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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, and NANCY OWENS and MJ WILLIAMS, Plaintiffs, vs. STATE OF MONTANA, Defendant.	)	Cause No. BDV-2010-702 Hon. Jeffrey M. Sherlock **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

What is most telling about the State's Opposition to Plaintiffs' Motion for Summary Judgment is what the State does not argue. First, the State does not argue that there are any material disputed facts that would make summary judgment inappropriate. Although the State introduced through an expert affidavit a few facts (which Plaintiffs do not dispute) regarding the question of suspect classification, the State explicitly concedes that it "does not contend that there remains any genuine issue of any fact material to Plaintiffs' claims under applicable law." (State's Combined Reply in Support of Motion to Dismiss and Opposition to Summary Judgment ("D. MSJ Opp.") p. 2.) As a result, the material facts that provide the foundation for Plaintiffs' motion—including that Plaintiffs and other committed, intimate same-sex couples are in every material respect similarly situated to different-sex couples who marry—are uncontroverted.

Second, the State does not argue that there is any true justification, whether reasonable or compelling, that would support discrimination between committed, different-sex couples, who can access State-provided relationship protections and obligations for their families, and committed same-sex couples, who cannot. Without even attempting to articulate a true justification for this differential treatment, the State simply hides behind the Marriage Amendment, making the tautological argument that the complained-of classifications pass constitutional muster because the term "spouse"—which the State mischaracterizes as "facially neutral"—emanates from the Marriage Amendment.[1] Plaintiffs are not seeking the status or designation of marriage—just the protections and obligations that the State provides to similarly situated different-sex couples who can marry—and, as demonstrated below, such conclusory argument does not meet minimal judicial scrutiny.

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[1] The term and status of "spouse" are obviously not facially neutral, as same-sex couples are explicitly prohibited under the Marriage Amendment from accessing it.

Having abandoned any argument as to disputed material facts or a justification for discrimination, the State largely reiterates the legal arguments it made in its Motion to Dismiss. Those arguments fail for the reasons discussed in Plaintiffs' Opposition to that Motion and as shown below, and this Court should therefore grant Plaintiffs summary judgment on all their claims.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO RELIEF FOR VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Regardless that majoritarian morality may be expressed in the public-policy pronouncements of the legislature, it remains the obligation of the courts - and of this Court in particular - to scrupulously support, protect and defend those rights and liberties guaranteed to all persons under our Constitution.

***Gryczan v. State*, 283 Mont. 433, 454-455, 942 P.2d 112 (1997).**

The Complaint seeks declaratory relief regarding Plaintiffs' constitutional deprivations on various grounds, as well as injunctive relief from enforcement of discriminatory legislation. (Plaintiffs' Complaint for Injunctive and Declaratory Relief ("Compl.") p. 20, ¶¶ 1-5 (declaratory judgment); ¶¶ 6,7 (injunctive relief).) Requests for this type of relief are typical in constitutional challenges of the kind Plaintiffs make here, and it is fully within this Court's power to grant the relief requested.

The State does not give appropriate respect to the Court's power to construe and interpret the Montana Constitution. Courts have "the inherent duty to interpret the constitution and to protect individual rights set forth in the constitution . . . ." *State v. Finley*, 276 Mont. 126, 134, 915 P.2d 208 (1996) (overruled on other grounds by *State v. Gallager*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817). This inherent duty includes the duty to interpret and protect the right to equal protection of the laws guaranteed by Article II, § 4. The Montana Constitution guarantees "to all persons, whether in the majority or in a minority, those certain basic freedoms and rights which are set forth in the Declaration of Rights" and "it remains the obligation of the courts . . . to scrupulously

support, protect and defend those rights and liberties guaranteed to all persons under our Constitution." *Gryczan*, 283 Mont. at 454-55 (emphasis added).

Declaratory judgment actions such as this one are routinely employed to redress constitutional violations. In *Gryczan*, the court said:

> Respondents brought this action under the Uniform Declaratory Judgments Act (the Act) found at Title 27, Chapter 8, of the Montana Code. Respondents argue that this Court has held that a party raising a "bona fide constitutional issue" can seek relief from the courts through a declaratory judgment action. *Stuart v. Dept. of Social & Rehab. Serv.*, 247 Mont. 433, 438-39, 807 P.2d 710, 713 (1991) (quoting *Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 109-10, 765 P.2d 745, 748 (1988)).
>
> [¶]Furthermore, Respondents point out, the Act itself provides that it is remedial and that it is to be liberally construed and administered to permit courts "to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations...." Section 27-8-102, MCA.

