

# TRIBAL EQUITY TOOLKIT:

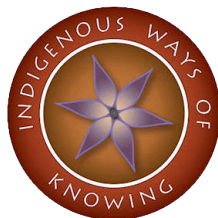
## Tribal Resolutions and Codes to Support Two Spirit & LGBT Justice in Indian Country



A collaboration of the Native American Program of Legal Aid Services of Oregon, the Indigenous Ways of Knowing Program at Lewis & Clark College, and the Western States Center



Native American  
Program • Legal Aid  
Services of Oregon



Lewis & Clark  
Graduate School of  
Education and Counseling



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This is an excerpt of the Toolkit. A complete copy of the Tribal Equity Toolkit will be available for download:

[https://graduate.lclark.edu/community\\_engagement/native\\_communities/indigenous\\_ways\\_of\\_knowing/](https://graduate.lclark.edu/community_engagement/native_communities/indigenous_ways_of_knowing/)

## ACKNOWLEDGMENTS

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PAST: Since time immemorial Indigenous Nations of, what now is known as the United States, have been Sovereigns; we have been responsible for the health and wellbeing of our citizenry, an endeavor that is intergenerational and connects us to the work of our ancestors. In the spirit of this kinship connection we respectfully acknowledge the collective wisdom and traditions of our ancestors.

PRESENT: To our partners, allies and collaborators. Specifically, gratitude for the Confederated Tribes of Siletz Indians, for their intention and action in operationalizing Two Spirit & LGBT equity work on behalf of their Tribal Citizens. To the Native American Program of Legal Aid Services and specifically Jennifer Amriott for her time, dedication, through research and commitment to this cause—and Kristy Barrett for her leadership, willingness and courage to be the first Native firm to produce a work such as this. To the Western States Center for their investment, constant support, advice, guidance and encouragement of our team to strike out, dream big and to the Indigenous Ways of Knowing Program at Lewis & Clark College for being the sinew that bound us all together framing our common vision.

FUTURE: In the spirit of this stewardship we respectfully acknowledge our generations rising; for it is in their interest that we carry forward this work, and it is to them that we entrust it.

## FOREWORD

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As Native people, we have all experienced, in our own individual and shared way, what it means to be treated as less than human. Our lands were taken, our people slaughtered, we had diseases and toxic influences injected into us, and our children taken from our homes and placed in institutions of assimilation - to conquer us, and to make us more like those who sought to control our communities. We have had to survive dehumanizing federal policies that treated us as children - as if we were unable to live responsibly, as if we did not have the right to be treated as equals.

Our Tribal societies have been damaged by the onslaught of policies, forced change, and the grief we have suffered. In spite of all of that, today we stand stronger than we have for several generations, able to exercise communal and individual decision making on our own behalf - more than our grandparents and their parents had ever dared to hope. Today we are reclaiming and reincorporating those parts of ourselves that it was the goal of those policies to alienate. Our sense of natural law, and the blessings of our creator's gifts, is restored in the present generation, and all of us - having *been* wronged - have a strong sense of what social justice is, and what it should look like.

Two Spirit is a term in the English Language that attempts to incorporate and honor the hundreds of ancient, respectful, Native Language terms that were used for thousands of years within our Tribal societies. Two-Spirit is used to denote people who have special roles within our communities, our cultures, and our ceremonial life. Our people were strong and beautiful in our traditional understanding of life, and that we all have different gifts. Two Spirit indicates an ability to see the world from both male and female perspectives and to bridge the world of male and female. The concept of balance is important in our traditional views, and balance can be between individuals or groups or within a particular individual. Two Spirit captures that concept of balance

within an individual. Throughout the modern era Two Spirit people and the traditions they held have been invisibilized and stigmatized both at the interpersonal and the institutional levels; by bringing these inequities to light Tribes now have another opportunity to respond and take action to protect all citizens of our nations as well as protect and preserve Two Spirit and LGBT narratives as an essential piece to preservation of our cultures. Many Two Spirit folks are known members of our Tribal communities who have been exemplary carriers of culture, strong political and ceremonial leaders, amazing artisans, even model citizens.

