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

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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.

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

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# APPELLANTS' OPENING BRIEF

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## STATEMENT OF THE ISSUES

1. Whether the State violates the Equal Protection Clause of the Montana Constitution by excluding committed, intimate same-sex couples from the statutory scheme of benefits and obligations that it provides to similarly-situated different-sex couples who can and do marry.

2. Whether the State infringes on Plaintiffs' fundamental rights to privacy, dignity and the pursuit of safety, health and happiness under the Montana Constitution by excluding committed, intimate same-sex couples from the statutory scheme of benefits and obligations that it provides to different-sex couples who can and do marry.

3. Whether Montana courts have authority to remedy the State's unconstitutional treatment of same-sex couples in Montana.

## STATEMENT OF THE CASE

Plaintiffs are six same-sex couples who are in loving, committed and intimate relationships and who live, work and raise families in Montana. Acknowledging that Montana's Marriage Amendment bars them from the legal status of marriage, Plaintiffs filed suit seeking to end the State's unconstitutional exclusion of same-sex couples from the statutory scheme of benefits and obligations afforded to different-sex couples who marry. Plaintiffs assert that the State's association of these benefits and obligations exclusively with marriage

violates their fundamental rights of equal protection, privacy, dignity and the pursuit of safety, health and happiness under Montana's Constitution.

Plaintiffs alleged, and provided uncontested evidence, that they are similarly-situated to different-sex couples who marry, but have been denied the benefits and obligations the State provides to married couples. They contend that this denial—for which the State has no rational, much less compelling, interest—constitutes discrimination on the basis of sexual orientation in violation of Montana's Equal Protection Clause, and burdens Plaintiffs' fundamental rights of privacy, dignity and the pursuit of safety, health and happiness under Montana's Constitution.

Plaintiffs sought declaratory relief establishing that the State's exclusion of same-sex couples from the "opportunity to obtain the protections" that the State provides "to different-sex couples who marry" violates the Montana Constitution. (Comp. at 20, ¶¶ 1-5.) Plaintiffs also sought injunctive relief to obtain "the protections and obligations the State provides different-sex couples who marry." (*Id.*, ¶¶ 6-7.)

The district court granted the State's motion to dismiss and denied Plaintiffs' motion for summary judgment. (Order of April 19, 2011 ("Order").) The Order acknowledged that "individuals such as Plaintiffs are denied a variety of benefits and protections that are statutorily available to heterosexual spouses," and that the

denial of such benefits has affected Plaintiffs in "a variety of real life scenarios." (*Id.* at 6.) The court also expressed doubt that Montana's Marriage Amendment, Montana Constitution article XIII, section 7, "standing alone, bars the relief that Plaintiffs seek." (*Id.* at 9.)

The district court dismissed the Complaint and denied Plaintiffs' motion for summary judgment based on its understanding that Plaintiffs were asking the court "to direct the legislature to enact a set of statutes," which the court found would violate the separation of powers. (*Id.* at 8.) The court also expressed concern that "there has been no explicit listing of all the statutes that would be affected by this Court's ruling." (*Id.*) The court recognized "that the Supreme Courts of Vermont and New Jersey have done what Plaintiffs would have this Court do," but stated its belief that "the proper way to deal with Plaintiffs' concerns are specific suits directed at specific, identifiable statutes." (*Id.* at 9-10.)

Plaintiffs moved to alter or amend the judgment, arguing that the Order failed to address their requests for declaratory relief. Plaintiffs also provided a list identifying hundreds of Montana statutes that conferred rights and benefits on spouses. The motion was deemed denied on July 5, 2011. *See* M. R. Civ. P. 59(d). This timely appeal followed.

## STATEMENT OF FACTS

### A. Plaintiffs Are in Intimate, Committed Same-Sex Relationships Similar in All Relevant Respects to the Relationships of Different-Sex Couples Who Marry.

Plaintiffs are twelve Montanans who are active in their communities, churches and schools; they also comprise six same-sex couples who are in loving, committed and intimate relationships. (Pls. ¶¶ 2-4.)[1] Like different-sex couples who marry, Plaintiffs support each other, live together as families, and in some cases, raise children and grandchildren together.[2] Social science research recognizes that committed, intimate relationships between persons of the same sex closely resemble the relationships of different-sex married couples on all the factors that are known to predict stability and instability in couple relationships. (*See* Affidavit of Dr. Leticia Peplau ("Peplau") ¶¶ 7, 12, 19, 22, 24; *see also* Affidavit of Dr. Suzanne Dixon ("Dixon") ¶ 12.)

There is no meaningful difference between the quality of Plaintiffs' same-sex relationships and the quality of relationships of persons of different sexes who

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[1] Plaintiffs are 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. (Their affidavits are cited by their last names or cited collectively as "Pls.")

[2] (*See, e.g.*, Leslie ¶ 4; Gibson ¶ 5; Owens ¶¶ 4, 6; Wagner ¶¶ 5-6; Long ¶ 5; Guggenheim ¶¶ 5-7.)

choose to marry. Despite Plaintiffs' similarity to different-sex couples who choose to marry, Plaintiffs and other gay or lesbian Montanans in same-sex relationships are denied the full panoply of statutory benefits and obligations currently provided to different-sex married couples. (*See* Affidavit of Christine Kaufmann ("Kaufmann") ¶¶ 11, 15.)

### B. The State Grants Numerous Benefits and Obligations to Different-Sex Couples That It Denies to Same-Sex Couples.

The State does not allow same-sex couples to marry. The Montana Constitution was amended by initiative in 2004 to add a provision—which Plaintiffs do not challenge—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 ("Marriage Amendment").

Different-sex couples who marry enjoy a wide range of significant benefits and are subject to significant obligations under Montana statutes, including rights in the event of a spouse's injury, death or intestacy,[3] a financial safety net under the tax code[4] and decision-making authority during medical emergencies and end-

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[3] *See, e.g.*, §§ 2-18-601, 19-2-802, 19-17-405, 19-18-605, 19-20-717, 27-1-513, 33-22-140, 37-19-904, 39-51-2205, 39-71-723, 50-9-106, 50-16-522, 50-16-804, 72-2-112, 72-2-331, 72-3-502, 72-5-312, 72-5-410, MCA.
[4] *See, e.g.*, §§ 15-7-307, 15-30-2110, 15-30-2114, 15-30-2366, MCA.

of-life situations.[5] (*See* Def. Response to Pl. Discovery Req. ("Def. RFA Resp.") No. 1.)

Plaintiffs and other gay or lesbian individuals in same-sex relationships are denied these same benefits and obligations. (Peplau ¶ 28; Dixon ¶ 30.)[6] Although same-sex couples may enter into certain private legal arrangements to protect their relationships and confer reciprocal benefits on each other, the State admits that "[b]eyond these legal arrangements, Plaintiffs do not have access to spousal benefits available to married couples under Montana law." (Defendant's Brief in Support of Motion to Dismiss ("Def. MTD") at 2.)

### C. Same-Sex Couples, Including Plaintiffs, Suffer Harm from the State's Failure to Grant Them Benefits and Obligations.