Gryczan, supra, at 441 (emphasis added). Montana courts also routinely determine that actions taken by the Legislature violate the Montana Constitution. These rulings sometimes require action to be taken by the Legislature, whether it be to amend an existing law or implement a new one. In many instances, these determinations have the effect of expanding the legal protections and obligations offered by the State. *See, e.g., Cottrill v. Cottrill Sodding Serv.,* 229 Mont. 40, 744 P.2d 895 (1987) (invalidating specific benefits exclusion from Worker's Compensation Act, and therefore, increasing benefits offered by the Act).[2]

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[2] The State is also incorrect in asserting that this Court has only the power to negate and not the power to direct relief. This Court has directed the Legislature to remedy a constitutionally deficient system for school funding. *See Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257. The State fails to distinguish *Columbia Falls*. The language in Article X, § 1(3) directing that the "legislature shall" create a system of education is relevant only to the question of whether a constitutional provision is self-executing or non-self-executing (non-self-executing clauses are non-justiciable political questions). *See Columbia Falls* at ¶ 15. That is not a question here. There is no doubt that the constitutional provisions regarding equal protection, privacy, and dignity are self-executing and therefore the Court is responsible for ensuring that the State's constitutional obligations have been met. *See* Mont. Const. Conv., Verb. Tr., Vol. V, p. 1644 addressed in Section II below. As "the final guardian and protector of the right to education"

The remedy sought in this case is no different from the remedy in other equal protection cases. A variety of statutes confer protection and obligations on married individuals. Plaintiffs have chosen to challenge the entire statutory scheme of spousal protections and obligations, as the harm that they are suffering results from their categorical exclusion from the statutory scheme. The creation of a legal status, such as civil unions or domestic partnerships, that provides the protections and obligations that the Legislature has currently associated exclusively with marriage would remedy that harm. This Court is not deprived of the ability to provide a remedy simply because Plaintiffs' harm arises from a statutory scheme as opposed to a single statute.[3]

II. THE STATUTORY SCHEME CHALLENGED BY PLANTIFFS CONSTITUTES "STATE ACTION."

This case is about discrimination in State statutes. Article II, Section 4 provides that "No person shall be denied the equal protection of the laws." Mont. Const. art. II, § 4 (emphasis added). Plainly, if the Legislature enacts a law which extends benefits to one class of persons but not another, equal protection "of the laws" is implicated. The State, however, argues that the provisions of the Declaration of Rights at issue are "negative rights against State action" and that "the failure of the State Legislature to enact [Plaintiffs'] preferred legislation" is not itself "State action." (D. MSJ Opp. p. 2.) These are straw men arguments for several reasons.[4]

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this Court had the authority to order the Legislature to enact a system that fulfills the mandate of the Montana Constitution. *See Columbia Falls*, ¶ 19.

[3] As described in Plaintiffs' opening brief, other states that have addressed this issue have reached a similar conclusion. *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"); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999) (ordering that "the state is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law").

[4] The State is also confusing the "State action" requirement of the Fourteenth Amendment of the U. S. Constitution with the provisions of Montana's Declaration of Rights. They are not the same. Montana's dignity clause contains no equivalent "State action" limitation. *See* Mont. Const. Conv., Verb. Tr., Vol. V, pp. 1645-46. (rejecting a proposal to delete from Article II, Section 4 the words

First, this case is not about the failure of the State Legislature to enact Plaintiffs' "preferred" legislation. Nor is it about a vacuum in which the State has never legislated. The thrust of Plaintiffs' Complaint is that in every instance where the State provides protections and imposes obligations on spouses, or otherwise predicates protections or obligations on marital status, it discriminates against similarly situated committed, same-sex couples who cannot avail themselves of the same advantages and responsibilities. The State action at issue before the Court is therefore extensive.[5]

The State argues that the statutory exclusions courts have invalidated in the past are "state laws that affirmatively exclude a class of people," citing *e.g.*, *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (1986). (D. MSJ Opp. pp. 2-3.) The State thereby implies that there can be no constitutional violation unless the State takes affirmative steps to discriminate or perhaps, if the drafter of a statute is so unsavvy as to explicitly include an exclusion into its text.[6] Discriminatory exclusions, however, can just as easily result from non-action (failure to include a