Today, some of our traditionalists understand the native language term, know the traditional role(s) and yet struggle with the application of the traditional term to our Gay/Lesbian Tribal Youth. It is damaging to our families and our communities to not share that part of our culture with our youth – whether they are Two Spirit themselves or not. They need to understand the cultural principles behind the traditional terms and the roles Two Spirits played and still play in our communities. For our Two Spirit Youth, it provides a bedrock of hope – giving them a healthy sense of purpose and role to fill, to deeply experience being a part of their community instead of feeling apart, alone and worthless. We need to decide if we want our communities to be healthy and whole, and if we want to be fair and just in our treatment of all our citizens. Finally, as with many of our best and most impactful legal and governmental transformations, we consider the impact of our policies and laws on our generations rising; we must ensure the security of basic rights as crucial lifelines in the protection of our Two Spirit youth and to celebrate their resilience and ensure that they continue to be valued members of our tribal nations.

This Toolkit provides us with an opportunity to reflect on how we, as Tribal Leaders and Tribal Communities, are either perpetuating policies that are damaging to the fabric of our Nations or enshrine, in policy and Tribal Law, our continued commitments to justice and to demonstrate, to the larger public, Equity as an enduring community value. The work compiled here – with love and understanding, is just what it says it is, - a toolkit. It does not dictate, it does not ask anything of you but to read it and decide what you believe in, and what core principles you stand for . It gives our communities another set of tools for restoring ourselves.

Please be strong in your work for all your people. Help them live long, healthy and productive lives, and do all you can to see that all tribal citizens reach their full potential. To be seen as fully human as is their birth right.

Respectfully,

Robert Kentta  
Siletz Tribal Member  
Cultural Resources Director, and  
Tribal Council Member

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## ABOUT THIS GUIDE

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This Guide is intended to give tribal legislators a brief overview of legal issues that impact the equal treatment of Two Spirit or lesbian, gay, bisexual, and transgender (LGBT) individuals. The Guide identifies areas in which existing laws may discriminate against LGBT individuals, and provides sample resolution and code language for tribal lawmakers to consider adopting to maximize LGBT equality within their communities. Commentary to the draft language is also provided to address some of the policy issues that tribal legislators should consider when developing or revising tribal laws to promote LGBT justice.

Many of the draft code provisions provided in this Guide are intended to assist tribes as they amend their existing laws to promote equality. It may therefore be helpful to work through this Guide with the tribe's existing laws in hand.

In most cases, the sample language provided in this guide is based on provisions from numerous sources. The tribal, federal, state, and international laws referenced during the development of this Guide are provided in the footnotes. If a tribe does not currently have laws governing the topics addressed in this Guide, the referenced laws may provide additional sample language.

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## WHAT THE GUIDE DOES NOT DO

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This Guide is not intended to provide "model" language. Instead, the sample language included in this Guide is offered as a starting point for promoting discussion. Each tribal government has different needs, resources, values, and policies, which should be reflected in the tribe's laws. These sample provisions should therefore be tailored to meet the specific requirements of the given tribal sovereign. In addition, because there are advantages and disadvantages to adopting each sample code provision, the provisions should not be adopted without thorough analysis by the appropriate tribal bodies and their legal counsel.

This Guide is also not a replacement for LGBT equality training. The Guide is designed for tribal lawmakers and the committees, staff, and community members who assist them in drafting and enacting tribal laws to promote equality and prevent discrimination. Special training for tribal decision-makers on issues impacting LGBT justice is also essential.

Finally, this Guide is just a first step toward the development of a broad range of sample code provisions to promote LGBT equality. Although we have attempted to identify a wide range of tribal laws that could be enhanced to further justice for LGBT individuals, this Guide is a first draft—and a work in progress. We welcome your comments, suggestions, experiences, questions, and alternate language... and hope to provide an updated, improved, and more comprehensive second edition in the future.

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## CHAPTER 2: FAMILY

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### PART A: MARRIAGE

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*“Marriage for same-sex couples would help strengthen legal ties of the entire family, including those between a child’s parents and between the child and his or her parents. Married LGBT parents would be recognized as legal parents upon a child’s birth, and would also have access to joint and stepparent adoption. Federally-recognized marriage would allow accurate representation of LGBT families for the purposes of safety net programs, tax credits and deductions, inheritance and Social Security protections, immigration sponsorship and other benefits; and make it easier for LGBT families to obtain health protections, including health insurance, medical decision-making, visitation and family leave.”<sup>1</sup>*

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### INTRODUCTION

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A marriage celebrates love, and provides public acknowledgment of a couple’s commitment to and responsibility for one another.<sup>2</sup> In addition, marriage can provide mutual support for the financial, physical, and emotional health of the couple and their family.

