

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

JAN DONALDSON and MARY ANNE GUGGENHEIM, MARY LESLIE and
STACEY HAUGLAND, GARY STALLINGS and RICK WAGNER, KELLIE
GIBSON and DENISE BOETTCHER, JOHN MICHAEL LONG and
RICHARD PARKER, and NANCY OWENS and MJ WILLIAMS,

Appellants,

v.

STATE OF MONTANA,

Appellee.

On Appeal from the Montana First Judicial District Court
Lewis and Clark County – Case No. BDV-2010-702
The Honorable Jeffrey M. Sherlock

***AMICUS CURIAE* BRIEF OF LEGAL VOICE AND
MONTANA HUMAN RIGHTS NETWORK**

APPEARANCES:

Vanessa Soriano Power
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
vspower@stoel.com
Attorneys for Legal Voice and
Montana Human Rights Network

APPEARANCES (continued):

STEVE BULLOCK and
MICHAEL BLACK
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Attorneys for Appellee
State of Montana

JENNIFER A. GIUTTARI
American Civil Liberties Union of
Montana Foundation
241 E. Alder
P.O. Box 9138
Missoula, MT 59807
Attorneys for Appellants

ELIZABETH O. GILL
American Civil Liberties Union
Foundation
39 Drumm Street
San Francisco, CA 94111
Attorneys for Appellants

ELIZABETH L. GRIFFING
727 Cherry Street
Missoula, MT 59802
Attorney for Appellants

JAMES H. GOETZ and
BENJAMIN J. ALKE
Goetz, Gallik & Baldwin, P.C.
35 North Grand
P.O. Box 6580
Bozeman, Montana 59771-6580
Attorneys for Appellants

RUTH N. BORENSTEIN
PHILIP T. BESIROF
NEIL D. PERRY
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
Attorneys for Appellants

ANANDA VISWANATHAN
Morrison & Foerster LLP
2000 Pennsylvania Avenue N.W.
Suite 6000
Washington, DC 20006
Attorneys for Appellants

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the rights of individuals in committed, intimate same-sex relationships to equal protection under the Montana Constitution.¹ This Court has set a high standard protecting the rights of Montanans, holding that “[t]he principal purpose of the Equal Protection Clause, Amend. XIV, U.S. Const., and *Article II, Section 4*, 1972 Mont. Const., is to ensure that persons who are citizens of this country are not the subject of arbitrary and discriminate state action.” *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895 (1987) (emphasis added; brackets in original) (quoting *Godfrey v. Mont. State Fish & Game Comm’n (In re Outfitter’s License of Godfrey)*, 193 Mont. 304, 306, 631 P.2d 1265 (1981)). The heightened protections afforded to citizens by the Montana Constitution are particularly significant here.

Legal Voice and the Montana Human Rights Network (“*Amici*”) work to advance the legal, social, and economic rights of women and men who are lesbian, gay, bisexual, or transgender. Statements of interest for each organization are set forth in Appendix A. *Amici* ask the Court to find that

¹ This case additionally involves the rights to privacy, dignity, and the pursuit of safety, health, and happiness under the Montana Constitution. However, this brief focuses on the issue of equal protection.

Montana's statutory scheme (1) classifies individuals on the basis of sexual orientation and denies same-sex couples statutory benefits and protections that are afforded to similarly situated different-sex couples; (2) is based on a suspect classification that is subject to strict scrutiny; and (3) under an equal protection analysis, requires a legal impossibility from same-sex couples (*i.e.*, marriage), which violates the Montana Constitution. Furthermore, individual identification of statutes is unnecessary to this Court's determination that the statutory scheme violates the Equal Protection Clause.

II. ARGUMENT

A. Courts Across the Country Have Applied Strict Scrutiny in Similar Cases Involving Statutory Classifications Based on Sexual Orientation.