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"by any person, firm or corporation or institution."); *see also* McNeal "Toward a 'Civil Gideon' Under the Montana Constitution: Parental Rights As a Starting Point," 66 Mont. L. Rev, 81, 84, 134 ("Montana's Equal Protection Clause also applies to private as well as state actors."); *see also* Clifford & Huff, "Some Thoughts on the Meaning and Scope of the Montana Constitution's 'Dignity Clause' With Possible Applications," 61 Mont. L. Rev. 301, 324. The Montana Supreme Court has repeatedly held that the individual rights embodied in the Montana Constitution go well beyond their counterparts in the U. S. Constitution. *See Gryczan, supra*, at 448.

[5] *See, e.g.,* Title 2, Chapter 2, MCA (intestate succession, homestead exception, elective share, maintenance allowance); Title 40, Chapter 4, MCA (relationship dissolution obligations and protections); Title 15, Chapter 30, MCA (misc. tax deductions), § 50-9-106, MCA (right to make end-of-life decisions); § 26-1-802, MCA (right to privileged communication); § 2-18-704, MCA, (right to continuation of insurance coverage); §§ 45-5-205, 45-5-621, MCA (crimes against partner or family member assault and nonsupport); §§ 70-32-301, 70-32-302 (homestead protections); § 39-51-2205, MCA (right to accrued benefits upon death).

[6] By way of example, a statute that provides benefits to "men" clearly excludes women, even though the text of the statute may not explicitly state so. Such a decision by the Legislature to provide benefits only to "men" would not be immune from constitutional scrutiny, and neither is the State's action here.

class of persons in a benefit program), as they can from overt action (a specific provision explicitly excluding the same group).

For example, in *Henry v. State Compensation Insurance Fund*, the court considered a claim of discrimination inherent in the statutory scheme that provided worker's compensation and occupational disease benefits. *See* 1999 MT 126, ¶ 2, 294 Mont. 449, 982 P.2d 456. As a result of historic evolution of two statutes, a system resulted in which workers who suffered an occupational "injury" covered by the Workers' Compensation Act were treated differently from those who suffered an occupational "disease" covered by the Occupational Disease Act: One Act provided for a "rehabilitation plan," the other did not. *Id.* at ¶¶ 44-45. There was no purposeful act on the part of the Legislature to exclude those workers who suffered from an occupational disease from the benefits of rehabilitation services—it was simply an historical artifact. *Id.* at 43. Without even a nod to the question of whether the discrimination was purposeful, the court struck down the discrimination as a violation of equal protection, finding no rational relationship between the classification used by the Legislature and any legitimate state interest and noting that the court ". . . has previously struck as unconstitutional provisions within the workers' compensation statutes that create arbitrary classes." *Id. at* ¶ 37; *see also Id.* at ¶ 45.

Second, by arguing that the rights in the Declaration of Rights are "negative" in nature, the State apparently means that those rights are dependent upon the Legislature for implementation and, so long as the Legislature refrains from acting, there is no State action that could trigger a constitutional challenge. This is simply wrong. At the Constitutional Convention, Delegate Mae Nan Robinson questioned Delegate Dahood, Chairperson of the Declaration of Rights Committee, about her concern that Article II, Section 4 as drafted would not be a "self-executing provision" and

that "it would take complete legislative implementation to make it effective." Delegate Dahood responded:

> [T]hat is not true for these reasons. I think the Illinois section, if memory serves correct, added a paragraph to indicate that the Legislature would set guidelines for the enforcement of that particular right. In any event, constitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights. If the language appears to be prohibitory and mandatory, as this particular section is intended to be, then in that event, the courts in interpreting the particular section are bound by that particular presumption and they must assume, in that situation, that it is self-executing.

Mont. Const. Conv., Verb. Tr., Vol. V, p. 1644 (emphasis added).

Finally, the Montana Legislature has acted affirmatively to exclude same-sex couples from certain statutory protections and obligations. For example, Section 40-1-401(4), MCA, provides that "a contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy." Because Section 40-1-401(1) prohibits "a marriage between persons of the same sex," subsection (4) constitutes an explicit and affirmative prohibition against same-sex couples entering into a civil contract to achieve a semblance of the marital relationship from which they are statutorily and constitutionally excluded.[7]

In affording statutory protections and obligations to one set of committed, intimate couples but not to another set of similarly situated couples, the State has acted in a way that discriminates against Plaintiffs and Plaintiffs are well within their rights to challenge their exclusion from the State's statutory relationship and family protection scheme.