Marriage is also a legal status that confers a powerful set of rights, benefits, and protections onto spouses.<sup>3</sup> For example, a 2004 study by the Congressional Budget Office found 1,138 statutory provisions “in which marital status is a factor in determining or receiving ‘benefits, rights, and privileges.’”<sup>4</sup> These laws include, among others:

- Tax laws;
- Child adoption, custody, and visitation laws and procedures;
- Public assistance and benefit laws;
- Probate laws and procedure;
- Laws relating to insurance, health and pension benefits;



- Laws relating to medical care and treatment, hospital visitation and notification, and rights guaranteed to hospital patients and nursing home residents;
- Laws governing advance directives for health care and designation of health care representatives;
- Law providing family leave benefits;
- Laws governing victim's compensation benefits;
- Laws governing worker's compensation benefits; and
- Laws relating to title, tenure, inheritance, survivorship, or other acquisition, ownership, or transfer of real and personal property.<sup>5</sup>

Many of these laws provide benefits, rights, and privileges to married couples of different sexes—but not to same-sex couples. For example, same-sex couples are not eligible for spousal and survivor Social Security benefits. The resulting difference in Social Security income for same-sex couples, compared to that of opposite-sex married couples, is approximately \$5,588 less per year.<sup>6</sup>

Same-sex couples may also lack access to public programs and private benefits available to a person upon the death of a spouse, including: the right to sue for wrongful death of a spouse; Social Security payments based on the spouse's earnings; veteran's benefits available to spouses of veterans; worker's compensation benefits for a spouse killed on the job; and a variety of other pension, disability, and retirement benefits.<sup>7</sup> There are numerous other financial challenges for same-sex couples, for which legal marriage at least partially shields different-sex couples.<sup>8</sup>

In addition, a legally recognized marriage can benefit a couple's children by enhancing the ability of the spouses to provide care and security for their family. For example, marriage can provide:

- Legal recognition of a child's relationship to both parents
- Legal recognition of joint parenting rights;
- Visitation rights and/or custody of children after divorce;
- Joint or co-parent adoption (in most states) and second-parent adoption (in most states);
- Foster parenting (in some states);
- Ability to enroll non-biological / not-jointly-adopted children in public and medical assistance programs;

- Recognition as an authority in educational settings to register a child for school, be involved in a child’s education plan, and provide consent on waivers and sign permission forms; and
- Ability to travel with a child if travel requires proof of being a legal parent.<sup>9</sup>

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### MANY RIGHTS, BENEFITS, AND PROTECTIONS ARE AVAILABLE ONLY THROUGH MARRIAGE

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Many of the rights, benefits, and protections offered by marriage are available only through *marriage*. Some opponents of same-sex marriage nevertheless suggest that same-sex marriage is unnecessary because gay and lesbian couples can obtain rights and protections similar to those afforded by marriage through other legal agreements.<sup>10</sup> It is true that legal agreements can provide same-sex partners with some rights, “such as power of attorney, naming the survivor in one’s will (at the risk of paying an inheritance tax, which does not apply to heterosexual married couples), and protecting assets in a trust. Even these agreements, however, represent only the ‘best guesses’ of the legal community and may not withstand challenges from extended family members of the couple.”<sup>11</sup> Moreover, even where legal agreements can provide important rights to same-sex couples, the cost of hiring an attorney places these protections out of reach for many families.<sup>12</sup>

In addition, while domestic partnerships and civil unions are available in some jurisdictions—and can offer same-sex couples some or all of the benefits of marriage—domestic partnerships and civil unions do not equal *marriage*. For example, not all jurisdictions recognize domestic partnerships and civil unions,<sup>13</sup> and federal law denies these partners many benefits available to opposite-sex spouses.<sup>14</sup> Finally, domestic partnerships and civil unions still deny same-sex couples “the freedom to marry, a right that has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].”<sup>15</sup>

#### **Defense of Marriage Act**

In 1996, Congress passed the Defense of Marriage Act (DOMA). The DOMA bars federal recognition of same-sex marriages for any purpose, even if states or tribes recognize such marriages. The DOMA’s bar to federal recognition of same-sex marriages means that same-sex married couples are denied approximately 1138 rights, benefits, and protections provided to married opposite-sex couples under federal law.

