

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

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

Plaintiffs and Appellants,

v.

STATE OF MONTANA,

Defendant and Appellee.

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

BRIEF OF *AMICI CURIAE*
GARY J. GATES AND M.V. LEE BADGETT
IN SUPPORT OF PLAINTIFFS AND APPELLANTS

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae Dr. Gary J. Gates and Professor M. V. Lee Badgett are, respectively, the Williams Distinguished Scholar and Research Director of the Williams Institute at UCLA School of Law, a national research center on sexual orientation and gender identity law and public policy. They have conducted extensive research regarding the demographic and economic characteristics of same-sex couples and their children in the United States, including in Montana. Drawing from their research, this brief describes the population to be affected and fiscal and economic implications of the relief requested in this case. *Amici* respectfully submit this brief pursuant to leave of court granted upon consent of all parties.¹

INTRODUCTION AND SUMMARY OF THE ARGUMENT

According to recent U.S. Census data, more than one thousand same-sex couples live in Montana, and hundreds of them are raising children.² In many ways, they resemble their fellow Montanans in different-sex, married relationships. Despite having higher rates of employment and college degrees, however, on average, they have fewer financial resources.

¹ A fuller statement of the interests of *amici* is included in Appendix A.

² The demographic data discussed herein are set forth in Appendix B.

Government studies and dozens of analyses by *amici* and other Williams Institute experts confirm that the relief sought in this litigation—a non-marital status with broad state-law rights and obligations—likely would have positive economic effects for Montana. While most of the fiscal effects would be small relative to the state budget, savings in public costs are probable. In addition, Montana’s private business sector could be expected to benefit from spending related to same-sex couples’ celebrations of their legal relationships and from other positive effects.

ARGUMENT

I. MONTANA’S SAME-SEX COUPLES RESEMBLE MONTANA’S DIFFERENT-SEX MARRIED COUPLES IN RELEVANT RESPECTS.

Using data from the U.S. Census Bureau, this section provides demographic and economic information about Montana’s resident same-sex couples and same-sex couples raising children, comparing same-sex couples to different-sex, married couples.³ In many ways, the more than 1,300 same-sex couples living in Montana

³ These analyses are derived from two sources: U.S. Census 2010 and the U.S. Census Bureau’s American Community Survey. The Census identifies same-sex couples where one adult describes his or her relationship with another adult of the same sex in the household as either “husband/wife” or “unmarried partner. Comparisons in this brief are made between same-sex couples and their different-sex, married counterparts, rather than with different-sex, unmarried couples. Married couples comprise 89% (201,611) of the 226,800 different-sex couples reported in Census 2010 as living in Montana. For a description of the Census 2010 data see G. Gates, *et al.*, *Census Snapshot: 2010 – Montana* (2011)

are similar to different-sex, married couples in the state. They live throughout the state, depend on one another financially, actively participate in Montana's economy, and roughly 300 of them are raising nearly 600 children. But, same-sex couples have fewer economic resources than their married counterparts: they have lower household incomes and lower rates of homeownership.

Data provided by states show that when a state offers same-sex couples a broad relationship-recognition status (whether registered domestic partnership or civil union, or marriage), in the first year on average 18% of the state's same-sex couples will enter a non-marriage status, and 30% will marry, with these numbers increasing over time.⁴ On average, the members of same-sex couples who enter a

(“*Montana 2010 Snapshot*”), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Montana_v2.pdf. For a discussion of the methodologies used, see G. Gates, *et al.*, *Census Snapshot: 2010 Methodology* (2011) (“*Census 2010 Methodology*”), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010-Snapshot-Adjustment-Procedures.pdf>. The American Community Survey figures presented here are derived by Dr. Gates from the 2005-2009 Public Use Microdata Samples. Same-sex-couple data are adjusted to account for measurement error created when a small portion of different-sex couples miscode the sex of one partner and inadvertently appear to be a same-sex couple. The adjustment procedure is explained in G. Gates, *et al.*, *Same-Sex Unmarried Partner Couples in the American Community Survey: The Role of Misreporting, Miscoding and Misallocation* (presentation at UCLA-California Center for Population Research and UC-Berkeley Population Center Mini-conference on Census Microdata and Applications, held June 3, 2011 at UCLA; unpublished manuscript available upon request).