Plaintiffs are vulnerable to the severe emotional and economic consequences of being treated, legally, as strangers. For example, when Plaintiff Mary Leslie's former partner of eight years, Erika, died in an employment-related accident, Mary was denied access to Erika's remains because Mary had no legally recognized relationship with Erika. (Leslie ¶ 4.) As Erika died without a will and the State's intestacy laws do not protect individuals in committed same-sex relationships, Mary was legally unable to prevent Erika's parents from removing many of Erika's

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[5] *See, e.g.*, § 50-9-106, MCA.

[6] Plaintiffs submitted below a list of many of the statutes that deny rights and benefits to gay or lesbian individuals in same-sex relationships. (Pls.' Motion to Amend or Alter Judgment.)

possessions from the home they shared. (*Id.* at ¶ 5; *see also supra* note 3.) Nor could Mary receive Workers' Compensation benefits or seek damages against Mary's employer in a wrongful death suit, which Erika's parents instead filed. (*Id.* at ¶ 5.) In short, in her time of greatest need, Mary was treated as a legal stranger to her life partner.

Even if committed, intimate same-sex couples could anticipate and plan for every contingency through private legal documents—which, of course, they cannot—they could not ensure that these arrangements would be respected or that the couples would not be treated as legal strangers during emergencies. (*See, e.g., id.* at ¶¶ 4-5; Boettcher ¶ 7; Donaldson ¶ 7; Guggenheim ¶ 7.) Such arrangements are also expensive, and therefore not available to many couples. (Gibson ¶ 6.) And, to have any hope that these arrangements will be respected, couples must carry with them the relevant legal documents at all times. (Donaldson ¶ 7.)

Moreover, the State's denial of benefits and obligations to gay or lesbian individuals in same-sex relationships stigmatizes these relationships by conveying the message that they are unworthy of legal recognition and support. Some form of legal recognition, other than marriage, would provide a modicum of governmental acknowledgment of the value and importance of these relationships, thereby reducing social stigma. (Peplau ¶¶ 27, 29.) By denying legal relationship recognition, however, the State perpetuates the stigma historically associated with

relationships between gay or lesbian individuals. (Peplau ¶ 29; Affidavit of Prof. George Chauncey ("Chauncey") ¶ 5.) This stigma inflicts severe harms, such as social ostracism, discrimination, violence and even adverse health effects, on these individuals. (Peplau ¶¶ 29-31; Chauncey ¶¶ 30, 50-51, 71, 82-83.)

All Plaintiffs have suffered from the stigmatic harm associated with being in relationships that are not legally recognized. (*See, e.g.*, Boettcher ¶¶ 4-7; Donaldson ¶¶ 5, 7; Haugland ¶¶ 3-7; Owens ¶¶ 5, 9; Parker ¶¶ 3-4; Stallings ¶¶ 5, 8.) Such harm has manifested itself as prejudice associated with being openly gay or lesbian, the necessity to conceal their sexual orientation and the indignity of having to prove the existence of a committed same-sex relationship through requirements and burdens not imposed on different-sex married couples. (*See, e.g.*, Donaldson ¶ 5; Long ¶ 4; Haugland ¶ 5.)

### D. This Court Has Provided, and Has Led the Executive Branch to Provide, Some Limited Recognition of Same-Sex Couples.

Although the Legislature has refused to grant benefits and obligations to committed, intimate same-sex couples, this Court and the Executive Branch have treated such couples as equal to married couples for certain purposes.

For example, the *Code of Judicial Conduct* promulgated by this Court in 2008 treats a judge's domestic partner as equal to a spouse with regard to rules governing recusal, anti-nepotism, permissible gifts and travel reimbursement. *See* Mont. Code of Jud. Cond. §§ 2.12(A)(2)-(3), 2.14 cmt. 2, 3.13(B)(8), 3.14(B)

(2008). A "domestic partner" is defined as "a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married." *Id.* (Terminology Section).

Similarly, the Department of Administration (through its Health Care and Benefits Division) allows state employees to receive employment-related benefits for their same-sex "domestic partners." (Order at 4; *see also* Def. RFA Resp. No. 14.) That policy was established in response to *Snetsinger v. Montana University System*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445, which held that there was no rational basis to permit unmarried different-sex couples to obtain benefits while denying those benefits to unmarried same-sex couples.

To establish eligibility for domestic partner benefits, the Department of Administration requires a state employee to complete a Declaration of Domestic Partner Relationship, attesting that: (1) both partners are at least 18 years of age; (2) both partners share a primary residence; (3) neither partner is legally married to anyone else; (4) neither partner is related by blood; and (5) both partners have a "financially-interdependent relationship."[7] All Plaintiffs meet the Department's

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[7] http://benefits.mt.gov/content/docs/forms/DomesticPartnerDeclaration.pdf (last visited November 12, 2011). Employees of Montana public schools may similarly obtain benefits for their same-sex domestic partners. http://mustbenefits.org/wp-content/uploads/2011/05/7-1-Domestic-Partner-Declaration-2010.pdf (last visited November 12, 2011).

criteria for "domestic partner."

### E. Gay and Lesbian Montanans Have Historically Suffered Discrimination Based on Their Sexual Orientation.

Gay and lesbian individuals have been and continue to be "subject to widespread and significant discrimination and hostility in the United States, including in the State of Montana." (Chauncey ¶ 4; *see also id.* at ¶¶ 78-83.) This discrimination has included medical theories that treated their sexual orientation as a disorder; penal laws that criminalized their consensual sexual behavior; and federal and state civil statutes, regulations and policies that contained classifications based on sexual orientation. (*Id.* at ¶ 5.)

Although society's views on same-sex relationships have evolved in recent years, gay and lesbian individuals continue to face severe prejudice in Montana and around the country. The State has admitted that lesbian and gay individuals: (1) are a minority in Montana, (2) have been the subject of prejudice and adverse stereotyping, (3) have experienced discriminatory treatment in Montana workplaces, and (4) have been victimized by anti-gay-motivated violence. (Def. RFA Resp. Nos. 6-9, 11.) Like many states, Montana has yet to enact even basic anti-discrimination protections for gay and lesbian individuals in employment, housing and public accommodations. (Chauncey ¶ 79.) And anti-gay violence, slurs and rhetoric persist. (*Id.* at ¶¶ 82-83; Kaufmann ¶¶ 11, 18-24; *see also* Def. RFA Resp. No. 8.)

## STANDARD OF REVIEW

This Court has plenary review over questions of constitutional law. The district court's conclusions regarding the constitutionality of a statutory scheme and whether declaratory judgment or injunctive relief was warranted are both questions of law, which this Court reviews for correctness. *Alexander v. Bozeman Motors, Inc.*, 2010 MT 135, ¶ 16, 356 Mont. 439, 234 P.3d 880; *Karlson v. Rosich*, 2006 MT 290, ¶ 7, 334 Mont. 370, 147 P.3d 196.

This Court reviews de novo both a district court's denial of summary judgment and grant of a motion to dismiss. *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285; *W. Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 18, 359 Mont. 34, 249 P.3d 35. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* M.R. Civ. P. 56(c); *Horton*, ¶ 10. A motion to dismiss "should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief." *Pub. Lands Access Ass'n v. Jones*, 2008 MT 12, ¶ 9, 341 Mont. 111, 176 P.3d 1005.