However, in 2009, to achieve greater equality for the federal workforce, President Obama extended to same-sex domestic partners the federal employment benefits that are currently available to married opposite-sex couples, in areas in which statutory authority exists to do so. In addition, on February 23, 2011, the Obama administration instructed the Justice Department to stop defending the constitutionality of the DOMA in court.

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## BENEFITS OF RECOGNIZING SAME-SEX MARRIAGE

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Recognition of same-sex marriages is an important step toward promoting equality and an end to discrimination. And, as discussed above, marriage can offer significant legal, financial, and emotional benefits to families—many of which cannot be obtained by other means.<sup>16</sup>

In addition, recognizing same-sex marriages appears to financially benefit governments. For example, in 2004, Massachusetts became the first U.S. state to issue marriage licenses to same-sex couples.<sup>17</sup> A 2008 UCLA study concluded that allowing non-resident same-sex couples to marry would boost the Massachusetts economy by \$111 million over a three year period. The study further estimated that state and local tax revenues would increase by \$5.1 million over three years (including \$4 million in sales and occupancy tax revenues and \$1.1 million in marriage license fees).<sup>18</sup>

A 2004 Congressional Budget Office (CBO) likewise determined that federal recognition of same-sex marriage would have a positive effect on the federal budget. According to the CBO, “allowing same-gender couples to marry would increase federal income tax revenues by \$400 million annually to the end of 2010.”<sup>19</sup>

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## TRIBAL RECOGNITION OF SAME-SEX MARRIAGE AND STATE LAW

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Some impacts of tribally-recognized same-sex marriages may differ depending on the laws of the state in which the tribe is located.<sup>20</sup> For example, in Oregon, the Oregon Family Fairness Act provides registered same-sex domestic partners with all of the statutorily-created spousal rights that are granted to married spouses.<sup>21</sup> Thus, same-sex couples who marry pursuant to the laws of an Oregon tribe may also apply for domestic partnership status under Oregon law. Such couples would be eligible for tribal spousal benefits, as well as spousal rights granted under Oregon law.<sup>22</sup> However, these couples will still be ineligible for many federal spousal benefits.

In contrast, same-sex couples married by tribes in states that have not enacted same-sex marriage or domestic partnership / civil union laws would be eligible only for spouse benefits provided by the tribe, and would not be eligible for any state or many federal spousal benefits.<sup>23</sup>

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## SAMPLE TRIBAL RESOLUTION IN SUPPORT OF TWO SPIRIT EQUALITY AND THE FREEDOM TO MARRY

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The sample Tribal Resolution in Support of Two Spirit Equality and the Freedom to Marry provided below was developed in July of 2012 as a tool for Tribes in Washington State to support

Why Marriage Matters Washington, a public education and awareness building campaign which put resources into explicitly reaching out to Tribes.

TRIBAL RESOLUTION IN SUPPORT OF THE TWO SPIRIT EQUALITY  
AND THE FREEDOM TO MARRY

(Preamble should include Tribe Specific 'WHEREAS' clauses discussing the business, purpose, values and history of the Tribe)

WHEREAS, prior to contact with settlers, many Tribal Nations across the country and continent had long and respected histories of respect and inclusion of those in their communities, who might now be described as Lesbian, Gay, Bisexual, Transgender, Third & Fourth Gender or Two Spirit.

