IN THE SUPREME COURT
OF THE STATE OF MONTANA
NO. 03-238

CAROL SNETSINGER, NANCY SIEGEL, CARLA GRAYSON, ADRIANNE NEFF, and PRIDE, INC., a Montana Non-Profit Corporation,

Plaintiffs-Appellants,

vs.

MONTANA UNIVERSITY SYSTEM, STATE OF MONTANA, RICHARD CROFTS, in his official capacity as Commissioner of Higher Education, and MARGIE THOMPSON, ED JASMIN, LYNN MORRISON-HAMILTON, CHRISTIAN HUR, JOHN MERCER, RICHARD ROEHM and MARK SEMMENS, in their official capacities as members of the Board of Regents,

Defendants-Respondents.

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

APPELLANTS' OPENING BRIEF

APPEARANCES:

For Plaintiffs-Appellants

Holly Jo Franz
Gough, Shanahan, Johnson & Waterman
33 S. Last Chance Gulch
P.O. Box 1715
Helena, MT 59624-1715
(406) 442-8560

Beth Brenneman
ACLU of Montana
Power Block West, Suite 4E
Helena, MT 59601
(406) 443-8590

Tamara Lange
Lesbian & Gay Rights Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627

For Defendants-Respondents

LeRoy H. Schramm
Chief Legal Counsel
Montana University System
2500 Broadway
P.O. Box 203101
Helena, MT 59620-3101
(406) 444-6570

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED FOR REVIEW

Whether a public employer that provides an opportunity for employees to purchase insurance for spouses or for different-sex domestic partners who sign an Affidavit of Common Law Marriage but not for same-sex domestic partners violates the rights to equal protection and dignity provided by Article II, § 4, the right to privacy provided by Article II, § 10, or the rights to pursue life's basic necessities and to seek safety, health and happiness provided by Article II, § 3 of the Montana Constitution, where independent state law prevents same-sex domestic partners from becoming spouses.

STATEMENT OF THE CASE

Carol Snetsinger and Nancy Siegel, Carla Grayson and Adrianne Neff, and PRIDE, Inc. challenged the Montana University System's policy that makes gay employees and their same-sex partners categorically ineligible to purchase dependent benefits.[1] Plaintiffs alleged that the policy treats gay people as second-class citizens, burdens their choices about how to structure their intimate relationships, stigmatizes their families, and devalues them as members of society. In their February 4, 2000, Complaint Plaintiffs sought declaratory judgment that

[1] The generic term "gay people" includes lesbians, gay men and bisexual people.

defendants' discrimination based on sex, sexual orientation and marital status violates the Montana Constitution's guarantees of equal protection, dignity and privacy and infringes plaintiffs' rights to pursue life's basic necessities and to seek safety, health and happiness. Defendants moved to dismiss. The District Court granted the motion and entered judgment for defendants on November 22, 2002. Plaintiffs appeal from that judgment.

Montana statutes authorize the Montana University System's Board of Regents to establish hospitalization, medical, health, disability, accident and life insurance plans "for the benefit of their officers and employees and their dependents." Complaint, ¶ 4 (quoting MCA § 2-18-702). In administering those plans, defendants interpret "dependents" to include both different-sex spouses and different-sex domestic partners who sign an Affidavit of Common Law Marriage ("Affidavit") but to exclude same-sex domestic partners under any circumstances. *Id*.

Carol Snetsinger and Nancy Siegel consider themselves married and would enter into a civil marriage if they were permitted to do so. *Id*., ¶ 12. They have resided together in a committed, loving relationship for many years, have held a commitment ceremony before family and friends, and satisfy their agreement of mutual support by providing for one another in wills, insurance policies and

retirement accounts and by sharing the expenses of their home – including the cost of health insurance. *Id*., ¶ 11-16, 22. Yet under defendants' policy, nothing Carol and Nancy do to demonstrate their commitment to one another will make them eligible for benefits. *Id.,* ¶¶ 59, 61.[2] In contrast, different-sex couples may qualify for benefits by entering into a solemnized marriage or by signing an Affidavit of Common Law Marriage ("Affidavit"). *Id.,* ¶ 60; Motion to Dismiss (hereinafter "Motion"), Affidavit of Linda Ryckman (hereinafter "Ryckman Affidavit"), Exh. 2. Defendants offered no independent justification for denying gay families equal benefits, confirming that the purpose of the exclusion is to express disapproval of same-sex couples.

ARGUMENT

This case is about equality in employment. The Montana University System could have based eligibility for "dependent" benefits on any number of neutral requirements by permitting employees to purchase health insurance only for their

[2] The same is true for Carla Grayson and Adrianne Neff, who are fulfilling their additional mutual obligation of caring and providing for their son, and for certain members of PRIDE. *Id.,* ¶¶ 25-37, 42. In addition, Carla and Adrianne also have a certificate of domestic partnership from Ann Arbor, Michigan. Complaint, ¶ 27. Under Ann Arbor's city code, Carla and Adrianne have made a commitment of mutual support, *see* Ann Arbor City Code Tit. IX, Sec. 110, 9:87, that is akin to the commitment of mutual support required of spouses under Montana law.

If the Court concludes that plaintiffs are required to allege the precise contours of their oral and written contractual obligations to one another, including their obligations of mutual support, then plaintiffs request an opportunity to amend their Complaint on remand.

children, only for dependents listed on their federal tax forms or only for loved ones whom they have agreed to support. Instead, defendants condition eligibility for benefits on eligibility to marry. In doing so, they deny gay employees equal access to family health insurance because same-sex couples are not eligible to marry under Montana law. Plaintiffs do not challenge Montana's definition of marriage; they challenge defendants' discriminatory policy. The fact that gay people are not permitted to marry does not justify discrimination against them in state employment.

It is the judiciary's role to ensure that every Montanan receives equal treatment under the law. Defendants' benefits policy violates equal protection by classifying plaintiffs based on their sex, sexual orientation and marital status and depriving them, without sufficient justification, of the benefits other employees and their families receive as compensation. Defendants' policy also infringes plaintiffs' fundamental rights to dignity, to privacy, to pursue life's basic necessities, and to seek safety, health and happiness; it does so both in a discriminatory fashion, in violation of equal protection, and directly, in violation of specific guarantees of the Montana Constitution.

The District Court avoided an inquiry into the sex, sexual orientation and marital status classifications inherent in defendants' policy, concluding instead

that "the classes are those employees who have dependents and those who do not," in other words, that "the distinction is based on whether the employee has dependents." Order at 7:16-17; 8:4-6. Montana's promise of equal protection cannot be so easily circumvented. In a state that prohibited interracial marriage, limiting benefits to married couples would classify according to race, not merely according to which employees had dependents. Likewise, in a state that prohibits same-sex marriage, limiting benefits to married couples classifies according to sex and sexual orientation. The fact that some different-sex couples may *refuse* the benefits offered to them (by deciding not to marry or to sign an Affidavit) does not change the discriminatory nature of the policy: defendants offer benefits to all heterosexual couples and no same-sex couples.