## SUMMARY OF ARGUMENT

Like different-sex couples who marry, Plaintiff couples are in committed, intimate relationships, are intertwined both financially and emotionally, and intend

to spend their lives together. Yet under current Montana law, Plaintiffs are excluded from the statutory scheme of benefits and obligations the State has associated exclusively with marriage—a legal status from which Plaintiffs are barred under Montana's Marriage Amendment. This exclusion violates Plaintiffs' fundamental rights of equal protection, privacy, dignity and the pursuit of safety, health and happiness guaranteed under Montana's Constitution.

I. The State's exclusion of Plaintiffs from the benefits and obligations it provides to similarly-situated heterosexual couples who marry constitutes discrimination based on sexual orientation. This discrimination should be subject to heightened scrutiny because sexual orientation meets the criteria for suspect classification treatment under Montana law: the State admits that gays and lesbians are targets of prejudice, discrimination and violence, and Plaintiffs' uncontroverted evidence establishes that gays and lesbians have experienced political powerlessness on both the state and federal level. Even under the lowest level of constitutional scrutiny, however, the State cannot show any legitimate governmental interest in the discrimination, and, as such, the discrimination violates Plaintiffs' right to equal protection.

II. Montana's constitutional rights of privacy, dignity, and the pursuit of safety, health, and happiness protect a person's decision to choose a life partner with whom to have a committed, intimate relationship. The State excludes

Plaintiffs from benefits and obligations solely because Plaintiffs are in same-sex relationships. This exclusion unconstitutionally burdens Plaintiffs' fundamental rights, conditions the provision of discretionary benefits, and penalizes Plaintiffs' failure to enter into "approved" relationships.

III. Plaintiffs are entitled to their requested declaratory judgments regarding their rights and the State's duties because they all have experienced and will continue to experience uncertainty surrounding recognition of their relationships, and declaratory relief should be granted regardless of whether injunctive relief is also granted. Plaintiffs are also entitled to injunctive relief to redress the violation of their constitutional rights. Courts have broad statutory and inherent equitable authority to prevent a continuing breach of constitutional duty, and although complete relief could be provided to Plaintiffs without ordering the Legislature to act, an order requiring legislative action is within well-established constitutional bounds when necessary to remedy the constitutional violations at issue.

## ARGUMENT

### I. THE STATE'S GRANT OF BENEFITS AND OBLIGATIONS ONLY TO MARRIED COUPLES VIOLATES THE EQUAL PROTECTION CLAUSE IN LIGHT OF THE MARRIAGE AMENDMENT.

#### A. The State's Reliance on Marriage To Impart Benefits and Obligations Discriminates Against Plaintiffs on the Basis of Sexual Orientation.

Plaintiffs are similarly situated to different-sex couples who wish to marry, as the only distinction between Plaintiffs and different-sex couples who marry is sexual orientation. (*See* State. of Facts, sec. A, *supra*.) Marriage is concededly unavailable to same-sex couples due to Montana's Marriage Amendment. Providing benefits and obligations only to married couples thus draws a bright line based on sexual orientation: *No* gay or lesbian individuals in same-sex relationships may obtain these State-conferred benefits and obligations, while *all* individuals in different-sex relationships have an opportunity to do so. This Court has already recognized that a classification between same-sex and different-sex couples is a classification based on sexual orientation. *Snetsinger*, ¶ 27.

It would be too formalistic to view this as simply a classification based on marital status. "A law or policy that contains an apparently neutral classification may violate equal protection if 'in reality [it] constitut[es] a device designed to impose different burdens on different classes of persons.'" *Snetsinger*, ¶ 16 (citation omitted). Thus, a statute that on its face classifies between pregnant persons and non-pregnant persons is still a classification based on sex, because only women can become pregnant. *Bankers Life & Cas. Co. v. Peterson*, 263 Mont. 156, 160-62, 866 P.2d 241 (1993). Likewise, although the challenged statutes superficially distinguish between spouses and non-spouses, in reality they

distinguish between different-sex couples who may marry under the law and similarly-situated same-sex couples who may not marry under the law.

Another state supreme court rejected the view that disbursing benefits and obligations only to married couples was merely a classification based on marital status. It held instead that "the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married." *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788 (Alaska 2005) ("*ACLU*"). The court reasoned that, when benefits are granted on the basis of marriage, "[s]ame-sex unmarried couples . . . have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The [benefits] programs consequently treat same-sex couples differently from different-sex couples." *Id.*; *see also Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998).

### B. The State's Discrimination Fails Rational Basis Review Because the State Has No Legitimate Governmental Interest in Granting Benefits and Obligations Based on Marriage While Excluding Plaintiffs from the Opportunity To Marry.

The State's discriminatory disbursement of statutory benefits and obligations is subject to heightened scrutiny, as Plaintiffs show below in Part C. But the statutes fail even rational basis review, which requires the State to show that the objective of the statutory scheme at issue is both legitimate and 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; *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 19, 302 Mont. 518, 15 P.3d 877. The State has not met that burden.

### 1. The Marriage Amendment—which Plaintiffs do not challenge—cannot justify the discriminatory scheme.

The Marriage Amendment offers no succor to the State. The State has admitted that the Amendment does not prohibit the State from "conferring similar benefits outside of marriage." (Def. MTD at 10.) And as noted above, the Executive and Judicial Branches have already taken actions that treat spouses and domestic partners as equal for certain purposes.

The State's admission is consistent with the plain language of the Amendment, which does not bar the State from providing same-sex couples the same benefits and obligations that are conferred on married couples. Instead, the Amendment limits the legal status of marriage to different-sex couples: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Mont. Const., art. XIII, § 7. The Marriage Amendment is not implicated by Plaintiffs' claims because their claims neither challenge the Amendment nor seek the right to marry or to be recognized as married. (Compl. ¶ 4.)

Courts have concluded that similar constitutional amendments (Appendix A) do not preclude the provision of benefits to same-sex couples. As the Alaska Supreme Court explained, "[t]hat [Alaska's] Marriage Amendment effectively

prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways." *ACLU*, 122 P.3d at 786-87. And, despite California's marriage amendment, the California Supreme Court held that each gay or lesbian Californian is entitled to "the opportunity of an individual to establish . . . 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 v. Horton*, 207 P.3d 48, 77 (Cal. 2009) (citation and internal quotes omitted). California's amendment, that court concluded, "eliminate[d] the ability of same-sex couples to enter into an official relationship designated 'marriage,'" but it did not change the State's obligations to treat same-sex couples equally in all other respects. *Id.*

In contrast to Montana, a number of other states have explicitly banned recognition of, and benefits for, same-sex couples. When Montana's Marriage Amendment was approved in 2004, Nebraska and Louisiana had already adopted constitutional marriage amendments with substantially broader language (Appendix B), and eight other states adopted similarly broad marriage amendments that same year. (Appendix C.) Another nine states subsequently adopted broad marriage amendments. (Appendix D.) If the authors of the initiative that resulted in the Marriage Amendment had wanted to ban relationship recognition and

benefits for same-sex couples, they could have said so expressly, as other states have.[8]

Finally, the placement of the Marriage Amendment in Article XIII shows that it was not intended to amend the rights identified in Article II (such as equal protection, individual dignity and privacy). While the Marriage Amendment precludes this Court from ordering that the State recognize a same-sex relationship as marriage, it does not otherwise modify the individual rights protected by Article II. These rights, by virtue of their placement in the Declaration of Rights, are fundamental. *State ex rel. Bartmess v. Bd. of Trustees*, 223 Mont. 269, 273, 726 P.2d 801, 803 (1986); *Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986). They receive the highest level of protection, as any laws infringing these rights are subject to strict scrutiny—a more demanding standard than that applied to non-fundamental rights. *See Reesor*, ¶ 13. These fundamental rights necessarily constrain the scope of other constitutional provisions, including the Marriage Amendment.