A growing number of courts have found that statutory classifications based on sexual orientation are inherently suspect (or quasi-suspect) and, as such, must be examined with a heightened level of judicial scrutiny. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 441-42 (Cal. 2008); *Varnum v. Brien*, 763 N.W. 2d 862, 895-96 (Iowa 2009); *see also Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998) (finding sexual orientation to be a suspect classification at the appellate court level); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal.

2010) (applying strict scrutiny to a ban on marriage of same-sex couples because the right to marry is a “fundamental right”).²

The court in *In re Marriage Cases* looked to various factors to find that classifications based on sexual orientation are subject to strict scrutiny. *In re Marriage Cases*, 183 P.3d at 444. The *Kerrigan* and *Varnum* courts examined nearly identical factors to hold that, at a minimum, such classifications merit a “heightened” level of scrutiny. *Kerrigan*, 957 A.2d at 430 (confirming sexual orientation as a quasi-suspect class and noting that courts generally apply the same criteria to determine whether a classification is suspect or quasi-suspect); *Varnum*, 763 N.W.2d at 895-96 (no need to reach the question of strict scrutiny

² In *Goodridge v. Department of Public Health*, Massachusetts invalidated a statutory ban on marriage of same-sex couples on equal protection grounds. 798 N.E.2d 941 (Mass. 2003). Because the Massachusetts Supreme Judicial Court found that the statute at issue could not survive even rational basis review, it did not consider whether classifications based on sexual orientation warranted an increased level of judicial scrutiny. The equal protection analysis in *Goodridge* is instructive here because Massachusetts, like Montana, prides itself on “protect[ing] matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution.” *Compare Goodridge*, 798 N.E.2d at 959, with *Snetsinger v. Mont. Univ. Syst.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445 (The Montana Equal Protection Clause contained in Article II, Section 4 “provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.”).

because statutes in question did not withstand heightened, or intermediate, scrutiny). These factors are substantively similar to those examined by this Court in prior decisions requiring equal protection analysis, and are likewise appropriate for consideration here. *See, e.g., In re C.H.*, 210 Mont. 184, 198, 683 P.2d 931 (1984) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

1. Other Jurisdictions Consistently Consider Similar Factors as Indicia of Suspect Classifications.

The *Kerrigan*, *Varnum*, and *In re Marriage Cases* courts' suspect class analyses all hinged on the consideration of two mandatory factors: (i) whether the defining characteristic of the classification was based on stereotypical bias stemming from a history of discrimination; and (ii) whether that characteristic was not indicative of an individual's ability to contribute to society. *In re Marriage Cases*, 183 P.3d at 444; *Kerrigan*, 957 A.2d at 427; *Varnum* 763 N.W. 2d at 889. The *Kerrigan* and *Varnum* courts then gave supplemental consideration, but not dispositive weight, to two additional factors that have been viewed as "subsidiary" by the Supreme Court: (iii) whether the class in question lacked political power; and (iv) whether its defining characteristic was one that

cannot or should not be required to be changed. *Kerrigan* 957 A.2d at 427-28; *Varnum* 763 N.W. 2d at 889.

The Supreme Courts of Iowa, California, and Connecticut all acknowledged and adopted the United States Supreme Court's practice of looking to the existence of prior discrimination as a required element of a suspect classification. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531-32 (1996); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). The courts had little difficulty finding that lesbian and gay residents of their respective states, and of the nation generally, have "long been the victim[s] of purposeful and invidious discrimination because of their sexual orientation." *Varnum*, 763 N.W. 2d at 889-90 (referencing the prior criminalization of homosexual conduct and attacks ranging from schoolyard bullying to violent hate crimes inflicted on gay and lesbian individuals); *see also In re Marriage Cases*, 183 P.3d at 445; *Kerrigan* 957 A.2d at 432-34; *Tanner*, 971 P.2d at 446 (finding that sexual orientation is a suspect class due to its status as a "distinct, socially-recognized group that ha[s] been the subject of adverse social or political stereotyping or prejudice").