Defendants compound the discriminatory nature of the policy by providing benefits to all different-sex couples who sign an Affidavit, whether or not they are legally married under Montana law. Conversely, defendants deny benefits to same-sex couples even when they have entered into contracts obligating them to support one another financially. Defendants cannot justify their discrimination against gay employees and their families.

I. Standard of Review

The Supreme Court has plenary review over questions of constitutional law and reviews all conclusions of law to determine whether they are correct. *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, ¶ 9, 315 Mont. 51, ¶ 9, 67 P.3d 290, ¶ 9. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *City of Cut Bank v. Tom Patrick Const., Inc.,* 1998 MT 219, ¶ 6, 290 Mont. 470, ¶ 6, 963 P.2d 1283, ¶ 6. The only relevant documents on a Rule 12 motion to dismiss are "the complaint and any documents it incorporates by reference." *Cut Bank*, ¶ 20.[3]

II. Plaintiffs Stated Claims for Violation of Montana's Equal Protection Clause

Defendants classify employees and their partners based on sex, sexual orientation and marital status by conditioning eligibility for dependent benefits on

[3] Plaintiffs agree that the "Dependents Eligibility" and Affidavit of Common-Law Marriage documents attached to the Ryckman Affidavit are admissible because their contents were alleged in the Complaint and no party disputes their authenticity. However, plaintiffs' motion to strike the Affidavit of Glen Leavitt and memorandum of Commissioner Crofts, *see* Reply Attachment 5; Surreply at 4-5*,* should have been granted because those documents do not concern facts that can be judicially noticed and were not attached to or incorporated in the pleading. *See, e.g., Plouffe v. Montana,* 2003 MT 62, ¶ 18, 314 Mont. 413, ¶ 18, 66 P.3d 316, ¶ 18. Although the failure to grant plaintiffs' motion to strike does not affect review of the substantive legal questions presented on appeal, the error should be reversed.

marriage, a status that is available to all different-sex couples but no same-sex couples. In addition, defendants discriminate based on sex and sexual orientation by allowing unmarried different-sex couples to qualify for benefits by signing an Affidavit while providing no similar opportunity for same-sex couples. Defendants' benefits policy is subject to strict scrutiny because it classifies plaintiffs based on two suspect criteria – sex and sexual orientation – and because it provides differential access to fundamental rights. The District Court did not find, and defendants have not argued, that the policy is both narrowly tailored and necessary to further a compelling governmental interest.

Moreover, defendants' policy cannot survive even rational basis review, which requires that the challenged classifications *themselves* rationally promote a legitimate state interest. It is hard to imagine how denying equal benefits to gay employees and their life partners promotes any state interest at all, much less a legitimate one. Denying same-sex couples equal benefits to express disapproval of homosexuality or to privilege heterosexuality is discrimination for its own sake and violates equal protection. *See Romer v. Evans,* 517 U.S. 620, 635 (1996); *cf. Gryczan v. Montana* (1997), 283 Mont. 433, 456-57, 942 P.2d 112, 126-27 (Turnage, J., concurring).

A. Standards of Equal Protection Review

Article II, § 4 of the Montana Constitution guarantees that "no person shall be denied the equal protection of the laws" and "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Montana Dep't of Corrections,* 2001 MT 134, ¶ 30, 305 Mont. 462, ¶ 30, 29 P.3d 992, ¶ 30. Montana's equal protection clause "provides for even more individual protection" than the federal equal protection clause. *Cottrill v. Cottrill Sodding Serv.* (1987), 229 Mont. 40, 42, 744 P.2d 895, 897.

In addressing an equal protection challenge, the Court "must first identify the classes involved and determine whether they are similarly situated." *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, ¶ 27, 982 P.2d 456, ¶ 27. A law or policy may be challenged if "by its own terms [it] classifies persons for different treatment." *State v. Spina,* 1999 MT 113, ¶ 85, 294 Mont. 367, ¶ 85, 982 P.2d 421, ¶ 85 (citation omitted). In addition, 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." *Spina,* ¶ 85.

Once the relevant classifications have been identified, "[t]he next step . . . is to determine the appropriate level of scrutiny." *Henry,* ¶ 29. That task requires the Court to "determine whether a suspect classification is involved or whether the nature of the individual interest involves a fundamental right, either of which would trigger a strict scrutiny analysis." *Henry*, ¶ 29. To satisfy strict scrutiny, defendants must establish that the discrimination advances a compelling state interest, is closely tailored to advance only that interest, and is "the least onerous path that can be taken to achieve the state objective." *M.E.I.C. v. Dep't of Env. Quality,* 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61.

Even where classifications do not affect fundamental or important constitutional rights or burden a suspect class, the government must "show that the objective of the statute is legitimate and bears a rational relationship to the classification." *In re S.L.M.* (1997), 287 Mont. 23, 32, 951 P.2d 1365, 1371. "A careful inquiry is required into . . . the rationality of the connection between legislative means [and] purpose and the existence of alternative means for effectuating the purpose." *In re C.H.* (1984), 210 Mont. 184, 198, 683 P.2d 931, 938.

B. Defendants' Policy Illegally Discriminates Based on Sex

1. Denying benefits to same-sex couples while providing them to different-sex couples classifies similarly-situated individuals based on their sex.

Defendants offer dependent benefits to all employees with *different-sex* partners (so long as they are willing to demonstrate their commitment to one another by marrying or signing an Affidavit) but deny benefits to all employees with *same-sex* partners under any circumstances. With respect to the statutorily-defined goal of providing benefits to state employees and their dependents, employees with same-sex partners are similarly situated to employees with different-sex partners. Equal protection guarantees that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." *State v. Renee,* 1999 MT 135, ¶ 27, 294 Mont. 527, ¶ 27, 983 P.2d 893, ¶ 27. Defendants violate that principle of equality by making eligibility for dependent benefits depend on the sex of the employee and the sex of the employee's partner.

The District Court concluded that defendants' policy "is neutral with respect to gender" because "[i]t applies to all employees who are not married. An unmarried employee who has an opposite-sex domestic partner cannot obtain dependent coverage for his/her domestic partner." Opinion at 7:20-21. That reasoning is flawed for four reasons.