WHEREAS, all citizens of our Nation are born free and equal in dignity and rights; and

WHEREAS, many Lesbian, Gay, Bisexual, Transgender, Third & Fourth Gender or Two Spirit ancestors and Citizens of our Tribe/ Nation have been targets of Homophobia & Transphobia, carrying with it extremely harmful and even lethal effects; and

WHEREAS, Our Nation/ Tribe is unwaveringly committed to all causes that strengthen the health of our Tribal Citizens, Families, Communities and Nation;

WHEREAS, our Tribal Government is committed to promoting the principle of non-discrimination and to supporting and strengthening individuals, families, communities and our Nation; and

WHEREAS, the principle of non-discrimination is embodied in the Charter of the United Nations, in Articles 2, 7, and 10 of the Universal Declaration of Human Rights, in Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights, and Article 2 of the International Covenant on Economic Social and Cultural Rights; and

WHEREAS, our Nation/ Tribe has taken steps to prohibit discrimination on grounds of sexual orientation in our laws and to address such discriminations; and<sup>24</sup>

WHEREAS, the principles of Sovereignty and Self-Determination dictate that our Tribal Nation has full and authority over issues that impact the health, welfare, preservation of culture and future for our Tribal Citizens; and

WHEREAS, in August of 2011, the Suquamish Tribe became the first jurisdiction in the state of Washington to recognize marriage for gays and lesbians by a unanimous vote of their Tribal Council; and

WHEREAS, in November 2012, Washington voters will have an opportunity to approve Referendum 74 extending marriage to lesbian and gay couples; and

WHEREAS, our Nation/ Tribe believes that marriage and the protection of families is a human right

that should be honored and respected regardless of who you love; and

WHEREAS, the social messages sent by Tribal laws and policies directly impact the mental, physical, spiritual and social health of our Tribal Citizens; and

WHEREAS, the laws and policies of the State of Washington have direct impact on our Tribal Citizens living within the borders of Washington State, outside our reservation; and now,

THEREFORE BE IT RESOLVED, that the (NAME OF NATION/ TRIBE HERE) hereby declares its support of the Freedom to Marry in the State of Washington exercising our Sovereignty in the interest of furthering the cause of human rights and the principle of non-discrimination for all our citizens wherever they reside.

The aforementioned resolution is now the official policy of the (NAME OF NATION/ TRIBE) signed this (DATE) of (MONTH), 20(YEAR).

#### CERTIFICATION

We hereby certify that this resolution was duly passed and approved by [Tribal Council / Business Committee] of the [insert name] Tribe on this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by a vote of \_\_\_ yes, \_\_\_ no, \_\_\_ abstain.

\_\_\_\_\_

Chair

\_\_\_\_\_

Tribal Secretary

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### SAMPLE TRIBAL MARRIAGE EQUALITY ORDINANCE

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Same-sex marriage is currently recognized by the Coquille Indian Tribe,<sup>25</sup> the Suquamish Tribe,<sup>26</sup> the states of Massachusetts, Iowa, New York,<sup>27</sup> Connecticut,<sup>28</sup> Vermont,<sup>29</sup> and New Hampshire,<sup>30</sup> the District of Columbia,<sup>31</sup> and seven countries.<sup>32</sup> In addition, same-sex marriage has been legalized by courts in Massachusetts,<sup>33</sup> Connecticut,<sup>34</sup> and Iowa.<sup>35</sup>

The sample Tribal Marriage Equality Ordinance provided below has been compiled from these tribal, state, and international laws, with the majority of the language based on the laws of the Coquille Indian tribe, New York, and the District of Columbia. This draft ordinance allows tribes with existing marriage laws to amend those laws to promote marriage equality. For tribes that have not yet adopted marriage laws, the marriage laws of Coquille Indian Tribe and Vermont offer examples of more comprehensive language covering the issuance of marriage licenses and certificates, void and voidable marriages, solemnization of marriages, etc.

### **Marriage Equality Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Marriage Equality Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.**

A. The [Tribal Council / Business Committee] finds that marriage is a fundamental human right, and an institution that strengthens family relationships and preserves the integrity, cohesiveness, and continuity of the [insert name] Tribe (Tribe). The formation and recognition of marriage is thus essential to the Tribe’s political integrity, economic security, and health and welfare.

B. The [Tribal Council / Business Committee] further finds that the right to equality without discrimination requires that couples of the same sex and couples of different sexes have equal access to marriage and to the protections, responsibilities, and benefits that result from marriage.

C. To reflect our values of respect and equality, it is the policy of the Tribe that the marriages of same-sex couples and the marriages of different-sex couples be treated equally in all respects under Tribal law.