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[8] Notwithstanding the district court's comment regarding statements included in the ballot materials (Order at 10), such statements cannot expand the actual language of the Amendment. *See Montanans for Equal Application of Initiative Laws v. Mont. ex rel. Johnson*, 2007 MT 75, ¶ 48, 336 Mont. 450, 154 P.2d 1202.

Thus, the Marriage Amendment cannot justify the State's exclusion of gay and lesbian individuals in same-sex relationships from receiving the benefits and obligations provided to different-sex married couples.

**2. Any purported governmental interest in the promotion of marriage does not justify the discriminatory scheme.**

Other than the Marriage Amendment, the only justification offered by the State below for its discrimination against same-sex couples was the notion that the State "reasonably could conclude that an option short of marriage would detract from or dilute the uniqueness of the marital bond." (Def. MTD at 10-11.) As that justification bears "no rational relationship to a legitimate governmental interest," it too fails even rational basis review. *Reesor*, ¶¶ 15, 19; *see, e.g.*, *Jaksha v. Butte-Silver Bow Co.*, 2009 MT 263, ¶ 24, 352 Mont. 46, 214 P.3d 1248; *Timm v. Mont. Dep't of Pub. Health & Human Servs.*, 2008 MT 126, ¶ 39, 343 Mont. 11, 184 P.3d 994.

Any government interest in encouraging people to enter into marriages does not justify the State's exclusion of Plaintiffs from the benefits and obligations conferred on married couples. Denying benefits to individuals who cannot marry does nothing to incentivize or promote marriage among those individuals. *See ACLU*, 122 P.3d at 793 ("denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage"); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir.

2011) ("the denial of benefits to same-sex domestic partners cannot promote marriage, since such partners are ineligible to marry").

Nor will providing benefits and obligations to same-sex couples undermine different-sex couples' incentive to marry. It will not "alter their decisions about whether to marry," and does not have "any relationship at all to the interest in promoting marriage." *ACLU*, 122 P.3d at 793. Moreover, providing Plaintiffs the benefits and obligations associated with marriage would not detract from the unique quality of the marital bond, which is not only the relationship status that society most values and respects, but also already has the force of a constitutional amendment behind it. (*See* Peplau, ¶ 27.)

Because it lacks any legitimate governmental interest to support it, the discriminatory statutory scheme here simply constitutes discrimination for its own sake. As the U.S. Supreme Court explained in a case involving gay and lesbian individuals, however, such unjustified discrimination is impermissible. *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."); *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").[9]

Accordingly, with no legitimate governmental interest to provide any support for the legislative classification at issue, the statutory scheme of benefits and obligations provided only to married couples violates Plaintiffs' constitutional rights to equal protection even under the lowest level of constitutional scrutiny.

### C. In Any Event, the State's Discrimination Based on Sexual Orientation Is Subject to Heightened Scrutiny, Which the State Cannot Satisfy.

The State's denial of benefits and obligations based on sexual orientation should be subject to heightened scrutiny because sexual orientation should be considered a suspect classification under Montana law.[10]

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[9] *See also* Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301, 335 n.137 (2000) (suggesting that "the failure to provide equal benefits and protections in Montana law to same-sex couples" could violate equal protection as reinforced by the Dignity Clause based on the State's "failure to respect the core humanity of gay and lesbian couples by denying that they can create, for themselves, the same sort of committed, loving relationships which heterosexual couples can create").

[10] Strict scrutiny applies "when a law affects a suspect class or threatens a fundamental right"; it requires the State to show that the statutory scheme "is narrowly tailored to serve a compelling governmental interest." *Reesor*, ¶ 13. Middle-tier scrutiny requires the State to demonstrate that the scheme "is reasonable and its interest in the resulting classification outweighs the value of the right to an individual." *Id.*

Traditional indicia of "suspect"-ness include a class's being "saddled with such disabilities, or 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." *In re C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984); *cf. Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987) (Article II, section 4, of the Montana Constitution provides more protection of individual rights than does the Fourteenth Amendment of the U.S. Constitution).

Sexual orientation satisfies these indicia, and therefore should be subject to heightened scrutiny in Montana. Other state courts have reached that conclusion under their states' constitutions. *See Varnum v. Brien*, 763 N.W.2d 862, 895-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-42 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008); *Tanner*, 971 P.2d at 524. And the Executive Branch of the federal government now takes the same view with respect to the U.S. Constitution. *See* Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) (hereinafter "AG Holder Letter") (Appendix E). Without repeating all the arguments relied on in these reasoned decisions, we highlight the following undisputed facts.

***Gay and lesbian people have experienced a history of purposeful discrimination.*** The State conceded that gay and lesbian individuals have been the subject of prejudice and adverse stereotyping, have experienced discriminatory treatment in Montana workplaces, and have been victimized by anti-gay-motivated violence. (Def. RFA Resp. Nos. 6-9; *see also* Chauncey ¶¶ 4, 8; Kaufmann ¶ 17; *Snetsinger*, ¶¶ 45-52 (Nelson, J., specially concurring) (documenting the long history in the United States, and in Montana, of discrimination against gay and lesbian individuals); *id.* ¶ 177 (Gray, C.J., dissenting) (stating that Justice Nelson's concurring opinion "correctly notes the historic discrimination against gay and lesbian citizens").)

***Gay and lesbian people are in a position of political powerlessness.*** Plaintiffs submitted uncontested evidence of the lack of political power of gay and lesbian people as a group. (*See* Chauncey ¶¶ 78-81.) This evidence is supported by the official position of the Obama Administration that gay and lesbian people meet the federal standard for political powerlessness. AG Holder Letter.

The nationwide political powerlessness of gay and lesbian people is no different for gay and lesbian Montanans. Every bill introduced to repeal the "deviate sexual conduct" law that this Court struck down in *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d 112 (1997), *fourteen years ago* as unconstitutional has failed. *Snetsinger*, ¶ 52 (Nelson, J., specially concurring). A major political party

in the State supports the re-criminalization of same-sex sexual conduct. *See* Mont. Republican Party Platform, *available at* http://www.mtgop.org/platform.aspx [last visited on November 12, 2011]. And nearly every statewide legislative effort to advance equality for gay and lesbian individuals in Montana has been defeated. (*See* Kaufmann ¶¶ 11-16.)