⁴ M.V.L. Badgett, *et al.*, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, at 1, 6, 10-16 (Nov. 2011) (“*Patterns of*

non-marital status or marry are older than different-sex couples who marry. In addition, same-sex couples have slightly lower dissolution rates than married, different-sex couples.⁵

A. Same-Sex Couples In Montana Are Geographically Diverse and Similar To Married, Different-Sex Couples Demographically.

An estimated 17,000 gay, lesbian, and bisexual individuals (single and coupled) live in Montana.⁶ The recent U.S. Census data show that 2,696 Montanans are members of 1,348 same-sex couples.⁷ There are more female same-sex couples (61%) than male same-sex couples (39%) in Montana.⁸

Individuals in same-sex couples are, on average, 41 years old, and significantly younger than individuals in married, different-sex couples (51 years

Recognition”), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf>.

⁵ *Id.* at 1-2, 8-9, 18-20.

⁶ This figure is derived as follows: An estimated 8.74 million Americans identify as lesbian, gay, bisexual or transgender. Gates, G., *How Many People are Gay, Lesbian, Bisexual, or Transgender* (April 2011), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. Census 2010 data show that 0.2% of all U.S. same-sex couples live in Montana. Gates, *et al.*, *United States Census Snapshot: 2010* (2011) (1,348 Montana same-sex couples is 0.2% of 646,464 same-sex couples nationwide), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>. If LGBT individuals live in Montana at the same 0.2% rate as same-sex couples do, then there are approximately 17,000 LGBT adults in the state.

⁷ *Montana 2010 Snapshot* at 1.

⁸ *Id.* at 2.

old) in Montana.⁹ Twelve percent of those in same-sex couples are aged 55 or older, compared to 39% of those in married, different-sex couples.¹⁰ Individuals in both types of couples span wide age ranges, from 20 to 93 in same-sex couples and 17 to 94 in married, different-sex couples.¹¹

Same-sex couples live in most Montana counties, and constitute 0.6% of coupled households and 0.3% of all households in the state.¹² Yellowstone County reported the most same-sex couples with 255 (0.42% of all households in the county), followed by Missoula County with 247 (0.54%), and Cascade County with 118 (0.35%).¹³ The counties with the highest percentage of same-sex couples are Big Horn County (1.03%), Glacier County (0.60%), and Lake County (0.55%).¹⁴

Montana's same-sex couples are as diverse racially and ethnically as their married, different-sex counterparts: 8% of individuals in same-sex couples and 7% of individuals in married, different-sex couples are nonwhite.¹⁵

⁹ The results of Dr. Gates' calculations are set forth in Appendix B.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Montana 2010 Snapshot* at 4-5.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *See* Appendix B.

B. Same-Sex Couples In Montana Are Raising Hundreds of Children and Depend Upon One Another Financially In Ways Similar To Married, Different-Sex Couples.

Twenty-two percent of same-sex couples in Montana are raising nearly 600 Montana children under the age of 18.¹⁶ A greater percentage of female same-sex couples are parents (24%) than male same-sex couples (19%). By comparison, 36% of married, different-sex couples in Montana are raising children.¹⁷

It commonly is understood that couples in which one partner does not work or earns significantly less than the other are financially interdependent. While married, different-sex couples in Montana show somewhat greater financial interdependence, many same-sex couples in the state also appear to be interdependent when using these indicia. For example, 29% of married, different-sex couples have only one wage earner, compared with 21% of same-sex couples.¹⁸ Similarly, the mean income gap between same-sex couples is \$20,500, compared with \$35,700 for married, different-sex couples.¹⁹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

C. Members of Same-Sex Couples Are Actively Engaged In Montana's Economy.

Individuals in same-sex couples in Montana are more likely to be employed and have college degrees than individuals in married, different-sex couples: 86% of individuals in same-sex couples are employed, compared to 66% of individuals in married, different-sex couples;²⁰ and 52% of individuals in same-sex couples have earned a college degree, compared to 30% of those in married, different-sex couples.²¹ In addition, despite the U.S. military's (recently ended) policy of excluding open lesbians and gay men, Montana residents in same-sex couples have served in the military: 8% of Montanans in same-sex couples are veterans or have served in the guard or reserve forces, compared to 17% of those in married, different-sex couples.²²

Despite having higher rates of employment and college degrees, and contrary to popular stereotype,²³ the earnings of same-sex couples are lower than those of married, different-sex couples. The mean annual income of same-sex couples is \$62,749, compared with the mean of \$72,787 for married, different-sex

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See generally M.V.L. Badgett, *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men* 1-19 (2001).

couples.²⁴ Same-sex couples are significantly less likely than married, different-sex couples to own their homes: 57% of same-sex couples are homeowners, compared to 81% of married, different-sex couples.²⁵

D. National Statistics Show Many Same-Sex Couples Formalize Their Relationships When States Offer Them a Legal Status For Doing So.