First, defendants explicitly classify employees and their partners based on their sex by using the term "spouse" to define eligibility for benefits. Limiting benefits to spouses creates a sex-based classification because independent state law defines marriage as a "personal relationship between a man and a woman," MCA 40-1-103, and prohibits marriage between persons of the same sex, MCA 40-1-401. A policy that conditions benefits on marriage does not burden all unmarried couples equally because different-sex couples are free to marry. Defendants could have chosen to determine benefit eligibility using any number of guidelines: that only employees themselves are eligible, that only employees and their children are eligible, that up to five designees of an employee are eligible, that people listed as dependents for federal-tax purposes are eligible, that same- and different-sex domestic partners are eligible, etc. Among these many options, defendants chose eligibility to marry as the dividing line, defining eligibility for benefits in sex-based terms.[4] Montana's equal protection clause requires defendants to justify their choice to discriminate based on sex.

[4] Although defendants' reliance on marriage to determine eligibility creates the sex-based classification, the Court need not rule on the validity of the marriage statutes in order to resolve Plaintiffs' claims. *See McLaughlin v. Florida,* 379 U.S. 184, 195 (1964). A challenge to the decision to draw the line for benefits eligibility at marriage says nothing about the constitutionality of the state's definition of marriage itself; that is a wholly separate issue. This lawsuit only asks the Court to determine whether defendants have a compelling reason for using the sex-based definition of marriage to determine plaintiffs' eligibility for benefits.

Second, with respect to the statutorily-defined goal of providing benefits to state employees and their dependents, plaintiffs are similarly situated to married different-sex couples (rather than to different-sex couples who choose not to marry) because they "stand in the same relation to [the] privileges conferred" as married couples. *See Leuthold v. Brandjord* (1935), 100 Mont. 96, 105, 47 P.2d 41, 45. Like married couples, plaintiffs need dependent health insurance benefits because of their emotional, moral and legal obligations to care for one another. Like married couples, Carol and Nancy have made a life-long commitment to one another, have demonstrated their legal interdependence by naming one another as primary beneficiaries in their wills and in life insurance and retirement policies, and have entered into an agreement of mutual support by which they share the expenses of their home, including the cost of health insurance coverage for Nancy, who works part time. *See supra* at 2-3. The same is true for Carla and Adrianne and for other same-sex couples who are members of PRIDE. *Id*.[5] Plaintiffs must run the same health risks and bear the same financial burdens married couples

[5] Plaintiffs' agreements to share the expenses of their home and to support one another financially are enforceable under Montana law. *See* MCA §§ 28-2-102, 28-2-903; *Peterson v. Nelson,* 252 P. 368 (Mont. 1926); *see also Whorton v. Dillingham* (1988), 202 Cal. App. 3d 447 (same-sex couple's oral contract of support enforceable).

would bear if they were forced to do without health insurance or to obtain it on the private market. The only distinguishing factor is their sex.

Third, defendants also disadvantage same-sex couples as compared to unmarried different-sex couples. Different-sex couples may qualify for benefits by signing an Affidavit stating that they have lived together and have agreed to become husband and wife and to assume towards each other "all the responsibilities and duties which the law attaches to such a relationship." *See* Ryckman Affidavit, Exh. 2. Yet this Court has already recognized that signing an affidavit of common-law marriage does not establish the existence of a marriage. *See Estate of McClelland* (1975), 168 Mont. 160, 162, 164, 541 P.2d 780, 782 (affidavit submitted to obtain government benefits did not prove existence of common-law marriage); *see also* MCA 40-1-103, 40-1-311, 40-1-324.[6] Thus, defendants offer unmarried different-sex couples a choice: tell us that you are committed to one another or forego dependent benefits. Defendants offer same-sex couples no such choice. No matter how committed or how financially and

[6] As a legal doctrine, common-law marriage exists only as a matter of equity by retrospective judicial determination. *See, e.g., Estate of Alcorn* (1994), 363 Mont. 353, 357, 868 P.2d 629, 631. Consequently, couples who sign defendants' Affidavit are not eligible for the myriad benefits available to married couples and cannot be required to shoulder the responsibilities of married couples unless and until a *court* finds that they are common-law spouses.

legally interdependent they are, same-sex couples are ineligible for dependent benefits.

Fourth, where a sex-based classification is alleged, the question is not whether defendants' policy discriminates against unmarried people, as the District Court suggested, but whether the sex discrimination that is inherent in a policy that conditions benefits on marriage–discrimination between different-sex couples and same-sex couples–is a classification based on sex for equal protection purposes. It is.

Defendants' policy violates equal protection because each individual's eligibility for dependent benefits depends on sex. Montana law requires that the government "treat similarly-situated *individuals* in a similar manner." *McDermott,* ¶ 30 (emphasis added). Equal protection law is

> concern[ed] with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class."

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (citation omitted). Defendants deny dependent benefits to a female employee with a female partner while offering them to a male employee with a female partner. Thus, defendants make an individual employee's eligibility for

dependent benefits depend on his or her sex. *See City of Los Angeles, Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978) (finding statutory violation where policy treated female employee "in a manner which but for that person's sex would be different").

The fact that eligibility also depends on the sex of the employee's partner does not cure the violation; it compounds it. The United States Supreme Court has applied this same principle in a series of equal protection challenges to discrimination based on race or sex. When Virginia argued that a law prohibiting interracial marriage did not discriminate on the basis of race because the prohibition applied equally to whites and non-whites, the Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8 (1967). To establish that the classification was based on race, it was unnecessary to show that whites and non-whites were treated differently; it was enough that the classification was defined in terms of the race of the members of a couple. *Id.* at 11; *see also McLaughlin,* 379 U.S. at 191.

Similarly, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court struck down a policy that provided benefits for all servicemen's wives but only provided

benefits for servicewomen's husbands when they proved actual dependence. The classification created no disparity between men and women because every time a servicewoman was disadvantaged, her husband was also disadvantaged. Nevertheless, because an *individual* employee's eligibility for benefits depended on his or her sex, the policy impermissibly discriminated based on sex. *Id.* at 688; *see also Califano v. Goldfarb*, 430 U.S. 199 (1977). Thus, to establish that defendants' policy creates a sex-based classification, it is not necessary to show that men as a class and women as a class are treated differently; it is enough that eligibility for benefits depends on sex.

Defendants have argued that relying on marriage is "natural," and the District Court held that marriage "is a reasonable and objective standard" because it is "recognized in law for many purposes." Opinion at 9. But the fact that Montana state law prohibits same-sex couples from marrying does not immunize defendants' policy against an equal protection challenge. The United States Supreme Court has rejected an analogous argument. In *McLaughlin,* a couple convicted of violating Florida's law against interracial cohabitation challenged the law as a violation of equal protection. 379 U.S. at 187 n.6. Florida argued that the law prohibiting interracial cohabitation was constitutional because it was "ancillary to and served the same purpose as" the state's law banning interracial

marriage. *Id.* at 195. The Supreme Court refused to consider the constitutionality of Florida's ban on interracial marriage and rejected the assertion that the cohabitation law was constitutional simply because it derived from the marriage law. *Id.* As the Court explained,

> even if we posit the constitutionality of the ban against the marriage of a Negro and a white, *it does not follow that the cohabitation law is not to be subjected to independent examination* under the Fourteenth Amendment. Assuming . . . that the basic prohibition is constitutional, in this case the law against interracial marriage, it does not follow that there is no constitutional limit to the means which may be used to enforce it. . . . [The interracial cohabitation law] must therefore itself pass muster under the Fourteenth Amendment . . . .