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[7] The State contends that Plaintiffs do not challenge this particular statute. (D. MSJ Opp. p. 7.) This is incorrect. Plaintiffs do challenge this statute as part of the statutory scheme in which the State affords relationship and family protections and obligations to different-sex couples through the status of marriage, but excludes same-sex couples from any comparable relationship status that would allow them to access the same relationship and family protections and obligations.

III. THE MARRIAGE AMENDMENT DOES NOT PRECLUDE PLAINTIFFS' REQUEST FOR RELIEF.

Montana's Marriage Amendment has a simple purpose—to limit the legal status or designation of being married to different-sex couples. As described in Plaintiffs' opening brief, unlike the sixteen state marriage amendments that include language that bars same-sex couples from marriage and the protections and obligations traditionally associated with marriage, Montana's Marriage Amendment does not restrict the provision of statutory relationship and family protections. *See, e.g.*, Neb. Const. Art. I, § 29; *cf.* Mont. Const. art. XIII, § 7. This interpretation is consistent with the plain reading of the Amendment's text;[8] conforms to the findings of high courts in states with similarly worded marriage amendments; and is further evidenced by the fact that the State currently provides domestic partnership benefits to its employees. *See Strauss v. Horton*, 207 P.3d 48, 77 (Cal. 2009); *Alaska Civil Liberties Union v. State*, 122 P. 3d 781, 786 (Alaska 2005); *see also* Defendant's Responses to Plaintiff's First Discovery Requests ("D. RFA Resp.") No. 14.[9]

Conversely, Montana's Marriage Amendment does not itself provide for any of the statutory protections and obligations currently afforded by the State to married couples. The State concedes that Montana's Constitution does not contain a "constitutional or judicially enforceable mandate for

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[8] 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.

[9] The State contends that interpreting the Marriage Amendment to apply only to the status or designation of marriage would reduce the Amendment to "empty symbolism." (D. MSJ Opp. p. 9.) As either a matter of fact or of law, there is simply no support for this statement: several recent state high court decisions regarding marriage for same-sex couples have turned on the conclusion 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, and the State does not contest the similar factual conclusions reached by Plaintiffs' expert. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 401, 434 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008); Peplau Aff. ¶ 27. In addition, the State itself cites as a state interest the avoidance of "relegating same-sex couples to sub-marital arrangements," thereby recognizing that there is more to marriage than "empty symbolism." (D. MSJ Opp. p. 16.)

the Legislature to provide or fund spousal benefits." (D. MSJ Opp. p. 4.) The decision to establish a statutory scheme of protections and obligations for couples was made by Montana's Legislature, as was the decision to then associate the scheme with marriage. It is this state action—affording statutory protections and obligations to certain committed, intimate couples, but not to others—that must still meet constitutional muster under Article II of the Montana Constitution.

The State claims that Plaintiffs have failed to cite "when or where, exactly, the Legislature made a decision to exclude them 'solely because of their sexual orientation'" and that the State's provision of benefits to spouses are "facially neutral." (D. MSJ Opp. pp. 4, 8.) Both characterizations are misleading. Plaintiffs are not arguing, nor need they argue, that the Legislature *knowingly* excluded them from this statutory scheme due to their sexual orientation (see Section II above regarding state action). It may be the case that the Legislature did not think about same-sex couples at the time that they established the statutory scheme, although on at least five occasions the Legislature has rejected efforts to enact relationship and family protections and obligations for same-sex couples. (Affidavit of Christine Kaufmann ("Kaufmann Aff.") ¶ 15.)[10] Nonetheless, the fact remains that the Legislature's decision to associate the statutory scheme of protections and benefits solely with marriage has resulted in the exclusion of same-sex couples and must be corrected by this Court.