**Section 3. Purpose.** The purpose of this ordinance is to recognize legal equality in the Tribe’s marriage laws. This ordinance formally recognizes valid marriages without regard to whether the parties are of the same or different sex.

**Section 4. Construction.**

A. All provisions of Tribal law that use gender-specific terms in reference to the parties to a marriage, or that in any other way may be inconsistent with this ordinance, shall be construed in a gender-neutral manner and as otherwise necessary to carry out the intent of this ordinance.

B. The omission from this ordinance of changes to other provisions of law shall not be construed as an intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage.

**Section 5.** The Tribe’s [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding three new sections, to read as follows:

**[citation]. Parties to a Marriage.**

1. Marriage is the legally recognized union of two persons. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same sex or different sexes.

2. No Tribal government treatment or legal status, effect, right, benefit, privilege,

protection, or responsibility related to marriage, whether deriving from a statute, resolution, administrative or court rule, regulation, policy, common law, or any other source of law, shall differ based on whether the parties to the marriage are or have been of the same sex or different sexes.

**[citation]. Equal Access to Marriage License.** No application for a marriage license shall be denied on the grounds that the parties are of the same sex.

*Commentary: Some states that recognize same-sex marriage do not require religious officials or organizations to solemnize or otherwise participate in marriages that do not comply with their religious beliefs. If a tribe wishes to include this type of exemption, language could read:*

**Section X.** The Tribe's [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding one new section, to read as follows:

**[citation]. Affirmation of Religious Freedom in Marriage.** Each religious organization, association, or society (religious group) has exclusive control over its own religious doctrine, teachings, and beliefs regarding who may marry within that particular religious tradition's faith. Nothing in this ordinance is intended to impact the freedom of members of religious groups to hold and declare their religious beliefs.

1. No official of a religious group shall be required to solemnize any marriage that is in violation of his or her religious beliefs.
2. No religious group shall be required to participate in the solemnization or celebration of a marriage that is in violation of the organization's religious beliefs.
3. No refusal by a religious group to provide services, accommodations, facilities, or goods in accordance with this section shall create any civil claim or cause of action or result in any Tribal action to penalize or withhold benefits from such group, unless the group makes such services, accommodations, facilities, or goods available to members of the general public for purchase, rental, or use.

**[citation]. Recognition of Marriages, Domestic Partnerships, and Civil Unions from Other Jurisdictions.** All marriages, domestic partnerships, and civil unions performed under the laws of another jurisdiction, which are valid under the laws of the jurisdiction when and where performed, shall be recognized as valid by the Tribe, provided that such marriage, domestic partnership, or civil union is not otherwise expressly prohibited by Tribal law.

*Commentary: The DOMA which permits tribes and states to refuse to recognize marriages established under the laws of other tribes, states, and territories.<sup>36</sup> This provision was therefore*

*included to explicitly recognize valid marriages, domestic partnerships, and civil unions created in other jurisdictions. However, if a tribe wishes to limit its recognition of other jurisdictions' marriages, domestic partnerships, and civil unions, additional language could read:*

*"For the exclusive purpose of providing Tribal and Tribally-administered benefits,..."*

*and/or*

*"The Tribe shall recognize marriages, domestic partnerships, and civil unions formed under the laws of another jurisdiction if: 1) At least one party to the marriage, domestic partnership, or civil union is a Tribal member at the time that recognition is requested; and 2) The party requesting recognition of the marriage, domestic partnership, or civil union provides adequate proof of the marriage, domestic partnership, or civil union."*

**Section 6. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 7. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 8. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 9. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

*Additional Commentary: For tribes that have existing domestic partnership / civil union laws and now wish to provide for same-sex marriage, the following additional legislation could be adopted to merge domestic partnerships / civil unions into marriages:*

**Section X. Merger of [Domestic Partnership / Civil Union] into Marriage.** Two persons who are parties to a valid [domestic partnership / civil union] entered into pursuant to [cite to Tribe's domestic partnership / civil union law], which has not been dissolved, terminated, or annulled by the parties or merged into a marriage by operation of law under section [cite section] of this ordinance as of [insert date], shall be deemed to be married on said date, and such [domestic partnership; civil union] shall be merged into a marriage by operation of law on said date.