The State nonetheless argued below that Plaintiffs could not demonstrate political powerlessness because of recent modest political gains made by gay and lesbian people in Montana and around the nation. (Defendant's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, at 13-15.) Occasional political success, however, does not show that a group possesses "sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means." *Kerrigan*, 957 A.2d at 444; *see also Frontiero v. Richardson*, 411 U.S. 677, 685, 93 S. Ct. 1764 (1973) (plurality) (sex-based classifications require heightened scrutiny notwithstanding that "the position of women in America has improved markedly in recent decades"); *In re Marriage Cases*, 183 P.3d at 443 ("if a group's *current* political powerlessness [were] a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications").

In light of these factors, this Court should treat sexual orientation as a suspect classification and subject the government's discriminatory statutory scheme to strict scrutiny, or at least some form of heightened scrutiny.[11] The challenged statutory scheme cannot survive any form of heightened scrutiny because the State has identified no compelling or substantial governmental interest that could be relied upon to refuse Plaintiffs and other same-sex couples the same benefits and obligations granted to different-sex married couples. *See Armstrong v. State*, 1999 MT 261, ¶ 41, 296 Mont. 361, 989 P.2d 364 (giving guidance as to what extraordinary interests would constitute compelling interests).

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[11] None of the decisions declining to apply heightened scrutiny to sexual orientation classifications is persuasive. Some of these decisions were based on a U.S. Supreme Court case, later overruled, upholding a state criminal sodomy law. *See, e.g., Equal. Found. v. City of Cincinnati*, 54 F.3d 261, 266-67 & n.2 (6th Cir. 1995) (relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472 (2003) (striking down Texas statute criminalizing sexual relations between gay men or lesbians)). A few, more recent decisions have improperly read *Lawrence* and *Romer* to hold that sexual orientation classifications are not subject to heightened scrutiny under the U.S. Constitution. *See, e.g., Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Protection. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *but see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (applying strict scrutiny to legislative classifications on sexual orientation). Those decisions also are inconsistent with the Executive Branch's conclusion that strict scrutiny applies. *See* AG Holder Letter.

## II. THE STATE'S EXCLUSION OF PLAINTIFFS FROM BENEFITS AND OBLIGATIONS ALSO UNCONSTITUTIONALLY INFRINGES PLAINTIFFS' RIGHTS TO PRIVACY, DIGNITY AND THE PURSUIT OF SAFETY, HEALTH AND HAPPINESS.

In addition to violating the fundamental requirement of equal protection, the State's exclusion of same-sex couples from state statutory benefits and obligations solely due to the fact that they are in committed, intimate same-sex relationships infringes Plaintiffs' constitutional rights of privacy, dignity and the pursuit of safety, health and happiness.

### A. Entering into a Committed, Intimate Relationship with a Same-Sex Partner Is Protected by the Rights to Privacy, Dignity and the Pursuit of Safety, Health and Happiness.

Montana's right of privacy, explicit within the state constitution's Declaration of Rights, guards against "legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private" and affords citizens significantly broader protections than does the U.S. Constitution. *See Armstrong v. State*, 1999 MT 261, ¶¶ 34, 48, 296 Mont. 361, 989 P.2d 364; *Gryczan*, 283 Mont. at 448. Indeed, this Court has characterized the breadth of the right as protecting against "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.

This Court has already recognized that individuals have an actual and

reasonable expectation of privacy with respect to certain deeply personal decisions and actions, including intimate sexual conduct and personal medical decisions. *See Gryczan*, 283 Mont. at 449-50; *Armstrong*, ¶¶ 52, 53; *see also State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441 (1997). Further, this Court has recognized a personal autonomy component in Montana's fundamental right of privacy that protects decisions involving the core area of personal, private and intimate life and "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; *see also Gryczan*, 283 Mont. at 450. Montana's constitutional right of privacy therefore protects an individual entering into an intimate, committed relationship with a same-sex partner. Even more, perhaps, than sexual conduct or personal medical decisions, falling in love with someone and structuring a life with that person are the core our personal, private and intimate lives.

Also, as this Court has observed, Montana's Declaration of Rights is "a cohesive set of principles" that overlap and provide redundant rights and guarantees. *Armstrong*, ¶ 71. Here, the protection provided by Montana's right of privacy is enhanced by the state constitutional guarantees to the rights of dignity and the pursuit of safety, health and happiness. *See Smith v. State*, 2010 Mont. Dist. LEXIS 12, ¶ 31 (Jan. 4, 2010); *see also* Mont. Const. art. II, §§ 4, 3;

*Snetsinger*, ¶ 64 (Nelson, J., concurring). Montana's fundamental 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 to answer] to their own consciences and convictions." *Armstrong*, ¶ 72. And the right to pursue safety, health and happiness includes the right "to make personal judgments affecting one's own health and bodily integrity without government interference." *Id.* Together, these rights provide cohesive and comprehensive protection of a person's most intimate decisions and activities.[12]

In sum, entering into a long-term, committed, intimate same-sex relationship falls squarely within the protection of Montana's constitutional privacy guarantee and correlative rights to dignity and the pursuit of safety, health and happiness. *See Strauss*, 207 P.3d at 74 (affirming the right of same-sex couples to a legally

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[12] The choice of one's life partner is necessarily fundamental, because enjoyment of the enumerated rights such as the pursuit of safety, health and happiness requires that one has the right to make deeply personal decisions. *See Butte Comm. Union*, 219 Mont. at 430, 712 P.2d at 1311 (right may be "fundamental" if it is one "without which other constitutionally guaranteed rights would have little meaning") (internal quotation omitted); *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996) (right to an opportunity to pursue employment is fundamental because "it is primarily through work and employment that one exercises and enjoys" the fundamental right to pursue life's basic necessities).

recognized relationship and family protection status under California's right of privacy despite existence of marriage amendment).[13]

### B. The State's Exclusion of Same-Sex Couples from the Benefits and Obligations Provided to Married Couples Infringes Plaintiffs' Fundamental Rights.

The State denies benefits and obligations to Montanans, such as Plaintiffs, who exercise their constitutional right to enter into a relationship with a same-sex partner. In denying these benefits and obligations, the State uncontrovertibly causes Plaintiffs direct economic, emotional, and stigmatic or dignitary harm (*see* State. of Facts, sec. C, *supra*), and thereby unconstitutionally infringes Plaintiffs' exercise of their fundamental rights to privacy, dignity, and the pursuit of safety, health, and happiness.