Id. (emphasis added). Likewise, in this case, "[t]he court[] must reach and determine . . . whether there is an arbitrary or invidious discrimination between those . . . covered by [the policy] and those excluded." *McLaughlin,* 379 U.S. at 191. The legality of defendants' discrimination against same-sex couples must be tested independently from Montana's prohibition on same-sex marriage.

2. Sex-based classifications are subjected to strict scrutiny, which defendants cannot satisfy.

Classifications based on sex are strictly scrutinized because freedom from sex discrimination is a fundamental right enumerated in Montana's Declaration of Rights. *See* Art. II, § 4; *Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174. Defendants cannot satisfy their burden of establishing that making

eligibility for dependent benefits depend on sex is necessary and narrowly-tailored to promote a compelling governmental purpose.

C. Defendants' Policy Illegally Discriminates Based on Sexual Orientation

1. Denying benefits to gay couples while providing them to heterosexual couples classifies similarly-situated individuals based on their sexual orientation.

Limiting dependent benefits to spouses and different-sex couples who sign an Affidavit also draws a bright line based on sexual orientation: *No* gay couple can obtain dependent benefits while *all* heterosexual couples have an opportunity to obtain benefits. Defendants' policy discriminates based on the core distinction between gay people and heterosexual people: gay people fall in love and have committed relationships with people of the same sex while heterosexual people fall in love and have committed relationships with people of a different sex. As Justice Turnage recognized in his concurrence in *Gryczan,* when the state discriminates between same-sex and different-sex couples, it is "[c]learly . . . a denial of the constitutional guarantee of equal protection of the law in violation of . . . Article II, Section 4 of the Montana Constitution." 283 Mont. 433, 456, 942 P.2d 112, 126.

A marriage-based employment benefits policy discriminates based on sexual

orientation even if it treats all unmarried people alike. *See Tanner v. Oregon Health Sci. Univ.,* 971 P.2d 435, 447-48 (Or. Ct. App. 1998). Avoiding mental gymnastics, the *Tanner* court explained that benefits are not available "on equal terms" as long as the state conditions benefits on marriage and denies gay couples an opportunity to marry. *Id*.; *see also Levin v. Yeshiva Univ*., 754 N.E.2d 1099, 1104 (N.Y. 2001) (university policy restricting housing benefits to married students unlawfully disadvantaged gay students). There is no need to question the validity of Montana's marriage law to reach that conclusion. The "marriage law merely defines who can and cannot marry; it was not intended to permit . . . [employers] to violate [state law]." *Levin,* 754 N.E.2d at 1111 (Kaye, C.J., concurring in part).

The District Court concluded that defendants' policy does not discriminate based on sexual orientation because it excludes unmarried heterosexual couples as well as all gay people. Opinion at 7-8 (citing *Hinman v. Dep't of Personnel Admin.*, 167 Cal. App. 3d 516, 526 (1985); *Phillips v. Wisconsin Personnel Comm.*, 167 Wis. 2d 205, 212-13 (1992); *Ross v. Denver Dep't of Health & Hospitals*, 883 P.2d 516, 521 (Colo. App. 1994); *Rutgers, Council of AAUP Chapters v. Rutgers*, 298 N.J. Super. 442, 462 (1997); *Bailey v. City of Austin*, 972 S.W.2d 180, 186 (Tex. App. 1998)). While that argument has been adopted in

some jurisdictions, it is illogical and, in this case, inapplicable.

First, the contention that defendants' policy merely distinguishes between married persons and unmarried persons ignores the reality that gay people cannot marry in Montana. Using the same contorted logic, General Electric once argued that a policy distinguishing between pregnant persons and non-pregnant persons did not classify individuals based on sex, despite the reality that only women can get pregnant. *General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976). Although the Supreme Court initially accepted that argument, the decision was criticized nationwide and ultimately was repudiated by congressional action. *See* 42 U.S.C. § 2000e; *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.,* 462 U.S. 669, 678-79, 684 (1983). Like most state courts, this Court refused to follow *Gilbert* and held that, because the ability to become pregnant is unique to women, "any classification which relies on pregnancy . . . is a distinction based on sex." *Bankers Life & Cas. Co. v. Peterson* (1993), 263 Mont. 156, 160, 866 P.2d 241, 243 (citation omitted).

Just as a pregnancy-based classification discriminates based on sex because it burdens women (the only people capable of getting pregnant), a marriage-based classification discriminates based on sexual orientation because it burdens gay people (the only people incapable of getting married). As the Oregon court

explained in *Tanner*:

> [The state] insists that in this case privileges and immunities are available to all on equal terms: All *married* employees – heterosexual and homosexual alike – are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.

971 P.2d at 447-48 (emphasis in original); *see also Levin,* 754 N.E.2d at 1104.

Second, defendants offer dependent benefits to all heterosexual couples – both married and unmarried. The only burden on unmarried heterosexual couples is the requirement that they sign an Affidavit. A heterosexual woman employed by defendants can obtain dependent benefits for a man she has been living with for two weeks so long as they are willing to sign an Affidavit, even if they could not establish the existence of a common-law marriage in court. *See supra* at 13. In contrast, Carol can never obtain dependent benefits for Nancy even though they have agreed to support one another financially and have lived together under that agreement for many years. Carla can never obtain dependent benefits for Adrianne even when Adrianne is financially dependent on Carla because she stays home to care for their toddler. No matter how they slice it, defendants' policy makes eligibility for benefits depend on sexual orientation.

2. Sexual-orientation based classifications should be subjected to strict scrutiny, which defendants cannot satisfy.

The second step of equal protection review is "to determine the appropriate level of scrutiny." *Henry,* ¶ 29. Any policy that disadvantages a suspect class is strictly scrutinized. *Id.,* ¶ 29.

> A suspect class is one 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. at 198, 683 P.2d at 938. Gay people constitute a suspect class because sexual orientation has no bearing on an individual's capacity to function as a member of society and yet they historically have been subjected both to legal disabilities and to discrimination and violence and have been rendered so politically powerless that protection from the majoritarian political process is necessary to enable their full participation in society.[7]

Courts have found that sexual orientation is irrelevant to government decision making in nearly every context from public employment, *see Weaver v. Nebo School Dist*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Glover v. Williamsburg Local School Dist. Bd. of Ed.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *Miguel v.*

[7] Neither the Montana Supreme Court nor the United States Supreme Court has ruled on the appropriate level of scrutiny for classifications based on sexual orientation. *See Romer,* 517 U.S. at 632-33, 635; Tobias Barrington Wolff, *Principled Silence,* 106 YALE L.J. 247 (1996).

