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

CAROL SNETSINGER, NANCY SIEGEL, CARLA GRAYSON, ADRIANNA 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 MORRISSON-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 JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of *Defendants-Respondents*.

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INTERST OF AMICUS CURIAE

The National Legal Foundation (NLF) is a public interest law firm which, along with it donors and supporters, is interested preserving the traditional family. The NLF has participated as a party and as an amicus in litigation involving these and similar issues in various state and federal courts around the country. It believes that its expertise will be of assistance to this Court in the instant case.

This Brief is submitted with the consent of all parties.

SUMMARY OF THE ARGUMENT

While the appeal in this case involves many issues, this Amicus Brief will address only Ms. Snetsinger's[1] arguments under Montana's Individual Dignity; Privacy; Life's Basic Necessities; and Safety, Health and Happiness Clauses. The University's spousal insurance policy violates none of these Clauses. The policy does not violate the Individual Dignity Clause because the policy does not devalue lesbian employees nor show prejudice towards them. It does not violate the Privacy Clause because lesbian employees do not have an actual or subjective expectation to privacy that is implicated by the policy. The policy does not violate the Basic Necessities or Safety, Health and Happiness Clauses because neither of these Clauses guarantees health care to Montanans.

[1] The Appellants in this case will be referred to variously as "the lesbian employees," "the employees," or collectively as "Ms. Snetsinger," as the context may dictate.

ARGUMENT

I. THE UNIVERSITY'S POLICY DOES NOT VIOLATE THE CONSTITUION'S INDIVIDUAL DIGNITY CLAUSE BECAUSE THAT CLAUSE'S CONCERNS ABOUT DEVALUATION AND PREJUDICE ARE NOT IMPLICATED.

Ms. Snetsinger claims that the University's policy violates the Individual Dignity Clause of the Montana Constitution (Montana Constitution, Article II, § 4). Yet her own argument belies her contention. First, Ms. Snetsinger hinges her entire argument on *dicta* from *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. (Appellants' Opening Brief at 38-39.) She cites *Armstrong* for the broadest of propositions, namely that individuals have a right to resolve "the most fundamental questions about the meaning and value of their own lives . . . answering to their own consciences and convictions." (Opening Brief at 39 (quoting *Armstrong*, ¶¶ 71-73).) In context, this passage deals with personal bodily autonomy—an issue not implicated by the criteria used by the University to decide who gets insurance benefits. To bolster this argument, Ms. Snetsinger also collected several concurring and dissenting opinions from individual Justices of this Court into a string cite. (Opening Brief at 38.) Finally, Ms. Snetsinger acknowledged in a footnote that the Individual Dignity Clause has primarily been invoked in the contexts dealing directly or indirectly with one's body, *e.g.*, bodily integrity *per se*, polygraph tests, civil commitment, and degrading treatment in

prison. (Opening Brief at 38 n.13.) Not one of these is cases is remotely similar to the instant case.

Ms. Snetsinger emphasizes that this Court's concern in the cases she has collected has been with the "devaluing" of individuals or with prejudice aimed at individuals. (Opening Brief at 38.) Her argument, however, then consists of baldly asserting—without any record support—that the University's 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." (Opening Brief at 39.) None of this is true. The University's policy simply seeks to ensure that benefits based upon spousal status are given only to those who are, in fact, spouses. Lesbian employees are treated no differently than employees who would seek benefits for cohabiting heterosexuals, roommates, intergenerational households, or other extended family units. The Individual Dignity Clause's concerns about devaluation and prejudice are simply not implicated by the University's policy.

II. THE UNIVERSITY'S POLICY DOES NOT VIOLATE ITS LESBIAN EMPLOYEES' RIGHT TO PRIVACY UNDER THE PRIVACY CLAUSE BECAUSE THOSE EMPLOYEES HAVE NEITHER A SUBJECTIVE OR ACTUAL EXPECTATION OF PRIVACY.