Nineteen states and the District of Columbia now allow same-sex couples to formalize their relationships within a legal status.²⁶ Sixteen offer rights and responsibilities similar to or the same as marriage through either a separate status or marriage.²⁷ Six offer limited protections through a registration system.²⁸ As of January 1, 2012 when new laws take effect in Delaware and Hawaii, 42% of U.S. residents will live in a jurisdiction offering same-sex couples a formal legal status.²⁹

²⁴ See Appendix B.

²⁵ *Id.*

²⁶ *Patterns of Recognition* at 1-4.

²⁷ *Id.* at 1-4, 23-32 (providing descriptions in Tables 1 and 2 and Appendix 1, and citations in endnote 1, for the laws of California, Connecticut, Delaware, District of Columbia, Hawai`i, Illinois, Iowa, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington).

²⁸ *Id.* (providing descriptions and citations for the laws of Colorado, Hawai`i, Maine, Maryland, Wisconsin, Vermont). Note that Hawai`i, New Jersey and Vermont offer both a limited status and a broad status.

²⁹ *Id.* at 1-2.

Over 140,000 same-sex couples, or 22% of all same-sex couples in the United States, have formalized their relationship under a state's law.³⁰ Forty-seven percent of all same-sex couples who live in a state that allows them to enter a family relationship status have done so.³¹ In the states with available data, dissolution rates for same-sex couples are slightly lower than the national divorce rate of different-sex couples, with 0.3% to 1.8% of same-sex couples ending their legal relationship annually, or 1.1% on average, compared with a 2% average divorce rate for different-sex couples.³²

Women in same-sex couples are more likely to formalize their relationships than men. According to the available data, 62% of same-sex couples who entered a state relationship status were female.³³ Same-sex couples who enter a state status tend to be younger than the general population of married, different-sex couples in those states.³⁴ When comparing newly married same-sex and different-sex couples, however, same-sex couples tend to be older than different-sex couples.³⁵

In sum, Census and other government data show that same-sex couples who will be affected most directly by this Court's ruling look in many respects like

³⁰ *Id.* at 1, 5.

³¹ *Id.* at 1, 6.

³² *Id.* at 18-20 and Tables 5 and 6.

³³ *Patterns of Recognition* at 2, 7-8.

³⁴ *Id.* at 2, 8-9.

³⁵ *Id.*

married, different-sex couples, including those raising children. However, while Montana's same-sex couples are employed at higher rates, on average they have fewer economic resources to provide for each other and their dependents than their married, different-sex counterparts.

II. OTHER STATES' EXPERIENCES SHOW THAT PROVIDING SAME-SEX COUPLES ACCESS TO FULL RIGHTS AND RESPONSIBILITIES UNDER MONTANA LAW IS LIKELY TO BENEFIT THE STATE FISCALLY WITHOUT NOTABLE ADMINISTRATIVE OR OTHER BURDENS.

More than two dozen government and academic studies have shown that allowing same-sex couples to access legal rights, and to assume corresponding responsibilities, has positive effects on public budgets, with minimal administrative or other burdens. The net positive budgetary impacts generally are driven by three main factors, with savings in means-tested public benefits programs being the largest. Filing fees also are considered. In addition, in jurisdictions unlike Montana in which the state and/or local governments collect sales taxes, increased revenues are possible from spending related to celebrations by same-sex couples. Implementation of legal recognition has required minor, one-time changes in state forms and training of public employees. Lastly, small but discernible positive effects are seen for the private sector.

A. State Commissions in Vermont and New Jersey Have Evaluated Their Civil Union Laws and Found Costs Were Low and Implementation Was Not Difficult.

1. The Vermont Civil Union Review Commission Report

Following the Vermont Supreme Court's December 1999 ruling that same-sex couples are entitled to the full range of rights and responsibilities under state law (*Baker v. State*, 170 Vt. 194), the Vermont legislature enacted Act 91 to allow lesbian and gay couples to assume the rights and responsibilities of spouses through the distinct legal status of civil unions. *See* VT. STAT. ANN. tit. 15, § 1201. One year later, the Vermont Civil Union Review Commission evaluated Act 91's effects on the state budget, agencies, and judiciary, finding the costs and burdens of implementation to be negligible. *Report of the Vermont Civil Union Review Commission* (2001), available at <http://www.leg.state.vt.us/baker/cureport.htm>.

2. The New Jersey Civil Union Commission Report

Following the New Jersey Supreme Court's ruling that same-sex couples are entitled to equal rights and responsibilities under state law (*Lewis v. Harris*, 188 N.J. 415 (2006)), the New Jersey legislature passed the Civil Union Act. *N.J.S.A.* 37:1-30, *et seq.* The New Jersey Civil Union Commission assessed the law two years later, reporting that "the Civil Union Act has resulted in minimal costs to the State. Most of the costs have been associated with changes in forms, programming

and training on the law.” N.J. Civ. Union Rev. Comm., *The Legal, Medical, Economic, & Social Consequences of New Jersey’s Civil Union Law 27* (Dec. 10, 2008), available at <http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf>. Further, “implementation of the Act has gone smoothly. ... None of the State Departments testifying received any complaints relating to the State’s implementation of the Act.” *Id.* at 27-28.