The second factor viewed as a prerequisite by the U.S. Supreme Court in determining the existence of a suspect classification and duly examined by the

courts in *In re Marriage Cases*, *Kerrigan*, and *Varnum* is whether the defining characteristic of that classification bore little, if any, relation to its members' ability to contribute to society. *In re Marriage Cases*, 183 P.3d at 444; *Kerrigan* 957 A.2d at 434-35; *Varnum* 763 N.W. 2d at 890-92. In each instance, the courts relied on precedent evidencing that sexual orientation is irrelevant to an individual's ability to perform or contribute to society. The *Varnum* court further found the existence of certain statutes and regulations in Iowa to be indicative of a public policy that sexual orientation is not relevant to a person's ability to contribute to a number of societal institutions. 763 N.W. 2d at 892 (listing Iowa statutes prohibiting consideration of sexual orientation in employment, housing, public accommodations, and education).

The *Kerrigan* and *Varnum* courts followed the federal equal protection framework by giving supplemental consideration to the political power (or, more aptly, the lack thereof) of the class in question.³ *See, e.g. Cleburne v. Cleburne*

³ The *In re Marriage Cases*, *Kerrigan* and *Varnum* courts also considered whether sexual orientation was an "immutable" characteristic. In each instance, the courts' relevant inquiries were not as to the existence of biologically proven immutability, but rather were of a characteristic that "is so integral an aspect of one's identity, [that] it is not appropriate to require a person to repudiate or change [it] in order to avoid discriminatory treatment." *In re Marriage Cases*,

(continued . . .)

Living Ctr., Inc., 473 U.S. 432, 445 (1985) (considering, but not finding, whether “the mentally retarded are politically powerless”). When analyzing the existence of this factor, the Connecticut and Iowa Supreme Courts looked not only to the current political power held by lesbian and gay people as a class, but also to the history thereof. *Kerrigan*, 957 A.2d at 439-44. These opinions further clarified that the political powerlessness factor in this inquiry has never required a showing of absolute powerlessness; rather the analysis consistently undertaken has been whether “the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means.” *Id.* at 444 (emphasis added); *see also Varnum*, 763 N.W. 2d at 894. Both the *Kerrigan* and *Varnum* decisions acknowledged that, although not a required factor in the determination of a suspect classification, this threshold was nevertheless satisfied with respect to lesbians and gay men as a class. *Kerrigan*,

(... continued)

183 P.3d at 442. Each court found sexual orientation to be such an integral trait, while also confirming that true immutability is not a required element of suspect classifications. *Id.*; *Kerrigan* 957 A.2d at 427, 438 (finding sexual orientation plays a “central role” in a “person’s fundamental right to self-determination”); *Varnum* 763 N.W. 2d at 893 (comparing classification of gender as suspect). Significantly, Montana courts have never included immutability in their suspect classification determinations.

957 A.2d at 453-54 (comparing relative political power of gay persons to African-Americans and women, despite the latter groups being afforded status of suspect and quasi-suspect classes); *Varnum*, 763 N.W. 2d at 894 (“the political power of gays and lesbians, while responsible for greater acceptance and decreased discrimination, has done little to remove barriers to civil marriage”).⁴ Furthermore, the Obama Administration has reviewed the long history of societal and governmental discrimination against the gay and lesbian community and found that gay and lesbian individuals have limited political power and meet the federal standard of “political powerlessness.” Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

⁴ The majority in *In re Marriage Cases* considered, but rejected as irrelevant, the factor of political powerlessness, noting that “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.” 183 P.3d at 443.

2. The Required Indicia of Suspect Classifications Have Been Considered by This Court in Its Equal Protection Jurisprudence.

This Court has not established a rigid test for determining the existence of a suspect classification. In *In re C.H.*, the Court expressly stated that a suspect class is one that has been “subjected to ... a history of purposeful unequal treatment.” 210 Mont. at 198. Appellants assert, and the State readily admits, that lesbian and gay individuals have been subject to private prejudice, discrimination, and even violence in Montana. Order at 7.