Guess, 112 Wash. App. 536 (2002), to public education, *see Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), to police protection, *see Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), to criminal prosecution, *see Gryczan,* 283 Mont. at 455, 942 P.2d at 125-26. Sexual orientation has no bearing on how well an employee performs a job or how much an employee needs health insurance benefits for family members. As a result, the very act of using sexual orientation to classify employees and their families suggests an improper motive and should be closely scrutinized to ensure that the discrimination is justified.

The history of government action toward gay people has been so invidious that classifications based on sexual orientation should be viewed with a high degree of suspicion. *See Tanner,* 971 P.2d at 447-48; *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); Lawrence H. Tribe, *American Constitutional Law,* 1616 (2d ed. 1988); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History,* 79 VA. L. REV. 1551, 1563 (1993); *see also People v. Garcia*, 77 Cal. App. 4th 1269, 1277 (2000). In *Tanner,* the court concluded that "it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice" and applied strict scrutiny in striking down an Oregon

state university's restriction of health benefits to married employees as a violation of Oregon's equivalent of an equal protection provision. 971 P.2d at 448. The analysis in *Tanner* should be given particular weight in this case because the Montana constitution is frequently analyzed in keeping with similar provisions in the Oregon constitution. *See, e.g., Marshall v. State, ex rel. Cooney*, 1999 MT 33, ¶¶ 12, 22, 293 Mont. 274, ¶¶ 12, 22, 975 P.2d 325 ¶¶ 12, 22 (voting); *Hulse v. State, Dep't of Justice, Motor Vehicle Div.,* 1998 MT 108, ¶¶ 31-35, 289 Mont. 1, ¶¶ 31-35, 961 P.2d 75, ¶¶ 31-35 (privacy); *State v. Bullock* (1995), 272 Mont. 361, 378-79, 901 P.2d 61, 72-73 (privacy).

The need to protect gay people from the majoritarian political process is evident in Montana. It has been only six years since same-sex sexual relationships were decriminalized, and decriminalization was the result of judicial rather than legislative action. *See Gryczan,* 283 Mont. 433, 454, 942 P.2d 112, 124-125. The state legislature passed a law in 1997 explicitly prohibiting same-sex couples from marrying. *See* MCA 40-1-401. All statewide legislative efforts on behalf of gay people have been unsuccessful, *see* Motion at 7, n. 3, and Missoula is the only

county in the entire state to offer dependent benefits for the domestic partners of its gay employees.[8]

Defendants' policy should be strictly scrutinized for all of the foregoing reasons, and the District Court's decision should be reversed because denying plaintiffs equal employment benefits is neither necessary nor the least onerous method of advancing a compelling state interest.

3. Making gay families ineligible for benefits cannot be justified under any level of scrutiny because it is motivated by a desire to disadvantage them.

Denying gay families equal employment benefits to express disapproval of homosexuality is discrimination for its own sake, which is inherently illegitimate. As the United States Supreme Court explained in *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Likewise, expressing "negative attitudes" toward or moral censure of a disadvantaged group is not a legitimate purpose.

[8] *See* Chaney, Rob, "County Oks insurance for domestic partners," Missoulian (Apr. 4, 2003) (located at www.missoulian.com/articles/2003/04/04/news/local/news03.txt).

See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985); *Lofton v. Kearney,* 157 F. Supp. 2d 1372, 1383 (S.D. Fla. 2001).[9]

In *Romer*, the Court expressly held that these principles apply to government action that disadvantages gay individuals. 517 U.S. at 634-35. Conditioning health insurance and other benefits on marriage, in a context where same-sex marriages are prohibited, unconstitutionally fences gay employees and their families out of society. *See id.* at 627 ("Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations[.]"). Because defendants' policy is a "classification of persons undertaken for its own sake," it cannot be justified under any level of scrutiny, *id.* at 635, and the District Court's order should be reversed.

4. Defendants' policy fails even rational basis review.

Even putting aside the propriety of heightened scrutiny and defendants' unconstitutional purpose, defendants' policy fails rational basis review. Defendants argued in the District Court only that their policy promotes administrative efficiency and that it is "inherently rational."

[9] Just as a policy cannot be justified by the state's own disapproval of gay people, it cannot be justified by the disapproval of others. *See Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) (state could not give effect to private discrimination by granting custody to father to avoid prejudice to the child based on mother's inter-racial relationship).

a. Administrative convenience cannot justify denying benefits to gay couples.

Standing alone, administrative convenience cannot justify a decision to deny benefits to one particular group of workers even if the government contends it is more difficult to assess the validity of its claims for benefits. *See Stavenjord v. Montana State Fund,* 2003 MT 67, ¶¶ 41, 47, 314 Mont. 466, ¶¶ 41, 47, 67 P.3d 229, ¶¶ 41, 47 (citing *Henry,* ¶¶ 38-39); *Frontiero*, 411 U.S. at 688.[10] Moreover, denying plaintiffs equal dependent benefits does not rationally advance any interest in administrative convenience. *See In re S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371. Defendants already make case-by-case determinations of eligibility for dependent benefits because they offer benefits to different-sex couples based on an assertion of common-law marriage. Providing an equivalent affidavit procedure for same-sex couples would not create an administrative burden beyond the *de minimis* effort necessary to revise one of the many affidavits of domestic

[10] Likewise, "even if the governmental purpose is to save money, it cannot be done on a wholly arbitrary basis. The classification must have some rational relationship to the purpose" of the challenged policy. *Arneson v. State* (1993), 262 Mont. 269, 275, 864 P.2d 1245, 1248. "Cost-control alone cannot justify disparate treatment . . . . Discrimination, that is, offering services to some while excluding others for any arbitrary reason, will *always* result in lower costs." *Heisler v. Hines Motor Co.* (1997), 282 Mont. 270, 283, 937 P.2d 45, 52. In the absence of any basis for reducing costs by depriving a particular class of persons of benefits, the classification violates equal protection. *Id*. In this case, there is no independent reason to reduce costs by denying benefits to same-sex couples as compared to any other group.

partnership used by other state university systems.