Further, the Marriage Amendment's constitutional prohibition on same-sex couples marrying means that any statutory classification drawn between spouses and non-spouses discriminates against same-sex couples. The State somewhat facetiously notes that other individuals are not able to marry—such as "close friends and family members" (D. MSJ Opp. p. 6)—but of course these individuals are not similarly situated to different-sex couples who choose to

[10] All affidavit citations refer to affidavits filed in support of Plaintiffs' Motion for Summary Judgment.

marry. Plaintiffs, as well as many other committed, intimate same-sex couples in Montana, are similarly situated to different-sex couples who marry, and it is for this reason that they are entitled to relief under the state's equal protection guarantee. The State in its opposition has presented no facts that contradict the significant personal and expert evidence on this topic presented by Plaintiffs in their summary judgment motion.[11]

In sum, Montana's Marriage Amendment prevents Plaintiffs and other committed, intimate same-sex couples from entering into the legal status of marriage in Montana, but it does not preclude them from challenging the Legislature's decision to grant protections and obligations to one set of committed, intimate couples, while denying them to another set of similarly situated couples.

IV. CLASSIFICATIONS BASED ON SEXUAL ORIENTATION WARRANT STRICT SCRUTINY.

The Montana Supreme Court has yet to determine whether classifications based on sexual orientation are inherently suspect under the Montana Constitution. Of the three cases involving equal protection claims of sexual orientation discrimination that have come before the Court, *Kulstad v. Manciani* (2009 MT 326, 352 Mont. 513, 220 P.3d 595), *Gryzcan* (283 Mont. 433, 942 P.2d 112 (1997)), and *Snetsinger v. Montana State University* (2004 MT 390, 325 Mont. 148, 104 P.3d 445), only one—*Snetsinger*—was decided on equal protection grounds, and the contested policy in that case failed to pass even rational basis review, thus obviating any need for the Court to address the plaintiffs' suspect class assertion. *Snetsinger*, ¶ 29. Yet, contrary to the State's

[11] *See* Plaintiffs' Combined Brief in Support of Motion for Summary Judgment and Response to Motion to Dismiss pp. 4-6, 19-20; *see also* 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; Affidavit of Letitia Anne Peplau ("Peplau Aff.") ¶¶ 7, 18, 19, 22, 26; Affidavit of Dr. Suzanne Dixon ¶ 12.

assertion, lack of consideration does not equate with a determination that a suspect class does not exist.

Legislative classifications based on sexual orientation fall squarely within the type of classifications that are inherently suspect under Montana law. Suspect class analysis is triggered where a group has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *See Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365 (1997) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278 (1973)). Based on the uncontroverted evidence presented by Plaintiffs—as well as the general historical record—it is clear that gay and lesbian people are such a group and that classifications based on sexual orientation should trigger heightened judicial scrutiny.

The State suggests that "modest political gains" recently achieved by lesbian and gay advocates, both in Montana and throughout the country, controvert any claim of political powerlessness. (D. MSJ Opp. p. 13.)[12] Proof that a group is *wholly* lacking in political influence, however, has never been a requirement for triggering suspect class analysis in equal protection jurisprudence. Indeed, when the U.S. Supreme Court held that sex-based classifications require heightened scrutiny, it did so in spite of its observation that "the position of women in America has improved markedly in recent decades." *See Frontiero v. Richardson*, 411 U.S. 677, 685, 93 S. Ct.

[12] The State also introduces evidence on this point, in the form of an affidavit from a Professor of Political Science regarding polls of Montanans that show over the past decade increasing acceptance of gay and lesbian people and disapproval of overtly discriminatory laws, such as Don't Ask Don't Tell. Plaintiffs in no way contest this evidence—indeed, Plaintiffs' experts testify similarly about changing attitudes over time. (Affidavit of Prof. George Chauncey ("Chauncey Aff.") ¶ 78.)

1764 (1973) (plurality opinion).[13] In *Frontiero*, the plurality reasoned that even with the significant political advances (including Title VII and the Equal Pay Act) that had been made toward gender equality, women were still "vastly under-represented" in the nation's representative bodies due to past discrimination. *Id.* at 686 n.17. This was evidenced by the fact that, as of the date of the decision, no women were serving in the U.S. Senate, only fourteen women were serving in the U.S. House of Representatives, and no woman had been elected President or appointed to serve on the United States Supreme Court. *Id.*

Nor have courts discontinued the application of heightened scrutiny when a suspect class exhibits growing political power. Despite significant political gains by racial and ethnic minorities and women in recent decades, the courts continue to apply heightened scrutiny to classifications based on race and sex. *See, e.g., Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738 (2007); *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996); *see also Blehm v. St. John's Lutheran Hosp., Inc.*, 2010 MT 258, ¶ 25, 358 Mont. 300, 2010 Mont. LEXIS 424 (including race and gender in the list of suspect classifications under Montana equal protection jurisprudence).

