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CLERK DISTRICT COURT
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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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<p>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,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>STATE OF MONTANA,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: right;">Cause No. BDV-2010-702</p> <p style="text-align: center;">ORDER</p>
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Before proceeding, the Court would like to compliment all the attorneys in this case. The briefing and oral argument presented to the Court were extremely well done, making the Court's decision very difficult.

BACKGROUND

On January 25, 2011, this matter was heard on Plaintiffs' motion for summary judgment and Defendant's motion to dismiss. This matter arose from a

1 complaint filed by several lesbian, gay, or bisexual (hereinafter gay) individuals.
2 These people are in committed, intimate, same-sex relationships. Plaintiffs are
3 professional persons — teachers, engineers, physicians, and college professors. It is
4 undisputed that Plaintiffs are productive members of society and have successfully
5 raised a number of children. In their complaint filed on July 22, 2010, Plaintiffs
6 seek injunctive and declaratory relief.

7 The key to Plaintiffs’ complaint is that under current Montana law, they
8 are unable to obtain relationship and family protections and benefits provided to
9 similarly situated heterosexual couples who marry. The relief sought by Plaintiffs is
10 contained in paragraph 7 of their prayer for relief, which requests “[a]n order requiring
11 the State to offer same-sex couples and their families a legal status and statutory
12 structure that confers the protections and obligations that the State provides to
13 different-sex couples who marry, but not the status or designation of marriage.” In
14 other words, Plaintiffs seek an order of this Court requiring the legislature to adopt a
15 civil union or domestic partnership statutory scheme.

16 At issue in this case is Article XIII, section 7, of the Montana
17 Constitution, which provides: “Only a marriage between one man and one woman
18 shall be valid or recognized in this State.” This constitutional provision was known as
19 Constitutional Initiative No. 96 (CI-96) and was approved by Montana voters on
20 November 2, 2004. Plaintiffs do not challenge this constitutional provision and
21 recognize that they will be unable to obtain the status of being married under current
22 Montana law.

23 Plaintiffs allege a variety of constitutional violations. Primarily they
24 assert a denial of equal protection of the laws as guaranteed under Article II, section 4,
25 of the Montana Constitution. Plaintiffs allege that they are denied a statutory structure

1 with relationship and family protections similar to those granted to heterosexual
2 couples. Plaintiffs also allege a denial of their right of privacy, dignity, and to pursue
3 life's basic necessities as mandated in Article II, sections 3, 4, and 10, of the Montana
4 Constitution. Further, Plaintiffs allege a denial of due process under Article II, section
5 17, of the Montana Constitution.

6 STANDARD OF REVIEW — MOTION TO DISMISS

7 In reviewing a motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P.,
8 courts must consider the complaint in the light most favorable to the plaintiff and
9 accept the allegations in the complaint as true. *Goodman Realty, Inc. v. Monson*, 267
10 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be dismissed under
11 Rule 12(b)(6), M.R.Civ.P. unless it appears that the plaintiff can prove no set of facts
12 in support of his claim which would entitle him to relief. *Wheeler v. Moe*, 163 Mont.
13 154, 161, 515 P.2d 679, 683 (1973). In other words, dismissal is justified only when
14 the allegations of the complaint itself clearly demonstrate that plaintiff does not have a
15 claim. *Id.* at 161, 515 P.2d at 683; see also *Buttrel v. McBride Land & Livestock Co.*,
16 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely
17 grants a motion to dismiss for failure to state a claim upon which relief can be granted.

18 DISCUSSION

19 **No Factual Dispute**

20 At oral argument, the Court inquired of both parties as to whether there
21 was any factual dispute. No factual dispute was raised, either at oral argument or in
22 the briefing.