In light of defendants' use of an affidavit procedure for different-sex couples who contend they are common-law married (regardless of the administrative burden that procedure may or may not entail), defendants' refusal to use an equivalent procedure for same-sex partners is entirely arbitrary.[11] "A classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws." *Davis v. Union Pacific R. Co.* (1997), 282 Mont. 233, 242, 937 P.2d 27, 32 (venue statute arbitrarily discriminated against victims of nonresident corporations); *see also McKamey v. State* (1994), 268 Mont. 137, 885 P.2d 515 (requirement that firefighters be members of military violated equal protection); *Arneson*, 262 Mont. 269, 864 P.2d 1245 (age discrimination in survivor benefits violated equal protection); *Brewer v. Ski-Lift, Inc.* (1988), 234 Mont. 109, 115, 762 P.2d 226, 230-231 (law imposing assumption of risk for skiing but not for other inherently dangerous activities violated equal protection).

[11] There is no reason to suspect a higher rate of fraud by people purporting to be same-sex couples. In fact, the existence of widespread homophobia makes it more likely that employees will fraudulently claim to be common-law married than that they will fraudulently register as same-sex domestic partners.

b. Asserting that the policy is inherently rational does not satisfy the rational basis test.

Defendants argued in the District Court that their policy is "inherently rational" because of "the nature of marriage since the founding of the republic" and "the centrality of marriage as a societal institution." Motion at 14-15. This argument ignores the central requirements of the rational basis test. A "careful inquiry is required into . . . 'the rationality of the connection between legislative means and purpose [and] the existence of alternative means for effectuating that purpose.'" *In re C.H.*, 210 Mont. at 198, 683 P.2d at 938. Defendants are reduced to arguing that their policy is *inherently* rational because they cannot articulate a legitimate governmental purpose, cannot explain the connection between their classification based on sexual orientation and a legitimate purpose and cannot demonstrate that "alternative means for effectuating" that purpose are unavailable.

Any argument that defendants' discrimination against gay families is intended to promote marriage must fail because the discrimination does not rationally advance the goal of promoting marriage. First, the exclusion is so disconnected from the ultimate goal as to be irrational; no heterosexual couple is going to get married because gay couples are excluded. Defendants could just as easily argue that it would be rational to limit state parks or public hospitals to

married couples because doing so would promote marriage. Second, defendants' policy actually *discourages* different-sex couples from marrying by making benefits available to any heterosexual couple who will sign an Affidavit even though signing an Affidavit does not create a marriage. Where, as here, discrimination against gay people "is so discontinuous with the reasons offered for it," the classification is "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer,* 517 U.S. at 632.

c. Defendants' discrimination based on sexual orientation does not rationally advance the purpose posited by the District Court.

Although defendants did not argue that they discriminate based on sexual orientation because gay couples are not subject to marital obligations of support, and the parties did not brief the issue, *see Oberg v. City of Billings* (1983), 207 Mont. 277, 283, 674 P.2d 494, 496-97 (holding courts should not "dream[] up a rational relationship to some governmental purpose"), the District Court concluded

that

> marriage is a reasonable and objective standard to determine who is a dependent. The marriage relationship imposes on a married person certain legal responsibilities, including the duty of support. Section 40-2-102 MCA. Although the named Plaintiffs have committed relationships with their respective partners, they are not subject to the legal responsibilities and obligations which are imposed on married persons.

Opinion at 9-10. However, even assuming, *arguendo,* that signing an Affidavit imposed such marital obligations, *but see McClelland,* 168 Mont. at 162, 541 P.2d at 782, the question in this case is not whether there is a rational basis for *providing* benefits to married couples, but whether there is a rational basis for *denying* benefits to gay couples.

It is hard to imagine how refusing to allow gay employees to purchase benefits for their partners can rationally advance the governmental purpose suggested by the District Court: helping married employees to comply with their duty of support. The asserted purpose is impossible to credit. *See Romer,* 517 U.S. at 635. First, the statute authorizing dependent benefits does not suggest such a purpose. Second, preventing gay couples from purchasing dependent benefits for their partners does not help married couples to comply with their marital obligations. Third, regardless of sexual orientation, people financially support their loved ones because they love them, not because law requires them to

do so. That fact is demonstrated in Montana by the absence of a single published judicial decision enforcing the obligation of mutual support prior to dissolution of the marriage. Fourth, plaintiffs have taken on by private agreement the obligation of mutual support that heterosexual couples take on when they marry under Montana law. *See supra* at 2-3.

An employee benefits program that helps heterosexual couples – but not gay couples – to meet their legal obligations to family members violates equal protection because it is entirely arbitrary and has no purpose other than to disadvantage gay couples. *See Cleburne,* 473 U.S. at 449 (discrimination was arbitrary where state purportedly required permit for disabled adult's group home because occasional flooding in the area might require quick evacuation but state required no such permit for nursing homes or hospitals); *Brewer,* 234 Mont. 109, 115, 762 P.2d 226, 230 (despite legitimate interest in "protecting the economic vitality of the ski industry" imposing assumption of risk for skiing was arbitrary where not imposed for other inherently dangerous activities); *Romer,* 517 U.S. at 635. All employees need health insurance for their families and there is no reason to distinguish between helping employees to satisfy obligations of mutual support imposed by Montana's marriage law and helping them to satisfy obligations of mutual support imposed by domestic partnership and civil union laws or by

private, enforceable contracts. *See supra* at 2-3, 13; *cf. Stavenjord,* ¶¶ 46-47; *Henry,* ¶¶ 44, 45.

Moreover, there is no basis from which to conclude that "alternative means for effectuating" the goal of helping married couples to comply with their obligations are unavailable. *See In re C.H.*, 210 Mont. at 198, 683 P.2d at 938; *Moran v. Sch. Dist. # 7 Yellowstone Cty.*, 350 F. Supp. 1180, 1186 (D. Mont. 1972). Retaining the existing system while allowing gay couples to obtain dependent benefits by signing an Affidavit of Domestic Partnership would provide just as much encouragement to heterosexual couples to comply with their obligations of support without discriminating against gay couples and preventing them from satisfying their own obligations of support. The fact that such a nondiscriminatory alternative is easily available demonstrates "the prejudicial and invidious effects of the . . . rule." *Moran,* 350 F. Supp. at 1186.

D. Defendants' Policy Illegally Discriminates Based on Marital Status

Defendants do not dispute that their policy classifies plaintiffs based on marital status. As discussed in the preceding sections, however, defendants do not explain *why* they deny dependent benefits to unmarried couples.[12] Even under

[12] Plaintiffs contend that defendants make benefits available to unmarried different-sex couples because the Affidavit does not establish the existence of a marriage under Montana law. However, for purpose of this claim, plaintiffs assume that defendants' policy distinguishes based on marital status.

rational basis review, defendants must show that their classification based on marital status was rationally selected to advance an independent, legitimate governmental purpose and that nondiscriminatory alternatives are not available. *See In re S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371; *see also University of Alaska v. Tumeo,* 933 P.2d 1147 (Alaska 1997) (finding statutory violation where policy denied health insurance benefits to domestic partners based on their marital status).