By consistently determining that classes of individuals historically subject to prejudice and antipathy deserve heightened protection under the law, Montana’s understanding of suspect classifications inherently embodies the notion that the discrimination imposed on members of a suspect class is rarely related to their merits as productive members of society. Even if this factor has not previously been an explicit part of Montana’s determination of suspect classifications, it was given due consideration by the district court. Order at 2. Further, it is undisputed that Appellants are not hindered by their sexual orientation from contributing to society, becoming professionals, or successfully

raising a family. *Id.*; *see also* Defendant's Response to Plaintiff's First Discovery Requests at 5.

While the question of political powerlessness has been considered a subsidiary factor in the determination of suspect classifications by other courts, this Court has considered it the essential element in the determination of a suspect classification. *See In re C.H.*, 210 Mont. at 198. Lesbian and gay individuals in Montana fall squarely within the definition of a class that lacks sufficient power to "promptly" end discrimination through traditional political means. *Kerrigan*, 957 A.2d at 444; Brief of Appellants at 23 (noting that every legislative effort introduced to strike down Montana's "deviant sexual conduct" law has failed, despite its being declared unconstitutional more than a decade ago).

Given that the indicia required by federal courts to prove the existence of a suspect class are not only present in this case, but are supplemented by the additional existence of political powerlessness (as required by Montana's own, more protective, equal protection jurisprudence), a statutory scheme that discriminates on the basis of sexual orientation should be subject to strict judicial scrutiny.

B. Discrimination by the State Based on Sexual Orientation Violates Montana's Equal Protection Clause and Is Subject to Strict Scrutiny.

The Montana Constitution makes clear that “the dignity of the human being is inviolable” and “[n]o person shall be denied the equal protection of the laws.” Mont. Const. Article II, § 4. Simply stated, the fundamental rule of equal protection is that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Applied here, Montana laws that provide significant rights, benefits, responsibilities, and protections to married couples, but deny the same to lesbians and gay people without justification, violate the equal protection clause of the Montana Constitution.

1. Montana's Statutory Scheme Constitutes Discrimination Based on Sexual Orientation.

To determine whether Montana's equal protection clause has been violated, the Court first identifies the classes involved and determines whether they are similarly situated. *In re S.L.M.*, 287 Mont. 23, 951 P.2d 1365 (1997). A law may then be challenged if “by its own terms [it] classifies persons for different treatment.” *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421 (1999). Even a law that contains an apparent neutral classification may violate equal protection if “in reality [it] constitute[s] a device designed to

impose different burdens on different classes of persons.” *Id.* That is precisely the case here.

First, the classes involved are similarly situated. They include different-sex couples and same-sex couples in committed, intimate relationships. Indeed, for equal protection purposes, Appellants are indistinguishable from different-sex couples who commit to each other through marriage. For example, Jan Donaldson and Mary Anne Guggenheim are individuals who have been in a committed, intimate same-sex relationship for 27 years. Complaint, ¶¶ 10-11. They are productive members of society, have successfully raised children as a couple, and have made parenting decisions together. *Id.* at ¶¶ 11-13. Jan and Mary Anne own their home together in joint tenancy with rights of survivorship and contribute equally to the mortgage. *Id.* at ¶ 14. They have a joint bank account and share all living expenses. They have executed wills and powers of attorneys and have named each other as beneficiaries on retirement accounts. Jan and Mary Anne, like any long-term married couple, have committed themselves to each other. *Id.* at ¶ 16.

Montana’s statutory scheme extends protections to those different-sex couples who marry, but denies same-sex couples who are similarly in committed,

intimate relationships the same rights because their partners are of the same sex. All different-sex couples have the option of availing themselves of the statutory rights and protections at issue by simply entering into marriage. But as the district court concluded, “individuals such as Plaintiffs are denied a variety of benefits and protections that are statutorily available to heterosexual spouses.” Order at 6. This eligibility restriction (marriage) is a legal impossibility for same-sex couples to meet because same-sex couples cannot marry in Montana. *Id.* at 3-4. As a result, the eligibility restriction has the effect of precluding same-sex couples from receiving the statutory benefits and protections available to similarly situated different-sex couples. Montana’s statutory scheme thus classifies all Montanans into two categories, with sexual orientation as the clear divider.