B. Williams Institute And Other Studies Consistently Find That Offering Same-Sex Partners Access to Legal Rights and Obligations Yields Financial And Other Benefits for States.

Professor Badgett and other Williams Institute experts have conducted studies for more than a dozen states and the District of Columbia, estimating the likely economic effects on public budgets and other financial and administrative effects of proposals to offer legal protections to same-sex couples and their children. Some studies have addressed the effects of allowing same-sex couples to enter civil unions or domestic partnerships with comprehensive rights and obligations under state law, as is requested here.³⁶ Others have looked more

³⁶ See, e.g., J.L. Herman, *et al.*, *The Fiscal Impact of Creating Civil Unions on Colorado’s Budget* (February 2011) (“*Colorado Budget Impact*”), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/fiscal-impact-creating-civil-unions-co-budget/>; B. Sears, *The Impact on the New Mexico Budget of Offering Domestic Partnerships to Same-Sex Couples* (Feb. 2, 2010) (testimony before the Finance Committee of the New Mexico Senate) (“*New Mexico Budget Impact*”), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/the-impact->

broadly at the effects of opening marriage to same-sex couples.³⁷ Still others have considered narrower proposals, such as offering health insurance or other employment benefits to cover the family members of public employees with a same-sex or unmarried, different-sex partner.³⁸

on-the-new-mexico-budget-of-offering-domestic-partnerships-to-same-sex-couples/; M.V.L. Badgett, *et al.*, *The Impact on Oregon's Budget of Introducing Same-Sex Domestic Partnerships* (Feb. 2008) ("Oregon Budget Impact"), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/the-impact-on-oregons-budget-of-introducing-same-sex-domestic-partnerships/>; M.V.L. Badgett, *et al.*, *Supporting Families, Saving Funds: A Fiscal Analysis of New Jersey's Domestic Partnership Act* (Nov. 2003), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/supporting-families-saving-funds-a-fiscal-analysis-of-new-jerseys-domestic-partnership-act/>; M.V.L. Badgett, *et al.*, *Equal Rights, Fiscal Responsibility: The Impact of AB 205 on California's Budget* (May 2003) ("California Budget Impact"), available at <http://williamsinstitute.law.ucla.edu/uncategorized/equal-rights-fiscal-responsibility-the-impact-of-ab-205-on-californias-budget/>.

³⁷ See, e.g., J.L. Herman, *et al.*, *The Impact on Rhode Island's Budget of Allowing Same-Sex Couples to Marry* (February 2011) ("Rhode Island Budget Impact") (providing, in endnotes 4-15, citations for the Williams Institute's economic impact reports for California, Connecticut, Iowa, Maine, Maryland, New Hampshire, New Mexico, Vermont and Washington), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/impact-ri-budget-same-sex-couples-marry/>. These reports all are available at <http://williamsinstitute.law.ucla.edu/category/research/economic-impact-reports/>.

³⁸ See, e.g., M.V.L. Badgett, *et al.*, *Financial Effects of Domestic Partner Benefits on State of Arizona* (Feb. 2007), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/financial-effects-of-domestic-partner-benefits-on-state-of-arizona/>; M.V.L. Badgett, *Testimony to the California State Senate Revenue and Taxation Committee* (April 26, 2006), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/testimony-by-dr-m-v-lee-badgett-to-the-california-state-senate-revenue-and-taxation-committee/>.

All of these studies that have analyzed proposals to offer same-sex couples access to broad state-law rights and obligations, whether through marriage or a non-marital status, have concluded that doing so would have a positive net impact on the state budget and economy.³⁹ Studies by state and local governments and the Congressional Budget Office have reached similar results.⁴⁰

³⁹ See the economic impact reports cited in endnotes 4-15 of *Rhode Island Budget Impact*, all of which are available at <http://williamsinstitute.law.ucla.edu/category/research/economic-impact-reports/>. Delaware has been the lone exception, with the Williams Institute projecting a modest increase in overall state costs because—unlike most states including Montana—Delaware did not offer health insurance for state employees’ domestic partners. J.L. Herman, *et al.*, *The Impact of Creating Civil Unions for Same-Sex Couples on Delaware’s Budget* (March 2011) (concluding that the net increase would be “a tiny fraction—on average a mere one hundredth of one percent—of Delaware’s annual \$3.3 billion budget over three years”), *available at* <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/impact-creating-civil-unions-for-same-sex-couples-on-de-budget/>.