The circular nature of defendants' argument that marital status discrimination promotes marriage reveals the absence of an independent rational basis. In addition, the discriminatory motive behind the classification is demonstrated by the availability of "alternative means" of advancing defendants' asserted interests. In *Moran*, the court held a school could not prohibit married students from participating in extracurricular activities because of "moral pollution," explaining that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." 350 F. Supp. at 1187; *see also Kaptein v. Conrad Sch. Dist.* (1997), 281 Mont. 152, 931 P.2d 1311 (explaining *Moran*). Although the school argued its purpose was to encourage the academic success of married students, the *Moran* court found the policy violated equal protection because "that

goal could be achieved in a nondiscriminatory fashion by tying participation in extracurricular activities to academic performance for *all students*, not just married students." *Kaptein,* 281 Mont. at 159-60, 931 P.2d at 1316. The fact that a nondiscriminatory alternative was available demonstrated "the prejudicial and invidious effects of the . . . rule." *Moran,* 350 F. Supp. at 1187. The same principle applies here. Instead of limiting eligibility to married couples in order to help employees satisfy obligations of support, defendants could simply modify their system by allowing same-sex couples to qualify by signing Affidavits of Domestic Partnership referencing their contractual agreements of mutual support. The availability of this simple alternative reveals the invidious nature of defendants' policy.

E. Strict Scrutiny Applies Even Where the Classification is Not Suspect Because Defendants' Policy Affects Plaintiffs' Fundamental Rights

When a governmental classification creates differential access to a fundamental right, that classification is subjected to strict scrutiny under the equal protection clause. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also Henry,* ¶ 29. Just as differential access for picketers violated equal protection in *Mosley* even though the government could have barred all picketers, differential provision of benefits to employees and their partners violates equal protection

even though defendants are not constitutionally required to provide any benefits at all. Thus, the sex, sexual orientation and marital status classifications drawn by defendants' policy are all subject to strict scrutiny because defendants provide plaintiffs differential access to the fundamental rights to dignity, to privacy, to pursue life's basic necessities and to seek safety, health and happiness. *See, e.g., McDermott,*¶ 31; *Oberg*, 207 Mont. at 285, 674 P.2d at 497-98.

III. Plaintiffs Stated Independent Claims for Violation of Their Fundamental Rights

Wholly apart from their equal protection claim, plaintiffs have alleged that defendants' policy violates their fundamental rights. *See Armstrong v. State,* 1999 MT 261, ¶¶ 71-73, 296 Mont. 361, ¶¶ 71-73, 989 P.2d 364, ¶¶ 71-73. The District Court concluded that because an entitlement to dependent benefits is not itself a fundamental right, *see Stratemeyer v. Lincoln Cty.* (1993), 259 Mont. 147, 855 P.2d 506; *Cottrill,* 229 Mont. at 43, 744 P.2d at 897; *but see Powell v. State Compensation Ins. Fund,* 2000 MT 321, 302 Mont. 518, 15 P.3d 877, denial of such benefits can never infringe fundamental rights. The argument in this case, however, is not that plaintiffs have a fundamental right to receive dependent benefits, but that putting those benefits out of their reach because of moral condemnation of their life choices infringes their fundamental rights. By the

District Court's reasoning, there would be no violation of dignity or privacy if the right to purchase condoms were limited to married couples because the right to purchase condoms is not itself a fundamental right. *But see Eisenstadt v. Baird*, 405 U.S. 438 (1972). Similarly, there would be no violation of dignity or privacy if dependent benefits were available for biological children but not for adopted children even though such a policy would inhibit the creation of new familial relationships through adoption, would stigmatize families with adopted children, and would devalue families with adopted children as participants in society. Montana's Constitution promises more.

A. Dignity

Article II, § 4 of the Montana Constitution provides that "[t]he dignity of the human being is inviolable." The dignity clause embodies the principle of republican government that individuals must be free to lead self-directed lives and protects each person's individual freedom to make decisions about family structure free from governmental interference or pressure. *Armstrong,* ¶¶ 71-73. Dignity is guaranteed by ensuring 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 . . . answering to their own consciences and convictions" rather than to the pressures or dictates of the political majority. *Id.*;

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, 308 (Summer 2000) (hereinafter "Clifford"). Because it focuses on the importance of respecting each individual as a full member of the community, the dignity clause requires that groups of people not be singled out and "devalued as members of society" or treated as "an inferior second-class of citizens." *In re Mental Health of K.G.F.,* 2001 MT 140, ¶¶ 56, 60, Mont. 1, ¶¶ 56, 60, 29 P.3d 485, ¶¶ 56, 60; *see also Girard v. Williams,* 1998 MT 231, ¶¶ 76-79, 291 Mont. 49, ¶¶ 76-79, 966 P.2d 1155 (Nelson, J., specially concurring); *In re C.R.O.,* 2002 MT 50, ¶¶43-48, 309 Mont. 48, ¶¶43-48, 43 P.3d 913, ¶¶43-48 (Nelson, J., Cotter, J., Leaphart, J., dissenting); *Walker v. Montana,* 2003 MT 134, ¶¶ 72-82, 316 Mont. 103, ¶¶ 72-82, __ P.3d. __.[13]

Recognizing that the right to dignity involves the right to be free from prejudice that values people based on group characteristics rather than individual attributes, this Court has explained that prejudice toward the mentally ill has the same "quality and character" as "prejudices such as racism, sexism, *heterosexism*

[13] This Court has invoked the dignity clause in a number of contexts, finding that it protects the right to bodily integrity, *see Armstrong,* ¶¶ 71-73*,* the right not to be subjected to a polygraph test as a condition of employment, *see Oberg*, 207 Mont. at 280, 674 P.2d at 495, the right to certain procedures at a civil commitment hearing, *see K.G.F.,* ¶¶ 44-47, and the right to be free from degrading treatment in prison, *see Walker,* ¶ 81.

and ethnic bigotry" and is "repugnant to our state constitution" because the dignity clause protects the right not to be "devalued as members of society" or treated as "an inferior second-class of citizens." *K.G.F.,* ¶¶ 56, 60 (emphasis added) (citing, *inter alia,* Clifford at 330-32). The heterosexist prejudice inherent in defendants' policy is likewise "repugnant" to the Montana Constitution. *See* Clifford at 333-35. Defendants' policy punishes plaintiffs for choosing same-sex life partners, devalues their contributions to society, treats them as second-class citizens, and undermines their ability to maintain their family relationships, to provide responsibly for their families and to live self-directed lives. By penalizing plaintiffs for choosing same-sex partners, defendants burden their right to resolve "the most fundamental questions about the meaning and value of their own lives . . . answering to their own consciences and convictions." *Armstrong,* ¶¶ 71-73.