2. Montana’s Statutory Classification Based on Sexual Orientation Is Suspect and Subject to Strict Scrutiny.

Montana’s statutory classification is based on sexual orientation. Contrary to the State’s position, the statutory scheme constitutes a suspect classification. 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 (quoting *San Antonio Ind. Sch. Dist.*, 411 U.S. at 28). “Examples of suspect classifications include wealth, race, nationality and alienage.” *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895 (1987) (citing *Oberg v. City of Billings*, 207 Mont. 277, 279, 674 P.2d 494 (1983)). As with the well-known history in this country establishing race and nationality as suspect classes, there is a well documented history of purposeful unequal treatment of lesbian and gay individuals.

a. Gay and Lesbian Montanans Are Targets of Violence and Harassment but Cannot Obtain Legislative Protection.

It is undisputed that gay and lesbian Montanans have long been subject to violence, harassment, and intimidation because of their sexual orientation. The record includes descriptions of numerous vicious beatings and assaults of gay and lesbian people in Montana motivated by hatred based on sexual orientation and gender identity. *See* Affidavit of Christine Kaufmann (“Kaufmann Aff.”), Attch. B. Nationally, the FBI reports that there were 1,297 reported hate crime incidents against individuals perceived to be gay or lesbian in 2008. *See* Affidavit of George Chauncey, Ph.D. (“Chauncey Aff.”), ¶ 83. The State cannot

and does not deny that lesbians and gay men have been victimized by anti-gay-motivated violence in Montana.

Despite this undisputed acknowledgment of violence and harassment against gay and lesbian Montanans, the Montana Legislature has repeatedly refused to protect the community through the passage of hate crime legislation. The State indicates that a “wide majority” of Montanans believe that violence against gay and lesbian people should be considered a hate crime, but the fact that a hate crime bill cannot pass the Legislature even with popular support provides strong evidence of the political powerlessness of the gay and lesbian community. Testimony from senators in opposition to hate crime legislation reflects the real motivation behind the refusal to protect gay and lesbian citizens. They contend that Montana’s gay and lesbian community is “abnormal” and “an affront to decency and morality.” Kaufmann Aff., ¶ 14. From 1991 to the present, there have been at least 32 bills introduced in the Legislature to promote equality and/or protect the rights of gay and lesbian Montanans, including anti-discrimination and relationship recognition laws. Not one of the bills was passed due to anti-gay bias. *Id.* at ¶¶ 11-17. In this atmosphere of disregard for their basic humanity, gay and lesbian Montanans are politically powerless to achieve

equal protection under the law against undisputedly heinous acts of violence and harassment, let alone achieve the benefits and protections they are due as members of committed same-sex relationships.

b. Youths Are Bullied on the Basis of Sexual Orientation and Gender Identity, but the Legislature Refuses to Provide Legal Protection.

Gay, lesbian, bisexual, and transgender teens throughout the country are subject to bullying, harassment, and violence from peers. *See* Gay, Lesbian and Straight Education Network, 2009 National School Climate Survey (surveying over 7,000 students in all 50 states and finding that nearly nine out of 10 lesbian, gay, bisexual, and transgender teens experienced harassment in the past year);⁵ *see also* Chauncey Aff., ¶ 8 (describing murder of 15-year-old Lawrence King by classmate because of his sexual orientation). In Montana, it is no different. Teens are attacked and harassed daily based on their perceived sexual orientation or gender identity. In addition to horrific physical assaults, teens have been threatened with rape, assault, and murder. Kaufmann Aff., Attch. B, ¶ 29 & Attch. C, ¶ 17. Sadly, these students cannot count on intervention. *Id.*

⁵ Available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1676-4.pdf.