This jurisprudence has led a number of state high courts to conclude that the determination of political powerlessness for purposes of equal protection requires only that a group "lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means." *See Kerrigan*, 957 A.2d at 444; *see also Varnum v.Brien*, 763 N.W.2d 862, 895 (Iowa 2009).[14] This is in line with the U.S. Supreme Court's observation that strict

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[13] Although *Frontiero* was a plurality decision, its holding has been approved on a number of subsequent occasions. *See, e.g., Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 730, 123 S. Ct. 1972 (2003).

[14] The State takes issue with Plaintiffs' reference to suspect class determinations from other states' high courts, noting the unique language and structure of Montana's Article II, Section 4. (D. MSJ

scrutiny applies when classifications "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" and when such "discrimination is unlikely to be soon rectified by legislative means." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249 (1985) (emphasis added).

Applying this standard, the political powerlessness of gay men and lesbians in Montana, as described by Plaintiffs' expert George Chauncey and State Senator Christine Kaufman and as a matter of the historical record is beyond dispute. As but one significant example, only fourteen years ago, intimate sexual relations between consenting same-sex partners was a crime in Montana, carrying a prison term of up to 10 years and/or a fine of up to $50,000. *See Gryczan*, 283 Mont. at 439. Despite being voided by both state and federal decisions, legislative attempts to remove the law have failed no less than four times and the deviate sexual conduct law that classifies same-sex couples as criminals is still on the books. In fact, the Montana Republican party has included in its platform the re-criminalization of same-sex intimate conduct. (Chauncey Aff. ¶ 82).

Compared to the status of women when *Frontiero* was decided, gay and lesbian people and their advocates have achieved far less legislatively—Montana has never enacted any statewide protection for gay and lesbian people, although there have been numerous attempts to do so, and the federal government has failed to enact even basic protections against discrimination on the basis of sexual orientation in housing, employment, public accommodations, and schools. (Chauncey Aff.

Opp. pp. 11-12.) If anything, however, Montana's unique Section 4 was intended to provide more comprehensive protection than other states' constitutions. *See, e.g., Cottrill*, 229 Mont. at 42 (noting that the language of Section 4 "provides for even more individual protection" than its federal counterpart); *Stratemeyer v. Lincoln County*, 259 Mont. 147, 155, 855 P.2d 506 (1993) (Trieweiler, J. dissenting) (the language of Section 4 "recognizes that majoritarian rule can at times be harsh, intolerant, and unfair. It recognizes that at times a basic framework of principle is necessary to prevent those with political influence from oppressing those without political influence.").

¶¶ 79-81, Kaufmann Aff. ¶¶ 11-17.) Montanans have also never elected an openly gay judge or executive and—as acknowledged by the State—they have elected only three openly gay legislators over the past decade, even though the Montana Legislature consists of 150 members. (*See* D. MSJ Opp. p. 14.) Although the recent gains of gay and lesbian advocates cited by the State are encouraging, they by no means demonstrate that gay and lesbian people as a group should not be deemed a suspect class.

V. PLAINTIFFS' EXCLUSION FROM RELATIONSHIP RECOGNITION AND STATE-PROVIDED FAMILY PROTECTIONS AND OBLIGATIONS UNCONSTITUTIONALLY BURDENS PLAINTIFFS' RIGHT OF PRIVACY.

The State does not contest that the right to choose one's life partner without governmental interference is protected by Montana's fundamental right of privacy—a protection further enhanced by Montana's unique rights of dignity and the pursuit of life's basic necessities, safety, health, and happiness. (D. MSJ Opp. pp. 18-19.) Yet individuals who choose to exercise their constitutional rights by choosing a same-sex life partner are singled out by the State for discriminatory treatment—they are excluded from the many protections and benefits, as well as obligations and responsibilities, provided by the State to different-sex couples who marry.