The District Court concluded that the deprivation of health insurance benefits is not a sufficient indignity to warrant constitutional protection. However, following this argument to its logical conclusion, racial segregation of lunch counters would not have been an affront to dignity because African Americans were deprived of nothing more than the right to buy a sandwich in a particular location. Of course, the indignity of racial segregation in this country was not the fact that an African American woman could not get a sandwich at the

whites-only lunch counter but that she could not get a sandwich there *because of her race*. In this case, it is not the deprivation of dependent benefits that offends plaintiffs' dignity. The affront to dignity lies in defendants' decision to deny gay employees and their partners equal benefits *because of their sexual orientation*.

B. Privacy

Montana's right to privacy under Article II, § 10 includes broad protection of personal autonomy and reflects "Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan,* 283 Mont. at 455, 942 P.2d at 125. "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States – exceeding even that provided by the federal constitution." *Armstrong,* ¶ 34; *see also Ennis v. Stewart* (1991), 247 Mont. 355, 358, 807 P.2d 179, 181-182.

> [T]he personal autonomy component of the right of individual privacy . . . is, at one and the same time, as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government – as in *Gryczan* – and as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.

Armstrong, ¶ 38. Defendants' policy of denying dependent benefits to same-sex partners while providing them to different-sex partners unlawfully burdens plaintiffs' rights to privacy and intimate association by interfering with their

profoundly personal life choices and by enforcing a particular set of individual values that condemns gay families as unnatural and immoral.

Defendants argued in the District Court that their policy does not violate plaintiffs' right to privacy because it neither criminalizes plaintiffs' families nor prohibits them from forming same-sex partnerships. Motion at 11-12. But Montana's right to privacy is not so limited.[14] Defendants' policy-making powers

> are defined by the Constitution and . . . [their] ability to regulate morals and to enact . . . [policies] reflecting moral choices is not without limits. . . . [T]he police power should properly be exercised to protect each individual's *right to be free from interference* in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.

Gryczan, 283 Mont. at 454, 942 P.2d at 125 (emphasis added). Defendants' policy interferes with plaintiffs' exercise of their fundamental right to make intimate and personal decisions about how to structure their family relationships, including decisions about whom to choose as a life partner.

---

[14] Indeed, even under the more limited privacy and intimate association rights guaranteed by the federal constitution, plaintiffs' "activities relating to . . . family relationships" are assured constitutional protection. *Ennis,* 247 Mont. at 359; *see also Roberts v. United States Jaycees,* 468 U.S. 609, 618 (1984); *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977); *Stanley v. Illinois,* 405 U.S. 645, 651-52 (1972) ("[F]amily relationships unlegitimized by a marriage ceremony . . . [are] often as warm, enduring, and important as those arising within a more formally organized family unit."); *Moore v. City of East Cleveland,* 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the state] from standardizing its children – and its adults – by forcing all to live in certain narrowly defined family patterns.").

Whether the issue is access to contraceptives or access to health insurance, restricting access has a profound impact on the plaintiffs' autonomy. Just as the couples in *Eisenstadt v. Baird* could have obtained contraceptives by traveling to New Jersey or by marrying, the plaintiffs in this case can obtain health insurance by paying for private coverage or by having both parents work instead of having one stay home to care for their child. 405 U.S. at 442; *State v. Baird,* 235 A.2d 673 (N.J. 1967). Just as the couples in *Eisenstadt* could have taken the risk of an unwanted pregnancy by foregoing the use of contraceptives, the plaintiffs in this case can take the risk of an accident or illness by foregoing the use of health insurance. Defendants interfere with and deny the very existence of plaintiffs' families in order to enforce a particular view of morality that condemns gay people as socially repugnant. *See Armstrong,* ¶¶ 36-38. That interference infringes plaintiffs' right to privacy.

C. Rights to Pursue Life's Basic Necessities and to Seek Safety, Health and Happiness

Article II, § 3 establishes that the right to pursue life's basic necessities and the right to seek safety, health and happiness – and any other rights necessary to ensure that these enumerated rights are meaningful – are fundamental rights. *Wadsworth,* 275 Mont. at 298-299, 911 P.2d 1165, 1171; *see also Girard,* ¶ 75

(Nelson, J., specially concurring).[15] Health insurance is a basic necessity of modern life that gives substance to the right to pursue safety, health and happiness.

> As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care.

275 Mont. at 299, 911 P.2d 1165, 1172. In *Wadsworth,* the state indirectly deprived an employee of his fundamental right to pursue life's basic necessities by depriving him of the right to pursue outside employment. *Wadsworth*, 275 Mont. at 299, 911 P.2d at 303 1172, 1174. Here, the infringement is direct; plaintiffs are deprived of the right to pursue health insurance through the only practical means of obtaining it – employment. It would be particularly perverse if an employee had a guaranteed right to work at a second job in order to pursue life's basic necessities, *id.,* but could be deprived directly of family health insurance – a basic necessity that defendants offer to all other employees as part of their standard package of compensation.

[15] A right is fundamental under the Montana constitution if it is either enumerated in the Declaration of Rights or is a right "without which other constitutionally guaranteed rights would have little meaning." *Wadsworth,* 275 Mont. at 299, 911 P.2d 1165, 1172.

D. Defendants' Policy Does Not Satisfy Strict Scrutiny

"[A]ny statute *or* rule which implicates [a fundamental right] must be strictly scrutinized and can only survive scrutiny if the State establishes . . . that its action is closely tailored to effectuate [a compelling state] interest and is the least onerous path that can be taken to achieve the State's objective." *M.E.I.C.*, ¶ 63. Plaintiffs' claims should be reinstated because no compelling state interest supports defendants' policy of denying same-sex couples dependent benefits.

//

//

//

CONCLUSION

For the foregoing reasons, the District Court's decision dismissing plaintiffs' claims should be reversed in its entirety.

Respectfully submitted,

GOUGH, SHANAHAN,
JOHNSON & WATERMAN

_____

Holly Jo Franz
Gough, Shanahan, Johnson & Waterman
33 S. Last Chance Gulch
P.O. Box 1715
Helena, MT 59624-1715
(406) 442-8560

Beth Brenneman
ACLU of Montana
Power Block West, Suite 4E
Helena, MT 59601
(406) 443-8590

Tamara Lange
Lesbian & Gay Rights Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that a true copy of *Plaintiffs' Opening Brief* has been sent via First Class United States Mail this __ day of May 2003 to counsel for defendants in the above-captioned proceeding, addressed as follows:

LeRoy H. Schramm
Chief Legal Counsel
Montana University System
2500 Broadway
P.O. Box 203101
Helena, MT 59620-3101

_____
Holly Franz

Certificate of Compliance

I certify in accordance with MT R. RAP Rule 27(d)(iv) that the foregoing document is proportionately double-spaced, with 14-point size, Times New Roman typeface and contains 9855 words.

_____

Holly Franz