Students have also learned that they cannot count on the majoritarian political process to protect them from such hate crimes. In the face of harassment and violence, the Legislature has voted against multiple efforts to address bullying in schools targeting gay and lesbian students. Kaufmann Aff., ¶ 16. This failure to protect gay and lesbian youth from physical and emotional trauma results in unequal treatment in schools, and demonstrates that, yet again, the gay and lesbian community does not have the political power to enact basic protections.

c. Contrary to the State's Contention, Complete Powerlessness Is Not Required to Find a Class Suspect.

The State points to a small number of administrative policies and two local ordinances providing certain protections on the basis of sexual orientation as evidence of political power. But courts have repeatedly rejected such arguments, because if evidence of any political power were to cause a class to lose its suspect status, there would be very few, if any, suspect classes. *See, e.g., In re Marriage Cases*, 183 P.3d 384. Although there have been a few isolated political victories for gay and lesbian Montanans, the gay and lesbian community has been unable to enact even the most basic protections through the legislative process because of the discrimination and animus described above.

In sum, Montana's gay and lesbian community has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," warranting heightened review of statutory classifications based on sexual orientation. *In re C.H.*, 210 Mont. at 198 (citing *San Antonio Ind. Sch. Dist.*, 411 U.S. at 28). This is not an unprecedented approach; as set forth in detail below, many jurisdictions have applied strict scrutiny to such classifications in similar cases.

d. The State Cannot Offer Any Justification for Discrimination Against Same-Sex Couples, Much Less Justification That Withstands Strict Scrutiny.

In cases involving strict scrutiny, the State has the burden of showing that the law is narrowly-tailored to serve a compelling government interest. *Reesor v. Mont. State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 (2004). The State has failed to provide any justification, much less a compelling government interest, for discrimination against same-sex couples. The State merely proffers that it has an interest in "preserving a single classification of couples as spouses within marriage." State's MSJ Opp. at 16-17. The State fully recognizes that same-sex couples cannot marry under Montana law. As such, whether an

individual can be categorized into this “single classification” as defined by the State is determined solely on the basis of sexual orientation. Inherent in the State’s argument is that there is an interest in classifying individuals according to their sexual orientation. The State’s argument essentially cites preserving the classification as a justification for the classification. Such an argument cannot stand. Discrimination for the purpose of discrimination is not a compelling government interest.

The State further argues that there is a “constitutionally compelling interest in preserving spousal benefits for spouses.” State’s MSJ Opp. at 16. This argument improperly characterizes what is and is not defined by the Montana Constitution. Specifically, the State fails to recognize that the Montana Constitution only defines who can enter into a marriage; it does not define who can receive family and relationship protections. The State has chosen to protect only those couples that have the ability to get married: heterosexual couples. The State has chosen not to extend the same statutory benefits and protections to those couples who do not have the ability to get married: lesbian and gay couples. As such, the State fails to offer a compelling interest in discriminating against

lesbian and gay couples while providing family and relationship benefits and protections only to heterosexual couples.

Finally, the State argues that there is insufficient evidence that the laws were passed with the specific intent of discriminating against lesbian and gay people. This argument likewise fails. The State has not offered a compelling government interest for denying benefits, rights, and protections to those couples who are unable to marry. Lack of intent to discriminate is not a justification for discrimination.

Even if sexual orientation were not a suspect class, these discriminatory laws are subject to rational basis review. Under rational basis review, the government must have a legitimate government interest that is rationally related to the law that classifies individuals and treats them differently. *Reesor*, 2004 MT 370, ¶ 13. As described above, the State has not offered any such justification for providing benefits, rights, and protections to married spouses but not to lesbian and gay couples in life-long committed relationships who cannot marry.