Under the well-established "unconstitutional conditions" doctrine, the State also "may not extract waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006); *see also Perry v. Sinderman*, 408 U.S. 593, 597 (1973) (government "may not deny a benefit to a person on a basis that infringes his constitutionally

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[13] California case law is especially relevant here as California and Montana added privacy provisions to their constitutions in the same year, and drafters in both states expressed the desire to elevate the judicially recognized right of privacy established in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965), to explicit constitutional status. *See Armstrong*, ¶ 46; *In re Marriage Cases*, 183 P.3d at 420.

protected interests"); *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795 (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"). This doctrine prevents the government from injecting "coercive" incentives into a decision constitutionally guaranteed to be free of government intrusion—essentially using carrots to achieve "what [it] is forbidden to achieve with sticks." *See Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981).[14]

Simply stated, Montana's Constitution requires that "when the State of Montana begins conferring benefits in a constitutionally protected area, it must do so in an even-handed and neutral manner." *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, *28-29 (1st Dist. May 22, 1995). Here, the State is offering coercive incentives in the form of statutory benefits and obligations to individuals entering into different-sex relationships, which are "approved" by the State, while withholding those same benefits and obligations to those entering "disfavored"

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[14] Under a similar doctrine, state actions that penalize the exercise of fundamental rights must also be evaluated under strict scrutiny. *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (conditioning eligibility for welfare benefits on living in state violated fundamental right to interstate travel); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (conditioning employment as teacher on not becoming pregnant violated fundamental right to procreate). Here, the State's exclusion penalizes Plaintiffs for exercising their constitutional right to enter into same-sex relationships.

same-sex relationships. This coercive exclusion unconstitutionally burdens the exercise of Plaintiffs' fundamental rights and effectively promotes and furthers the stigma and harm suffered by same-sex couples.

The imposition of these burdens on the exercise of Plaintiffs' fundamental rights triggers a strict scrutiny analysis. *Gryczan*, 283 Mont. At 449 (violation of fundamental right reviewed under strict scrutiny); *Armstrong*, ¶ 34 (same). As such, the State must demonstrate a compelling state interest to justify its exclusion of same-sex couples from the benefits and obligations it grants to married couples, which, as discussed above, it cannot do.

## III. THE DISTRICT COURT ERRED IN CONCLUDING THAT IT WAS POWERLESS TO GRANT A REMEDY FOR THE VIOLATIONS OF PLAINTIFFS' CONSTITUTIONAL RIGHTS.

The district court refused to adjudicate whether the State was violating the Constitution, concluding that the court would be unable to provide Plaintiffs with *any* remedy for any violations it found. In doing so, it misconceived both the role the judiciary plays in protecting constitutional rights and the breadth of the court's remedial authority, and it ignored Plaintiffs' requests for declaratory relief.

The Constitution vests in the judiciary the "power and obligation" to "protect individual rights." *State v. Finley* (1996), 276 Mont. 126, 135, 915 P.2d 208 (1996), *rev'd in part on other grounds*, *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817. "Inherent" in that judicial power "is the responsibility to

determine whether a particular law conforms to the Constitution." *In re License Revocation of Gildersleeve*, 283 Mont. 479, 484, 942 P.2d 705 (1997). A court abdicates this responsibility when it reflexively invokes separation of powers to refuse to undertake an analysis of whether legislative action or inaction violates individual constitutional rights. Any judicial interpretation of a statute or statutory scheme may be construed as implicating separation of powers, yet courts routinely carry out their fundamental responsibility to remedy constitutional violations.

While the Legislature may enact laws that reflect the prevailing view of the majority, those laws must conform to the bounds set by the Constitution. "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*, 283 Mont. at 454-55, 942 P.2d at 125. Pursuant to that obligation, courts must adjudicate violations of the Constitution and must exercise their authority to provide a remedy. As shown below, Montana courts have ample power to provide Plaintiffs relief.

### A. At a Minimum, This Court Can Order Issuance of a Declaratory Judgment of Plaintiffs' Rights so That the Political Branches of Government May Have a Reasonable Opportunity To Bring the State into Compliance with the Constitution.

#### 1. The district court erred by failing to address Plaintiffs' claims for declaratory relief.

Five out of seven of Plaintiffs' claims for relief sought entry of declaratory judgments regarding Plaintiffs' rights and the State's correlative obligations. (Comp. at 20, ¶¶ 1-5.) Overlooking these claims entirely, the district court's Order addressed only one of Plaintiffs' two requests for injunctive relief. (Order at 2, 8; Comp. at 20, ¶ 7.) This was error. *See Pub. Lands Access Ass'n*, ¶ 9.

#### 2. Plaintiffs are entitled to declaratory judgment.

To obtain a declaratory judgment, Plaintiffs only needed to show (as they did) "a legitimate and realistic fear" of future injury and that the entry of a declaratory judgment could resolve "the rights, status or legal relationships of one or more of the real parties in interest." *Gryczan*, 283 Mont. at 441-43, 446. The Uniform Declaratory Judgment Act ("UDJA") is to "be liberally construed and administered" because it seeks "to afford relief from uncertainty and insecurity with respect to rights." Section 27-8-102, MCA; *see also Trustees of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 41, 315 Mont. 210, 69 P.3d 663.

Plaintiffs undeniably experience insecurity and uncertainty, as they do not know when the State will choose to respect their relationships with each other or

with their families. Although this Court has previously recognized the relationships and families of gay and lesbian individuals in some circumstances,[15] all Plaintiffs have nevertheless experienced lack of recognition of their relationships and families. (*See* State. of Facts, sec. C, *supra.*)

This insecurity and uncertainty would persist even if (as the district court suggested) individual actions could theoretically be brought in a piecemeal fashion to address each individual statutory right and benefit. As this Court has previously explained, uncertainty warranting a declaratory judgment can exist if a constitutional dispute can only be resolved through multiple court proceedings, particularly because multiple proceedings could deter those who did not "have the financial resources" from pursuing their rights. *McGillivray v. State*, 1999 MT 3, ¶ 9, 293 Mont. 19, 972 P.2d 804; *see also Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 421, 481 P.2d 330 (1971) (declaratory judgment appropriate "to eliminate or reduce a multiplicity of future litigation").

A declaratory judgment would concretely benefit Plaintiffs because the State would then be on notice regarding the scope of Plaintiffs' constitutional rights and the State's correlative duties. The declaratory judgment "proceeds on the assumption . . . that responsible defendants, like government officials . . . , do not

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[15] *Snetsinger*, ¶¶ 27-29, 35; *Kulstad v. Maniaci*, 2009 MT 326, ¶ 1, 352 Mont. 513, 220 P.3d 595.

need more than a declaration of the law to obey it." Edwin Borchard, *Declaratory Judgments* 279-280 (2d ed. 1941); *see also id.* at 966-967.[16]

Entering a declaratory judgment regarding Plaintiffs' rights would serve the courts' primary function of adjudicating citizens' rights under the Constitution, while allowing the coordinate branches of government a reasonable opportunity to bring the State's conduct into compliance with the Constitution. *See State ex rel. Tipton v. Erickson*, 93 Mont. 466, 475, 19 P.2d 227 (1933) (legislature presumed to act in good faith); *State v. Bowser*, 21 Mont. 133, 139-40, 53 P. 179 (1898) (same for executive branch).[17]

### 3. Declaratory relief can be issued even when injunctive relief is unavailable.

The district court erred by dismissing the entire case and denying Plaintiffs' motion for summary judgment based solely on its perceived inability to grant a single claim for injunctive relief. Even assuming *arguendo* that no injunctive relief

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[16] This Court has previously relied on this treatise in interpreting the UDJA. *See, e.g., Carpenter v. Free*, 138 Mont. 552, 556, 357 P.2d 882, 883 (1960).