23 **Legal Landscape**

24 Before proceeding, it would be helpful to review the legal landscape in
25 which the Court is operating. As noted above, Montana has a constitutional provision

1 that prevents the marriage of gay individuals. However, Montana, in its proprietary
2 functions, does allow gay state employees to receive employment-related benefits for
3 their same-sex partners. However, Montana does not have a domestic partnership or
4 civil union statutory framework. In the case of *Snetsinger v. Mont. Univ. Sys.*, 2004
5 MT 390, 325 Mont. 148, 104 P.3d 445, the Montana Supreme Court decided a case
6 involving employment benefits of Montana university employees. The employment
7 practice prohibited gay employees from receiving insurance coverage for their same-
8 sex domestic partners. The Montana Supreme Court held that the University System's
9 policy violated the equal protection provisions of the Montana Constitution by
10 impermissibly treating unmarried same-sex couples differently than unmarried
11 opposite-sex couples. *Id.*, ¶ 29.

12 As noted above, Montana has adopted what is known as the "marriage
13 amendment" to its constitution. A similar amendment was enacted in the state of
14 Alaska. In *Alaska Civ. Liberties Union v. State*, 122 P.3d 781 (Alaska 2005), the
15 Alaska Supreme Court held that the state of Alaska violated equal protection by
16 offering valuable benefits to their employees' heterosexual spouses that were not
17 available to unmarried employees' domestic partners. It is of interest to note that the
18 Alaska Supreme Court held that the Alaska marriage amendment, which is very similar
19 to Montana's, did not foreclose the plaintiffs' equal protection claims.

20 The states of Vermont and New Jersey have taken the matter further.
21 The Court has been directed to *Baker v. State*, 744 A.2d 864 (Vt. 1999). Vermont had
22 no constitutional provision such as exists in Montana and Alaska. The plaintiffs, three
23 same-sex couples, were denied marriage licenses. The Vermont Supreme Court ruled
24 that the state was constitutionally required to extend to same-sex couples the common
25 benefits and protections that flowed from marriage under Vermont law. The court did

1 not rule that the plaintiffs were entitled to marriage licenses, but directed the
2 legislature to craft an appropriate means of addressing the constitutional mandate. The
3 court noted that the legislature could enact a domestic partnership or registered
4 partnership act which would establish alternate legal status to marriage for same-sex
5 couples. *Id.*, at 886.

6 A similar case was presented to the New Jersey Supreme Court in *Lewis*
7 *v. Harris*, 908 A.2d 196 (N.J. 2006). New Jersey also did not have a marriage
8 amendment. However, New Jersey had a limited domestic partnership act. The
9 plaintiffs in *Lewis* were same-sex couples who sued the state seeking a declaration that
10 New Jersey laws prohibiting their marriage violated the equal protection guarantees of
11 the New Jersey Constitution. They also sought an order compelling government
12 officials to grant them marriage licenses. The New Jersey Supreme Court noted that
13 the state did not articulate any legitimate public need for depriving the same-sex
14 couples of the host of benefits and privileges available to heterosexual married
15 couples. The court went on to hold that under New Jersey's equal protection
16 guarantee, committed same-sex couples must be afforded on equal terms the same
17 rights and benefits enjoyed by married opposite-sex couples. *Id.* at 220-21. The court
18 went on to note that the state could fulfill its constitutional mandate in one of two
19 ways. It could either amend the marriage statute to allow same-sex couples to marry or
20 enact a parallel statutory structure by another name by which same-sex couples would
21 not only enjoy the rights and benefits, but also bear the burdens and obligations of civil
22 marriage. *Id.*, at 224.

23 It is important to note what Plaintiffs can do to protect themselves and
24 their partners under existing Montana law. As noted in the papers presented to the
25 Court, the Plaintiffs can and have entered into joint tenancy arrangements on their

1 houses and bank accounts. Further, they have executed powers of attorney and wills in
2 favor of their partners. Further, same-sex parents involved in a parenting plan dispute
3 may obtain a legally recognized relationship with their partner's biological child. See
4 e.g. Section 40-4-228, MCA (parenting and visitation matters between an actual parent
5 and a third party.)