*Or:*

**Section X. Merger of [Domestic Partnership / Civil Union] into Marriage.** Two consenting persons who are parties to a valid [domestic partnership / civil union]



entered into pursuant to [cite to Tribe's domestic partnership / civil union law], which has not been dissolved, terminated, or annulled by the parties, and who are eligible to marry pursuant to [cite Tribal law(s) re: valid marriages], may apply for and receive a marriage license and have such marriage solemnized pursuant to Tribal law.

B. The parties may apply to the [name of official recording marriages] to have their [domestic partnership / civil union] legally designated and recorded as a marriage, without any additional requirements of solemnization or payment of marriage licensing fees.

C. Upon application, the parties shall be issued a marriage certificate, and such marriage certificate shall be recorded with [name of recording agency].

D. The [domestic partnership / civil union] shall be dissolved by operation of law by any marriage of the same parties to each other, as of the date of the marriage stated in the certificate.

*And:*

**Section X. No New [Domestic Partnerships / Civil Unions].** No new [domestic partnerships; civil unions] shall be established under Tribal law on or after the effective date of this ordinance.

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## ENDNOTES

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<sup>1</sup> *All Children Matter: How Legal and Social Inequities Hurt LGBT Families*, <http://action.familyequality.org/site/DocServer/AllChildrenMatterCondensedFinal10192011.pdf?docID=2403>.

<sup>2</sup> Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 1, 349-364 (July 1, 2006), <http://pediatrics.aappublications.org/content/118/1/349.full>.

<sup>3</sup> *Id.*; GLAD, *Marriage: Tips and Traps*, <http://www.glad.org/uploads/docs/publications/marriage-tips-traps.pdf>.

<sup>4</sup> Wikipedia, *Same-Sex Marriage in the United States*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States) (citing Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004), <http://www.cbo.gov/doc.cfm?index=5559>).

<sup>5</sup> Other laws include: laws relating to immunity from compelled testimony and the marital communication privilege; laws providing a spouse with the right to a surname change without petitioning the court; laws relating to anatomical gifts; laws governing pay for military service; legal requirements for assignment of wages; laws providing for causes of action related to or dependent upon spousal status (including wrongful death, emotional distress, loss of consortium, and other torts and contract actions); laws providing domestic violence protections; law prohibiting discrimination based upon marital status; and laws related to tuition assistance for higher education for surviving spouses or children.

<sup>6</sup> *Same-Sex Marriage in the United States*, *supra* note 5 (citing Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 5); M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (Chicago: University of Chicago Press 2003)).

<sup>7</sup> For a more comprehensive list of benefits available to spouses but not same-sex couples, *see Marriage: Tips and Traps*, *supra* note 4; Pawelski et al., *supra* note 3, at 349-364.

<sup>8</sup> For a more comprehensive list of these challenges, *see* Pawelski et al., *supra* note 3, at 349-364; *Marriage: Tips and Traps*, *supra* note 4; *Same-Sex Marriage in the United States*, *supra* note 5 (internal citations omitted); Human Rights Campaign, *Domestic Partner Benefits: Related Laws and Regulations*, <http://www.hrc.org/resources/entry/domestic-partner-benefits-related-laws-and-regulations>.

<sup>9</sup> For a more comprehensive discussion of the benefits that marriage can provide to children, *see* Pawelski et al., *supra* note 3, at 349-364; *Marriage: Tips and Traps*, *supra* note 4.

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<sup>10</sup> Pawelski et al., *supra* note 3, at 349-364.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *id.*; *Marriage: Tips and Traps*, *supra* note 4; *Same-Sex Marriage in the United States*, *supra* note 5 (citing *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 5; BADGETT, *supra* note 7).

<sup>13</sup> National Conference of State Legislators, *Civil Unions & Domestic Partnership Statutes*, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>.

<sup>14</sup> Bushyhead, *supra* note 1, at 524-525.

<sup>15</sup> *Id.* (citing *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008)).

<sup>16</sup> Pawelski et al., *supra* note 3, at 349-364; *Marriage: Tips and Traps*, *supra* note 4.

<sup>17</sup> Wikipedia, *Same-sex marriage in Massachusetts*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_Massachusetts](http://en.wikipedia.org/wiki/Same-sex_marriage_in_Massachusetts).