⁴⁰ For example, New York City’s Comptroller projected an increase of \$247 million in activity related to same-sex weddings in New York State during the first three years if that state changed its marriage law, \$175 million of that in New York City. Offsetting those projections against additional health insurance costs for companies that did not cover same-sex partners, the gains were \$184 million for the state, and \$142 million of that in New York City. Testimony of Marcia Van Wagner, Deputy Comptroller of New York City, before the New Jersey Civil Review Commission (June 18, 2008), *available at* <http://www.state.nj.us/lps/dcr/downloads/Transcript-CURC-and-Public-Hearing-06182008.pdf>. *See also* Testimony of New York State Comptroller Alan G. Hevesi to New York City Council in Support of the Right to Civil Marriage for Same-Sex Couples in New York State (Mar. 3, 2004) (describing grounds to anticipate positive budgetary effects for New York State), *available at* <http://www.osc.state.ny.us/press/releases/mar04/030304b.htm>; Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriage* (2004) (projecting federal budget gain of just under \$1 billion per year if

Professor Badgett has had the opportunity to test the projections of economic effects for Massachusetts of allowing same-sex couples to marry against the actual effects. In line with the Institute's predictions, the Massachusetts economy realized nearly \$100 million in additional wedding-related spending over the first five years. See N.G. Goldberg, et al., *The Business Boost from Marriage Equality: Evidence from the Health and Marriage Equality in Massachusetts Survey* (May 2009) ("*Business Boost in Massachusetts*"), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/the-business-boost-from-marriage-equality-evidence-from-the-health-and-marriage-equality-in-massachusetts-survey/>. Similarly, a recent study has confirmed the positive impacts on Iowa's budget of spending related to same-sex couples' weddings.⁴¹

states allow same-sex couples to marry), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

⁴¹ See A. Kastanis, et al., *Estimating the Economic Boost of Marriage Equality in Iowa: Sales Tax* (Dec. 2011) (for the first year, using data provided by the State, spending on weddings and related tourism added at least \$12-\$13 million to state and local economies, comprising at least \$850,000 to \$930,000 in added state and local tax revenues), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/estimating-the-economic-boost-of-marriage-equality-in-iowa-sales-tax/>. Compare M.V.L. Badgett, et al., *The Impact on Iowa's Budget of Allowing Same-Sex Couples to Marry* (April 2008) (projecting a gain of \$5.3 million per year to the state if Iowa opens marriage to same-sex couples), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/the-impact-on-iowas-budget-of-allowing-same-sex-couples-to-marry/>.

As noted, the Institute’s experts have performed economic analyses for several state legislatures—including California, Colorado, Hawaii, New Mexico, and Oregon—that were considering proposals to offer legal protections to same-sex couples similar to the remedy proposed here.⁴² These studies considered key areas of economic activity and fiscal concern, used consistent methodologies, and reached similar conclusions: allowing same-sex couples access to the benefits and obligations of marriage under state law has positive effects on the state economy and budget.⁴³

To indicate potential application in Montana, these key areas are discussed below and include (1) savings realized when recognition of both partners’ assets means fewer people qualify for means-tested assistance from the state; (2) other economic implications for which there is minimal impact; and (3) positive effects on businesses and the state economy frequently observed when same-sex couples are offered broad rights and obligations under state law.

⁴² See, e.g., the studies referenced *supra* in footnote 36.

⁴³ The numbers naturally varied state-to-state, with projections, respectively, of \$8.1 to 10.6 million in annual savings for California (*California Budget Impact* at 1, 3); \$4.8 million in net gain over the first three years for Colorado (*Colorado Budget Impact* at 1); savings of between \$74,000 and \$569,000 annually for New Mexico (*New Mexico Budget Impact* at 2); and net savings of \$1.5 to \$3.7 million biennially for Oregon (*Oregon Budget Impact* at 1).

1. Public Benefits Programs

The methodology used to estimate the likely impact on a state's public benefits programs of extending broad legal recognition to same-sex couples includes the following steps. First, an estimate is made of the rate at which same-sex couples are expected to enter into the new legal status when it becomes available. Census data indicate how many same-sex couples live in each state, and data from other states show that approximately 18-30% of a state's couples can be expected to enter into a new status in the first year, depending on the particular status, with the total number increasing over time.⁴⁴

States generally fund several public benefits programs to assist low-income individuals and families. When a state does not allow same-sex couples to formalize their relationship, individuals with a same-sex partner are considered "single" for benefits eligibility purposes. Once same-sex partners may enter a legal status, however, both partners' income and assets can be considered. Doing so reduces the number of people eligible for benefits. When measuring the fiscal effect of such a reduction, the calculation includes the possibility that some couples will be discouraged from entering the legal status by the probable loss of benefits and that some low-income couples still will qualify.