While judicial and constitutional history clearly shows Montana's intent to protect her citizens from unwarranted government intrusion, *Gryczan v. State*, 283

Mont. 433, 448, 942 P.2d 112, 121 (1997); Mont. Const., Art. II § 10 (2002), the question before this Court is whether such protection of privacy under the Constitution's Privacy Clause confers a constitutional right for state employees to purchase health benefits from the state university's health plan for same-sex third parties of their choosing.

Neither in her Opening Brief nor in her Reply Brief does Ms. Snetsinger so much as acknowledge that this Court has articulated a two-prong test to evaluate a putative privacy infringement. *See, e.g., Ennis v. Stewart*, 247 Mont. 355, 358, 807 P.2d 179, 181 (1991). Unfortunately for Ms. Snetsinger, her claim does not fare well under that test.

Under the first prong, "the person claiming the right [must have] a subjective or actual expectation of privacy." *Id.* at 358, 807 P.2d at 182. Under the second prong, the expectation must be one that society is prepared to recognize as reasonable. *Id.* Ms. Sentinel meets neither prong.

A. Ms. Snetsinger has demonstrated no subjective or actual expectation of privacy, having based her claim on mere unsupported assertions as to the University's motives.

Ms. Snetsinger alleges that the University has "burden[ed] [the employees'] 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." (Opening Brief at 40-41.)

Ms. Snetsinger further alleges that the University policy "interferes" with the employees' "fundamental right to make intimate and personal decisions about how to structure their family relationships." (Opening Brief at 41.) Finally, Ms. Snetsinger allege that the University's policy "interfere[s] with and den[ies] the very existence of [the employees'] families in order to enforce a particular view of morality that condemns gay people as socially repugnant." (Opening Brief at 42.) Ms. Snetsinger's assertions are unfounded.

Contrary to Ms. Snetsinger's assertions, the University policy is silent as to any particular set of values and never "condemns gay families as unnatural and immoral." (Opening Brief at 40-41.) Instead, the policy extends benefits to all employees equally and allows all employees to purchase benefits for their legal dependents. The University's policy does not "interfere" with Ms. Snetsinger's "right to make personal decisions about how to structure their family relationships." (Opening Brief at 41.) Rather, the University makes no inquiry into employees' sexual habits or affinities, plans for adopting or having children, intentions to get or stay married, or other matters relating to employees' personal autonomy. Finally, the policy makes no judgment as to the existence of the employees' "families" so as to "enforce a particular view of morality that condemns gay people as socially repugnant." (Opening Brief at 42.) The policy simply permits all employees to purchase benefits for legally recognized

dependents.

There is nothing about such a policy that implicates an actual expectation of privacy. Furthermore, even under a subjective standard for determining Ms. Snetsinger's expectation of privacy, her claim fails. Even subjective expectations must be based upon *something*. The only way the University's policy could violate a subjective expectation of privacy is if Ms. Snetsinger could believe that marriage (solemnized or common law) is never used in Montana as the basis to confer a benefit.

Unfortunately for Ms. Snetsinger's claim, quite the opposite is true. A married couple with no children and only one spouse employed receives twice the standard deduction than an unmarried resident with no children gets. 2003 Mont. Laws 544. When a Montana resident dies without a will, intestate succession laws favor the spouse to inherit the estate. Mont. Code Ann. § 72-2-112 (2002). When a state employee dies without having named a beneficiary, the benefit devolves upon the spouse first. Mont. Code Ann. § 19-2-802 (2002). Sometimes the categorization works to the detriment of the married person as in some workers' compensation claims. The spouse of a decedent owed a workers' compensation benefit may only receive the benefit if he remains unmarried. Mont. Code. Ann. § 39-71-721(5) (2002). Rather than being the basis for a subjective expectation of privacy, conferring benefits based upon marital status is a normal part of

transacting business with the state.