6 On the other hand, individuals such as Plaintiffs are denied a variety of
7 benefits and protections that are statutorily available to heterosexual spouses. In
8 Plaintiffs' reply brief in support of their motion for summary judgment, filed with the
9 Court on January 13, 2011, they set forth, at page 5, footnote 5, a variety of statutes
10 which, they state, discriminate against same-sex couples. Those statutes are: Title 2,
11 chapter 2, MCA (intestate succession, homestead exception, elective share,
12 maintenance allowance); Title 40, chapter 4, MCA (relationship dissolution obligations
13 and protections); Title 15, chapter 30, MCA (miscellaneous tax deductions); Section
14 50-9-106, MCA (right to make end-of-life decisions); Section 26-1-802, MCA (right to
15 privileged communications); Section 2-18-704, MCA (right to continuation of
16 insurance coverage); Section 45-5-205 and -621, MCA (crimes against partner or
17 family members assault and non-support); Sections 70-32-301 and -302 (homestead
18 protections); and Section 39-51-2205, MCA (right to accrued benefits upon death).
19 In addition, Section 87-2-106(4), MCA, allows a heterosexual individual to buy a
20 hunting or fishing license for his or her spouse, but would deny the same opportunity
21 to a same-sex couple.

22 Plaintiffs have set forth a variety of real life scenarios, where these laws
23 have affected them. One of the Plaintiffs, for example, was denied access to the
24 remains of her deceased partner. Plaintiffs also note that those without a will find that
25 Montana's testacy laws provide no protection for the surviving member of a same-sex

1 partnership. Montana's workers' compensation death benefit provisions speak of
2 benefits available to spouses, but not for surviving same-sex domestic partners.
3 Further, under state law, bereavement leave is provided for heterosexual spouses, but
4 not to partners in a same-sex domestic partnership. Plaintiffs also note that under
5 Montana's tax laws, they are not able to file joint returns and are unable to take the
6 spousal exemption for non-working spouses if filing separately. Plaintiffs also note
7 that Montana statutes allow heterosexual spouses to withhold life sustaining
8 procedures for their terminally ill partners, but the same right is not afforded to them.
9 Further heterosexual spouses have priority to become guardians for the heterosexual
10 spouse who becomes mentally incompetent — a law that does not apply to Plaintiffs.

11 In addition to these statutory arrangements, there appears little doubt that
12 Plaintiffs have been subject to private prejudice, discrimination, and even violence in
13 Montana. (See State's Reply Br. Supp. Mot. Dismiss, at 12.) The State also does not
14 dispute the economic and emotional harm often suffered by the Plaintiffs due to their
15 sexual orientation. However, the State, and indeed this Court, are not sure how much
16 of this social stigma is caused by the State and how much is caused by private parties.

17 Every court addressing this or related issues has noted that it is irrelevant
18 to a court's analysis to consider personal, moral, or religious beliefs about whether
19 persons should enter into intimate same-sex relationships or whether same-sex
20 individuals should be allowed to marry. See e.g., *Alaska Civ. Liberties Union*, at 783.
21 Casual reference to any of the popular national or local media shows that this topic is
22 highly charged. This Court recognizes that it is this Court's duty to preserve the
23 constitutional rights of all parties regardless of how unpopular they may be or
24 unpopular may be their cause. Indeed, this Court finds itself quite sympathetic to the
25 plight of Plaintiffs. See e.g. *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997).

1 enact a law that would impact an unknown number of statutes would launch this Court
2 into a roiling maelstrom of policy issues without a constitutional compass.