⁴⁴ *Patterns of Recognition* at 6-7 and Table 3.

Thus, to estimate a state's savings, it is assumed that a particular percentage of the state's same-sex couples will enter the new status during a particular period of time, and some of those couples will continue to receive benefits. That number is estimated assuming that an equal proportion of married, different-sex couples and legally partnered same-sex couples will remain eligible for benefits. Census data show the percentages of individuals in same-sex couples and in married, different-sex couples receiving public assistance, allowing an estimate of the number of individuals in same-sex couples likely to remain eligible. These calculations allow a projection of the decrease in state spending when some in formalized same-sex relationships cease to be eligible for public benefits.⁴⁵

Because this methodology and these conclusions are consistent state-to-state, it is reasonable to anticipate based on the numerous studies of other states that Montana similarly would see a decrease in public spending were its same-sex-couple residents permitted access to full rights and obligations under state law.

⁴⁵ Census data are consistent with this expectation. *See* R. Albelda, *Poverty in the Lesbian, Gay, and Bisexual Community*, 14 (March 2009) (both men and women in same-sex couples are significantly more likely than those with a different-sex spouse to receive TANF or emergency cash assistance; 1.8% of men and 1.9% of women in same-sex couples receive SSI, compared with only 1.2% of those with a different-sex spouse), *available at* <http://wiwp.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

2. Other Economic Implications For the State

Other economic implications routinely considered when evaluating the likely fiscal effects of offering broad legal recognition to same-sex couples are described below. They include the effects of extending employee benefits to same-sex partners, income and estate tax consequences, administrative costs for changing government forms, and burdens on the judicial system. Based on other states' experiences, it is clear that offering same-sex couples full state-law rights and responsibilities is unlikely to have negative consequences for Montana's budget.

a) State Employee Benefits

The state is unlikely to incur additional costs due to extending employee benefits to same-sex partners because it already provides such benefits, in keeping with *Snetsinger v. Montana University System*, 325 Mont. 148 (2004).

b) Estate, Inheritance and State Income Taxes

Allowing same-sex couples access to broad state-law rights and responsibilities will not affect estate tax revenues because currently there is no estate tax in Montana.⁴⁶ Montana likewise has no inheritance tax.⁴⁷

⁴⁶ See http://revenue.mt.gov/forindividuals/taxes_licenses_fees_permits/inheritance.mcp.x.

⁴⁷ *Id.*

Regarding personal income tax, state laws vary such that legal recognition of same-sex couples may cause a net gain or a net loss to the state.⁴⁸ Past studies indicate, however, that any changes in state income tax revenue are likely to be very small compared with revenues overall.

c) **Administrative Costs and the Judicial System**

It is unlikely that there would be any significant increase in administrative costs or more than minimal additional burdens on Montana's judicial system if same-sex couples are offered broad legal recognition. There would be costs to print applications for the new legal status and dissolution forms, but the fees paid by same-sex couples can more than offset the costs.⁴⁹ Likewise, while the judicial system could see a small increase in testate proceedings and dissolution proceedings, corresponding reductions in other proceedings are likely to offset any such increases, making the overall effects negligible.⁵⁰

⁴⁸ Compare *Oregon Impact Report* at 3 (“the net positive impact on the State’s income tax revenue will be over \$765,000 per year”) with *Delaware Impact Report*, at 1 (“Income tax revenues will fall slightly when same-sex couples may file jointly.”).

⁴⁹ See, e.g., *Oregon Impact Report* at 11-14; *California Impact Report* at 8-11.

⁵⁰ See, e.g., *Iowa Impact Report* at 3 (“Any increase in demands on the state court system will be very small relative to the existing average caseload of judges, and the normal year-to-year variation in total caseloads. Accordingly, we predict no increase in costs for the State’s court system.”); *Oregon Impact Report* at 11-14 (“the introduction of domestic partnerships would add a negligible number of cases to the state court dockets, such that no additional judges, staffing, courtrooms, or programming would be necessary.”).