[17] A recent example of this form of remedy can be found in *Columbia Falls Elementary School District No. 6 v. State*, 2004 WL 844055, at *32 (Mont. Dist. Ct. Apr. 15, 2004), *aff'd*, 2005 MT 69, ¶ 37, 326 Mont. 304, 109 P.3d 257, where the court declared the State in violation of Montana's Constitution but—mindful of the fact that legislative action would be required to remedy the violation—delayed the effect of its judgment for a period of time to allow the government "ample time to address the very complicated and difficult issues" involved in the case.

was available against the State (a proposition we show is incorrect in Part B, *infra*), declaratory relief should have been granted.

The UDJA itself provides that a declaratory judgment can be entered even when injunctive relief is not appropriate, as it authorizes courts to "declare rights . . . *whether or not further relief* is or *could be claimed*." § 27-8-201, MCA (emphasis added). Consistent with the statute's plain language, this Court has found that a person may obtain a declaratory judgment even where injunctive relief is prohibited by law. *See Jeffries Coal Co. v. Indus. Accident Bd.*, 126 Mont. 411, 414, 252 P.2d 1046 (1953) (plaintiff that could not seek injunction could nevertheless institute declaratory judgment action if defendant unreasonably delayed taking action). The U.S. Supreme Court, interpreting similar statutory language, has likewise explained that a court "'has a duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.'" *Steffel v. Thompson*, 415 U.S. 452, 468, 94 S. Ct. 1209 (1974) (quoting *Zwickler v. Koota*, 389 U.S. 241, 254, 88 S. Ct. 391 (1967)); *Powell v. McCormack*, 395 U.S. 486, 499, 518, 89 S. Ct. 1944 (1969). Indeed, one of the critical reasons for statutes authorizing declaratory judgments was "[t]o enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus,

certiorari, injunction, prohibition or habeas corpus." Borchard, *Delcaratory Judgments, supra*, at 288.

This Court has repeatedly permitted declaratory judgments to be entered against the State, as well as against the Legislature. *See, e.g., McGillivray*, ¶¶ 9-12; *State ex rel. Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 477-78, 543 P.2d 1317 (1975); *see also Nw. Improvement Co. v. Rosebud Co.*, 129 Mont. 412, 415, 288 P.2d 657 (1955) (rejecting argument that it was "not proper or competent to make the state or its subdivisions a party to such [a declaratory judgment] action"). This case is no different.

### B. Montana Courts Possess Broad Equitable Authority to Redress Constitutional Violations.

The district court also erred in holding that it lacked the equitable authority to grant Plaintiffs the injunctive relief to which they are entitled. (Order at 8-11.) That error stemmed from a misapprehension regarding the breadth of the court's authority to vindicate constitutional rights and the possible remedies, short of enjoining the Legislature, that might be sufficient to bring the State into compliance with the state constitution. In any event, Montana courts possess the authority to enjoin the Legislature to remedy constitutional violations.

### 1. Montana courts have broad equitable authority to hear challenges to statutory schemes.

The Legislature has granted the courts broad authority to "prevent the breach of an obligation," which is defined as "a legal duty by which one person is bound to do or not to do a certain thing and [which] arises from . . . operation of law." Sections 27-19-102, 27-1-105, MCA; *see also* Sections 27-1-401 to 403, MCA (authorizing grant of specific and preventive relief). Plaintiffs invoke the courts' authority to prevent precisely such a breach. Plaintiffs claim that the Constitution imposes a duty on the State to provide them the same benefits and obligations as those provided to different-sex married couples, and seek an injunction to prevent a continuing breach of that legal duty.

The Montana Constitution's grant of equity jurisdiction to the Judiciary, Montana Constitution article VII, section 4, further vests the courts with the "inherent authority" to "protect" citizens from constitutional violations. *Seubert v. Seubert*, 2000 Mont. 241, ¶¶ 23-24, 301 Mont. 382, 13 P.3d 365; *see also Link v. Haire*, 82 Mont. 406, 423, 267 P. 952 (1928) ("By this [constitutional] provision, Montana has adopted the entire system of equity jurisprudence. The Legislative Assembly has not the authority thus to restrict the great and beneficent powers of a court of equity."). This broad, inherent equitable authority is bolstered by the Constitution's provision that a "remedy shall be afforded for every injury of person, property, or character." Mont. Const. art. II, § 16.

The district court declined to adjudicate this case on the merits in part because the court thought it would be better heard in a multiplicity of separate suits. (Order 9-10.) But one of the "the grand principle[s] which underlie[] the doctrine of equity" is that "every judicial controversy should, if possible, be ended in one litigation; that the decree pronounced in the single suit should determine all rights, interests, and claims, should ascertain and define all conflicting relations, and should forever settle all questions pertaining to the subject-matter." *State v. Dist. Court of First Judicial Dist.*, 90 Mont. 213, 222, 300 P. 544 (1931). Thus, this Court has repeatedly held that "it is clearly the province of a court of equity, by injunction," to hear a dispute in a single action in order to prevent a "multiplicity of suits." *Palmer v. Israel*, 13 Mont. 209, 212-13, 33 P. 134 (1893); *see also Mont. Bd. of Pharm. v. Kennedy*, 2010 MT 227, ¶ 30, 358 Mont. 57, 67, 243 P.3d 415, 422 (permanent injunction appropriate to "preclude" a "multiplicity of proceedings").

The district court also raised a concern that Plaintiffs had not explicitly identified every state statute that they claimed to be unconstitutional. (Order at 8.) But the court is not deprived of its equitable power merely because Plaintiffs' harm arises from an extensive statutory scheme rather than a single statute. *See City of Billings v. Co. Water Dist. of Billings Heights*, 281 Mont. 219, 226, 232, 935 P.2d 246 (1997) (plaintiff was entitled to preliminary injunction in constitutional

challenge to statutory scheme concerning utility rates); *cf. Hollow v. State*, 222 Mont. 478, 479-81, 487, 723 P.2d 227 (1986) (plaintiff was entitled to declaratory judgment that certain provisions of the Montana Code, relating to the Montana Economic Development Board's authority to utilize the in-state investment fund to guarantee certain loans or bonds, were unconstitutional); *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶¶ 24, 45, 294 Mont. 449, 982 P.2d 456 (statutory scheme relating to vocational rehabilitation benefits held unconstitutional). When the State violates the Constitution the same way in multiple statutes, a single action is all that is required. In any event, Plaintiffs addressed the court's concern by listing many of the statutes that grant benefits to or impose obligations on married couples, in Plaintiffs' motion to alter or amend the judgment.

**2. The district court could have granted relief to Plaintiffs without ordering the Legislature to take action.**

The district court expressed concern that it lacked the power to order the legislature to act, and thus could not provide relief to Plaintiffs. But it erred in assuming that was the only way to provide Plaintiffs complete relief. "Courts sitting in equity are empowered to determine all the questions involved in the case and to do complete justice; this includes the power to fashion an equitable result." *Blaine Bank of Mont. v. Haugen*, 260 Mont. 29, 35, 858 P.2d 14 (1993).