The State attempts to recast the constitutional interests at issue, arguing that Plaintiffs are merely claiming an "entitlement to certain legislatively created benefits" or "public subsidy of private conduct." (D. MSJ Opp. p. 18.) Plaintiffs have never argued, however, that the State is *compelled* to provide particular legislatively created benefits or public subsidies to committed, intimate couples.[15] Plaintiffs challenge the Legislature's decision to provide legislatively created benefits and public subsidies only to individuals who make certain constitutionally-protected

[15] The State concedes that neither the Marriage Amendment nor any other provision in Montana's Constitution mandates the provision of particular protections and obligations to married spouses. (D. MSJ Opp. p. 4 (acknowledging that there is no "constitutional or judicially enforceable mandate for the Legislature to provide or fund spousal benefits.)

choices—choosing a different-sex life partner, as opposed to a same-sex life partner. Plaintiffs seek only to obtain equal access to the State's existing statutory scheme of relationship and family protections and obligations. *See Jeannette R.*, 1995 Mont. Dist. LEXIS 795, *25 (1st Dist. May 22, 1995) ("although 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"); *see also Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 784 (Cal. 1981) ("[The Government] bears a heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise a constitutional right.").

VI. PLAINTIFFS' EXCLUSION FROM RELATIONSHIP RECOGNITION AND STATE-PROVIDED FAMILY PROTECTIONS AND OBLIGATIONS CANNOT SATISFY ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

Because classifications based on sexual orientation should be deemed suspect and because the State's exclusion of Plaintiffs' from statutory relationship and family protections and obligations unconstitutionally burdens their fundamental rights, the Court should apply heightened scrutiny. The State has failed, however, to provide even a single, legitimate state interest that is rationally related to the exclusion of same-sex couples from a recognized relationship and family status and related protections and obligations, much less a compelling state interest to which the exclusion is narrowly tailored.

Without citing any factual evidence in support of any state interest, the State articulates three vague "interests" in the statutory exclusion at issue: "preserving a single classification of couples as spouses within marriage"; the Marriage Amendment; and avoiding separate and unequal "sub-marital arrangements." (D. MSJ Opp. p. 16.) None of these interests satisfy any level of equal protection scrutiny.

The State may not maintain a discriminatory statutory restriction simply because it has done so in the past. *See Lawrence v. Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472 (2003) ("[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."). Tradition has been invoked time after time in our history in efforts to justify what we now recognize as invidious discrimination. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 550, 16 S. Ct. 1138 (1896) (legislature is "at liberty to act with reference to the established usages, customs and traditions of the people"); *Muller v. Oregon*, 208 U.S. 412, 421-422, 28 S. Ct. 324 (1908) ("[H]istory discloses the fact that woman has always been dependent upon man."). Moreover, "preserving a single classification of couples as spouses within marriage" is not a purpose that is independent of the classification. The classification—excluding same-sex couples from a statutory scheme of relationship and family protection—is the same as the asserted purpose—preserving that exclusion. The purpose does not explain the classification, it merely repeats it, rendering it "a classification undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620 (1996).

Nor can the Marriage Amendment serve as a justification for the State to deny equal statutory protections and obligations to same-sex and different-sex couples. As discussed above, the Marriage Amendment presents no impediment to the relief Plaintiffs seek—the constitutional mandate only limits the State in conferring on couples the status of marriage, it does not preclude the State from including same-sex couples in a statutory relationship and family protection scheme through a different status. Nor can the Marriage Amendment provide the State with a perverse interest in avoiding "separate and unequal sub-marital arrangements." Plaintiffs of course agree that relationship statuses other than marriage are inherently lesser statuses. (Peplau Aff. ¶ 27.) The

limited discrimination enshrined in the Montana Constitution through the Marriage Amendment, however, does not abrogate any of Plaintiffs' other rights under Article II of the Montana Constitution, including the right to equal protection such as that right may now be interpreted (i.e., exclusive of marriage). The State has also expressly disavowed any interest in "avoiding separate and unequal sub-marital arrangements" by providing benefits to the same-sex domestic partners of state employees. (D. RFA Resp. No. 14.)

Finally, Plaintiffs have no obligation to demonstrate animus on the part of the Legislature in arguing that the State's exclusion of Plaintiffs' from a statutory relationship and family protection scheme violates even the lowest level of equal protection scrutiny. Rational basis review in Montana "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 v. State Ins. Comp. Fund*, 2000 MT 321, ¶ 19; 302 Mont. 518; 15 P.3d 877 (emphasis added). The State has not met this burden here.

CONCLUSION

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. This Court should therefore conclude that Plaintiffs are entitled as a matter of law to summary judgment on all their claims.

DATED this 12th day of January, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on the following counsel of record, by the means designated below, this 12th day of January, 2011.

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