C. Protection of Individual Rights by This Court Is Needed to Ensure an End to Discriminatory Laws in Montana.

Lesbian and gay Montanans have been and continue to be subject to purposeful discrimination and denigration from state institutions and officials. This is reflected, in particular, by the Legislature's continued focus on the private, consensual sexual behavior of lesbian and gay people. The Legislature has long outlawed consensual sex between same-sex couples through the so-called "deviate sexual conduct law." In 1981, the Montana State Legislature raised the maximum fine for a person convicted under the "deviate sexual conduct law" to \$50,000—by far the largest such fine in the nation. *Chauncey Aff.*, ¶ 71. In 1989, Montana took the additional step of including consensual same-sex behavior in the newly passed sex offender registration law. The only non-assaultive sex "crime" included in the sex offender registration law was consensual sex between two members of the same gender. *Id.*

Although this Court struck down Montana's "deviate sexual conduct" law in *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997), the law still remains on the books. Mont. Code Ann. § 45-2-101(21). The "deviate sexual conduct law" specifically targets gay and lesbian individuals by criminalizing sexual contact "between two persons of the same sex." *Id.* In fact, such conduct is considered a

felony under state law. This Court struck down the law as a governmental intrusion into the right to privacy with no compelling state interest. *Gryczan*, 283 Mont. at 456. Despite being struck down as unconstitutional, the Legislature has repeatedly refused to repeal the law. Kaufmann Aff., ¶ 12. Multiple legislative attempts (in 1999, 2001, and 2003) to remove the “deviate sexual conduct law” from the books have all failed. Chauncey Aff., ¶ 82. Further, the Republican Party of Montana, which holds the majority of seats in both the Montana House and Senate, currently includes in its platform support for the recriminalization of “homosexual acts.” *Id.*

Even though it has been 14 years since this Court’s decision in *Gryczan*, the fact that this unconstitutional law still remains on the books demonstrates both the purposeful unequal treatment of lesbian and gay citizens and their political powerlessness. The lesbian and gay community does not have the political power to defend against this type of targeted discrimination; it is only through the efforts of this Court that Montana’s lesbian and gay citizens can find equal protection under the law.

D. Piecemeal Litigation of Montana's Statutory Scheme Is Unjustified and Would Impose an Undue Burden on Individual Litigants.

In its Order, the district court erroneously suggests that to succeed in an equal protection challenge against a statutory scheme, Appellants must identify every statute that could be affected by the unconstitutional action and the desired remedy. *See* Order at 8-9. This is unsupported by Montana law. In justifying its ruling, the district court attempted to distinguish cases in Montana and other states. *See id.* at 9-10. But those cases make clear that such a requirement is not appropriate. *See Baker v. State*, 744 A.2d 864 (Vt. 1999) (general exclusion of same-sex couples from benefits incident to marriage violates Vermont Constitution). Similarly here, Appellants identified sufficient statutes to allow the Court to declare that the State's statutory scheme discriminates against same-sex couples in violation of the equal protection clause of the Montana Constitution. *See, e.g., Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 304 (2005) (affirming school system violated Public Schools Clause and deferring to Legislature to provide threshold decision); *Goodridge*, 798 N.E.2d at 969-70 (barring individual from protections of marriage solely because person would marry someone of the same sex violates Massachusetts Constitution).

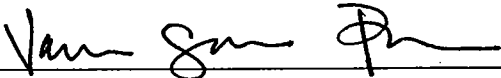
Finally, the district court's suggested approach (to require "specific suits directed at specific, identifiable statutes"⁶) would only encourage and result in undesirable piecemeal litigation. For example, in *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005), the Alaska Supreme Court specifically declared that the marital classification in a state employment benefits scheme violated the Alaska Constitution's Equal Protection Clause. *Id.* at 794. More broadly, it held that because Alaska's definition of the legal status of marriage excludes same-sex couples, a marital classification in a statute is facially discriminatory. *See id.* at 788-89. While this opinion would appear to have far-reaching impact, same-sex plaintiffs in Alaska were required to bring a separate lawsuit to obtain equal benefits under a different statute. This was inefficient, burdensome, and wholly unnecessary. Where, as here, there is nothing that precludes the Court from directing the Legislature to amend the statutory scheme to comply with the Equal Protection Clause, piecemeal litigation can be avoided.

III. CONCLUSION

For all the foregoing reasons, *Amici* respectfully urge the Court to reverse the district court's judgment on equal protection grounds.

⁶ *See* Order at 9-10.