B. The University has not violated a privacy expectation that society is prepared to recognize as reasonable.

Assuming *arguendo* that the University's policy has implicated Ms. Snetsinger's expectation of privacy, such an expectation is unreasonable, and thus is still not protected by the Montana Constitution. *Ennis,* 247 Mont. at 358, 807 P.2d at 182 While privacy in Montana has no "final boundaries" with respect to personal autonomy, it is not absolute. *Armstrong*, ¶ 38. This Court has found a reasonable expectation of privacy in "non-commercial, consensual, adult sexual activity," *Gryczan*, 283 Mont. at 451, 942 P.2d at 123, and in a woman's choosing a healthcare provider when electing to terminate her pregnancy, *Armstrong*, ¶ 39. But privacy is unreasonably expected when refusing to connect a residence to the municipal water supply in contravention of local code. *Ennis*, 247 Mont. at 359, 807 P.2d at 182. A privacy expectation is also unreasonable when a person wishes to keep the fact of a marriage private in order to continue receiving state-funded death benefits. *Killion v. State Compensation Insurance Fund*, 1999 MTWCC 30, ¶ 53.

Ms. Snetsinger's claim is unlike any of the previously cited cases in which privacy was reasonably expected. Ms. Snetsinger's claim does not involve private consensual behavior. Rather, it involves a chain of interrelated financial relationships. Society has an interest in who can be treated like a spouse. As

stated above, Montana has not extended spousal benefits to non-spouses in her tax laws, workers' compensation funds, or intestacy laws. Furthermore, any increased cost to the University system (or to any branch or agency of state government) is of significant interest to society. It is not reasonable for society to be expected to "pick up the tab" for additional administrative costs, employer share of premiums (if any), or any other direct or indirect costs associated with enumerable employee dependants without the employee being required to justify their eligibility. This is what the University's policy is about—not intruding into Ms. Snetsinger's putative privacy.

III. THE UNIVERSITY'S POLICY DOES NOT VIOLATE THE RIGHT TO PURSUE LIFE'S BASIC NECESSITIES CLAUSE BECAUSE THAT CLAUSE PROTECTS THE RIGHT TO PURSUE THOSE NECESSITIES, BUT DOES NOT GIVE A SUBSTANTIVE RIGHT TO THEM.

The right to pursue life's basic necessities is guaranteed by Article II, section 3 of the Montana Constitution. As Ms. Snetsinger acknowledges, (Appellants' Reply Brief at 21), this Clause does not guarantee achievement of life's basic necessities; rather it guarantees the right to pursue these things. There is no constitutional infringement of the right to pursue life's basic necessities when certain benefits are not offered to those who do not qualify.

The Clause safeguards the inalienable liberty of all people to strive to attain these fundamental aspects of life. The right to pursue life's basic necessities

"encompasses *the right to the opportunity to pursue* employment . . . ." *Wadsworth v. State*, 275 Mont. 287, 301, 911 P.2d 1165, 1173 (1996) (emphasis added). The focus on the pursuit—as opposed to the achievement—is revealed by the rejection by the Constitutional Convention committee that drafted section 3 of proposals that would have granted more than simply a right to pursue life's necessities. *2 Montana Constitutional Convention*, 627-28 (rejecting proposals to enshrine a substantive right to the necessities of life and to a right to work).

It is well established that Article II, section 3 was not intended "'to create a substantive right for all the necessities of life to be provided by the public treasury.'" *Butte Community Union v. Lewis*, 219 Mont. 426, 430-31, 712 P.2d 1309, 1312 (1986) (quoting the official committee comment to the provision). Instead, section 3 was included as a statement of principle. *2 Montana Constitutional Convention*, at 627. One delegate stated that section 3 was "more or less a constitutional sermon" to the Legislature. *5 Montana Constitutional Convention*, at 1637.

While the Basic Necessities Clause, as a "constitutional sermon," was primarily a statement of principle, this does not mean that *no* substantive rights are associated with it. However, to reiterate, the drafting committee for section 3 understood this right to protect the *pursuit* of life's basic necessities, which necessitates protecting the right to *seek* employment as the means to that pursuit.