<sup>18</sup> *Id.* (citing *The Impact of Extending Marriage to Non-Resident Same-Sex Couples on the Massachusetts Budget*, <http://escholarship.org/uc/item/2q65153b>).

<sup>19</sup> Pawelski et al., *supra* note 3, at 349-364 (citing *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 5). See also *Same-Sex Marriage in the United States*, *supra* note 5. The CBO believed that the “marriage penalty tax” would be a significant factor in the projected increase. In addition, “[a]lthough Social Security payments and spending on insurance coverage for partners of federal workers would rise over time, other expenditures such as Medicaid and Supplemental Security Income would decrease. The net result would be a savings of nearly \$1 billion per year.” *Id.*

<sup>20</sup> Bushyhead, *supra* note 1, at 534-535.

<sup>21</sup> *Id.* (internal citations omitted).

<sup>22</sup> *Id.*, at 531 (internal citations omitted).

<sup>23</sup> *Id.*, at 534-535 (internal citations omitted).

<sup>24</sup> Insert this WHEREAS only if your Tribe/ Nation has adopted such laws and measures.

<sup>25</sup> Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>. See also Tulalip Tribal Code, Existing marriages, §4.20.030(1), at <http://www.codepublishing.com/wa/Tulalip/> (making

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all marriages valid under the laws of the jurisdiction where and when performed valid within the jurisdiction of the Tulalip Tribes).

<sup>26</sup> “In October 2011, the Suquamish Tribal Council amended its existing Marriage and Divorce Ordinance to permit marriages regardless of the couple’s gender. The amendment passed by a unanimous vote of the council and allows same-sex couples to receive the same treatment and benefits as opposite-sex couples. At least one person entering the marriage must be an enrolled member of the Suquamish Tribe. The amendment also provides for tribe members in civil unions entered in recognized jurisdictions to convert the union into a Suquamish Tribal marriage.” Leonard Forsman, SAME-SEX MARRIAGE LAW REFLECTS SUQUAMISH TRIBAL VALUES, JURIST – Hotline (Sept. 14, 2011), <http://jurist.org/hotline/2011/09/leonard-forsman-same-sex-marriage.php>.

<sup>27</sup> New York Marriage Equality Act, <http://open.nysenate.gov/legislation/bill/A8354-2011>.

<sup>28</sup> Conn sH.B. 899, Public Act No. 09-13, <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>.

<sup>29</sup> Vt. S.115: An act relating to civil marriage, [www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf](http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf).

<sup>30</sup> 2009 N.H. Laws ch.59, H.B. 73, <http://news.findlaw.com/wsj/docs/glrts/nh-same-sex-marriage.html>.

<sup>31</sup> District of Columbia Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Bill 18-482, <http://www.dcwatches.com/council18/18-482.htm>.

NOTE: States with constitutional amendments banning same-sex marriage include: Alabama; Alaska; Arizona; Arkansas; California; Colorado; Florida; Georgia; Idaho; Kansas; Kentucky; Louisiana; Michigan; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; and Virginia. CNN, *Fast facts: Same-sex marriage* (May 31, 2012),

<http://www.cnn.com/2012/05/31/us/ff-same-sex-marriage/index.html> (citing Lambda Defense Fund and National Conference of State Legislatures).

<sup>32</sup> These countries include Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden. *Pathway for the U.S.? BERK. J. INT’L LAW* 1, 132, [http://www.boalt.org/bjil/documents/GlassArticle\\_000.pdf](http://www.boalt.org/bjil/documents/GlassArticle_000.pdf). Canada’s Civil Marriage Act is available at <http://www.canlii.org/en/ca/laws/stat/sc-2005-c-33/latest/sc-2005-c-33.html>.

<sup>33</sup> *Goodridge v. Mass. Department of Public Health*, 440 Mass. 309 (2003) (finding that it was unconstitutional under the Massachusetts constitution to allow only heterosexual couples to marry).

<sup>34</sup> *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008).

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<sup>35</sup> *Varnum v. Brien*, 763 N.W.2d 862 (April 3, 2009) (“If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded.”).

<sup>36</sup> Specifically, the provision states: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” 28 U.S.C. § 1738C. This provision of the DOMA is an exception to the U.S. Constitution’s Full Faith and Credit Clause.