3. Effects of Offering Same-Sex Couples Formal Legal Recognition on Business and the Overall Economy

Drs. Badgett and Gates have studied the effects on businesses and the economy overall when a state allows same-sex couples to enter a status with broad legal rights and duties.⁵¹ First, expenditures on celebrations bring enhanced revenues for businesses such as florists, caterers, hotels, and restaurants. Second, businesses may benefit from lower costs when their employees are healthier and happier. Research suggests that employees with a same-sex partner are more likely to have health insurance when a state offers broad legal protections, leading to improved health.⁵² Other research suggests that employees have greater job satisfaction and are less likely to leave their jobs when offered equal family

⁵¹ M.V.L. Badgett, *et al.*, *The Effect of Marriage Equality and Domestic Partnership on Business and the Economy* (Oct. 2006) (“*Marriage Equality and Domestic Partnership*”), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Badgett-Gates-MarriageEqualityontheEconomy-Oct-2006.pdf>. See also G.J. Gates, *Marriage Equality and the Creative Class* (May 2009) (concluding that “[t]he evidence that marriage equality may enhance the ability of Massachusetts to attract highly-skilled creative class workers among those in same-sex couples offers some support that the policy has the potential to have a long-term positive economic impact.”), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Gates-MA-Creative-Class-May-2009.pdf>.

⁵² *Marriage Equality and Domestic Partnership* at 2-3; N. Ponce, *et al.*, *The Effects Of Unequal Access To Health Insurance For Same-Sex Couples In California*, 29 *Health Affairs* 1539, 1541 (Aug. 2010) (“The percentage of firms... offering ... coverage to same-sex domestic partners grew from 34.4 percent in 2004 to 64 percent in 2006.”), available at <http://content.healthaffairs.org/content/29/8/1539.full.html>.

benefits, which can reduce the costs to employers of employee turnover.⁵³ Consequently, when private employers follow an example set by state law—and offer equal treatment including equal family benefits—they are likely to enjoy improved competitiveness in recruiting and retaining talented and committed employees.⁵⁴ Finally, very few employers would see increases in costs due to treating same-sex couples the same as different-sex couples, and for those that do, the cost changes are small and at least partly offset by the gains noted above.⁵⁵

CONCLUSION

Thousands of Montana families, including hundreds of children, will be affected by the Court's decision in this case. Sixteen other jurisdictions already have allowed same-sex couples access to the full range of state-law rights and obligations offered to different-sex couples through marriage. Government studies and academic research by the Williams Institute show that this direction should not be rejected out of concern for public costs or implementation burdens. Rather, a

⁵³ *Marriage Equality and Domestic Partnership* at 2-3. Numerous courts have noted this effect. See, e.g., *Tyma v. Montgomery County*, 369 Md. 497, 512-13 (2002); *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 562-63 (2001). See also *Snetsinger*, 325 Mont. at 164-65, notes 5&6 (Nelson, J., concurring).

⁵⁴ See B. Sears, et al., *Economic Motives for Adopting LGBT-Related Workplace Policies* (October 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corporate-Statements-Oct-20111.pdf>.

⁵⁵ *Marriage Equality and Domestic Partnership* at 1-3.

large body of scientific findings indicate it is reasonable to anticipate modest positive effects.

DATED this 16th day of December, 2011.

FRANZ & DRISCOLL PLLP

By: _____/s/_____
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APPENDIX A

INTERESTS OF *AMICI*

Amici curiae respectfully submit this brief in support of Plaintiffs and Appellants pursuant to consent of all parties. *Amici* are Dr. Gary J. Gates and Professor M. V. Lee Badgett, both of the Williams Institute at UCLA School of Law, a national research center on sexual orientation and gender identity law and public policy.

Dr. Gates is the Williams Distinguished Scholar at the Williams Institute. He co-authored *The Gay and Lesbian Atlas* (Urban Instit. Press, 2004), which summarized the available demographic data on the gay and lesbian population in the United States. Dr. Gates' doctoral dissertation included the first significant demographic study of the gay and lesbian population using U.S. Census data. Since then, he has authored dozens of groundbreaking studies of the demographic characteristics of same-sex couples, and of the lesbian, gay, bisexual and transgender population, in the United States. Dr. Gates holds a Ph.D. in Public Policy and Management from Carnegie Mellon University.

Professor Badgett is Research Director of the Williams Institute. She also directs the Center for Public Policy and Administration at the University of Massachusetts Amherst, where she is a professor of Economics. Professor Badgett studies family policy and labor market discrimination based on sexual orientation,

race, and gender. Her latest book, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (NYU Press, 2009), focuses on the U.S. and European experiences with marriage equality for gay couples. She also co-edited *Sexual Orientation Discrimination: An International Perspective* (Routledge, 2007), and her first book, *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men* (Univ. Chicago Press, 2001), is widely recognized as having discredited the myth of gay affluence. In addition to authoring and co-authoring many journal articles and policy reports, Professor Badgett provides expert testimony for legislative and regulatory bodies, and cases such as *Perry v. Brown*, the federal constitutional challenge to California's Proposition 8. She also advises businesses about the economic effects of employment policies. Professor Badgett received her Ph.D. in Economics from the University of California at Berkeley, and her B.A. in Economics from the University of Chicago. She has taught at Yale University and the University of Maryland as well as the University of Massachusetts, Amherst.