DATED: November 19, 2011. STOEL RIVES LLP



Vanessa Soriano Power, MSBA No. 7286

Cooperating Attorney for Legal Voice and
Montana Human Rights Network

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing *Amicus Curiae* Brief by sending via overnight delivery, addressed to the following:

James H. Goetz
Benjamin J. Alke
Goetz, Gallik & Baldwin, P.C.
35 North Grand
Bozeman, MT 59715

Jennifer A. Giuttari
Interim Legal Director
American Civil Liberties Union of Montana Foundation
241 E. Alder
Missoula, MT 59802

Ruth N. Borenstein
Philip T. Besirof
Neil D. Perry
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

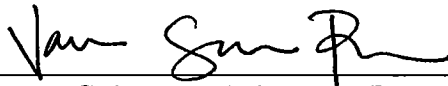
Anand Viswanathan
Morrison & Foerster LLP
2000 Pennsylvania Avenue N.W.
Suite 6000
Washington, DC 20006

Elizabeth O. Gill
LGBT & AIDS Project
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111

Elizabeth L. Griffing
727 Cherry Street
Missoula, MT 59802

Steve Bullock, Montana Attorney General
Michael Black, Assistant Attorney General
Office of the Montana Attorney General
215 North Sanders
Helena, MT 59620

DATED this 19th day of November, 2011.



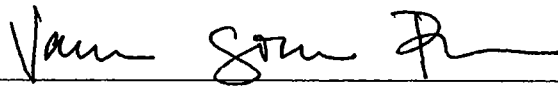
Vanessa S. Power, Montana Bar No. 7286

Cooperating Attorney for Legal Voice and
Montana Human Rights Network

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points and is double-spaced, and the word count calculated by Microsoft Word 2007 is not more than 4,897 words, excluding the cover page, tables of contents and authorities, certificate of service, and this certificate of compliance.

Dated this 19th day of November, 2011.



Vanessa S. Power, Montana Bar No. 7286

Cooperating Attorney for Legal Voice and
Montana Human Rights Network

APPENDIX A

STATEMENTS OF INTEREST OF AMICI CURIAE

Legal Voice is an organization dedicated to upholding women's legal rights to equality, privacy, self-determination, and bodily autonomy. Formerly known as the Northwest Women's Law Center, Legal Voice is a regional, non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and ensuring women's rights to equality, reproductive freedom, and self-determination. Toward that end, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country.

In Montana, Legal Voice (then the Northwest Women's Law Center) served as co-counsel in *Gryczan v. State of Montana*, the landmark case in which this Court declared that Montana's statute criminalizing consensual sexual conduct between adults of the same gender violated Montanans' constitutional right to privacy. Legal Voice (then the Northwest Women's Law Center) has also appeared before this Court as *amicus*, most recently in *Snetsinger v. Montana University System*, in *Stoneman v. Drollinger*, and in *Baxter v. State of Montana*. This case is of equal significance to women's legal rights because it will make an important pronouncement on the contours of the Montana Constitution's privacy

clause and its protection of the right to self-determination, including the right of individuals to choose same-sex life partners without government interference.

The **Montana Human Rights Network** (the “Network”) is a grassroots, membership-based organization of over 1,400 members. The Network’s mission is to promote democratic values such as pluralism, equality, and justice; to challenge bigotry and intolerance; and to organize communities to speak out in support of democratic principles and institutions. Since the early 1990s, the Network has advocated for equal protection and fairness under the law for Montana’s lesbian, gay, bisexual, and transgender community. The Network has previously joined amicus briefs in *Gryczan v. State of Montana*, the landmark case in which the Montana Supreme Court declared unconstitutional the statute criminalizing consensual sexual conduct between adults of the same gender; and *Snetsinger v. Montana University System*, in which the Montana Supreme Court ruled that the Montana University System must provide same-sex employees with the option of purchasing health insurance and other employee benefits for their domestic partners. The Network joins this *Donaldson and Guggenheim v. State of Montana* amicus brief in support of the Appellants’ efforts to secure basic legal protections for themselves and their families.