The committee indicated that the means of attaining the basic necessities would not be provided by the public treasury, thus suggesting that the practical issue was the means of engaging in the pursuit, and that those means must come from private sources. *2 Montana Constitutional Convention*, at 627. In debates on other matters, references to the pursuit of basic necessities were also commonly associated with the right to earn a living. *6 & 7 Montana Constitutional Convention*, at 2370 (suggesting that a proposed quasi-blue law amendment was in violation of the right to pursue life's basic necessities); 2690 (referring to pursuing life's basic necessities, a delegate stated "We're not here to play God, to take away a man's livelihood" and sought to avoid depriving "anyone of the right to make a living or . . . to hold a job").

The recognition of the centrality of a right to work in order to pursue life's basic necessities also lies at the heart of this Court's reasoning in *Wadsworth*. There this Court noted that fundamental rights under Montana's constitution are those either found in the Declaration of Rights or "without which other constitutionally guaranteed rights would have little meaning." *Wadsworth* at 299, 911 P.2d at 1172. This Court annunciated the simple principle that the opportunity to pursue employment is necessary to the pursuit of life's basic necessities. *Id.* Since most of life's necessities are either primarily or exclusively connected with employment, the right to pursue life's basic necessities would have

little meaning apart from the opportunity to pursue employment. *Id.*

In the instant case, the policy of granting benefits to employees and their dependents does not in any way inhibit the right of appellants to pursue any necessity of life that they may want. Since the necessities of life are not a substantive right, any difficulties they may have in procuring such rights do not create a constitutional violation of their rights. Instead, like all Montana's citizens, those University employees who desire to procure more of life's necessities are free to do so in any way that they are able, including seeking other insurance coverage privately or through additional or different employment.

In *Wadsworth*, the state was directly depriving an employee of his primary or exclusive means (via additional employment) of engaging in his pursuit of the necessities of life. Here, there is no infringement upon the employees' means of pursuing, much less their right to pursue, those necessities.

IV. THE UNIVERSITY'S POLICY DOES NOT VIOLATE THE SAFETY, HEALTH AND HAPPINESS CLAUSE BECAUSE THAT CLAUSE DOES NOT GUARANTEE A RIGHT TO HEALTHCARE BENEFITS.

Ms. Snetsinger links health insurance to both the Basic Necessities Clause and the Safety, Health and Happiness Clause (which is also contained in Article II, section 3), arguing that health insurance as "a basic necessity that gives substance to the right to pursue safety, health and happiness." (Opening Brief at 43.) Thus, all that was discussed in section III of this Brief, *supra*, is relevant here. Only one

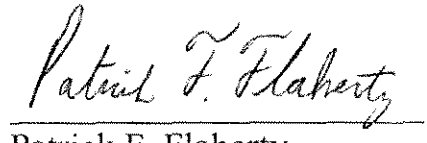
further point need be added: Rather than establishing a substantive right of all citizens to health insurance, this right was included in order to recognize that health itself is needed for the full enjoyment of life, *2 Montana Constitutional Convention*, at 627 (official committee comment).

This Court's holding in *Butte* comports with this understanding of the Safety, Health and Happiness Clause. There, this Court held that welfare benefits are not a fundamental right. *Butte* at 430-31, 712 P.2d at 1311-12. This Court pointed out that welfare is a benefit, not a right. *Id.* So here, the University System group benefits eligibility is not a right. Requiring that spousal benefits be limited to spouses cannot violate the Safety, Health, and Happiness Clause.

CONCLUSION

For the foregoing reasons, this Court should hold that the University's policy does not violate the Individual Dignity; Privacy; Life's Basic Necessities; or Safety, Health and Happiness Clauses. For these and other reasons, this Court should affirm the District Court's decision.

Respectfully Submitted
This 10th day of November, 2003



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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Snetsinger, et al. v. Montana University System, et al.*, No. 03-238, on all required parties by depositing same in the United States mail, first class postage, on November 10, 2003 addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 27, I certify that this brief is printed with proportionately spaced Time New Roman typeface of 14 point. The word count for the applicable portions of this brief is 2,751 words as calculated by Microsoft Word and contains an average of 211 words per page.

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