As scholars of sexual orientation public policy, *amici* Gates and Badgett have substantial interests in the question before this Court—whether Montana has constitutionally adequate reasons to deny to its residents who have formed a committed, family relationship with a same-sex partner any means of access to the

comprehensive rights and responsibilities the State offers to different-sex couples through marriage.

Amici have conducted extensive research and authored numerous studies regarding the demographic and economic characteristics of same-sex couples and the children they are raising in the United States, including in Montana. *See, e.g.*, C. Carpenter & G. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 *Demography* 573-590 (2008); M.V.L. Badgett & G. Gates, *Registered Domestic Partnerships among Gay Men and Lesbians: The Role of Economic Factors*, 6 *Rev. Economics of the Household* 327-346 (2008); G. Gates, *Diversity among Same-sex Couples and Their Children in American Families: A Multicultural Reader* (S. Coontz, ed., 2008); G. Gates & R. Sell, *Measuring Gay and Lesbian Couples* in *The Handbook of Measurement Issues in Family Research* (S. Hofferth & L. Casper, eds., 2006).

They also have conducted numerous studies of the economic and other implications for states of offering legal protections, and corresponding obligations, to same-sex couples and their families. *See, e.g.*, M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 *Drake L. Rev.* 1081 (Summer, 2010); M.V.L. Badgett, *et al.*, *The Impact on Maryland's Budget of Allowing Same-Sex Couples to Marry*, 7 *Univ. Maryland L. J. of Race, Religion, Gender and Class* 295-339 (2007); M.V.L. Badgett, *et al.*, *Supporting Families, Saving Funds: An*

Economic Analysis of Equality for Same-sex Couples in New Jersey, 4 Rutgers J. of Law & Public Policy 8 (2006); M.V.L. Badgett, *et al.*, *Putting a Price on Equality? The Impact of Allowing Same-Sex Couples to Marry on California's Budget*, 16 Stanford Law & Policy Review 197-232 (2005).

Amici have familiarized themselves with the issues in this case and, as scholars, believe the information they present will assist the Court in its consideration of this case. Accordingly, *amici curiae* respectfully submit this brief in support of Plaintiffs and Appellants.

APPENDIX B

Couples (source: Census 2010)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
1,348	525 (39%)	823 (61%)	226,800	201,611	25,189

Mean Age of Individuals in Couples (source: ACS 2005-2009)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
41.3	40.8	41.6	49.5	50.7	36.5

Individuals in Couples 55 Years Old or Older (source: ACS 2005-2009)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
12%	14%	10%	37%	39%	12%

Age Span for Individuals in Couples (source: ACS 2005-2009)

Youngest in Same-sex	Oldest in Same-sex	Youngest in Different-sex	Oldest in Different-sex
20	93	17	94

Non-White Race of Individuals in Couples (source: ACS 2005-2009)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
8%	19%	3%	7%	7%	12%

Couples Raising “Own” Children (source: Census 2010)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
297 (22%)	100 (19%)	197 (24%)	(36%)	73,017 (36%)	8,639 (34%)

Mean Income Gap (source: ACS 2005-2009)

Same-sex Couples	Different-sex Married Couples
\$20,578	\$37,754

Home Ownership (source: ACS 2005-2009)

Same-sex Couples	Different-sex Couples
57%	81%

Employment of Individuals in Couples (source: ACS 2005-2009)

Individuals in Same-sex Couples	Individuals in Married Couples
86%	67%

Mean Household Income of Couples (source: ACS 2005-2009)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
\$62,749	\$59,430	\$64,541	\$71,044	\$72,787	\$52,695

Individuals in Couples with College Degree (source: ACS 2005-2009)

Same-sex	Same-sex male	Same-sex female	Different-sex	Different-sex married	Different-sex unmarried
52%	38%	60%	28%	30%	16%

Military Service of Individuals in Couples (source: ACS 2005-2009)

Individuals in Same-sex Couples	Individuals in Different-sex Married Couples
8%	17%

CERTIFICATE OF COMPLIANCE

The undersigned, Holly Franz, certifies that this Brief complies with the requirements of Rule 11(4)(d). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 5000 words or fewer, excluding caption, table of contents, certificate of compliance and service page. The undersigned relies on the word count of the word processing system used to prepare this document.

_____/s/_____
Holly Franz

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief Of Amici Curiae Gary J. Gates and M.V. Lee Badgett In Support Of Plaintiffs And Appellants* was mailed, postage fully prepaid thereon at Helena, Montana on the 16th day of December, 2011 and directed to:

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