3 Plaintiffs note that this very Court in *Columbia Falls Elem. Sch. Dist.*
4 *No. 6 v. State*, 2005 MT 69, 109 P.3d 257, 326 P.2d 304, declared a statutory scheme
5 unconstitutional and allowed the legislature the broad discretion to correct the
6 unconstitutional portions of the statutes. However, there is a great difference between
7 *Columbia Falls* and this case. In *Columbia Falls*, this Court was dealing with a
8 discreet school funding formula that all parties identified. When the Court acted, it
9 knew exactly what statutes would be affected by legislative action. That is not the case
10 here. Here, Plaintiffs refer to a “statutory scheme.” (Pls.’ Reply Br. Supp. Mot.
11 Summ. J., at 4.) However, the statutes that have been brought to the Court’s attention
12 in this case are not a scheme such as the Court was presented in *Columbia Falls*. Here
13 we have a not yet entirely specified array of statutes that deal with many different
14 topics and were enacted over a variety of years.

15 It is true that the Supreme Courts of Vermont and New Jersey have done
16 what Plaintiffs would have this Court do. However, those states did not have a
17 marriage amendment, as does the state of Montana. This Court should note that it does
18 not particularly feel that the marriage amendment, standing alone, bars the relief the
19 Plaintiffs seek. It is instructive to note that the Alaska Supreme Court dealt with a
20 similar amendment in *Alaska Civ. Liberties Union*. However, the Alaska court was not
21 directing the Alaska legislature to enact a statutory domestic partnership arrangement
22 that would affect an unknown number of statutes. Rather, the Alaska Supreme Court
23 was dealing with a specific statutory arrangement dealing with employee benefits.
24 That court, as noted above, held that the Alaska marriage amendment did not bar its
25 finding those provisions unconstitutional. In the view of this Court, the proper way to

1 deal with Plaintiffs' concerns are specific suits directed at specific, identifiable
2 statutes.

3 Although this Court does not necessarily feel that Montana's marriage
4 amendment bars it from acting, this Court does feel that the existence of the marriage
5 amendment plays into the jurisprudential decision that Plaintiffs' requested relief
6 constitutes an impermissible sojourn into the powers of the legislative branch.

7 Attached to the State's brief in support of its motion to dismiss filed on
8 October 29, 2010 was the voter information pamphlet presented when CI-96 was
9 adopted by the people of Montana. Quotes from both proponents and opponents of the
10 constitutional amendment seem to suggest that the marriage amendment then under
11 contemplation had more to do with the mere designation of people as being married.
12 Indeed, the proponents and opponents seem to both acknowledge that the marriage
13 amendment would have something to do with benefits and obligations that relate to the
14 status of being married. For example, the proponents noted that "small business
15 employers in Montana may someday be required to provide expanded health coverage,
16 retirement and fringe benefits to same-sex 'spouses' of employees." The opponents
17 noted that "if CI-96 were to pass, the State could nullify the contractual agreements
18 made between same-gender partners. CI-96 would limit innovative and robust
19 companies from treating their employees equitably." Thus, it appears that both the
20 proponents and opponents of CI-96 felt that that constitutional provision bore on some
21 of the very issues now presented to this Court.

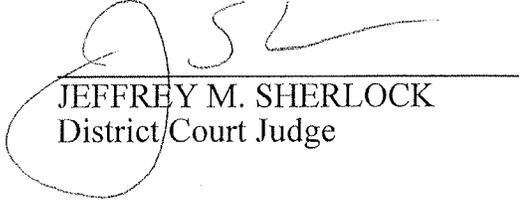
22 In sum, this Court finds that it cannot grant the relief that Plaintiffs seek.
23 To do so would violate the constitutional separation of powers existing in the state of

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1 Montana. Therefore, Defendant's motion to dismiss is GRANTED, and Plaintiffs'
2 motion for summary is DENIED.

3 DATED this 19 day of April 2011.

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6 JEFFREY M. SHERLOCK
District Court Judge

7 pcs: James H. Goetz/Benjamin J. Alke
8 Elizabeth L. Griffing
Anthony Johnstone

9 T/JMS/donaldson v state order.wpd

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