatment of domestic partners belies its position. As it admits, the State currently recognizes and provides benefits to the domestic partners of state employees (following *Snetsinger*, the State voluntarily extended domestic partner benefits to all state employees). (State Br. at 7.)

Where the State has failed to provide sufficient evidence that the statutory classification at issue is rationally related to a legitimate governmental objective, Montana courts have struck down the statutes as unconstitutional. For example, in *Jaksha v. Butte-Silver Bow County*, this Court held that a statute requiring firefighters to be "no more than 34 years of age at the time of [their] original appointment" was not rationally related to the legitimate governmental objective of protecting the safety of the firefighters and the public. 2009 MT 263, ¶¶ 4, 23-24, 352 Mont. 46, 214 P.3d 1248. The reasoned that there was no "factual or empirical basis" for the cut-off point and the "fact that firefighters in their 50's can perform their functions competently demonstrates that this age limitation is without any rational basis." *Id.* at ¶ 24.

Finally, Montana courts' assessment of rational basis does not turn on whether the statutory exclusion of same-sex couples from the benefits and

obligations provided to married couples was "motivated by animosity towards gays and lesbians." (State Br. at 31.) As this Court has long made clear, a statute fails rational basis if its classification is merely "arbitrary." In *Arneson v. State*, the Court assessed a retirement benefits statute that treated differently retired and deceased or disabled employees. 262 Mont. 269, 864 P.2d 1245 (1993). The Court deemed the statute unconstitutional under rational basis review because it was "unable to find any rational relationship to the purpose of the legislation for the establishment of such a classification. It is wholly arbitrary and an example of the legislature picking and choosing who will receive benefits." *Id.* at 274-75.

Nor is it relevant, for the purposes of equal protection analysis, that the statutory scheme at issue was established before "any public discussion in favor of or opposed to same-sex partnerships." (State Br. at 15.) Montana courts have found unconstitutional numerous statutes that were not enacted with explicit, discriminatory intent. For example, in *Henry v. State Compensation Insurance Fund*, 1999 MT 126, ¶ 2, 294 Mont. 449, 982 P.2d 456, the court struck down a law that excluded certain injured workers from the benefits of rehabilitation services, even though the law's exclusion was simply a historical artifact and not a purposeful act on the part of the legislature. *Henry*, ¶¶ 43-45. While it may be the case that the Legislature

did not think about same-sex couples at the time they established the statutory scheme, the fact remains that the Legislature's decision to associate relationship benefits and obligations solely with marriage resulted in the discriminatory treatment of same-sex couples.

Because the State has failed to show that the exclusion of Plaintiffs from the benefits and obligations provided to married couples is rationally related to a legitimate government purpose, the Court should conclude that such exclusion violates Plaintiffs' rights to equal protection, even under the lowest level of constitutional scrutiny.

D. Classifications on the Basis of Sexual Orientation Are Subject To Heightened Scrutiny, Which the State Has Not Satisfied.

Because the State's denial of benefits and obligations to Plaintiffs is based on sexual orientation, it should be subject to heightened scrutiny. As detailed in Plaintiffs' Opening Brief, Plaintiffs have satisfied all the criteria for sexual orientation to be deemed a suspect classification under Montana law. (Br. at 21-25.) The State does not (and could not) rebut the extensive evidence marshaled by Plaintiffs. The State therefore simply points to a few isolated instances of political success by gay and lesbian Montanans, which it claims, incorrectly, mean that Plaintiffs cannot demonstrate political powerlessness. (State Br. at 27-30.)

First, the State's argument is wholly at odds with how courts have actually conducted suspect class analysis.[5] According to the State's test, even a single legislative victory for a particular group would instantly disqualify that group from being treated as a suspect class. Yet the U.S. Supreme Court deemed sex-based classifications to be suspect in a case decided in the midst of the women's rights movement, despite its recognition that "the position of women in America has improved markedly in recent decades." *Frontiero v. Richardson*, 411 U.S. 677, 685, 93 S. Ct. 1764 (1973) (plurality). In fact, after surveying the federal legislative activity prohibiting sex-based discrimination over the past ten years, the Court concluded that the recent increase in legal protection for women supported its finding sex to be a suspect classification. *Id.* at 687-88 ("Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.").

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[5] The State also improperly truncates the political powerless prong of the suspect class analysis by ignoring the national political powerlessness of gay and lesbian individuals. (*See, e.g.*, Affidavit of Prof. George Chauncey ¶¶ 78-81; AG Holder Letter, App'x E to Br.) Courts assessing political powerlessness have not limited this analysis to particular localities, regions, or states, but have also considered national realities. *See Snetsinger*, ¶ 51 (Nelson, J., specially concurring); *Frontiero v. Richardson*, 411 U.S. 677, 685-86, 93 S. Ct. 1764 (1973) (plurality); *Kerrigan*, 957 A.2d at 444-47.