The court could have provided complete relief without directing any order to the legislature. As noted above, the State, through its Department of

Administration, has established criteria for domestic partnerships and allows any state employee to submit a declaration showing that he or she meets those criteria and identifying his or her partner. Based on that declaration, the State gives the same employment benefits to a domestic partner that it gives to a spouse. Thus, the district court could have ordered the Department of Administration to allow any Montanan to submit such a declaration, and then required the State (through its officials and employees) to provide those persons whose declarations have been accepted all the benefits and obligations that it provides to married couples. Other combinations of orders to executive officials and instructions to the lower courts exist that would also provide significant relief to the Plaintiffs. *See ACLU*, 122 P.3d at 795 (identifying other remedial options).

### 3. In any event, Montana courts possess the power to enjoin the Legislature if necessary.

For the reasons discussed above, there is no need to determine at this stage whether Montana courts have the authority to order the Legislature to enact legislation. But if action by the Legislature were required to remedy the constitutional violations, the Constitution grants Montana courts the power to order such action. For example, despite the fact that the power to tax is a legislative function, this Court has ordered cities to levy taxes to meet their legal obligations. *See State ex rel. Mueller v. Todd*, 114 Mont. 35, 44, 132 P.2d 154 (1942); *State v. City of Great Falls*, 19 Mont. 518, 540, 49 P. 15 (1897).

This authority exists because even though the Legislature is an independent branch of government, "independence [does not] mean absolute independence because 'absolute independence' cannot exist in our form of government." *Powder River Co. v. State*, 2002 MT 259, ¶ 112, 312 Mont. 198, 60 P.3d 357. As the Ohio Supreme Court explained: "One of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the basic law." *State ex rel. Scott v. Masterson*, 183 N.E.2d 376, 379 (Ohio 1962). "Failure to act is as much subject to judicial control as improper actions" because the "judicial power to determine invalid the enactments of legislative bodies which are violative" of the Constitution "extends equally" to "compel the performance of duties imposed upon public officers." *Id.*; *see also City of Cleveland ex rel. Nelson v. Locher*, 266 N.E.2d 831, 834 (Ohio 1971) ("a court may determine that an act or statute is invalid because it is contrary to the Constitution and compel its amendment").

Other state courts have directed legislatures to amend statutory schemes to ensure compliance with constitutional requirements protecting the rights of same-sex couples. As the district court acknowledged (Order at 9), both the Supreme Courts of New Jersey and Vermont required their legislatures to enact laws to ensure that same-sex couples received the rights and benefits that married couples

received. *See Baker v. State*, 744 A.2d 864, 886 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

Cases from around the country have recognized that a state judiciary has the power to enjoin the legislature to act when necessary to remedy constitutional violations. "When the legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required by the constitution." *Campbell Co. Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995); *accord Guinn v. Legislature of Nev.*, 71 P.3d 1269, 1276 (Nev. 2003); *In re Opinion of Justices No. 338*, 624 So. 2d 107, 109-10 (Ala. 1993); *see also Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 168 Cal. App. 4th 460, 479, 85 Cal. Rptr. 3d 639, 650 (Ct. App. 2008) ("mandamus is available to compel the Legislature's performance," and while "a court cannot direct how the Legislature exercises its discretion, it can require the Legislature to comply with all laws that govern it"). Montana courts possess equal authority to remedy constitutional violations.

## CONCLUSION

As shown above, Plaintiffs have established based on uncontroverted evidence that the challenged statutory scheme violates their rights under the Montana Constitution and that they are entitled to the declaratory and injunctive relief they seek. For the foregoing reasons, the judgment of the district court should be reversed and the case remanded with instructions to grant Plaintiffs'

motion for summary judgment and to enter a declaratory judgment and injunction in their favor.

DATED this 14th day of November, 2011.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is: double spaced (except footnotes and quoted and indented material are single spaced); proportionately spaced with Times New Roman text typeface of 14 points; has left, right, top and bottom margins of 1 inch; and the word count calculated by Microsoft Word is 9,942 words (excluding the Table of Contents, Table of Citations, Certificate of Compliance, and Certificate of Service).

DATED this 14th day of November, 2011.

GOETZ, GALLIK & BALDWIN, P.C.

By: _____
James H. Goetz

**Attorney for Appellants**

## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that the foregoing document was served upon the following counsel by the means designated below on this 14th day of November, 2011.

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## INDEX TO APPENDIX

## APPENDIX A

## State Constitutional Amendments Similar to Montana's Marriage Amendment

1. Alaska Const. art. 1, § 25 (1998) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.");
2. Ariz. Const. art. 30, § 1 (2008) ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state.");
3. Cal. Const. art. 1, § 7.5 (2008) ("Only marriage between a man and a woman is valid or recognized in California.");
4. Colo. Const. art. II, § 31 (2006) ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state.");
5. Miss. Const. art. 14, § 263A (2004) ("Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.");
6. Mo. Const. art. I, § 33 (2004) ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.");
7. Nev. Const. art. I, § 21 (2002) ("Only a marriage between a male and female person shall be recognized and given effect in this state.");
8. Or. Const. art. XV, § 5a (2004) ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.");
9. Tenn. Const. art. XI, § 18 (2006) ("The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.").

## APPENDIX B

### Broader State Constitutional Amendments Approved Prior to Montana's Marriage Amendment

1. Neb. Const. art. I, § 29 (2000) ("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.");
2. La. Const. art. XII, § 15 (2004) ("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.").

## APPENDIX C

## Broader State Constitutional Amendments Approved Contemporaneous With Montana's Marriage Amendment

1. Ark. Const. Amendment 83 § 2 (2004) ("Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas . . . .");
2. Ga. Const. art. I, § IV, Para. I(b) (2004) ("No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.");
3. Ky. Const. § 233A (2004) ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.");
4. Mich. Const. art. I, § 25 (2004) ("[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.");
5. N.D. Const. art. XI, § 28 (2004) ("No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.");
6. Ohio Const. art. XV, § 11 (2004) ("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.");
7. Ok. Const. art. II, § 35 (2004) ("Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.");
8. Utah Const. art. I, § 29 (2004) ("(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.").

## APPENDIX D

## Broader State Constitutional Amendments Approved Subsequent to Montana's Marriage Amendment\

1. Tex. Const. art. I, § 32(b) (2005) ("This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.");
2. Kan. Const. art. 15, § 16 (2005) ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.");
3. Ala. Const. Art I, § 36.03(g) (2006) ("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 . . .");
4. Idaho Const. art. III, § 28 (2006) ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.");
5. S.D. Const. art. XXI, § 9 (2006) ("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.");
6. Va. Const. art. I, § 15-A (2006) ("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.");
7. Wis. Const. art. XIII, § 13 (2006) ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.");
8. S.C. Const. art. XVII, § 15 (2007) ("This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated.");
9. Fl. Const. art. 1, § 27 (2008) ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.").

# ATTACHMENT E

## Office of the Attorney General
Washington, D. C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications

[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

**Standard of Review**

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[2] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none

[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the

engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

**Application to Section 3 of DOMA**

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia* , 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or

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argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

**Application to Second Circuit Cases**

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

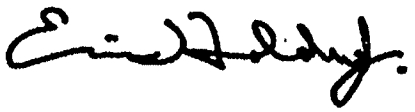
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General